

**DISCRETIONARY DECISION-MAKING BY TRUSTEES IN
CANADA'S PERSONAL BANKRUPTCY SYSTEM**

by

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ABSTRACT

Each year, tens of thousands of Canadians turn to the bankruptcy system for relief from unmanageable debt loads. Bankruptcy provides individuals with a significant benefit, the opportunity to be released from their debts. This release of past debts is called a discharge. The existence of this significant benefit raises the spectre of abuse. Policy makers and the public share an anxiety that unscrupulous individuals may improperly take advantage of the debt relief available in bankruptcy.

Bankruptcy trustees, the professionals who administer bankruptcy files, are granted significant discretion to police abuse in the bankruptcy system. When a trustee believes that a debtor should not receive a discharge, the trustee can trigger a court hearing, by filing an opposition to the debtor's discharge. At the resulting hearing, if the court agrees that the debtor is undeserving, it can deny the debtor's discharge, delay it, or grant it subject to the debtor fulfilling conditions. This dissertation examines how trustees exercise their discretion when deciding whether or not to file an opposition.

To understand how trustees exercise their discretion, this dissertation examines three different types of data. It starts with a synthesis of traditional sources of law including legislation and case law. This synthesis reveals that the traditional sources of law identify both pre-bankruptcy misconduct, and non-compliance during bankruptcy as grounds upon which a debtor's discharge may be opposed, but do little to constrain or direct the trustees' discretion. Next it analyzes empirical data, including quantitative data provided by the Office of the Superintendent of Bankruptcy, a branch of the federal government, on all the oppositions filed in 2012, and qualitative interviews undertaken with 40 bankruptcy trustees in 13 communities across Canada. This analysis reveals that oppositions are lodged in about 10% of files. Trustees rarely oppose on the basis of a debtor's pre-bankruptcy misconduct, most oppositions result from a debtor's non-compliance during bankruptcy. The dissertation explains how this pattern of oppositions may result from the economic and emotional constraints facing trustees.

PREFACE

This dissertation is an original intellectual product of the author, Anna Jane Samis Lund. The fieldwork reported in Chapters 4-7 was covered by UBC Ethics Certificate number H13-02512 “Discharge Opposition Project”.

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LIST OF ABBREVIATIONS

<i>BLA</i>	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
CAIRP	Canadian Association of Insolvency and Restructuring Professionals
CRA	Canada Revenue Agency
OSB	Office of the Superintendent of Bankruptcy

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1. DISCRETIONARY DECISION-MAKING IN CANADA'S PERSONAL BANKRUPTCY SYSTEM

The first English Act showing concern for the rehabilitation of the debtor was enacted in 1705 in the reign of Anne. A debtor who was a merchant could get a discharge of all his debts owing at the time of his bankruptcy provided he surrendered all of his property and conformed to the other provisions of the statute. However, the legislator remained very much aware of the continuing problem of the fraudulent debtor. So, while being given new privileges, the debtor had to be free from fraud and submit himself to the control of the Court. Evidence of the concern of the legislator that debtors might abuse the privileges given to them was the severity of the penalty for a debtor who did not strictly comply with the law. The penalty, in the past, had been to stand in the pillory or to have an ear cut off. The new penalty was hanging.¹

1.1. INTRODUCTION

The enforceability of promises lies at the heart of the commercial law system, with exceptions to enforceability available in only a few, carefully circumscribed situations. Canada's personal bankruptcy system gives over-indebted individuals a fresh start, providing them with a mechanism to release past financial obligations. In exchange for surrendering most of their property for the benefit of their creditors, individual debtors can access a discharge, which releases them from most of their pre-bankruptcy debts. Bankruptcy represents a departure from the normal practice of promises given and enforced. The availability of debt relief can evoke discomfort amongst the public and policy makers, who are concerned that undeserving debtors may be improperly taking advantage of the debt relief available in the bankruptcy system. Since the introduction of the discharge into English bankruptcy law in 1705, legislators have struggled to craft a system that enables deserving individuals to access relief, but prevents abuse by undeserving ones. This project is complicated by the fact that there is no agreed upon definition of deservingness. Different theories of bankruptcy law suggest that different conduct could disentitle an individual from receiving debt relief.

The Canadian personal bankruptcy system adopts a number of different mechanisms to weed out abusive debtors. Central amongst these is the opposition to discharge process.

¹ Study Committee on Bankruptcy and Insolvency Legislation, "Report of the Study Committee on Bankruptcy and Insolvency Legislation" (Ottawa, 1970) at para 1.1.14 (Chair: Roger Tassé) [citations removed].

In most bankruptcies, a debtor receives an automatic discharge after a set amount of time. A trustee – the professional who administers the bankruptcy process – a creditor, or an analyst at the federal Office of the Superintendent of Bankruptcy (“OSB”) can lodge an opposition to an individual’s discharge (collectively the “potential opponents”). Oppositions can be lodged based on individuals’ pre-bankruptcy conduct, or their lack of cooperation during the bankruptcy process. When such an opposition is lodged, an individual no longer receives an automatic discharge. Instead, a court hears submissions on whether or not the individual’s access to the discharge should be partially or wholly restricted.

The opposition to discharge process delegates significant responsibility for fact finding and characterizing conduct as problematic to potential opponents. The ultimate decision about whether or not to limit a debtor’s access to the discharge rests with the judicial officer, but they only see files where a potential opponent has triggered a court hearing. In deciding whether to trigger this review, potential opponents must sort deserving debtors from undeserving ones. They are granted significant discretion to determine what constitutes deservingness. The legislation identifies a list of grounds upon which a potential opponent may lodge an opposition. This list does little to circumscribe or direct the potential opponents’ discretion because the list is both broadly drawn and non-exhaustive. In a study carried out on bankruptcy files in 1994, Iain Ramsay noted that in almost all bankruptcies there was a legislative ground that would allow a potential opponent to oppose the discharge, but discharges were only opposed in 14% of the cases.² According to my research in 2012, there were 74,731 bankruptcies filed, and 7,082 oppositions lodged, suggesting that oppositions are being filed in approximately 10% of all bankruptcies. In this dissertation, I set out to understand how one category of potential opponents – trustees – decides to oppose a discharge.

My initial interest in this subject was sparked by the rich cultural narratives around debt, and the deservingness of those who incur it. Debt is often painted as a scourge. Many

² Iain Ramsay, "Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis" (1999) 37 *Osgoode Hall L J* 15 at 69 ["Individual Bankruptcy"].

religious traditions urge their adherents to guard against it.³ Debt drives the narrative in many foundational works of literature. Madame Bovary is a famous example; she divides her energies between bouts of unsustainable spending, and extra-marital affairs.⁴ The young doctor Lydgate in *Middlemarch* is driven into debt by a spendthrift wife.⁵ Mitya, the eldest Karamazov brother, is accused of killing his father, and the accusation gains an air of reality in part because the father's wealth could remedy the Mitya's indebtedness.⁶ The stories underline the dangers of debt. Sometimes it is denounced more explicitly. In Shakespeare's *Hamlet*, Polonius cautions his son against indebtedness, in part because it can have a corrosive effect on one's values, namely husbandry (i.e., thrift).⁷ Benjamin Franklin equated indebtedness with a loss of liberty.⁸

Debtors are stigmatized, but the narratives around debt reveal nuance and complexity in how we perceive of debt. At the same time we condemn indebtedness, we also celebrate the fruits of people's borrowing. For many Canadians, home ownership, post-secondary education and entrepreneurial activity are only possible if one has access to credit, i.e., if one can incur debt. Credit can also sustain individuals when they encounter a gap in the social safety net. Canadians might turn to credit to pay for uncovered medical expenses, when they experience a reduction in income that is not addressed through employment insurance, or when their retirement savings prove to be insufficient. Our legal system is adept at liquidating a broad range of obligations into debts and credits. A person could end up heavily indebted as the result of a marriage breakdown, a business dispute, or a moment of negligent conduct. One critical perspective on debt characterizes it as tool of oppression, lorded by financial institutions over disempowered individuals. The Strike Debt movement,

³ Michael D Sousa, "Bankruptcy Stigma: A Socio-Legal Study" (2013) 87 Am Bkrptcy L J 435 at 446.

⁴ Gustave Flaubert, *Madame Bovary* (Paris: Michel Lévy Frères, 1857).

⁵ George Eliot, *Middlemarch* (Edinburgh: William Blackwood and Sons, 1871).

⁶ Fyodor Dostoyevsky, *The Brothers Karamazov* (Moscow: The Russian Messenger, 1880)

⁷ William Shakespeare, *The Tragedy of Hamlet: Prince of Denmark*, Act I, Scene III, 75-77.

⁸ Benjamin Franklin, *The Way to Wealth* (1758), cited in Sousa, *supra* note 3.

which started in the aftermath of the Great Recession and encourages debtors to default as a form of protest, reflects this critical perspective.

I expected these complex cultural narratives around indebtedness to animate how trustees conceived of deservingness. Moreover, considering the wide grant of discretion to trustees, I thought there could be significant variation in the types of decisions that they made during the opposition to discharge process, depending on each individual trustee's own views on debt. My findings defied these expectations. I found that trustees exercise their discretion according to a predictable, consistent pattern, and that this pattern of decision-making is largely determined from the financial and emotional realities of the trustees' workplaces. These findings contribute to our understanding of how legal discretion operates, by illustrating how extra-legal factors may constrain an individual's exercise of otherwise broad discretionary powers.

In this introductory chapter, I do four things. First, I explain some of the choices I have made with respect to terminology. Second, I explain why I chose to focus on trustees as opposed to the other two categories of potential opponents (i.e., OSB analysts, and creditors), or judicial officers. Third, I explore the tension between the flexibility of discretionary decision-making and the foundational ideals of the rule of law: predictable, consistent, unbiased decision-making. Fourth, I outline how my dissertation will examine the trustee's exercise of discretion in the opposition to discharge process, including a brief overview of my methodology. I have provided a more detailed exposition of my methodology in Appendix A.

1.2. NOTES ON TERMINOLOGY

1.2.1. JUDICIAL OFFICERS

I will refer to the person who presides over the application for discharge hearings as a judicial officer. Judicial officers are given different titles in different jurisdictions across Canada, and this term is intended to include all of these actors regardless of their official title. My choice of term has been shaped by the suggestion of Registrars Bray and Nettie that the presiding actor in a bankruptcy hearing should be assigned a title that reflects the

growing importance of his or her judicial role and (in some locations) diminishing responsibility for the operation of the registry.⁹

1.2.2. PERSONAL, CONSUMER AND BUSINESS BANKRUPTCIES

I identify the subject of my dissertation as Canada's personal bankruptcy law. This terminology departs from much of the academic writing about bankruptcy, which tends to be characterized as being oriented to either consumer or business bankruptcy. Individuals whose debts relate to consumer spending fall into the former category, and corporate persons fall into the latter. In the case of an individual who has accrued at least some of his or her debts from operating a business, the distinction between consumer and business bankruptcies is problematic, because there is no agreed-upon approach for assigning the debtor into one of the categories.¹⁰ The *Bankruptcy and Insolvency Act* ("BLA") sets out a special proposal process available to consumer debtors and defines "consumer debtor" as "an individual who is bankrupt or insolvent and whose aggregate debts; excluding any debts secured by the individual's principal residence, are not more than \$250,000 or any other prescribed amount."¹¹ Paul Heath criticized definitions, such as this one, that rely on a debt limit to separate consumer bankruptcies from business ones because "it assumes that all bankruptcies falling under a prescribed dollar amount are due to the same causes: a proposition that cannot be sustained."¹² He suggested two alternatives: defining a person as a consumer bankrupt if (s)he has "become bankrupt through means other than business activity" or as any natural person who is unable to pay his or her debts.¹³ The OSB employs

⁹ Michael Bray & Scott Nettie, "Registering Change, Current Issues Before Registrars in Bankruptcy" in Janis Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Thomson Reuters Canada Limited, 2010) at 404-5.

¹⁰ Janis Sarra & Danielle Sarra, "Assessing Insolvent Consumer Debtors, Challenges and Strategies for Empirical Research" (Ottawa: Office of the Superintendent of Bankruptcy, 2009) at 14.

¹¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 66.11, [BLA].

¹² Paul Heath, "Consumer Bankruptcies: A New Zealand Perspective" (1999) 37 *Osgoode Hall L J* 427 at 443-4.

¹³ *Ibid* at 443.

the former approach for its statistical analysis; it currently defines a consumer debtor as “an individual with more than 50 percent of total liabilities related to consumer goods and services.”¹⁴ This definition is also not without problems as it may be difficult for a debtor (or his or her trustee) to classify debts as being either personal or business in nature. Especially with small- and medium-sized enterprises, there tends to be a high degree of conflation between personal and business debts, with people relying on their personal credit facilities to fund their businesses.¹⁵

This dissertation considers the bankruptcies of natural persons, including both those classified by the OSB as business bankruptcies and those classified as consumer bankruptcies. The scope of my research is largely dictated by my focus on the discharge. Natural persons are able to access a discharge, regardless of whether the OSB classifies them as consumer or business bankrupts. Corporations almost never receive a discharge in bankruptcy, because, unlike natural persons, they must pay all creditors in full before they can apply for a discharge.¹⁶ Rather than attempting to secure a discharge for an insolvent corporation, its directors will use bankruptcy or another vehicle to liquidate the corporation, and will then incorporate a new one. The availability of the discharge to natural persons reflects a normative choice that individuals should not be required to languish in debt indefinitely. Bankruptcy offers a reprieve to the over indebted individual.

1.3. WHY TRUSTEES?

The opposition to discharge process revolves around two exercises of discretion. First, the potential opponent must decide whether or not to lodge an opposition to discharge. When an opposition is lodged, the second exercise of discretion is triggered: the

¹⁴ Office of the Superintendent of Bankruptcy Canada “Annual Insolvency Rates” (January 9, 2013) online: Industry Canada www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01819.html > [February 18, 2013]. Ramsay has suggested that this definition under represents the number of bankruptcies actually caused by business failure, see Ramsay, “Individual Bankruptcy”, *supra* note 2 at 28.

¹⁵ Janis Sarra, “Economic Rehabilitation: Understanding the Growth in Consumer Proposals Under Canadian Insolvency Legislation” (2009) 24 *Banking & Fin L R* 383 at 393.

¹⁶ *BLA*, *supra* note 11 s 169.

judicial officer must decide whether to limit a debtor’s access to the discharge. There are four different actors, who are potentially engaging in discretionary decision-making: bankruptcy trustees, OSB analysts, creditors and judicial officers. I opted to focus my dissertation on the exercise of discretion by trustees.

Trustees are licensed professionals who administer bankruptcy files. Many have an accounting background, though this is not a pre-requisite to becoming a trustee. They meet with the debtor, help them fill out the paperwork necessary to start a bankruptcy, and then monitor the individual during bankruptcy to ensure the individual is fulfilling his or her duties. Their remuneration is tied to the value of assets in a debtor’s estate. I discuss the licensing, responsibilities, and remuneration of trustees in greater detail in Chapter 4.

As compared to other potential opponents, trustees are typically much more active in the opposition to discharge process. When Iain Ramsay did a quantitative analysis of a random sample of 1,147 bankruptcy cases filed in the Toronto District in 1994, he found that trustees were the most likely of the potential opponents to oppose the discharge (58.9% of all oppositions), followed by creditors (39.0%) and the OSB (2.1%).¹⁷ My own analysis suggests a slightly different breakdown of opponents, with oppositions by trustees being even more common and oppositions by creditors or the OSB being even more rare than in Iain Ramsay’s study. I analyzed all of the bankruptcy files in which an opposition was lodged in 2012 (n=7082), and coded them according to who had lodged the opposition. On most files, only one party lodged an opposition, but sometimes two or more parties opposed a debtor’s discharge. My results are set out in the following table. I have provided two sets of numbers for each opponent type – the percentage of all files where they were the only opponent and the percentage of all files where they lodged an opposition, either alone or with other parties

Table 1.1: Breakdown of Oppositions Filed in 2012, By Opponent(s)

¹⁷ Ramsay, “Individual Bankruptcy”, *supra* note 2 at 69.

Type of Opponent	Files Where Only Opponent (%)	Files Where An Opponent (%)
Trustee	87.43	94.27
Creditor	5.03	11.38
OSB	0.32	1.00
No Information	N/A	0.34

Because trustees are responsible for lodging the vast majority of all oppositions, investigating how they exercise their discretion will help illuminate how the opposition to discharge system operates on most files where an opposition is lodged.

I decided that trustees make a more compelling subject of inquiry than judicial officers on two grounds. First, the judicial officer’s scope for discretion is fettered by the structure of the opposition for discharge process, they only see those debtors, whose discharges have been opposed by potential opponents. They are limited to confirming whether or not they agree with the potential opponent’s determination that a debtor is undeserving. Second, the decision-making processes of judicial officers have been the subject of significant study, whereas the decision-making processes of trustees have received little scholarly attention. My dissertation starts to fill this gap in the literature.

1.4. DISCRETION AND THE RULE OF LAW

Legal systems struggle to be flexible, but also predictable, consistent and unbiased. Providing those actors, who implement the system, with a wide scope for discretionary decision-making injects flexibility into the system. This flexibility is especially important when actors are required to make complex, fact-specific judgments, such as judgments of deservingness in the personal bankruptcy system. The bankruptcy system tries to limit access to relief to deserving debtors, but sorting the deserving debtors from the undeserving ones is not a straightforward task, because most people’s financial breakdowns are complicated occurrences. A forensic analysis of the breakdown may reveal that a person made unwise decisions, but also fell victim to unfortunate circumstances, or was hastened into ruin by systemic factors – like the decline of the auto industry or the lack of coverage

for expensive medication.¹⁸ It is unlikely that a person could set out black and white rules about what constitutes culpable behavior that would not result in gross injustices when applied universally. The wide latitude granted to potential opponents and judicial officers allows them to be responsive to all the elements of a person's situation when making a determination of deservingness. At the same time, giving potential opponents and judicial officers greater discretion increases the risk that their decisions may be inconsistent, or unpredictable. Moreover, when individuals are granted wider latitude to craft decisions, there is more room for them to place weight on irrelevant or improper considerations.

Previous scholarship on the Canadian personal bankruptcy system has flagged the trustee's wide scope for discretion as a potential problem. Based on interviews carried out with bankruptcy trustees in 1997 and 1998, Iain Ramsay wrote a piece in 2000 detailing some of the ways a trustee could reshape the course of a debtor's bankruptcy. Bankruptcy is not the only legal mechanism for addressing over indebtedness and trustees assist debtors in choosing between different available mechanisms. Ramsay found that trustees dissuaded debtors from choosing one of the alternatives mechanisms for partly self-regarding reasons, such as it required a longer time commitment from trustees and (prior to 1998) resulted in a meager fee for them.¹⁹ Another example of where trustees had significant discretion was in deciding whether property was exempt. When debtors make assignments into bankruptcy, they surrender all of their non-exempt property for the benefit of their creditors, but get to retain their exempt property. In Ontario, at the time the trustees were interviewed, a car could only be considered exempt if it was "so essential to the [debtor's] business or profession that a debtor is incapable of carrying on without it."²⁰ Ramsay found some

¹⁸ Stephanie Ben-Ishai, Saul Schwartz & Thomas Telfer, "A Retrospective on the Canadian Consumer Bankruptcy System: 40 Years After the Tassé Report" (2011) 50 Can Bus L J 236 at 246 ["40 Years After the Tassé Report"].

¹⁹ 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 Bankr L J 399 at 433-440 ["The Canadian Trustee in Bankruptcy"]. The debt relief mechanism in question was the consumer proposal, which is discussed in Chapter 2, Section II.B.4.

²⁰ *Ibid* at 441.

trustees who would classify a car as exempt according to a less exacting standard, because they were sympathetic to the debtor, or trying to induce the debtor to file for bankruptcy with them, as opposed to a competitor.²¹

Considering his findings, Ramsay was understandably disenchanted with the level of discretion granted to trustees. He called for more routinization in the bankruptcy process, to standardize and simplify the process, and reduce the extent to which trustees could influence a debtor's experience of bankruptcy.²² By contrast, in a system where bankruptcy trustees have a significant amount of discretion and can craft individualized responses, bankrupts may have difficulty predicting at the outset how they will be treated, they may be treated inconsistently, and trustees have greater latitude to put weight on irrelevant considerations. I consider each of these concerns in turn.

Rules that lack predictability are problematic if one takes seriously the notion that the rule of law requires people to be able to ascertain the laws by which they are bound. Lon Fuller describes a reciprocal relationship between government and citizens, where the former says, "these are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct."²³ Fuller argues that a government fails to uphold its end of the bargain when its rules are secret, or applied retroactively, or change so frequently that it is impossible for people to know by what rules their conduct will be judged.²⁴ A citizen is not afforded the opportunity to choose to obey the rules, and his or her obedience, or lack thereof, becomes merely a matter of coincidence. A legal system where actors are afforded significant discretion to deploy their power can operate like a system of secret, retroactive or frequently changed rules. The people subject to these exercises of discretion, i.e., the bankrupts, do not know on what grounds the discretion will be exercised and there is nothing to limit the actors, i.e., potential opponents and judicial

²¹ *Ibid* at 441-2.

²² *Ibid* at 402.

²³ Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964) at 40.

²⁴ These were three of the eight ways in which Fuller thought rules could fail, see *ibid* at 39.

officers, from changing the grounds upon which their discretion is exercised and applying the new grounds retroactively.

A second way of understanding Ramsay's criticism is that he is concerned with the lack of consistency in the bankruptcy system. Consistent application of rules increases predictability, but it also means that like cases are being treated alike. In an overly-individualized system, this manner of consistency may be lacking, and the potential for unfair outcomes increases when similar cases are treated differently. For example, it seems intuitively unfair that if two debtors engage in the same misconduct, such as non-payment of the trustee's fees, one might receive an automatic discharge while the other's discharge is opposed by the trustee and ultimately made subject to limits by the judicial officer.

A third way of understanding Ramsay's concern with an individualized approach is that it increases the likelihood that trustees may take irrelevant considerations into account. Ramsay was concerned that trustees were discouraging debtors from pursuing one of the available debt relief options because it was not as richly remunerative for trustees. Implicit in Ramsay's analysis is the belief that the trustee's remuneration is an irrelevant consideration, which should not impact the course of an individual's bankruptcy. Trustees do need to receive fair level of remuneration for the bankruptcy system to function, but maximizing the trustee's remuneration is not a central goal of the system.

Ramsay's findings suggested deliberate decision-making on the part of trustees to privilege their interests over the goals of the bankruptcy system, but irrelevant or improper considerations can be incorporated into discretionary decision-making regimes inadvertently or implicitly. Previous law and society studies have suggested that actors rely heavily on cultural inputs, including schemas and norms, when exercising their discretion. Schemas are, "cognitive frames that guide and narrow perception, (and) define our understanding of problems and solutions."²⁵ Norms are informal rules governing the conduct of people in a

²⁵ Steven Maynard-Moody & Michael Musheno, "Social Equities & Inequities in Practice: Street Level Workers as Agents and Pragmatists" (2012) 72:S1 Pub Admin Rev S16 at S19 ["Social Equities"].

community.²⁶ They may align with legal prescriptions, but extend to a wide variety of matters not covered by the formal law. Some norms express an important underlying value.²⁷ Other norms reflect common practices that have acquired a prescriptive quality over time, (e.g., many people behave this way, therefore people should behave this way).²⁸ Norms and schemas are a back door through which irrelevant or improper considerations may enter into the decision-making process, because they often reflect commonly held biases or prejudices.

Barbara Yngvesson's study of show-cause proceedings in a Massachusetts county revealed how schemas frame decision-making in ways that incorporate class prejudices.²⁹ In some jurisdictions, when an individual believes that a crime has been committed, but the police have not taken action, that individual can file a complaint with the court and then the clerk will hold a show cause hearing to determine if there are sufficient grounds upon which to issue a charge.³⁰ The clerks studied had a significant amount of discretion to dispose of the complaints: many were dismissed, some were resolved informally, and some were issued as technicalities with the understanding that no further steps would be taken if the accused stayed out of trouble for a set period of time. Charges were only issued in response to about 1/3rd of the private complaints.³¹ Yngvesson noted that the middle class clerks, when dealing with complainants from a lower social class, who lived in a "bad" part of town, shifted their baseline for criminality. The clerks viewed some level of violence in these communities as normal and non-criminal. The clerks would only intervene when the

²⁶ Allan G. Johnson, *The Blackwell Dictionary of Sociology: A User's Guide to Sociological Language* (Oxford: Blackwell Publishers, 2000) at 209.

²⁷ Fabrice Teroni & Julien Deonna, "Differentiating Shame from Guilt" (2008) 17 *Consciousness & Cognition* 725 at 732, 735.

²⁸ Emma Cunliffe, *Murder, Medicine and Motherhood* (Portland, OR: Hart Publishing, 2011) at 99.

²⁹ Barbara Yngvesson, "Making Law at the Doorway: the Clerk, the Court and the Construction of Community in a New England Town" (1988) 22 *Law & Soc'y Rev* 409.

³⁰ *Ibid* at 410.

³¹ *Ibid* at 415.

violence escalated beyond an acceptable level for the “bad” part of town. Yngvesson’s insight about the framing potential of schemas also points to how they reinforce power structures: violence needed to be more severe in “bad” communities before the court would characterize it as unacceptable and intervene.

David Engel’s study of personal injury litigation in a rural Illinois county provides an example of how norms shape judgments in ways that incorporate common prejudices and reinforce social hierarchies. Engel reported that personal injury litigants were viewed negatively and explained this stigmatization with reference to the community’s values and norms. Members of the community valued self-sufficiency, personal responsibility, and hard work. These values were translated into norms. Individuals were expected to take precautions to avoid injury. When individuals failed to take adequate precautions, they were expected to take responsibility for any resulting harm to themselves. Individuals were expected to earn their money through hard work. The common view was that personal injury plaintiffs had deviated from all three of these norms – they had not taken sufficient precautions to avoid injury, they were attempting to “escape responsibility” for the resulting injuries, and they were trying to acquire money through litigation, instead of hard work.³² These attitudes impacted the operation of the legal system. Lawyers in the county were reticent to take on personal injury plaintiffs as clients.³³ Civil juries shared this negative outlook: “awards were very low and suspicion of personal injury plaintiffs was very high.”³⁴ Engel pointed out that the normative judgments made about personal injury litigants reinforced the stigmatization of socially marginal members of the community. He found that personal injury litigation was pursued by marginal community members, who lacked the social capital to resolve their disputes informally or the financial wherewithal to absorb the loss themselves.³⁵ The community’s norms recast social marginality as moral deviance.

³² David Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18 *Law & Soc'y Rev* 551 at 558-59.

³³ *Ibid* at 561, 565.

³⁴ *Ibid* at 560.

³⁵ *Ibid* at 571.

Ramsay's solution to the problems he identified in the decision-making of trustees was to prescribe greater routinization in the bankruptcy system. Legislators promote routinization by enacting rules, i.e., precise directives that can be applied almost mechanically. Rules can be contrasted to standards, which require a person to exercise his or her judgment. A speed limit drafted as a rule may set a maximum speed of 50 kilometres an hour, whereas a speed limit drafted as a standard may enjoin people from driving unreasonably fast. Rules promote predictability and consistency. Standards promote flexibility. Legislators have granted broad discretion to potential opponents and judicial officers in the opposition to discharge system through the use of standards.

Based on the previous law and society studies, and considering the wide range of discretion granted to trustees, I expected that I might find them making unpredictable, inconsistent decisions that incorporated subtle biases against already marginalized members of Canadian society, such as individuals drawn from lower socio-economic classes. I am unable to rule out that such decision-making is taking place, but my research supports a very different conceptualization of how trustees exercise their discretion. Despite being granted broad discretion to penalize a debtor's pre-bankruptcy conduct and compliance during bankruptcy, trustees have voluntarily ceded much of this power. Their oppositions focus almost exclusively on whether or not debtors comply with their duties during bankruptcy; oppositions based on pre-bankruptcy misconduct are rare. This is the pattern of decision making that one might expect to find where legislators opted to constrain decision-making with rules, but the opposition to discharge system is enacted using a number of standards. My findings defy traditional legal conceptions of how discretion operates.

My research suggests that trustees' discretionary decision making is constrained and directed by extra legal factors, the financial and emotional demands placed on them at work. The financial explanation for the pattern of trustees' oppositions is that trustees lack the resources to investigate pre-bankruptcy misconduct, whereas instances of debtor non-compliance are easily (and inexpensively) identified. The emotional explanation is that trustees carry out emotional labour as part of their work, which orients them away from judging pre-bankruptcy misconduct as blameworthy, but towards characterizing non-compliance harshly. The account of discretionary decision-making offered in this dissertation

adds to our understanding of how the implementation of doctrinal law is mediated through individuals, and the financial and emotional realities of their lives.

1.5. AN OUTLINE OF THE DISSERTATION

In this project, I tried to understand how the law is enacted on a day-to-day basis by the actors tasked with implementing it. The legislation and case law in this area establish a structure within which these actors operate, but it is impossible to understand the operation of the opposition to discharge system by looking merely at these traditional sources of law. Instead, to better understand how bankruptcy law operates on the ground, I have supplemented these traditional sources of law with two additional types of data – quantitative data collected by the OSB and qualitative interviews with bankruptcy trustees.

I start my analysis of the opposition to discharge process with an overview of the traditional sources of law. In Chapter 2, I describe the different mechanisms in the *BLA* designed to weed out abusive or undeserving debtors, including a detailed explanation of how the opposition to discharge process operates.³⁶ I then explore how the different mechanisms interact. These mechanisms provide some guidance as to what types of conduct may disentitle a debtor from accessing a discharge, but stop well short of establishing a fully fledged definition of deservingness. In Chapter 3, I turn to written decisions from judicial officers, another traditional source of law. I analyzed 282 decisions from application for discharge hearings, decided between 2003 and 2013, to identify the policy rationales that guide judicial officers in their judgments about the relative deservingness of different debtors. I use the academic literature, which has ventured different suppositions about the proper policy goals of bankruptcy law, to structure my analysis of the cases. The case law provides a shared, albeit imprecise language that actors can use to discuss debtor deservingness, but does little to clarify the legislative ambiguity about the boundaries that separate deserving from undeserving debtors. I suggest that greater precision in language is possible, but that the indeterminacy of the case law results from the bankruptcy system serving multiple ends. I further argue that it would be both politically unfeasible and undesirable for the bankruptcy system to adopt a singular purpose.

³⁶ *BLA*, *supra* note 11.

In the balance of my dissertation, I draw on empirical research to better understand how trustees exercise their discretion. I carried out interviews with 43 individuals, 40 bankruptcy trustees and three estate administrators, the support staff persons who assist trustees. I designed my sample to include people from a variety of different geographic locations and practice contexts. I interviewed individuals who practice in 13 communities in 8 different provinces. My sample included a mix of individuals working as sole practitioners, in small, local firms, or in large regional or national firms. Each interview covered a range of topics including (i) the interviewee's background and practice context, (ii) the interviewee's processes for identifying which files could be opposed and for deciding whether or not to actually lodge an opposition, (iii) the interviewee's impressions of the discharge process, (iv) specific debtor types and whether or not the interviewee would oppose them and (v) the emotional demands of the interviewee's work.

In Chapter 4, I explore how the procedural aspects of a trustee's work may shape the trustee's exercise of discretion. First, I look at how the trustee identifies files in which grounds for opposition exist. Identifying when a debtor has failed to cooperate with the trustee during bankruptcy is straightforward, but uncovering instances of pre-bankruptcy misconduct is more difficult and the trustee is heavily reliant on self-disclosure by a debtor or receiving assistance from creditors or the OSB. Second, I explore how trustees decide whether or not to proceed with an opposition once they have identified grounds for doing so. Many trustees reported that they were primarily opposing for non-compliance by a debtor during bankruptcy and characterized the decision to oppose as automatic or non-discretionary. The decision to oppose for non-compliance may be straightforward, but even in these cases my interviewees identified different degrees of non-compliance that would be required before they would oppose a discharge. To better understand how trustees exercise their discretion in less straightforward cases, I asked the trustees about their continuing education practices, i.e., how they develop and maintain current background knowledge of consumer bankruptcy law, and about the resources they draw on when faced with difficult questions. Their answers suggest that, to varying degrees, trustees are situated in a thick network of professional ties, which may already promote consistency in the implementation of bankruptcy law and could be harnessed to further advance this goal.

While examining these procedural aspects of a trustee's work, it became evident that their pattern of oppositions may be shaped by financial factors. The relative rarity of oppositions based on pre-bankruptcy misconduct may result from the fact trustees lack the resources to uncover pre-bankruptcy conduct, and there is little financial incentive for them to do so. It is more difficult to explain the continuing prevalence of oppositions based on a debtor's non-compliance using financial factors.

In Chapter 5, I compare how trustees approach three different types of debtors with how those debtors are handled by judicial officers in the case law. I presented each of my interviewees with a series of different debtor types and asked how they would assess whether or not to oppose the debtor's discharge.³⁷ These debtor types were drawn from my review of the written decisions and included the debtor with high levels of consumer credit, the debtor with tax debts and the debtor with an outstanding judgment. I compared how trustees assess these debtor types with how they are assessed in the written decisions. I found that trustees tended to view these archetypes sympathetically, even though the case law characterized their conduct as blameworthy. When they were inclined to judge the debtors harshly, trustees often located the responsibility for opposing elsewhere, i.e., with the affected creditor, and would respond to the behavior outside of the opposition to discharge system with steps aimed at rehabilitating the debtor.

In Chapters 6 and 7, I advance an additional explanation for the pattern of trustee oppositions, which supplements the financial one. This explanation focuses on how the emotional labour of bankruptcy trustees might be shaping their exercises of discretion. In Chapter 6, I introduce the concept of emotional labour, as it was initially formulated by the sociologist Arlie Hochschild in her comparative study of flight attendants and debt collectors working at Delta Airlines. I present a basic model of how emotions may impact judgments of deservingness. I then trace two strands of the subsequent research on emotional labour: studies of professionals and studies of people working in the debt industry. Trustees belong to both of these groups and their emotional labour is determined by similar demands and obstacles. The discussion of the emotional labour of professionals and workers in debt

³⁷ This approach was derived from the use of skeletonized hypothetical in Engel, *supra* note 32 at 570.

occupations foreshadows my analysis of the emotional labour of trustees in Chapter 7 and locates my project in this larger body of work.

In Chapter 7, I examine the trustee's role in the opposition to discharge process through the lens of emotional labour: which emotions are trustees trying to cultivate, which ones are they working to suppress and how might this work impact their judgments about the deservingness of debtors. I identify three key emotional themes from my interviews. First, trustees work to feel compassion in their initial interactions with a debtor and this emotional state is not conducive to forming judgments that the debtor's pre-bankruptcy conduct was blameworthy. Second, trustees feel very hopeful about the rehabilitative potential of bankruptcy and become very frustrated when debtors behave in ways that belie their hopeful outlook. A debtor's non-compliance during bankruptcy is particularly apt to raise the trustee's ire. Third, trustees work to limit their emotional register to the emotions appropriate for a professional. To do so, trustees may adopt a view of a debtor as a subject of treatment as opposed to viewing the debtor as someone with whom the trustee is fully engaged in a reciprocal relationship. By adopting such a view, the trustee may narrow the criteria against which the debtor is judged – focusing solely on behaviors that advance or hamper the course of treatment. These emotional impacts are consistent with trustees opposing infrequently for pre-bankruptcy misconduct. They either view it as unproblematic or unrelated to the debtor's course of treatment. The emotional impacts are also consistent with trustees opposing on the basis of non-compliance, because they are frustrated that the debtors have behaved in ways that derailed the bankruptcy process.

Throughout my dissertation, I supplement my analysis of legislation, case law and qualitative interviews with data collected by the OSB on oppositions to discharge. Working with an analyst at the OSB, I compiled a data set containing information about the 7082 oppositions filed in Canada in 2012. By analyzing this data, I have been able add flesh to my portrait of how the opposition to discharge process currently works and to double check some of the assertions made by my interviewees.

2. A DOCTRINAL FRAMEWORK

2.1. THE OPPOSITION TO DISCHARGE PROCESS IN ITS LEGAL CONTEXT

The opposition to discharge process is one part of a very intricate bankruptcy system, which is one element of Canadian debtor-creditor law. It is best understood in this larger doctrinal context. The opposition to discharge process requires judicial officers and potential opponents to make judgments about an individual's deservingness – or lack thereof. The judgments are shaped by the decisions an individual made in seeking relief from creditor enforcement activities, including alternatives an individual chose to forego. Moreover, a judicial officer's or potential opponent's willingness to take action against an undeserving debtor in the opposition to discharge process may be muted or amplified by the interaction between the opposition to discharge process and other mechanisms in the bankruptcy system for policing abuse.

In this chapter, I locate the opposition to discharge process in its larger doctrinal context. I start with an overview of how creditors enforce payment of their debts, and the options for debtors who are seeking relief from these enforcement activities. Bankruptcy is one option for debtors who are seeking such relief, and I explain how an individual proceeds through bankruptcy. I slow down to examine in detail how an individual's access to debt relief is mediated through the opposition to discharge process, including changes made to the process in 2009. I then describe four other mechanisms used to police abuse in the bankruptcy system, and analyze how the mechanisms connect to one another.

This overview of debtor-creditor law, the bankruptcy system, and the discharge process will provide readers, who do not have a background in this area, with a sufficient understanding of the doctrinal context to engage fully in the subsequent analysis of how actors exercise their discretion in the opposition to discharge process. I end the chapter by outlining how discretion is central to the opposition to discharge process and how I propose to critically examine these exercises of discretion.

2.2. DEBTORS AND CREDITORS

2.2.1. **HOW TO GET PAID: CREDITOR'S OPTIONS**

Creditors regularly encounter situations where they are owed a debt, but the debtor is refusing, or unable, to voluntarily satisfy the obligation. The steps a creditor will take to enforce an unpaid debt differ depending on whether or not the creditor is secured or unsecured.

2.2.1.1. SECURED CREDITORS

If the creditor is secured, it will have loaned money on the understanding that if the debtor fails to repay, the creditor can take possession of the debtor's property. The right to take possession of property may be limited to a specified item of property (e.g., a car), or a category of property (e.g., the debtor's equipment), or it may apply to all the debtor's property. The property that the secured creditor can repossess is referred to as the collateral, and one says that the secured creditor has a security interest in the collateral.

If the debtor defaults on its loan, the secured creditor can seize the collateral, and will usually resell it, with the proceeds of the sale being credited against the unpaid debt. In some instances, the secured creditor may be entitled to retain the collateral in satisfaction of the outstanding loan.³⁸ If the proceeds of the sale are insufficient to cover the outstanding debt, the creditor might be able to sue the debtor for the difference and seek to recover the balance as an unsecured creditor; however, in some instances the ability of a creditor to pursue the debtor for the deficiency will be restricted by legislation.³⁹

Secured loans are commonly used in business contexts, and an individual who is running a sole proprietorship may have significant secured liabilities. Consumers also frequently use secured loans to acquire new assets. A mortgage on a house is a form of a secured loan – if the debtor fails to pay, the secured creditor can foreclose on the house. Consumers may have financed the purchase of a car on credit, with the vendor retaining an

³⁸ See e.g., *Personal Property Security Act*, RSA 2000, c P- 7, s 62.

³⁹ See e.g., *Law of Property Act*, RSA 2000, c L-7, s 53, which provides that when a secured creditor has financed the purchase of a consumer good, the secured creditor can either seize and sell the asset or sue the debtor for the unpaid debt, but cannot do both.

interest in the car to secure full payment of the purchase price. Other big assets, such as household furnishings or electronics, may also have been purchased with a secured loan.

2.2.1.2. UNSECURED CREDITORS

An unsecured creditor has lent money without taking an interest in collateral. If the debtor fails to pay back the debt, the creditor must take a number of steps to recover on the debt. First, the creditor will sue the debtor to get a judgment, which is a court order confirming the debtor's liability and the amount owed. The creditor can then use this judgment to enforce the debt, either through seizure or garnishment.

Seizure refers to taking possession of property belonging to the debtor and selling it. The property may be personal property, such as a car, or home electronics, or real property, such as a house, a condominium, or vacation property. The proceeds from the sale will then be applied to the outstanding debt. If there are other creditors, who have reduced their debts to judgments, the proceeds will be shared with them.⁴⁰

Garnishment refers to when a third party owes money to the debtor, and the creditor directs the third party to pay that amount to the creditor instead of to the debtor. For instance, a creditor may garnish the debtor's wages, which means that the debtor's employer will pay a portion of the debtor's wages directly to the creditor. A creditor may also garnish a debtor's bank accounts. The amount held in the bank account is payable to the debtor, but the creditor will direct that it should be paid to the creditor instead. If there are other creditors, who have reduced their debts to judgments, the proceeds will be shared with them.⁴¹

A creditor's ability to seize property or garnish wages may be limited by exemption legislation. Debtors need to be able to support themselves, notwithstanding their outstanding obligations. Recognizing this reality, governments have passed legislation providing that some property cannot be seized, and some portion of a debtor's wages cannot be garnished. These exemptions are primarily set out in provincial legislation, and vary

⁴⁰ See e.g., *Civil Enforcement Act*, RSA 2000, c C-15, s 99(3) [CEA].

⁴¹ See e.g., *ibid*, s 99(3).

greatly from province to province – both in terms of the types and values of property that are exempt. For instance, in June 2014, a debtor in Saskatchewan could claim up to \$50,000 in his or her house as exempt, whereas a debtor in British Columbia could claim up to either \$9,000 or \$12,000 depending on where in the province he or she lived, and a debtor in Ontario would have no exemption for equity in his or her house.⁴² A debtor in Saskatchewan is entitled to exempt the lesser of 70% of his wages or \$1500/month, plus an extra \$300 for each dependent.⁴³ In Ontario, 80% of his wages would be exempt.⁴⁴ In British Columbia, 70% would be exempt, or at least \$100 per month.⁴⁵ There are some additional exemptions contained in federal legislation, which are uniform across Canada. For instance, property held by an Indian or an Indian band that is located on a reserve is exempt from seizure by anyone other than another Indian or Indian band.⁴⁶ Property not protected by exemption legislation is subject to being seized and is called exigible property.

2.2.2. HOW TO GET RELIEF: DEBTOR’S OPTIONS

Once debt reaches a certain point it becomes unmanageable, both financially and personally. Monthly payments may be eaten up by interest accruing on the principal – and repayment becomes increasingly unlikely. Secured creditors may take steps to seize their collateral, including foreclosing on a debtor’s home. Unsecured creditors may launch lawsuits against a debtor, and if successful, seize the debtor’s property, or garnish his or her

⁴² *Enforcement of Money Judgments Act*, SS 2010, c E-9.22, s 93(1)(l), *Enforcement of Money Judgments Regulation*, RRS c E-9.22 Reg 1, s 23(4); *Court Order Enforcement Act*, RSBC 1996, c 78, s 71.1; *Court Order Enforcement Exemption Regulation*, BC Reg 28/98, s 3; *Execution Act*, RSO 1990, c E-24, s 2(2) – The Ontario legislation provides for an exemption for home equity up to a prescribed amount, but no amount of exemption is prescribed.

⁴³ *Enforcement of Money Judgments Act*, *ibid*, s 95(2); *Enforcement of Money Judgments Regulation*, *ibid*, s 23(7);

⁴⁴ *Wages Act*, RSO 1990, c W-1 s 7(2).

⁴⁵ *Court Order Enforcement Exemption Regulation*, *supra* note 42, s 3(5).

⁴⁶ *Indian Act*, RSC 1985, c I-5, s 89. “Indian” is a defined term under the Act and is used here in that technical context, notwithstanding the political incorrectness of this term. If a debtor makes an assignment into bankruptcy, additional federal exemptions apply to his or her property, see *BLA*, *supra* note 11, s 67.

wages or the contents of his or her bank account. Alternatively, they may sell or refer their unpaid accounts to a collection agency, who may aggressively pursue repayment with abrasive demand letters and telephone calls. Bankruptcy provides relief to the over indebted individual, but bankruptcy is only one of several options. When a debtor opts to meet with a bankruptcy trustee, the trustee is required to explore a range of options with the debtor including non-legislative debt-settlement arrangements, the Orderly Payment of Debts process, Division I or II Proposals under the *BLA*, and an assignment in bankruptcy.⁴⁷ Depending on the debtor's position, it may also be in his or her best interest to do nothing.

These options offer – to different degrees – two types of relief: a stay, and debt adjustment or forgiveness. A stay prevents creditors from taking enforcement actions against the debtor, and it may apply to all creditors, or only a subgroup. It is intended to maintain the *status quo*, while the debtor organizes its financial affairs. A stay does not affect the underlying debts, and once the stay is lifted, the creditors can attempt to enforce the debts owing. The second form of relief affects the underlying debt. A debtor may adjust his or her outstanding obligations: seeking a longer time period to repay the debts, decreasing the rate of interest being charged on the debt or reducing the principal owing. The scope of the stay (if any) and debt relief (if any) varies between the debtor's options for relief – these are canvassed in greater detail below.

2.2.2.1. DO NOTHING

Some debtors have such meager financial means that creditors cannot realistically enforce their debt against the debtors. Any property they own is exempt from seizure, and they may not be earning any wages, may be earning wages in an informal setting that makes it difficult to garnish, or are earning such low wages that the costs of pursuing garnishment outweigh the potential recovery. Such individuals are described as judgment proof, and because the creditors cannot take any steps to enforce their debts, the debtor does not need to do anything to protect him or herself from enforcement mechanisms. One drawback to adopting inaction as a response is that creditors may continue to harass the debtor, which can be a significant source of stress. Additionally, if the debtor's financial situation improves,

⁴⁷ Office of the Superintendent of Bankruptcy, Directive Number 6R3 “Assessment of An Individual Debtor”(April 30, 2010), s 7(3).

the creditors may then enforce on their debts. The debtor's poverty operates as a limited stay – making actual enforcement unlikely, but doing nothing to forestall aggressive collection tactics or successful enforcement efforts in the future. Many judgment proof debtors may still desire some form of debt relief.⁴⁸

2.2.2.2. INFORMAL SETTLEMENT ARRANGEMENTS

Debtors have a number of non-legislative options for dealing with their debts. A debtor can negotiate with his or her creditors to alter the terms of repayment, asking for a reduced interest rate, a longer period of time to pay or a reduction of the principal owing. A debtor may retain the services of a credit counselling agency to negotiate with creditors on his or her behalf. The credit counselling agency will not seek a reduction in the principal owing, but may get concessions from the creditors with respect to the time for payment or the interest charged. The debtor would then make payments to the agency, who will distribute the funds amongst the creditors.⁴⁹ A debtor may seek a loan to pay out debts with high interest rates, consolidating their obligations into one debt subject to lower interest rates. None of these options offer the debtor the protection of a temporary stay while he or she seeks to work out an informal settlement arrangement.

2.2.2.3. ORDERLY PAYMENT OF DEBT ORDERS

Debtors in Alberta, Saskatchewan and Nova Scotia can seek relief using an Orderly Payment of Debt Order. The Orderly Payment of Debt Order allows a debtor with small consumer debts to get a court order consolidating his or her debts into one amount.⁵⁰ The debtor then makes payments to the court and the court distributes the funds amongst the creditors.⁵¹ Once the consolidation order is in place, a stay protects the debtor. The stay

⁴⁸ Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor" (2007) 45 Osgoode Hall L.J. 471 at 475-76 ["Bankruptcy for the Poor"].

⁴⁹ Stephanie Ben-Ishai & Saul Schwartz, "Debtor Assistance and Debt Advice: The Role of the Canadian Credit Counselling Industry" (2011) 7:7 Osgoode CLPE School Research Paper Series 30/2011.

⁵⁰ *BLA*, *supra* note 11, s 218.

⁵¹ *BLA*, *supra* note 11, s 230(2), 235.

applies to all debts covered by the order and lasts as long as the debtor makes the payments required under the order.⁵² The order does not cover debts that are secured against land, or debts that were incurred in the ordinary course of business.⁵³

Under the order, the debtor is required to repay the principal of the consolidated debts in full, usually within a three-year period, unless the creditors consent to or the court allows for a longer repayment period.⁵⁴ The debts covered by the order accrue interest at a rate of 5 percent per annum, and this rate will often be lower than the interest rate being charged on the debts prior to the Orderly Payment of Debt Order being granted.⁵⁵ For instance, compare this rate to many credit cards which charge interest of 20% *per annum* and pay roll loans which are excluded from the criminal interest rate of 60% *per annum*, and often charge well in excess of this amount.⁵⁶

Quebec has a procedure that is similar to an Orderly Payment of Debt Order called the Voluntary Deposit Scheme.⁵⁷

2.2.2.4. DIVISION I OR II PROPOSALS

Debtors across Canada can make use of the proposal schemes under the *BLA*. Under a proposal, a debtor negotiates with his creditors to make regular payments towards his outstanding obligations – usually over a period of three to five years – in exchange for

⁵² The stay set out in *BLA* s 229 is lifted if the debtor remains in default for more than three months, s 233(5). The Court can lift the stay on a number of grounds other than ongoing default, *BLA*, *supra* note 11, s 233(1)-(3).

⁵³ *BLA*, *supra* note 11, s 218(2)(c), (d). These limits have not been amended by regulation, though the other limitations set out in section 218 have, see *Orderly Payment of Debt Regulations*, CRC, c 369, s 28.

⁵⁴ *BLA*, *supra* note 11, s 220(1)(b)(1), 226.

⁵⁵ *Orderly Payment of Debts Regulation*, *supra* note 53, s 31.

⁵⁶ *Criminal Code*, RSC 1985, c C-46, s 347, 347.1; Freya Kodar, "Conceptions of Borrowers & Lenders in the Canadian Pay Day Loan Regulatory Process: The Evidence from Manitoba & Nova Scotia" (2011) 34:2 Dalhousie L J 445.

⁵⁷ *Code of Civil Procedure* art 652-659.01 CCP.

concessions from his creditors. Like with the Orderly Payment of Debt Order, the debtor may be given longer to pay, or interest may be charged at a reduced rate; however, unlike the Order Payment of Debt Order, a significant reduction of the principal owing is a common feature of proposals under the *BLA*. Creditors are given the opportunity to vote on the proposal, and it becomes binding on them once they either vote in favour, or are deemed to have voted in favour, and the court approves, or is deemed to have approved the proposal.⁵⁸

Individual debtors with less than \$250,000 in debt, not including any mortgage debt owing on a principal residence, can file a proposal under Division II of the *BLA*. The approval process for a Division II proposal is streamlined: unless the Official Receiver or a sufficiently significant creditor requests that a vote be held on the proposal, the creditors are deemed to have approved it.⁵⁹ Likewise, the court is deemed to have approved the proposal unless the Official Receiver or an interested party requests a court hearing.⁶⁰ Individual debtors can also file a proposal under Division I of the *BLA*. There is no minimum or maximum debt threshold for a Division I proposal, but the process is less streamlined: there are no provisions for deeming that creditors or the court have approved the proposal. Additionally, the consequences of a failed proposal are more severe. A debtor whose Division I proposal is rejected by creditors or the court is automatically assigned into bankruptcy, and he or she then undergoes the bankruptcy process, described in the next section. A debtor whose Division II proposal is rejected by creditors is not subject to an automatic bankruptcy assignment.⁶¹

Both Division I and Division II proposals afford a debtor the protection of a stay. The stay in a Division I proposal automatically applies to both secured and unsecured creditors.⁶² The stay in a Division II proposal usually only applies to unsecured creditors, but

⁵⁸ *BLA*, *supra* note 11, s 54 (Div I creditor vote), 58-9 (Div I court approval), 66.15-19 (Div II creditor vote), 66.22-66.24 (Div II court approval).

⁵⁹ *BLA*, *ibid*, s 66.18.

⁶⁰ *BLA*, *ibid*, s.66.22.

⁶¹ *BLA*, *ibid*, s 57, 61(2).

⁶² *BLA*, *ibid*, s 69.1.

in rare cases, the court may make an order extending the scope of the stay to cover secured creditors as well for a limited period of time.⁶³

2.2.2.5. BANKRUPTCY

When a debtor makes an assignment into bankruptcy, all of his or her exigible property vests in the bankruptcy trustee for the benefit of the creditors. The individual debtor will be entitled to retain exempt property. The *BLA* incorporates provincial exemption law and provides debtors with the benefit of some additional exemptions, which are uniform across Canada.⁶⁴ For instance, most RRSPs – except for any amounts contributed in the 12 months before bankruptcy – are exempt.⁶⁵ The trustee will gather together the debtor’s exigible property and then realize upon it, usually by selling it. In many instances, the debtor may agree to buy non-exempt assets from the trustee using the debtor’s post-assignment income. The proceeds of any sale will be distributed amongst the creditors.

While in bankruptcy, the debtor has a number of duties, including providing monthly reports to the trustee of his or her income and expenses. The Office of the Superintendent of Bankruptcy has prescribed a method for determining what income is not required for covering the necessities of life; these amounts are deemed to be surplus income.⁶⁶ The debtor must pay part – usually half - of that surplus to the trustee.⁶⁷ The surplus income payments will be distributed to the creditors, and may be applied towards the trustee’s fees.

⁶³ *BLA, ibid*, s 69.2.

⁶⁴ *BLA, ibid*, s 67.

⁶⁵ *Ibid*, s 67(1)(b.3); in some provinces, RRSPs are exempt, including contributions made in the 12 months before bankruptcy, see e.g., *CEA, supra* note 40, s 92.1.

⁶⁶ Office of the Superintendent of Bankruptcy, Directive Number 11R2-2014 “Surplus Income” (March 18, 2014).

⁶⁷ *BLA, supra* note 11, s 68; Office of the Superintendent of Bankruptcy, Directive No. 11R2-2014, *ibid*.

A debtor in bankruptcy is afforded the protection of a stay. The stay automatically applies to unsecured creditors. In rare instances, the court may order that the stay be extended to prevent secured creditors from enforcing against collateral.⁶⁸

Bankruptcy does not merely reduce the principal a debtor owes, in most cases it wipes out the entire debt. At the end of a bankruptcy, an individual debtor will be granted a discharge, which releases him or her from the obligation to pay his or her pre-bankruptcy debts. The discharge is the primary benefit available to debtors in bankruptcy. In the next section, I set out how the discharge operates in the Canadian bankruptcy system, including changes made to the discharge process in 2009.

Bankruptcy is the most drastic option available to debtors who need relief because it results in the complete elimination of most debts, as opposed to merely giving individuals more time to pay, relief from interest, or a partial reduction of the principal. Many people feel that this drastic remedy should only be available to the truly needy, whereas individuals who require relief, but can afford some degree of repayment, should opt for one of the less drastic options. In judging whether or not a bankrupt individual is deserving of a discharge, potential opponents and judicial officers are apt to consider whether the individual adopted too drastic a remedy having regard to the magnitude of his or her financial distress.

2.2.3. THE DISCHARGE

The discharge releases an individual from most pre-bankruptcy debts, which means that the creditors holding those debts are not able to enforce them once a discharge has been granted. Most individuals who make an assignment into bankruptcy are granted a discharge automatically after a set period of time. Since 1992, first-time bankrupts have been entitled to an automatic discharge after a set period of time has expired. First-time bankrupts with no surplus income are discharged automatically after 9 months; those with surplus income are discharged after 21 months.⁶⁹ In 2009, the automatic discharge was extended to second-time bankrupts. Second-time bankrupts with no surplus income are automatically discharged after

⁶⁸ *BLA, ibid*, s 69.3.

⁶⁹ *BLA, ibid*, s 168.1(1)(a).

24 months, and those with surplus income are automatically discharged after 36 months.⁷⁰ Bankrupts who wish to be discharged earlier can apply to the court for a discharge, but if they make such an application and are unsuccessful, they will lose their entitlement to the automatic discharge.⁷¹

A small group of bankrupts have no entitlement to a discharge in the first place, including an individual with two or more previous bankruptcies and an individual with high income tax debts.⁷² High income tax debts are defined as personal income tax debts in excess of \$200,000, where that debt amounts to 75% or more of the individual's total unsecured claims.⁷³ When a bankrupt is not entitled to an automatic discharge, the trustee is tasked with bringing an application to the court, and a judicial officer will decide if the debtor should be granted a discharge.⁷⁴

An individual may lose his or her entitlement to an automatic discharge, through his or her own acts, or if someone objects to it. If (s)he refuses or neglects to receive financial counselling from the trustee, she will no longer be entitled to an automatic discharge.⁷⁵ Alternatively, a creditor, the OSB or the trustee may oppose an individual's automatic discharge, triggering a court hearing.

A number of grounds upon which a discharge can be opposed are set out in section 173 of the *BIA*, which are reproduced below in Table 2.1. How an individual behaves prior to and during bankruptcy may give the potential opponents grounds to oppose the individual's discharge. Pre-bankruptcy behaviors such as failing to keep appropriate books of account, gambling, living extravagantly, or engaging in frivolous and vexatious litigation are identified as grounds for opposing a discharge. An individual's conduct during bankruptcy

⁷⁰ *Ibid*, s 168.1(1)(b).

⁷¹ *Ibid*, s 168.1(2).

⁷² *Ibid*, s 168.1(1), 169, 172.1.

⁷³ *Ibid*, s 172.1(1).

⁷⁴ *Ibid*, s 169.

⁷⁵ *Ibid*, s 157.1(3).

can be grounds for opposing the individual's discharge, including failure to pay surplus income, failure to account satisfactorily for a loss of assets and failure to fulfill duties, such as the requirement to submit monthly income and expense sheets. An individual's choice to make an assignment into bankruptcy is a ground for opposition if the individual had the financial wherewithal to make a proposal to his or her creditors. The list of grounds for opposition set out in section 173 is not exhaustive and potential opponents can oppose a debtor's discharge on grounds other than those listed in the legislation.⁷⁶

Table 2.1: Legislative Bars to Discharge

Subsection	Bar To Discharge
173(1)(a)	The assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible
173(1)(b)	The bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included
173(1)(c)	The bankrupt has continued to trade after becoming aware of being insolvent
173(1)(d)	The bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities
173(1)(e)	The bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs
173(1)(f)	The bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt
173(1)(g)	The bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date

⁷⁶ *Ibid*, s 168.2, 172.

Subsection	Bar To Discharge
	of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action
173(1)(h)	The bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors
173(1)(i)	The bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities
173(1)(j)	The bankrupt has on any previous occasion been bankrupt or made a proposal to creditors
173(1)(k)	The bankrupt has been guilty of any fraud or fraudulent breach of trust
173(1)(l)	The bankrupt has committed any offence under the <i>BLA</i> or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder
173(1)(m)	The bankrupt has failed to comply with a requirement to pay imposed under section 68
173(1)(n)	The bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness
173(1)(o)	The bankrupt has failed to perform the duties imposed on the bankrupt under the <i>BLA</i> or to comply with any order of the court

When an opposition is filed, the matter may be referred to mediation, or the court may hold a hearing on the discharge.⁷⁷ When a court hears an application for a discharge, the

⁷⁷ *Ibid*, s 168.2, 170.1. A case must be sent to mediation if the only ground(s) upon which a trustee or a creditor opposes the debtor's discharge is that the debtor failed to make surplus income payments or the debtor could have made a viable proposal, but chose bankruptcy instead, *ibid*, ss 170.1, 173(1)(m)-(n); *Bankruptcy and Insolvency General Rules*, CRC, c 368, s 105(2)(c) [*General Rules*].

presiding judicial officer has a number of options: it may adjourn the matter, or it may grant an absolute discharge, a conditional discharge, a suspended discharge or it can refuse to grant a discharge.⁷⁸ If the court adjourns the matter, it indicates that it will hear the application at a later time. It may set a specific date for hearing the application or it may adjourn the matter indefinitely, and leave it to the affected parties to bring the matter back before the court at a future date. An absolute discharge relieves the bankrupt from the obligation of repaying all dischargeable debts as of the date of the discharge: the bankrupt remains liable for the non-dischargeable debts listed in section 178 of the *BLA* and any debts incurred after filing for bankruptcy. Where a section 173 fact is proven, or where the individual has high personal income tax debts, the court does not have the jurisdiction to grant an absolute discharge.⁷⁹ A conditional discharge requires the bankrupt to fulfill one or more obligation(s) before (s)he receives a discharge. The order often requires the individual to pay money into the estate. A suspended discharge postpones the date of the bankrupt's discharge, and prior to the discharge date, the bankrupt may remain subject to the trustee's supervision, and responsible for surplus income payments. A judge can grant a suspended and a conditional discharge concurrently.⁸⁰ A refused discharge means the bankrupt does not receive the benefit of debt relief. When the court refuses a discharge, an individual remains an undischarged bankrupt unless and until (s)he successfully reapplies for a discharge in the future. The court may indicate that the bankrupt can only reapply for a discharge after fulfilling certain conditions, or once a given amount of time has elapsed.

When an individual remains undischarged, the trustee supervising his or her bankruptcy may apply to be discharged. A trustee is usually discharged from an estate once it has been fully administered; meaning that all the exigible assets have been realized upon – or deemed incapable of realization, though a trustee can be discharged earlier if the court believes there is sufficient cause.⁸¹ Once a trustee is discharged, he or she remains the trustee

⁷⁸ *BLA*, *ibid*, s 172(1).

⁷⁹ *Ibid*, s 172(2), 172.1(3).

⁸⁰ *Ibid*, s 172(4).

⁸¹ *Ibid*, s.41.

of the bankruptcy estate for the purposes of fulfilling any duties incidental to the administration of the estate, but if there are further assets to be realized upon, an interested person must apply to have a trustee appointed or re-appointed to deal with the assets.⁸² From the point of view of the bankrupt, the trustee's discharge is important because it heralds the end of the stay protecting the individual from creditor enforcement activities. If an individual remains undischarged from his or her debts, but a trustee is discharged from the estate, the individual's creditors can again take steps to collect on their debts.⁸³

2.2.4. 2009 AMENDMENTS

The *BLA* underwent significant changes as a result of two separate pieces of legislation that came into force in September 2009.⁸⁴ A number of the amendments impact the discharge process; seven are outlined in this section.

2.2.4.1. FIRST-TIME BANKRUPTS

First-time bankrupts with surplus income are automatically discharged after 21 months. Prior to the amendments, they were automatically discharged after 9 months. The change was designed to require affluent bankrupts to contribute more to their estates – 21 months of surplus income payments instead of 9 months – but adopting differential treatment for bankrupts with surplus income and those without may have had an unintended consequence. Bankrupts may perceive an incentive to reduce their income during the first 9 months of a bankruptcy, so as to avoid incurring surplus income obligations, and thereby get discharged 13 months earlier.⁸⁵

⁸² *Ibid*, s 41(10), (11).

⁸³ *Ibid*, s 69.3(1.1).

⁸⁴ *Wage Earner Protection Program Act*, SC 2005, c 47 [2005 Amendments]; *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007, c 36 [2007 Amendments].

⁸⁵ Registrar Rick Lee, Leah Drewcock, David Wood, Chantal Gingras & Andre Bolduc, "Consumer Legislative Reform" (Panel Presentation delivered at the Annual Review of Insolvency Law, February 21, 2014). This unintended consequence was flagged during the panel presentation.

2.2.4.2. SECOND-TIME BANKRUPTS

The automatic discharge was extended to second-time bankrupts. Prior to the amendments, trustees had to apply for a discharge on behalf of a second-time bankrupt. A growing percentage of the total number of people in bankruptcy seem to be making a proposal for the second, third, fourth or fifth time. Thomas Telfer reported that repeat filers, as a percentage of all bankruptcies, increased from 14.99% in 2010, to 15.57% in 2011 and 16.11% in 2012 – though both the total number of bankruptcies and repeat filers decreased during this period.⁸⁶ The bulk of repeat filers are second-time filers. In 2012, 14.63% of all people in bankruptcy were second-time filers, 1.37% were third timers, 0.10% were fourth timers and 0.001% were fifth timers.⁸⁷ By extending the automatic discharge to second-time filers, the 2009 amendments reduced the number of court applications that bankruptcy trustees need to arrange, and that judicial officers need to preside over.

2.2.4.3. EVIDENCE AT HEARINGS

Since 2009, potential opponents can use affidavit evidence or oral evidence to establish the existence of a section 173 fact. Prior to the amendments, potential opponents could only use oral evidence.

2.2.4.4. SECTION 170 REPORTS

The section 170 report provides information about the debtor's financial affairs and conduct, which may inform a potential opponent's decision to lodge an opposition to discharge. The trustee prepares the report. Prior to the amendments, the trustee was required to prepare a section 170 report in every case. Since 2009, the trustee is only required to prepare a section 170 report in four situations: (i) if a bankrupt is required to make surplus

⁸⁶ Thomas G W Telfer, "Repeat Bankruptcies and the Integrity of the Canadian Bankruptcy Process" (Paper delivered at the INSOL Academics' Colloquium, Hong Kong, March 22-23, 2014) [Forthcoming 55 Canadian Business L J 231], 3-5 ["Repeat Bankruptcies"].

⁸⁷ Telfer, "Repeat Bankruptcies" *ibid at 5*, the remainder of the bankrupt individuals were filing for a first time.

income payments, (ii) if an automatic discharge is opposed, (iii) if a bankrupt has filed for bankruptcy before, or (iv) if a court hearing of the discharge is required.⁸⁸

2.2.4.5. MEDIATION

Mediation became mandatory when a potential opponent was opposing solely on the ground that the bankrupt had not made surplus payments, that an individual could have made a proposal, but opted instead for bankruptcy, or a combination of these two grounds.

2.2.4.6. WAIVER OF DISCHARGE

The ability of a bankrupt to waive his or her discharge was removed from the legislation in 2009.

2.2.4.7. PERSONAL INCOME TAX DEBTORS

A personal income tax debtors is defined in the legislation as a person with \$200,000 or more in personal income tax debt, where that amount accounts for 75% or more of the person's total debt.⁸⁹ Prior to the amendments, personal income tax debtors were not treated differently than other debtors, but since 2009, personal income tax debtors are no longer entitled to an automatic discharge. The personal income tax debtor's trustee must apply to the court for a discharge after a set period of time, and the court is limited to granting a suspended or conditional discharge or refusing the discharge; the court cannot grant an absolute discharge.⁹⁰ In deciding how to dispose of the case, the court is directed to consider four factors: (i) the bankrupt's circumstances when the tax debt was incurred, (ii) the efforts the bankrupt made to pay the tax debt, (iii) whether the bankrupt was paying other debts instead of the tax debt, and (iv) the bankrupt's future financial prospects.⁹¹ This amendment identifies tax debtors as particularly worthy of censure, and it has been criticized because it treats bankrupts who owe money to the Crown differently from bankrupts who owe debts

⁸⁸ *General Rules*, *supra* note 77, s 121.1(1).

⁸⁹ *BLA*, *supra* note 11, s 172.1.

⁹⁰ *Ibid*, 172.1(3).

⁹¹ *Ibid*, s 172.1(4).

to other creditors, which runs counter to the Crown's policy that it should not receive special treatment during insolvency proceedings.⁹²

2.3. OTHER MECHANISMS FOR POLICING ABUSE

The opposition to discharge process is one mechanism in the Canadian bankruptcy system for policing abuse by individuals; however, it is not the only one. Four others mechanisms bear mentioning: non-dischargeable debts, impeachable transactions, bankruptcy offences, and surplus income. Each of these mechanisms further elucidates who is the honest, unfortunate debtor, by delineating the opposite, what types of conduct attract sanction in bankruptcy. The provisions are also interconnected in such a way that one type of behavior may be penalized by multiple mechanisms. The interactions between the five mechanisms may impact whether or not potential opponents decide to lodge an opposition.

2.3.1. NON-DISCHARGEABLE DEBTS

Non-dischargeable debts are another type of limit placed on an individual's ability to access the discharge. Whereas the opposition to discharge process limits an individual's ability to get relief from the entirety of his or her pre-bankruptcy debts, the non-dischargeable debt provisions apply to specific debts. Section 178 lists debts from which a debtor is not released upon discharge. The list reflects a judgment by Parliament that some types of financial obligations are so serious that an individual should not be relieved from fulfilling them.⁹³ Included on the list are debts for spousal or child support, civil damage awards for intentional infliction of bodily harm or sexual assault, and two types of debts incurred through fraud.⁹⁴ Controversially, government-funded student loans are not dischargeable for seven years after an individual has stopped being a full time student.⁹⁵

⁹² Ben-Ishai et al, "40 Years After the Tassé Report", *supra* note 18 at 256.

⁹³ *Re Hudjik*, 2005 ABQB 244 at para 15, 10 CBR (5th) 42, Laycock Reg.

⁹⁴ *BLA*, *supra* note 11, s 178(1)(a.1), (c), (d), (e).

⁹⁵ *Ibid*, s 178(1)(g). A student can make a special application to have the loan discharged 5 years after he or she has stopped being a full time student, but must show that he or she has acted in good faith and is suffering financial difficulty that prevents him or her from repaying the loan, see s.178(1.1). For criticisms, see e.g., Ben-Ishai et al, "40 Years After the

The focus of section 178 is the type of debt an individual incurred prior to bankruptcy, and consequently primarily penalizes pre-assignment conduct, with one exception. If an individual fails to disclose a debt to his or her trustee, the creditor owed the undisclosed debt will be entitled to pursue the individual after bankruptcy. The creditor will not be able to recover the full amount of the original debt, but only the amount of any dividend that the creditor would have received from the bankrupt's estate had the debt been properly disclosed.⁹⁶ This dividend will usually represent a small portion of the original debt, or may have no value at all.⁹⁷

The debts listed in section 178 cannot be discharged in a bankruptcy; however, they can be compromised in a Division I or II proposal. It remains difficult to compromise such a debt: the proposal must explicitly set out that the section 178 debt will be compromised and the creditor to whom the debt is owed must vote in favour of the proposal.⁹⁸ A compromise cannot be forced onto an unwilling creditor holding a non-dischargeable debt; however, if the creditor is willing to accept some form of compromise, an individual with section 178 debts may be better served by opting for a proposal over a bankruptcy.

An individual with a non-dischargeable debt may face sanctions under other mechanisms. Debts incurred through fraud while acting in a fiduciary capacity and debts related to goods and services acquired fraudulently are both non-dischargeable.⁹⁹ Fraud of

Tassé Report", *supra* note 18 at 255. This provision was highlighted in Industry Canada's Discussion Paper as an area where it was considering revisions, see Canada, Industry Canada, *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act – Discussion Paper* (Ottawa, 2014) at 15 online: [https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Discussion_Paper_StatutoryReview-eng.pdf/\\$FILE/Discussion_Paper_StatutoryReview-eng.pdf](https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Discussion_Paper_StatutoryReview-eng.pdf/$FILE/Discussion_Paper_StatutoryReview-eng.pdf) [June 15, 2015]

⁹⁶ *BLA*, *supra* note 11, s 178(1)(f).

⁹⁷ See e.g., *Schreyer v. Schreyer*, 2011 SCC 3 at para 34, [2011] 2 SCR 605, where the bankrupt had not notified his estranged spouse about his bankruptcy, nor had he notified his trustees about his spouse's equalization of property claim. The court characterized the spouse's claim under section 178(1)(f) as irrelevant, because the debtor's creditors had not received any dividends in his bankruptcy.

⁹⁸ *BLA*, *supra* note 11, s 62(2.1), 66.28(2.1).

⁹⁹ *Ibid*, s 178(1)(d), (e).

any sort – a broader category – is a ground for opposing an individual’s discharge.¹⁰⁰ Fraudulent behavior is also prosecuted under the offence provisions of the *BLA* and the *Criminal Code*.¹⁰¹

2.3.2. IMPEACHABLE TRANSACTIONS

An individual can subvert the bankruptcy process by disposing of assets prior to making an assignment. If exigible assets are transferred to a third party prior to an assignment, their value is no longer available for distribution amongst the creditors of the estate. Where property or services are provided to a third party for conspicuously less than they are worth, it is called a transfer at undervalue.¹⁰² If exigible assets are transferred to a creditor prior to the assignment, the scheme of distribution provided for in the *BLA* may be subverted. For instance, instead of the usual pro-rata distribution amongst unsecured creditors, an individual could pay a favoured unsecured creditor in full prior to the assignment, leaving nothing to be distributed amongst the other creditors in bankruptcy. Where a payment to one creditor disadvantages other creditors, it is called a preference.¹⁰³

The impeachment provisions allow a trustee or creditor to set aside some pre-bankruptcy transactions.¹⁰⁴ The third party or creditor who received the property can be compelled to transfer it back to the estate.¹⁰⁵ The trustee then realizes on the asset and distributes the proceeds according to the priority scheme set out in the *BLA*. These

¹⁰⁰ *Ibid*, s 173(10(k)).

¹⁰¹ *Ibid*, s 198(1)(a), (f); *Criminal Code*, *supra* note 56, s 380.

¹⁰² *BLA*, *supra* note 11, s 2, 96.

¹⁰³ *Ibid*, s 95.

¹⁰⁴ The impeachment powers are set out in *BLA*, *ibid*, s 95-101. Creditors and the trustee may also have recourse to impeachment powers under provincial legislation, such as Ontario’s *Assignments and Preferences Act*, RSO 1990, c A33, and *Fraudulent Conveyances Act*, RSO 1990, c F-29.

¹⁰⁵ Depending on which impeachment power is used, the transferee may be required to pay over an equivalent sum of money, rather than retransfer the property, *BLA*, *supra* note 11, s 96(1), 98.

impeachment provisions can be used to undo some of the harm caused by the individual's pre-bankruptcy disposition of assets.

The impeachment provisions overlap with the opposition to discharge process. One of the grounds for opposing an individual's discharge set out in section 173 is that the individual gave a preference to a creditor in the three months prior to bankruptcy, while insolvent.¹⁰⁶ Additionally, a bankrupt, who transferred property prior to making an assignment, may have his or her discharge opposed on the basis that he or she has failed to account satisfactorily for a loss of or deficiency in assets.¹⁰⁷ An individual who engages in such pre-bankruptcy dispositions may also be charged with a bankruptcy offence.¹⁰⁸

2.3.3. BANKRUPTCY (AND OTHER) OFFENCES

The *BLA* lists a number of offences, which are prosecuted in a manner akin to criminal offenses. An individual who is convicted of an offence faces serious penalties. Depending on the offence, the individual could be required to pay a penalty of up to \$10,000, spend three years in jail, do community service, and pay compensation for any damage caused to another party.¹⁰⁹ The list of offences covers misconduct by bankrupts, creditors, trustees and other parties who may become enmeshed in the administration of a bankrupt's estate. With respect to bankrupts, the offences police both pre-assignment conduct as well as an individual's conduct during bankruptcy. For instance, an individual commits an offence if he or she obtained credit on the basis of a falsified application or bought goods on credit and resold them, either in the year before or during bankruptcy.¹¹⁰ During the bankruptcy process, an individual commits an offence if he or she knowingly provides incorrect information on a statement or – when subject to questioning – refuses to

¹⁰⁶ *Ibid*, s 173(1)(h).

¹⁰⁷ *Ibid*, s 173(1)(d).

¹⁰⁸ *Ibid*, s 198(1)(a).

¹⁰⁹ *Ibid*, s 198, 204.1, 204.3.

¹¹⁰ *Ibid*, s 198(1)(e), (g).

answer a question truthfully.¹¹¹ There are further catchall provisions that makes any failure of a bankrupt to fulfill his or her duties, or any contravention of the *BLA* or related regulations an offence.¹¹²

Bankrupt individuals also risk running afoul of and being prosecuted under offence provisions in other legislation. Trustees are obligated to report to the court when they believe an individual has committed an offence under the *BLA* or any other act.¹¹³ The *BLA* is ambiguous as to whether a trustee or the Crown should prosecute the offences.¹¹⁴ In practice, the OSB refers a case to the RCMP, and the RCMP then decides whether or not to investigate and press charges.¹¹⁵

On its website, the OSB has made available a list of criminal and penal sanctions rendered against bankrupts under the *BLA* and other statutes since 2010.¹¹⁶ The vast majority of convictions are for *BLA* offences, or under the fraud provisions of the *Criminal Code*.¹¹⁷ Bankrupts have also been convicted under the *Criminal Code* for using forged documents, and for contravening the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.¹¹⁸

¹¹¹ *Ibid*, s 198(b)(c).

¹¹² *Ibid*, s 198(2), 202(4).

¹¹³ *Ibid*, s 205(1). The Official Receiver is under the same obligation.

¹¹⁴ *Ibid*, s 205(3), (4). For a discussion of this ambiguity see Andrew Diamond “Emphasizing the Criminal in Quasi-Criminal under the *Bankruptcy and Insolvency Act*,” in Janis Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Carswell, 2010) [“Emphasizing the Criminal”].

¹¹⁵ Diamond, “Emphasizing the Criminal”, *ibid* at 415.

¹¹⁶ Office of the Superintendent of Bankruptcy, “Criminal/Penal Sanctions Rendered since 2010” (September 10, 2013) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02706.html> [June 15, 2015].

¹¹⁷ *Criminal Code*, *supra* note 56. Most convictions are under s 380, the general fraud provision, but one bankrupt was prosecuted under s 62 which makes it a crime to obtain credit on the basis of false information.

¹¹⁸ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, s 74.

The offence provisions overlap with the opposition to discharge process. An individual's discharge can be opposed on the grounds that he or she committed an offence under the *BLA* or any other statute, if the offence relates to the bankruptcy proceedings or the individual's property.¹¹⁹

2.3.4. SURPLUS INCOME PAYMENTS

If an individual earns more than he or she requires to pay for necessary expenses, he or she will be obliged to pay a portion of that surplus income, usually half, into his or her estate. Bankruptcy is intended to provide relief to the overwhelmed individual, who cannot pay his or her debts, not the individual who merely would rather not pay: a distinction is sometimes drawn between "can't pay" and "won't pay".¹²⁰ The surplus income requirement can be understood as a method for ensuring that high-earning bankrupts cannot discharge their debts without making a substantial contribution to their estate.

The Canadian approach has been contrasted with the American means test.¹²¹ In the United States, an individual's bankruptcy filing is presumed to be abusive if the individual's income exceeds his or her necessary expenses by more than a guideline amount. The individual's bankruptcy filing may either be dismissed or converted into a proposal.¹²² American "won't pay" are unable to access bankruptcy relief, and the drafters of the bill hoped that this would push "won't pay" to deal with their debts through a proposal mechanism, but the means test has been criticized for making it difficult for "can't pay" debtors to access bankruptcy, by imposing additional costs and paperwork on all individual's

¹¹⁹ *BLA*, *supra* note 11, s 173(1)(l).

¹²⁰ Stephen Lea, Avril Mewse & Wendy Wrapson "The Psychology of Debt in Poor Households in Britain" in Ralph Brubaker, Robert M. Lawless & Charles J. Tabb, eds, *A Debtor World: Interdisciplinary Perspectives on Debt* (Oxford, UK: Oxford University Press, 2012), 151-166 at 151-2.

¹²¹ See Jacob Ziegel, "Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges: Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies" (2006) 7 *Theoretical Inquiries L* 299 ["Facts on the Ground"]; Ben-Ishai et al, "40 Years After the Tassé Report", *supra* note 18 at 251.

¹²² *Bankruptcy Code*, 11 USC s 707(b)

seeking relief in bankruptcy.¹²³ In comparison, in Canada, “won’t pays” are allowed to take advantage of the bankruptcy system, but required to pay half of their surplus income into the estate for at least 21 months. The Canadian approach ensures that “won’t pays” contribute something to their creditors without restricting the access of “can’t pays” to the bankruptcy system.¹²⁴

The surplus income payment requirement overlaps with the opposition to discharge process. Non-payment of surplus income is one of the grounds listed in section 173 upon which an individual’s discharge can be opposed.¹²⁵ An individual with high surplus income payments will often also be making a sufficiently high income that he or she could have made a proposal under Division I or II. An individual’s discharge can be opposed on the ground that he or she could have made a viable proposal, but opted instead to make an assignment in bankruptcy.¹²⁶ If either or both of these grounds are the only basis upon which a discharge is opposed, a mediation will be held and there will be an application for discharge hearing only if the mediator is unable to establish discharge conditions to which all the parties agree.¹²⁷ The amount of the surplus income is usually determined by the trustee having regard to the OSB’s guidelines and an individual’s personal and family situation – however, in some cases, the court will be asked to determine the amount payable and will

¹²³ Eugene Wedoff, “Means Test in the New 707(b)” (2005) 79 Am Bank L J 231 at 277-78. The *Bankruptcy Abuse Prevention and Consumer Protection Act* was shaped by significant lobbying by the consumer credit industry, see Ziegel, “Facts on the Ground”, *supra* note 121 at 314; Henry Sommer, “Trying to Make Sense out of Nonsense: Representing Consumers under the *Bankruptcy Abuse Prevention and Consumer Protection Act* of 2005” (2005) 79 Am Bank L J 191 at 191. For a history of the political debates surrounding the means test in American bankruptcy law, see David Skeel, *Debt’s Dominion* (Princeton, NJ: Princeton University Press, 2001).

¹²⁴ Ziegel, “Facts on the Ground”, *supra* note 121 at 309-10.

¹²⁵ *BLA*, *supra* note 11, s 173(1)(m).

¹²⁶ *Ibid*, s 173(1)(n).

¹²⁷ *Ibid*, s 170.1.

issue an order fixing the amounts owing.¹²⁸ Once the court has fixed the amount payable, non-payment of surplus income is a bankruptcy offence.¹²⁹

2.3.5. INTERACTIONS OF THE MECHANISMS

The opposition to discharge process is just one mechanism for punishing abusive behavior – but there are others and the availability of these other mechanisms could impact a potential opponent’s decision to lodge an opposition. By examining the incentives created by the interactions amongst the different mechanisms, one can predict what impact the availability of the four additional mechanisms will have on the opposition to discharge process. In this section, I examine some of these interactions.

2.3.5.1. CREDITOR WITH A NON-DISCHARGEABLE DEBT

A creditor with a debt, which falls into one of the categories provided for in section 178, may prefer not to lodge an opposition.¹³⁰ A creditor with a non-dischargeable debt may benefit if the bankrupt is discharged from all their other debts. The creditor’s debt is not affected by such a discharge, and it can then take steps to enforce its debt through garnishment or seizure, without having to share the proceeds of such enforcement with the creditors, whose debts have been released.¹³¹

2.3.5.2. CREDITOR WITH A VIABLE OPPORTUNITY TO IMPEACH A TRANSACTION

Creditors may prefer to impeach a transaction, rather than oppose a discharge. If a creditor opposes a discharge and is successful in having a payment condition imposed, the

¹²⁸ *Ibid*, s 68(3), (10).

¹²⁹ *Ibid*, s 198(2).

¹³⁰ Diamond, "Emphasizing the Criminal", *supra* note 114 at 413.

¹³¹ In *Re Mott* (2005), 16 CBR (5th) 229 at para 17, [2005] OJ No 4469 (ON Sup Ct) Nettie Reg, a creditor opposed the debtor’s discharge despite holding a non-dischargeable debt. The court noted that it would have been in the creditor’s interest to have the debtor discharged as quickly as possible, and yet the creditor opposed the discharge, underlining the seriousness of the debtor’s misconduct.

payment is not made to the opposing creditor, but rather to the estate, to be divided amongst all the creditors according to the priority scheme in the *BLA*.

The impeachment provisions can be more lucrative for creditors. A trustee can impeach a pre-bankruptcy transaction, but will often be reluctant to do so because of the risks of incurring significant costs, and of not recovering sufficient value to cover those costs. Unless a creditor is willing to indemnify the trustee for the costs incurred in the litigation, trustees regularly refuse to use their impeachment powers. Where a trustee refuses to impeach a pre-bankruptcy transaction, one or more creditors can get a court order allowing them to step into the trustee's place and deploy the impeachment powers.¹³² If the creditor – or creditor group – successfully recovers value, each creditor who undertook to impeach the transaction is entitled to retain an amount equal to the value of its claim against the bankrupt's estate and the costs of the impeachment proceeding. Any amounts in excess of this are paid over to the estate to be divided amongst the other creditors, who were not involved in impeaching the transaction.¹³³ Unlike in the opposition to discharge process, a creditor who incurs the risk and expense of an impeachment proceeding is rewarded in preference to other creditors. A creditor faced with the prospects of a reasonably viable impeachment proceeding and lodging an opposition to an individual's discharge would be wise to expend its energy on the former. Unfortunately for creditors, reasonably viable opportunities to impeach pre-bankruptcy transactions appear infrequently, especially in personal bankruptcies, where the individual often has few or no assets.

2.3.5.3. TRUSTEE WITH A VIABLE OPPORTUNITY TO IMPEACH A TRANSACTION

From a trustee's perspective, even in the rare case where a reasonably viable opportunity to impeach a transaction presents itself, the risk of pursuing the opportunity will generally outweigh any potential pay-off. The trustee's fee structure provides no or little reward to trustees who take these extra steps.¹³⁴ One might expect that the availability of

¹³² *BLA*, *supra* note 11, s 38.

¹³³ *Ibid*, s 38(3).

¹³⁴ See the discussion of the fee structure in Chapter 4.

impeachment proceedings has little impact on a trustee's decision to file an opposition to discharge.

2.3.5.4. POTENTIAL OPPONENT WHERE BANKRUPT HAS COMMITTED AN OFFENCE

The possibility of an individual being prosecuted for an offense probably has little impact on any potential opponent's decision to file an opposition because prosecutions under the offence proceedings are such a rarity. In 2008, the OSB requested that the RCMP investigate 21 cases, and the RCMP charged nine individuals.¹³⁵ According to the summaries published on the OSB's website, between 2010 and 2012, convictions were handed down in approximately 30 cases a year. During that same time period, an average of approximately 80,000 consumer bankruptcies were filed each year, meaning convictions were being entered in 0.04% of all cases.¹³⁶

¹³⁵ Diamond, "Emphasizing the Criminal", *supra* note 114 at 415-16.

¹³⁶ It is unclear if the convictions listed on the OSB's website are only for consumer who have filed bankruptcy, or also includes consumers who filed proposals and individuals who sought relief in bankruptcy or proposals but were classified as "business debtors". If any of the convictions listed are for individuals who fall into these other groups, the conviction rate will be even lower.

Table 2.2: Rate of Bankrupts Convicted of an Offence as Percentage of Total Consumer Bankruptcies Filed Each Year, 2010-2012

Year	Total Number of Consumer Bankruptcies Filed¹³⁷	Number of Cases where Convictions were Entered¹³⁸	Rate of Conviction as a Percentage of New Bankruptcies
2010	92,694	31	0.033%
2011	77,993	32	0.041%
2012	71,485	28	0.039%

Potential opponents have little reason to believe that an individual will face prosecution under the offence provisions, and so if they believe that an individual’s behavior warrants censure, the onus fall on them to oppose the bankrupt’s discharge. Conversely, the seeming indifference of the police and prosecutors to abuse in the bankruptcy system might engender apathy amongst potential opponents. Absent vigorous prosecution of offences, potential opponents may question if an individual’s behavior is serious enough to merit an opposition.¹³⁹

¹³⁷ Office of the Superintendent of Bankruptcy, “Insolvency Statistics in Canada -- 2011, Table 2: Insolvencies Filed By Consumers” online: Industry Canada http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02825.html [June 15, 2015]; Office of the Superintendent of Bankruptcy, “Insolvency Statistics in Canada -- 2012, Table 2: Insolvencies Filed By Consumers” online: Industry Canada http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br03061.html [June 15, 2015].

¹³⁸ Office of the Superintendent of Bankruptcy, “Criminal/Penal Sanctions Rendered since 2010”, *supra* note 116.

¹³⁹ One of my interviewees related an experience, where he took steps to report individuals who were forging his name on documents: “The RCMP looked into it – I referred them to the OSB and ultimately they filed the report with the police, and they decided not to do anything. Which is shocking to me. You know we get worried about opposing the discharge on things that are relatively minor. In comparison, here’s people that we had considerable evidence to support that they had [committed fraud]. And nothing’s done about it. So it does kind of make you – you’re a little disillusioned as to why would we oppose the discharge of somebody that, something that’s considered less offensive, it’s almost like there’s a standard set.”

2.3.5.5. POTENTIAL OPPONENT WHERE BANKRUPT HAS SURPLUS INCOME

The inclusion of mandatory surplus income payments mitigates the risk that “won’t pay” debtors are using the bankruptcy system to avoid manageable debts, and potential opponents may be less inclined to oppose an individual’s discharge where the individual has contributed an amount to his or her estate that reflects his or her income and expenses. Unlike the offence provisions, which are rarely used, it is mandatory in every bankruptcy for a trustee to calculate whether or not an individual has surplus income. The ability of the surplus income provisions to extract contributions from “won’t pay” debtors is limited in one important manner – it does not require payments from individuals, who enter bankruptcy with valuable exempt property. For instance, there is no monetary limit on the value of RRSPs that are exempt under the *BLA*.¹⁴⁰ An individual could make an assignment into bankruptcy with a very sizeable RRSP, then receive a discharge from all his or her debts, which he or she could have paid if he or she had liquidated some or all of the RRSPs. In such a circumstance, a potential opponent may oppose the individual’s discharge and ask the court to impose a conditional payment order in recognition of sizeable exempt property retained by the bankrupt individual.¹⁴¹

2.3.6. **SKETCHING A DEFINITION OF DESERVINGNESS**

By examining the types of behavior sanctioned by the opposition to discharge process and the four other mechanisms outlined above, one can better understand when potential opponents may be motivated to oppose a discharge, one can also identify some core behaviors that are deemed to be culpable in the personal bankruptcy system. Both the pre-assignment conduct of the bankrupt individual and his or her behavior during the bankruptcy may attract sanctions. Fraud is considered serious, censure-worthy conduct and is targeted by a number of the mechanisms, likewise the intentional depletion of value in a

¹⁴⁰ *BLA*, *supra* note 11, s 67(1)(b.3). There is one important limit on this exemption - contributions made in the 12 months before bankruptcy are not exempt, unless there is an additional provincial provision exempting the contributions.

¹⁴¹ See e.g., *Re Nebaj*, 2013 SKQB 195, 421 Sask. R. 125, Thompson Reg; *Re Grandoni*, 2007 BCSC 233, 31 CBR (5th) 282, Sainty Reg; *Re Gettlich* (2007), 36 CBR (5th) 322, 2007 CarswellOnt 6565 (ON Sup Ct) Nettie Reg.

bankrupt's estate, non-fulfillment of a bankrupt's duties and opting for bankruptcy when one has the financial wherewithal to contribute towards one's debts.

Beyond these core behaviors, a mix of other conduct is either sanctioned or prohibited, such as gambling, trying to escape one's obligations to financially support one's ex-spouse, or failure to pay personal income tax. In this penumbra of sanctionable conduct, it can be confusing why some behaviors have been included and not others. For instance, in *Schreyer v. Schreyer*, the Supreme Court of Canada questioned why spousal support payments are non-dischargeable, but equalization of property debts are not.¹⁴² Registrar Diamond has highlighted the inconsistency in treating bankrupts with gambling addictions differently from bankrupts with other types of addictions or mental health issues.¹⁴³ The legislation provides some clear indications as to what types of behaviors may preclude an individual from being characterized as deserving, but the definition of deservingness that emerges is neither exhaustive – potential opponents can oppose discharges on grounds other than those listed in section 173 – nor is it always coherent.

2.4. CONCLUDING THOUGHTS

As the foregoing exposition illustrates, bankruptcy legislation provides for a complex system with many overlapping and interconnected provisions governing who gets debt relief. A basic understanding of this system is a necessary pre-requisite for fully engaging with the analysis that follows, but the question at the heart of my dissertation is simple, how do trustees exercise their discretion when delegated the authority to make judgments about deservingness and blameworthiness. Bankruptcy legislation sets out a framework in which such decisions are made, but provides significant room for discretionary decision-making by potential opponents and, when an application is triggered, a judicial officer. In the absence of clear legislative direction, potential opponents and judicial officers may turn to a supplementary source of law, written legal decisions. In the next chapter, I synthesize a

¹⁴² *Schreyer v. Schreyer*, *supra* note 97 at paras 37-40.

¹⁴³ Andrew Diamond, "What to do with a Drunken Sailor and Other Bankrupts with Addictions or What Are Appropriate Conditions to Impose on the Discharges for Bankrupts Suffering from Addiction and Mental Illness? Section 173 Voluntary vs. Involuntary" (2008) 36 CBR 167 at 176 ["Drunken Sailor"].

decade's worth (2003-2013) of decisions from applications for discharge hearings. My synthesis reveals that the case law does little to restrict the scope of a potential opponent's or judicial officer's discretion, or to promote consistent and predictable decision-making in the opposition to discharge process.

3. THE RATIONALES FOR BANKRUPTCY: SCHOLARS & JUDICIAL OFFICERS

3.1. INTRODUCTION

The opposition to discharge process tasks trustees with sorting deserving debtors from undeserving ones. The legislation sets out the framework in which they exercise this discretion, but leaves each trustee with considerable flexibility to determine what conduct should disentitle an individual debtor from receiving debt relief. In this chapter, I turn to consider a second source of law which may inform how trustees conceive of deservingness in the context of the opposition to discharge process: the written decisions of judicial officers who have presided over applications for discharge. These decisions contain determinations about the relative deservingness of specific individuals. One can also extract from these decisions broader principles about how the goals of bankruptcy law inform the definition of deservingness in bankruptcy. These broader principles may inform judicial officers, when they decide future applications for discharge, and potential opponents, including bankruptcy trustees, when they decide whether or not to lodge an opposition.

Judicial officers are called on to exercise significant discretion at application for discharge hearings, tailoring discharge orders to reflect the circumstances of each individual bankrupt. Writing about discharge hearings, Stephanie Ben-Ishai noted that courts are granted a considerable amount of discretion without being given “clear policy rationales” to illuminate their reasoning.¹⁴⁴ She identified this exercise of judicial discretion as an area requiring further research including “a systematic review of the rhetoric found in decisions on discharge hearings.”¹⁴⁵ I have carried out such a review, reading and coding 282 written decisions from application for discharge hearings heard over the decade between 2003 and 2013.

My review of the written decisions reveals that judicial officers are generally in agreement that in crafting discharge orders, they should be balancing the interests of three

¹⁴⁴ Stephanie Ben-Ishai, "Discharge" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy and Insolvency: Bill C-55, Statute C.47 & Beyond* (Markham, ON: Lexis Nexis, 2007) at 369 ["Discharge"].

¹⁴⁵ *Ibid* at 370.

groups: the bankrupt, his or her creditors, and the public. Despite this consistency in the language used by judicial officers, the case law provides inconsistent guidance about what goals the opposition to discharge system should advance, and how these goals help identify conduct that should disentitle a debtor from debt relief in bankruptcy. There are multiple sources of inconsistency. The principle of *stare decisis* promotes consistency across a legal system, but its ability to do so is hampered in the opposition to discharge process. Additionally, aligning the standards, against which one assesses the deservingness of debtors, with the goals of bankruptcy is complicated by the existence of multiple goals, and imprecision in the language used to describe these goals.

Canada's common law courts operate according to the principle of *stare decisis*, meaning that when a court is making a decision, it is bound by previous determinations of the issue. However, not all decisions are equally binding. Courts are bound to follow decisions made by higher courts in the same jurisdiction. A bankruptcy registrar operating in Saskatchewan is bound by decisions of the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal. A decision of the Nova Scotia Court of Appeal would not be binding on a registrar operating in Saskatchewan, because even though it is a decision of a higher court, it is from a different jurisdiction. Decisions of the Supreme Court of Canada are binding on courts in all of Canada's provinces and territories.

When courts abide by the principle of *stare decisis*, it produces a degree of consistency in the decisions within a jurisdiction, because lower courts are all applying the law as articulated by higher courts. Sometimes a jurisdiction may be internally consistent, but have adopted a different interpretation of a rule than is being applied in other Canadian jurisdictions. For instance, the Alberta Court of Appeal and the Ontario Court of Appeal may adopt different interpretations of the law, resulting in the law being applied differently in Alberta and Ontario.¹⁴⁶ In the face of such a split, Supreme Court of Canada decisions play an important harmonizing role.

¹⁴⁶ Such a split currently exists with respect to whether or not a debtor's exemptions are treated as rights or privileges, compare *Direct Rental Centre (West) Ltd. v. Norkus Estate (Trustee of)*, 2001 ABCA 233, 299 AR 39; and *Re Fields* (2004), 71 OR (3d) 11, 240 DLR (4th) 494 (Ont CA) aff'd (2002), 59 OR (3d) 611, 32 CBR (4th) 216 (ON Sup Ct) Polowin J.

There are two features of the opposition to discharge process that hamper the principle of *stare decisis* from promoting consistency in the judicial officers' decisions. First, judicial officers make a large number of decisions and only a small number are appealed. Consequently, there are few written decisions from higher level courts clarifying how applications for discharge should be decided. Second, each application for discharge provides a judicial officer with multiple grounds for differentiating it from previous decisions. Under the principle of *stare decisis*, a court is not bound to follow precedents from a higher court in the same jurisdiction if there is a relevant ground for distinguishing the precedent from the current case. Many aspects of an individual's background may be viewed as relevant to whether or not they are deserving of a discharge, and so there are many potential grounds upon which a judicial officer may distinguish a case from binding precedents. The written decisions acknowledge that applications for discharge hearings are "essentially fact driven"¹⁴⁷ and that "each case must be considered on its unique set of facts".¹⁴⁸

The content of the written decisions engenders additional confusion about what types of behaviour should be censured by the opposition to discharge system. There are at least two reasons for this confusion. First, the bankruptcy system serves a number of competing goals and the outcome of a hearing may depend to a large extent on which goal a judicial officer emphasizes in his or her reasons. Two similarly situated debtors may be treated differently depending on whether or not the judicial officer focuses on maximizing creditor recovery or rehabilitating the debtor. Second, even when two judicial officers indicate that their reasons advance the same goal, they may have different ideas of what that goal means. For instance, some judicial officers view rehabilitation of the debtor purely from a balance sheet standpoint – the debtor is rehabilitated when his or her debts are released.

¹⁴⁷ *Re Lynn*, 2011 MBQB 79 at para 28, 264 Man R (2d) 309, Sharp Reg.

¹⁴⁸ *Nagy v. Minister of National Revenue*, 2010 SKQB 124 at para 40, 353 Sask R 287, Schwann Reg, citing Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2009) at 782. See also *Wutzke v. Minister of National Revenue*, 2011 SKQB 270 at para 14, 84 CBR (5th) 7, Schwann J; and *Re Simoes*, 2011 BCSC 63 at para 7, 74 CBR (5th) 261, Sainty Reg.

Other judicial officers understand rehabilitation to require an element of learning, and debtors are expected to show that they have learned from their financial difficulties before they will be entitled to receive a discharge.

To unscramble the different approaches adopted by judicial officers, I draw on academic literature considering the bankruptcy discharge. The discharge marks a drastic break from the normal rule that one's debts must be paid. One of the ongoing projects of bankruptcy scholars is to provide a justification for why people are allowed to escape otherwise binding obligations in the bankruptcy system.¹⁴⁹ Scholars sometimes attempt to articulate a single principle that both rationalizes the discharge and provides a rigorous tool for analyzing the scope and content of bankruptcy law. Other scholars suggest that there are a number of competing rationales for the discharge that must be balanced when crafting bankruptcy policy. Some rationales focus on how the law can affect the behaviour of individual debtor and creditors, whereas others analyze the impact of bankruptcy law at a societal level. Commonly, scholars will articulate their rationales and then analyze how these rationales shape current policy debates over the proper scope and content of bankruptcy law.

In this chapter, I canvass these academic efforts and set out a framework of the different rationales identified by scholars for the availability of the discharge. I then use this framework to structure my analysis of the rationales employed by judicial officers. The chapter is divided into five sections, each of which starts with an overview of a scholarly rationale and then traces how judicial officers make use of the rationale. The five rationales identified in this chapter are bankruptcy as a collection device, bankruptcy as rehabilitation, bankruptcy as a tool to regulate credit, bankruptcy as a social safety net, and bankruptcy as an expression of important values.

This chapter serves both a descriptive and a remedial end. One aim of this chapter is to synthesize the case law upon which trustees may draw when deciding whether or not to oppose an individual's discharge. I organize the case law according to the rationales for

¹⁴⁹ Margaret Howard, "A Theory of Discharge in Consumer Bankruptcy" (1987) 48 Ohio St L J 1047 at 1048.

bankruptcy with which it is most closely aligned. A second aim is to bring greater clarity to how the bankruptcy system's rationales are discussed. I identify imprecise use of language as one of the two sources of confusion in the content of written decisions. My detailed framework of rationales identifies where this imprecision arises by flagging terms that have developed multiple meanings, such as rehabilitation, commercial morality, integrity of the bankruptcy system, and public interest. By showing the multiple meanings attributed to these terms, my framework provides the language necessary to be more precise in how one discusses the rationales of bankruptcy.

This chapter does not seek to address the other source of confusion in the content of written decisions, which results from the bankruptcy system serving a number of goals. This ambiguity could be addressed by prioritizing the goals so it is clear which ones should be emphasized when a situation engages competing goals. I have not undertaken such a project in this chapter. I end this chapter by arguing that a priority scheme of rationales would be politically undesirable, and would not reflect the diversity of legitimately held views about goals the bankruptcy system should promote. Short of ranking them in a priority scheme, there are fruitful discussions to be had about the rationales of the bankruptcy system. One could assess the validity of their empirical claims. One could argue over how well they accord with a community's values. These are important lines of inquiry, but not the one that I have undertaken in this chapter. The central project of this chapter is to illustrate how the rationales of the bankruptcy system can guide a legal actor's exercise of discretion in the opposition to discharge process. As will be clear by the end of the chapter, the rationales of bankruptcy fail to provide consistent, predictable guidance to legal actors about what types of conduct should disentitle a debtor from a discharge.

3.2. THE FIVE RATIONALES

3.2.1. BANKRUPTCY AS A COLLECTION DEVICE

3.2.1.1. SCHOLARS

Bankruptcy is one collection device available to a creditor. Whereas some collection devices are designed for use in a situation where a debtor is unwilling to pay an obligation owing to a single creditor, bankruptcy is designed for use in the situation where a debtor is unable to pay its obligations generally. In this latter situation, the creditors are faced with a

collective action problem. If creditors race to dismantle the debtor, they will each incur a set of collection costs and may not be able to achieve the same level of recovery as if the debtor's assets were sold off as a going concern. Creditors must monitor the debtor closely for symptoms of financial distress, which may signal the start of the race. Bankruptcy prevents such a race, eliminates redundant collection costs and allows for the debtor's assets to be realized upon in a manner that maximizes their value. When a creditor's recovery is governed by a coordinated, orderly process like bankruptcy, creditors are saved the cost of monitoring the debtor's financial health.¹⁵⁰

As a collection device, bankruptcy takes as one of its goals, maximizing return to the creditors. It also strives to provide a fair and orderly method of distributing this return amongst creditors having regard for the fact that there is little chance of sufficient recovery to pay out each creditor in full. Such equitable treatment of creditors is important because it fosters creditor support for and cooperation with the bankruptcy system. The basic rule governing distribution in bankruptcy is that secured creditors are entitled to realize upon their collateral, according to the terms of their security agreement, and then the unsecured creditors are paid out on a pro-rata basis.¹⁵¹ For example, if an unsecured creditor was owed an amount equal to 10% of the debtor's total unsecured debt load, that creditor would receive 10% of any pay out to the unsecured creditors. The *BLA* contains a long list of exceptions to the general rule of rateable payment to creditors. Some creditors have been singled out in the legislation for preferential treatment, because they are particularly vulnerable or otherwise deserving. This preferential treatment may involve being paid out in priority to other creditors, not being subject to the bankrupt stay, or as discussed in Chapter

¹⁵⁰ Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Washington, DC: Beard Books, 2001) at 12 [*Logic and Limits*]. Thomas Telfer developed a historical argument for the necessity of bankruptcy as a collection device by noting that Canada had no federal bankruptcy legislation between 1880 and 1919, during which time creditors found the alternatives to bankruptcy so unpalatable that they eventually lobbied for the re-instatement of a federal bankruptcy regime. See Thomas Telfer, "Access to the Discharge in Canadian Bankruptcy Law and the New Role of Surplus Income: A Historical Perspective" in Charles Rickett and Thomas Telfer eds, *International Perspectives on Consumers' Access to Justice* (Cambridge: Cambridge University Press, 2003) at 231-263.

¹⁵¹ *BLA*, *supra* note 11, s 141. The distribution amongst unsecured creditors is also called a rateable or *pari passu* distribution.

2, it can mean having a debt that is not discharged by bankruptcy.

If a central goal of bankruptcy is to maximize creditor recovery, the discharge may be characterized as a carrot to incentivize debtor cooperation in the procedure.¹⁵² The debtor assists the trustee to realize upon non-exempt property and, in exchange, is released from his or her debts. Jason Kilborn dismisses the contemporary relevance of this rationale for the discharge on the grounds that most American (and Canadian) debtors have no assets to be divided amongst the creditors and so the benefit of the discharge accruing to the debtor can no longer be justified on the basis of a countervailing benefit accruing to the creditors.¹⁵³ Stephanie Ben-Ishai argues that, even when there is no distribution to creditors from the debtor's estate, creditors benefit because they save the expense of attempting to collect from an insolvent debtor, and are not required to incur pre-bankruptcy monitoring costs.¹⁵⁴ Additionally, they derive a benefit from the transparent, equitable administration of the debtor's estate: there may be some comfort in knowing that an independent, third party – the trustee – has assessed and confirmed the debtor's lack of ability to pay, and that no creditor is being afforded special privileges, other than those provided for under the *BLA*.

3.2.1.2. JUDICIAL OFFICERS

At the application for discharge stage, judicial officers reflect concern for the role of bankruptcy as a collection device by seeking to maximize the creditor's recovery (or minimize their losses) and ensuring that the creditors are treated equally in the process. These two outcomes are characterized as the creditors' interest in the process.

¹⁵² Howard, *supra* note 149 at 1048; John Honsberger, "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37 Osgoode Hall L J 171 at 178. For a related argument, see John McCoid, "Discharge: The Most Important Development in Bankruptcy History" (1996) 70 Am Bankr L J 163 at 186.

¹⁵³ Jason Kilborn, "Mercy, Rehabilitation, And Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy" (2003) 64 Ohio St L J 855.

¹⁵⁴ Ben-Ishai, "Discharge", *supra* note 144 at 371.

3.2.1.2.1. MAXIMIZING RETURN TO CREDITORS

The goal of maximizing the return to the creditors is advanced by conditioning the bankrupt's discharge on a payment into the estate.¹⁵⁵ Where a court deems that a debtor is worthy of sanction, it may prefer a conditional order over a refused or a suspended order, because the conditional order can translate into enhanced recovery for the creditors, if one of the conditions of the discharge is a further payment into the estate, and the debtor fulfills the condition. For instance, in *Re Kiamanesh*, the court opted for a conditional order over a refusal, because a refusal would "put creditors no further ahead" whereas a conditional order might result in increased recovery for the estate's creditors.¹⁵⁶

Where a debtor's conduct has been particularly egregious, a judicial officer may prefer suspensions and especially refusals, but may still justify this choice in terms of creditor recovery. In *Re Gamaleldine*, the bankrupt provided little evidence of how he had managed to accrue unsecured debts of approximately \$460,000.¹⁵⁷ The judicial officer concluded that the bankrupt had been less than forthright and his financial woes were not believable.¹⁵⁸ The bankrupt's discharge had been opposed by both his trustee and the AMEX Bank of Canada. AMEX indicated that it would prefer the judicial officer to condition the discharge on a large payment, rather than refusing the discharge altogether, because the conditional payment requirement might generate some recovery for the creditors, whereas a refusal would not.¹⁵⁹ Notwithstanding the creditor's expressed preference, the judicial officer refused the bankrupt's discharge, reasoning that the need to protect the integrity of the bankruptcy

¹⁵⁵ *Re Hudjik*, *supra* note 93 at para 13; *Re Green* (2004), 7 CBR (5th) 217 at para 34, 2004 CarswellOnt 5588 (ON Sup Ct) Sproat Reg; *Re Kaufman*, 141 ACWS (3d) 365 at para 12, 2005 CarswellOnt 3405 (ON Sup Ct) Nettie Reg; *Re Simoes*, *supra* note 148 at paras 17-19.

¹⁵⁶ *Re Kiamanesh*, 2009 BCSC 441 at para 62, 2009 CarswellBC 822, Humphries J; see also *Re Beindorff*, 2005 CarswellOnt 6571 at para 34 (ON Sup Ct) Nettie Reg; *Re Zuk* (2006), 30 CBR (5th) 30 at para 16, 2006 CarswellOnt 8183 (ON Sup Ct) Nettie Reg; *Re Simoes*, *supra* note 148, para 26.

¹⁵⁷ *Re Gamaleldine* (2007), 157 ACWS (3d) 477, 2007 CarswellOnt 3384 (ON Sup Ct) Nettie Reg.

¹⁵⁸ *Ibid* at para 12.

¹⁵⁹ *Ibid* at para 11.

system outweighed the creditors' right of recovery.¹⁶⁰ But even as it made this order, creditor recovery remained a concern for the judicial officer and he reasoned that, following the refusal, the trustee would seek a discharge from the case, the stay would be lifted and creditors could then take steps to recover on their pre-assignment debts.¹⁶¹

In some cases, recovery to creditors may militate against a conditional order because the debtor's ability to make payments is so restricted that any conditional order will result in minimal recovery for creditors. In *Re Cote*, the judicial officer considered whether it should make an impoverished bankrupt's discharge conditional on payment of a small amount.¹⁶² It decided against making such an order, reasoning that the payments would be so small that they would be of no benefit to the creditor, and would barely cover the trustee's fees for administering the conditional order.¹⁶³

Recovery to creditors helps judicial officers resolve a variety of other issues that arise in applications for discharge. In *Re Morris*, the judicial officer held that the debtor could have made a proposal, but chose not to.¹⁶⁴ The judicial officer noted that proposals were encouraged because they usually resulted in a higher return to creditors than a bankruptcy.¹⁶⁵ The judicial officer then conditioned the bankrupt's discharge on a payment that was designed to give creditors a recovery similar to what they would have received had the

¹⁶⁰ *Ibid* at para 12.

¹⁶¹ *Ibid* at para 11. See also *Re Tang* (2007), 29 CBR (5th) 258, 2007 CarswellOnt 1860 (ON Sup Ct) Nettie Reg, where the court came to a similar conclusion.

¹⁶² *Re Cote*, 2010 BCSC 490, 66 CBR (5th) 45, Bouck Reg.

¹⁶³ *Re Cote*, *ibid* at para 34; see also *Re Rubin*, 2011 BCSC 85 at para 23, 74 CBR (5th) 231, Sainty Reg, where the court declined to make a conditional order because it would have resulted in negligible recovery for the creditors. But see *Re Jabs*, 2010 BCSC 1325 at para 95, 71 CBR (5th) 121, Bouck Reg, where the court made the debtors discharge conditional on payment even though there would be little recovery for creditors because it felt that the requirement to make the payment would enhance the rehabilitation of the debtor.

¹⁶⁴ *Re Morris*, 2004 SKQB 4, 243 Sask R 204, Herauf Reg.

¹⁶⁵ *Re Morris*, *ibid* at para 12; see also *Re Dugas*, 2004 NBQB 200 at para 33, 50 CBR (4th) 200, Bray Reg.

bankrupt made a proposal.¹⁶⁶ In *Re Gettlich*, the bankrupt had sued third parties prior to the bankruptcy and received an award of \$165,000, but only after expending litigation costs of \$103,000.¹⁶⁷ The judicial officer required the bankrupt to pay part of the award into the estate as a condition of her discharge, but allowed her to deduct her legal costs because it did not want to discourage individuals from pursuing pre-bankruptcy litigation, which served a number of laudable ends, including increasing the recovery of creditors.¹⁶⁸

3.2.1.2.2. EQUITABLE TREATMENT OF CREDITORS

In addition to maximizing the value of the debtor's estate for the benefit of creditors, bankruptcy law also ensures that the value of the estate is distributed amongst the creditors in an orderly, equitable fashion. The *BLA* contains a number of provisions to ensure that its distribution scheme is not subverted. The stay prohibits creditors from enforcing their debts outside of the bankruptcy process. When a debtor makes payments to one creditor in preference to others prior to bankruptcy, the trustee or creditors can apply to set aside the transaction and recover the lost value for the benefit of the estate, and the whole creditor group.¹⁶⁹ Judicial officers are also alive to the importance of bankruptcy as a method for orderly distribution when setting the terms of the discharge. This concern looms largest in two situations: when a creditor is asking for a conditional discharge order that benefits it more than other creditors, and when a debtor has engaged in preferential treatment of one creditor prior to bankruptcy.

3.2.1.2.2.1. Conditional Order Favouring One Creditor

When a conditional order requires a debtor to pay a further sum of money, the *BLA* stipulates that such a sum must be paid to the trustee.¹⁷⁰ This amount is then distributed according to the priority scheme set out in the *BLA*. An amendment passed in 2005 would

¹⁶⁶ *Re Morris*, *ibid* at para 25.

¹⁶⁷ *Re Gettlich*, *supra* note 141.

¹⁶⁸ *Ibid* at para 15.

¹⁶⁹ *BLA*, *supra* note 11, s 95.

¹⁷⁰ *Ibid*, s 176(3).

have allowed judicial officers to direct that conditional order payments be made to a specific creditor, class of creditors, the trustee, or some combination thereof.¹⁷¹ This amendment was criticized because it would undermine the principle of equal treatment of creditors, and may set up perverse incentives, encouraging creditors to hide information from the trustee or cut side deals with the debtor.¹⁷² The 2005 amendment was repealed before it came into force.¹⁷³

Despite the clear language of the *BLA* requiring the conditional order payments be made to the trustee, creditors have come up with creative rationales for why conditions should be attached to discharges that favour one creditor. Requests for payments to a specific creditor seem to contravene the clear language of the *BLA* and meet with little success.¹⁷⁴ A murkier area seems to be where a creditor is asking that the debtor's discharge be conditioned upon the debtor consenting to judgment in favour of one creditor.

When a section 173 ground has been established, the *BLA* empowers judicial officers to order that the discharge is conditional on the debtor "consent[ing] to such judgments... as the court may direct."¹⁷⁵ In *Re Milad*, a frequently cited decision from 1984, the Ontario Court of Appeal held that "the powers conferred by this section are not sufficiently wide to enable the bankruptcy judge to make an order which is inconsistent with a fundamental principle of the *Bankruptcy Act*, namely, the principle of *pari passu* distribution amongst creditors of the same rank."¹⁷⁶ Regular unsecured creditors are unlikely to convince a court that the debtor should be required to consent to judgment in favour of that creditor as a condition of discharge, but the creditor may have more success if there is some basis upon

¹⁷¹ *2005 Amendments*, *supra* note 84, s 104(3).

¹⁷² Stephanie Ben-Ishai, "Discharge", *supra* note 144 at 369.

¹⁷³ *2007 Amendments*, *supra* note 84, s 101.

¹⁷⁴ *Re Coish*, 2010 NLTD 91 at para 20, 97 Nfld & PEIR 210, Hoegg J; *Re Karim*, 2007 BCSC 624 at paras 13-15, 32 CBR (5th) 283, Hinkson J.

¹⁷⁵ *BLA*, *supra* note 11, s 172(2)(c).

¹⁷⁶ *Re Milad* (1984), 46 OR (2d) 33, 9 DLR (4th) 477 (Ont CA).

which to distinguish the creditor from the general group of unsecured creditors.¹⁷⁷ For instance, judicial officers have ordered debtors to consent to judgment in favour of one creditor, where that creditor holds a non-dischargeable claim or a preferred claim.¹⁷⁸ Judicial officers have been unwilling to attach such a condition to a debtor's discharge, where the creditor in question is a general or unsecured creditor, because such an order "offends the Act's fundamental principle that all creditors of the same class must be treated equally."¹⁷⁹

3.2.1.2.2.2. Preferences

The second situation in which equitable treatment of creditors impacts the outcome of a discharge application hearing is when there is evidence that the debtor made a preferential payment to one or more creditors prior to bankruptcy. The trustee or creditors may be able to set aside the preferential payment using the impeachment powers in the *BLA* or provincial legislation. The impeachment powers, discussed in greater detail in Chapter 2, enable a trustee or creditors to set aside some of a debtor's pre-bankruptcy transactions, including a preference given by a debtor to a creditor. There are a host of reasons why

¹⁷⁷ For examples of two cases where the court did not grant the creditor's request for a consent judgment in its favour see *Re Bhullar*, 2005 MBQB 28 at para 12, 194 Man R (2d) 162, Cooper Reg; *Re Burroughs*, 2010 SKQB 51 at para 47, 348 Sask R 126, Schwann Reg. Both involved judgment debtors.

¹⁷⁸ In *Re Wirick*, 2006 BCSC 1273, 26 CBR (5th) 52, Sigurdson J [*Wirick 3*], the court conditioned the debtor's discharge on the debtor consenting to judgment in favour of the Law Society of British Columbia in the amount of \$500,000. The Law Society had a non-dischargeable claim against the debtor, resulting from the debtor's involvement in a long series of fraudulent mortgage transactions. In *Re Boucher*, 2007 BCSC 644, 34 CBR (5th) 28, Rogers J, the court held that the CRA was not entitled to a conditional order requiring the debtor to consent to judgment in favour of the CRA. The court distinguished the previous case of *Re Toal* (1993), 13 Alta LR (3d) 74, 144 AR 269 (AB QB) Agrios J, where such an order was granted, on the basis that at the time *Re Toal* was heard, the CRA's claim was accorded a preferred status under the legislation. The legislation had since been changed to remove the Crown's preferred status.

¹⁷⁹ *Re Boucher*, *ibid* at para 33. See also, *Re Manning*, 2011 ABQB 566, 528 AR 353, Romaine J. But see *Re Dolgetta*, 2008 ABQB 556, 455 AR 276, Hanebury Reg, where the debtor was ordered to consent to judgment in favour of her trustee. Although there were other unsecured creditors, the judicial officer ordered that once the trustee's costs had been satisfied, all further payments on the consent judgment should be put towards repaying the objecting creditor.

trustees or creditors may opt not to impeach a preference. Impeachment proceedings can be unappealing, because they can be high-risk and high-cost. The creditor, who received the preferential payment, may lack the ability to pay the value of the preference back into the debtor's estate. The payment may fall outside of the scope of those transactions that can be impeached under the *BLA* or applicable provincial legislation.¹⁸⁰ As an additional or alternative tool for addressing this inequity, judicial officers will consider preferential payments when setting the terms of discharge, and may require the bankrupt to compensate its creditors for value dissipated through the preference.

In *Re Chung*, the debtors had run a business together and made personal assignments into bankruptcy when the business failed, because they had personally guaranteed many of the businesses loans.¹⁸¹ The debtors had mortgaged their home shortly before the assignment into bankruptcy and used the proceeds to pay some creditors and other individuals to whom they felt a moral obligation.¹⁸² The judicial officer criticized these payments, reflecting that “it is precisely to avoid such a situation and deal with equitable distribution of one's assets that the *BLA* exists.”¹⁸³ To the extent that the payments were made to people to whom the debtors owed a legal obligation, the judicial officer found they were preferences. To the extent that the payments were made to people to whom the debtors owed merely a moral obligation, the judicial officer found that the debtors had failed to account satisfactorily for the loss of assets.¹⁸⁴ Both types of payments constituted grounds

¹⁸⁰ Provincial impeachment powers are incorporated into the *BLA*, *supra* note 11, s 72.

¹⁸¹ *Re Chung*, 2006 CarswellOnt 975, 146 ACWS (3d) 13 (ON Sup Ct) Nettie Reg.

¹⁸² *Ibid* at paras 9-10.

¹⁸³ *Ibid* at para 10.

¹⁸⁴ *Ibid* at para 13.

under section 173.¹⁸⁵ The court conditioned the debtors' discharge on the debtor reimbursing the trustee an amount equivalent to these payments.¹⁸⁶

In *Re Nguyen* the debtor had cashed in an RRSP prior to bankruptcy to repay a gambling debt owed to a friend.¹⁸⁷ In finding that this amounted to a preferential payment the court noted: "while bankrupts understandably prefer to pay family and friends, Parliament has rightly declared that all creditors are to be treated equally, insofar as is set out in the scheme of distribution in the *BLA*."¹⁸⁸ Interestingly, the court characterized this as a failure to account satisfactorily for loss of assets, as opposed to a preferential payment. The debtor was required to pay an amount to his estate that was equivalent to the amount of the preferential payment.¹⁸⁹

Both scholars and judicial officers recognize that bankruptcy has an important role to play as a collection device. When this orientation is adopted at a discharge hearing, the judicial officer will craft orders that promote creditor recovery and equal treatment of the creditors. Conditional orders requiring payment are generally viewed as preferable for creditors because they stand to recover some portion of their debt, but judicial officers have

¹⁸⁵ *BLA*, *supra* note 11, s 173(1)(h), (d).

¹⁸⁶ *Re Chung*, *supra* note 181 at para 27. Each debtor had an additional payment requirement in the amount of \$15,000, and one was required to pay a further amount reflecting unpaid surplus income.

¹⁸⁷ *Re Nguyen*, 2007 CarswellOnt 8134, 162 ACWS (3d) 538 (ON Sup Ct) Nettie Reg, it is unclear from the judicial officer's reasons how much of this RRSP would have been exempt under section 67 of the *BLA*, had the debtor held them at the time of bankruptcy. If the RRSPs were fully exempt, then the transfer of the RRSPs to the friend should not have been impeachable as a preference, because it would not prejudice other creditors, see Roderick Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc, 2009) at 185.

¹⁸⁸ *Re Nguyen*, *supra* note 187 at para 6.

¹⁸⁹ *Ibid* at paras 15-17. Other conditions included payment of an additional amount of \$40,000, giving an undertaking not to have credit for two years or to gamble for three years. The discharge was also suspended for a period of one year. A similar outcome was reached in *Re Teatro* (2009), 176 ACWS (3d) 332, 2009 CarswellOnt 1693 (ON Sup Ct) Nettie Reg, where the debtor was required to repay the amount of preferential payments that he had made to loan sharks and his long term employer.

justified a range of other outcomes on the basis of creditor recovery. Equitable treatment of creditors is engaged as a concern when a creditor asks for a discharge order that provides it with a specific benefit, such as a consent judgment in its favor, or where a debtor has given a creditor a preference. Judicial officers use their power at discharge hearing to reverse the effects of preference, and are usually – though not always – reticent to make an order that specifically benefits one creditor over others, unless there is a recognized basis in the legislation for the special treatment.

3.2.2. BANKRUPTCY AS REHABILITATION

3.2.2.1. SCHOLARS

Rehabilitation plays a central role in many academic justifications for the bankruptcy system and the discharge, but rehabilitation can mean a number of different things. Margaret Howard identified three strands of rehabilitation: as financial education, as emotional relief, and as economic recovery.¹⁹⁰

Financial education should enable the debtor to avoid the behaviours or decisions that resulted in his or her bankruptcy.¹⁹¹ Where the debtor has engaged in financial mismanagement, education will improve the debtor's financial literacy. The Canadian Task Force on Financial Literacy, created by federal government in 2009 to help develop a strategy to strengthen the financial literacy of Canadians, identified four elements that individuals need to make appropriate financial decisions: (i) knowledge to understand their personal finances, (ii) skills to apply that knowledge to everyday life, (iii) confidence to make important decisions, and (iv) responsibility to make decisions that are appropriate to the situation.¹⁹² Where the debtor has engaged in other behaviors that have contributed to his or her financial difficulties, this framework may still prove useful. Debtors require new skills and knowledge, but also need to cultivate confidence and responsibility.

¹⁹⁰ Howard, *supra* note 149 at 1060.

¹⁹¹ Howard, *supra* note 149 at 1060.

¹⁹² Task Force on Financial Literacy, *Canadians and Their Money* (Ottawa: Department of Finance Canada, 2010) at 10.

Margaret Howard doubted that a bare discharge would educate a debtor. She argued that if consumer education is the goal, the bankruptcy process should incorporate mandatory counselling.¹⁹³ The Canadian system does. Karen Gross thought that bankruptcy could be educative, even without mandatory counselling. She characterized the discharge as an important facilitator of financial learning which allows debtors to experiment as both entrepreneurs and consumers of credit, secure in the knowledge that missteps will not result in indefinite over indebtedness, but rather debt forgiveness and another opportunity to learn.¹⁹⁴ She described bankruptcy as “the helping hand given to children learning to walk.”¹⁹⁵

The second type of rehabilitation Howard contemplated was emotional. She described this type of rehabilitation as follows:

Debt is demoralizing, we are told, a hopeless, unbelievable financial situation leads to a very costly social situation with its resulting relief costs, suicides, and criminality concomitant to financial despair. Discharge of debt in bankruptcy, however, liberates the bankrupt psychologically. The newly freed debtor has renewed confidence in his ability to control his future and newly-resurrected self-respect.¹⁹⁶

Gross also acknowledged that bankruptcy is an emotional balm. She suggested that everyone – debtors, creditors and members of the public – feels better when debtors are given a fresh start.¹⁹⁷

The third type of rehabilitation contemplated by Howard is economic recovery, whereby a debtor is enabled to “resume economic participation in the open credit

¹⁹³ Howard, *supra* note 149 at 1060.

¹⁹⁴ Karen Gross, *Failure and Forgiveness* (New Haven, CT: Yale University Press, 1999) at 97-8.

¹⁹⁵ *Ibid* at 98.

¹⁹⁶ Howard, *supra* note 149 at 1061.

¹⁹⁷ Gross, *supra* note 194 at 96-7.

economy.”¹⁹⁸ The release of debts, without more, accomplishes this manner of rehabilitation. This strand of rehabilitation may be justified by linking it to a positive impact on the larger economy. Individual economic rehabilitation can increase consumption, entrepreneurialism and productive work.

As the Canadian economy is currently structured, the consumption of products and services by individuals is vitally important to economic growth.¹⁹⁹ When over-indebted consumers try to repay their obligations, then tend to reduce their consumption levels. Gross argued that when an individual is granted a discharge from past debts, the individual’s consumption levels increase, benefitting the economy.²⁰⁰

John Czarnetzky argued that the role of bankruptcy is to stimulate economic growth by encouraging entrepreneurial risk taking. He argued that people are most likely to take entrepreneurial risks when they feel in control of their lives. Bankruptcy law enhances this sense of control by reassuring would-be entrepreneurs that economic failure will not result in a lifetime of debt-servitude.²⁰¹

Thomas Jackson argued that the discharge encourages individuals to re-engage as productive participants in the workforce. An over-indebted individual, who has no realistic opportunity of repaying his or her debts and no access to a discharge, has an incentive to spend more time pursuing leisure activities than productive ones, because his creditors can garnish his pay cheque, but not his pleasure. The debtor’s dependents may suffer as a result because the debtor will be less able to support them, and society will lose the benefit of his

¹⁹⁸ Howard, *supra* note 149 at 1062.

¹⁹⁹ Jerry Buckland, *Hard Choices* (Toronto, ON: University of Toronto Press, 2012) at 18-21.

²⁰⁰ Gross, *supra* note 194 at 100.

²⁰¹ John Czarnetzky, "The Individual And Failure: A Theory of Bankruptcy Discharge" (2000) 32 *Ariz St L J* 393.

or her productive labour. The discharge ensures that debtors do not end up in a situation where they might rationally choose leisure over productive work.²⁰²

3.2.2.2. JUDICIAL OFFICERS

Rehabilitation looms large in the judicial officers' rhetoric. Like the theorists, the judicial officers acknowledge that rehabilitation can benefit both the individual and the larger community, and it is alternatively characterized as a matter of the debtor's interest, or less frequently, but not uncommonly, a matter of public interest. Also, like academics, judicial officers use the term rehabilitation to talk about a number of different ideas. Judicial officers may use rehabilitation to denote either financial literacy or economic rehabilitation. The emotional rehabilitation available in bankruptcy is not central to how judicial officers explain their discharge decisions. A fourth meaning emerges from the case law, judicial officers write about how bankruptcy can rehabilitate a citizen.

3.2.2.2.1. REHABILITATION AS FINANCIAL LITERACY

Judicial officers look for evidence that bankrupts are exiting the bankruptcy system understanding the causes of their financial difficulties, with the skills, knowledge, confidence and responsibility necessary to avoid such difficulties in the futures. Sometimes judicial officers view the mere act of making an assignment into bankruptcy as enough to teach the debtor a lesson in financial literacy. More often, judicial officers will require additional evidence. They expect debtors to complete their duties, refrain from the types of behaviors that caused their financial difficulties, and adopt an appropriate attitude of remorse or contrition. When a judicial officer doubts that a debtor has internalized the lessons of bankruptcy, the judicial officer may craft a discharge order with conditions designed to further develop the debtor's knowledge, skills, confidence and responsibility.

²⁰² Thomas Jackson, "The Fresh Start Policy in Bankruptcy Law" (1985) 98 Harv L Rev 1393 at 1418-24 ["Fresh Start"]. Margaret Howard used this logic to argue against making proposals mandatory for those who can afford to repay some or all of their debts. She reasoned that debtors who are not motivated to repay their obligations for moral reasons, will have little economic incentive to comply with the plan and may rearrange their financial affairs, including taking a lower paying job, to minimize their ability to repay, see Howard, *supra* note 149 at 1084-85.

Judicial officers apply their concern for rehabilitation as financial literacy to justify different outcomes. Some adopt a view similar to Karen Gross' that the mere fact of making an assignment into bankruptcy is enough to jolt debtors into better financial choices. For instance, in *Re Spencer*, a judicial officer rejected, as unnecessary, the OSB's request for a 21-month suspended discharge, during which time the debtors would submit budgets, pay surplus income and be prohibited from owning credit cards.²⁰³ The debtors had been carrying a high credit card balance prior to bankruptcy, because they lost their jobs at the same time and relied on credit cards to make ends meet.²⁰⁴ In rejecting the OSB's request, the judicial officer noted that he was "satisfied they have learned from what has happened to them."²⁰⁵

Many judicial officers require concrete evidence that bankrupts have learned from the bankruptcy process, beyond the mere fact they made an assignment. The process itself may provide such educational opportunities, or bankrupts may be directed to additional educational opportunities specifically tailored to the causes of their financial problems.

The duties imposed on the debtor during bankruptcy – attending counselling, submitting income and expense statements, and paying surplus income – are designed to help the debtor develop better financial habits. The counselling sessions provide debtors with knowledge to understand their personal finances – the first element of financial literacy identified by the Task Force. The first counselling session covers basic financial literacy skills, including money management, spending and shopping habits, warning signs of financial difficulties, and obtaining and using credit.²⁰⁶ The second counselling session reaffirms the financial literacy skills taught in the first session, and then broadens to conversation to identify and address non-budgetary causes of financial difficulty. Where

²⁰³ *Re Spencer*, 2009 NSSC 34 at para 16, 285 NSR (2d) 4, Cregan Reg.

²⁰⁴ *Ibid* at para 4.

²⁰⁵ *Ibid* at para 17; see also *Re Lobrenz*, 2007 BCSC 1823 at para 59, 38 CBR (5th) 41, Young Reg.

²⁰⁶ Office of the Superintendent of Bankruptcy, Directive Number 1R3 "Counselling in Insolvency Matters" (August 14, 2009), s 6.

appropriate, the individual carrying out the counselling will put the debtor in touch with specialized support services.²⁰⁷ By completing monthly income and expense statements, and providing surplus income to the trustee, debtors practice applying their new knowledge to their own circumstances, and they demonstrate that they are able to exercise the responsibility necessary to live on the modest means provided for by the OSB's guidelines.

Duties are geared to help the debtor and non-completion of duties may prevent a debtor from getting a discharge. The *BLA* stipulates a debtor loses his or her entitlement to an automatic discharge if he or she refuses or neglects to receive counselling.²⁰⁸ Additionally, judicial officers recognize their importance and non-completion may impact the outcome at the application for discharge hearing. In *Re Montalban*, the judicial officers noted that counselling allows a debtor to “learn from his or her financial mistakes, with a view to not repeating them.”²⁰⁹ The judicial officer in *Re Rahman* refused a debtor's discharge, in part because the debtor had failed to comply with his duties, reasoning that “parliament did not impose duties on bankrupts for their convenience, but to foster rehabilitation, and as part of the price, if you will, of society's absolution of debt.”²¹⁰

Judicial officers may require evidence, in addition to the completion of duties, that a debtor is rehabilitated before they will grant the debtor a discharge. In deciding whether or not a debtor has evidenced sufficient rehabilitation to earn a discharge, judicial officers will evaluate both the actions and the attitude of the debtor.²¹¹ They will look for attitudes and

²⁰⁷ Directive Number 1R3, *ibid*, s 7.

²⁰⁸ *BLA*, *supra* note 11, s 157.1(3).

²⁰⁹ *Re Montalban*, 2013 BCSC 683 at para 19, 100 CBR (5th) 167, Fitzpatrick J.

²¹⁰ *Re Rahman*, 2010 ONSC 4377 at para 57, 70 CBR (5th) 290, Nettie Reg; see also *Re Lynn*, *supra* note 147 at para 12.

²¹¹ *Re Ledrew* (2005), 13 CBR (5th) 63 at para 20, 140 ACWS (3d) 236 (ON Sup Ct) Ground J, citing *Re Cohen* (1994), 30 CBR (3d) 83, [1994] OJ No 3147 (ON Ct J (Gen Div)) Adams J, see also *Re Parker*, 2007 MBQB 243 at para 15, 219 Man R (2d) 198, Yard J, citing *Touhey v. Barnabe*, [1995] OJ No 2337, 1995 CarswellOnt 3495 (ON Ct J (Gen Div)) Platana J; *Re Chronopoulos* (2007), 162 ACWS (3d) 188 at para 24, 2007 CarswellOnt 6981 (ON Sup Ct) Pierce J, citing *Re Darvis* (1997), 74 ACWS (3d) 917 at para 14, 1997 CarswellOnt 3500 (ON Ct J (Gen Div)) Kozak J; *Re Lynn*, *supra* note 147 at para 8, citing *Touhey v. Barnabe*, *ibid* at

actions, which suggest that debtors understand the genesis of their financial difficulties, have developed the skills and confidence to avoid similar problems in the future, and are taking responsibility to make necessary changes.

Sometimes it is evident from a bankrupt's post assignment conduct that he or she is continuing to engage in the behaviors that contributed to his or her financial ruin. Absent evidence that a debtor is working to address these problematic behaviors, judicial officers have legitimate reasons to fear repeat bankruptcy filings. In *Re Crisbuk*, the debtor was a tax protestor.²¹² He filed for bankruptcy a second time owing nearly \$400,000 in unpaid personal income tax and GST to CRA.²¹³ The judicial officer refused his discharge, noting that "there is no point in talking about the prospect of rehabilitation when the bankrupt does not acknowledge that... he has any obligation to pay tax."²¹⁴ Likewise, in *Re Tang*, the debtor was a second-time bankrupt, and both bankruptcies were caused by gambling.²¹⁵ The judicial officer noted, with a hint of incredulity, that at the time of the discharge hearing, the debtor was "still attempting to work in the gambling field, and yield to the sweet temptations of Lady Luck, and her siren song of easy fortunes and riches."²¹⁶ The judicial officer refused to grant Mr. Tang a discharge.²¹⁷ In *Re Hosseini*, the debtor had filed income and expense statements throughout the bankruptcy that revealed that the debtor was continuing to spend beyond his means.²¹⁸ The judicial officer characterized this as evidence that the debtor had

para 7; *Re Mann*, 2003 BCSC 1243 at para 48, 47 CBR (4th) 67, Bouck Reg.

²¹² *Re Crisbuk*, 2013 BCSC 1413 at paras 7, 9, 2013 CarswellBC 2374, Young Reg.

²¹³ *Ibid* at para 1.

²¹⁴ *Ibid* at para 23; see also *Re Berenbaum*, 2011 ONSC 72 at para 34, 73 CBR (5th) 1, Nettie Reg; *Re Brydeges*, 2009 NBQB 25 at para 19-21; *Re Arsenault*, 2008 NBQB 134 at para 37, 336 NBR (2d) 1, Gleixner Reg.

²¹⁵ *Re Tang*, *supra* note 161 at para 3.

²¹⁶ *Ibid* at para 7.

²¹⁷ *Ibid* at para 8.

²¹⁸ *Re Hosseini* (2008), 48 CBR (5th) 222, 2008 CarswellOnt 6621 (ON Sup Ct) Nettie Reg.

not been rehabilitated, and one ground for refusing the debtor's discharge.²¹⁹ *In Re Jabs*, the debtor had lived extravagantly prior to his assignment into bankruptcy, and continued to do so afterwards: he decamped for a 6-month stay at a resort in Belize shortly after his assignment, and upon his return to Victoria, maintained a membership and attended events at an elite private club.²²⁰ This continued extravagance helped convince the judicial officer that the debtor was not rehabilitated, and he attached conditions to the debtor's discharge.²²¹

In addition to demonstrating that a person has changed his or her behavior, debtors are expected to acknowledge the ways in which they contributed to their financial ruin and appear contrite and cooperative. Those who do not may find they have difficulty accessing a discharge. In *Re Contu*, the debtor had driven a car into a house while impaired and was sued for \$1 million. The debtor filed for bankruptcy while the civil litigation was pending. At the hearing, the debtor professed to be suffering mental anguish as a result of the accident, but also suggested that the plaintiffs were taking advantage of the situation to upgrade their home and lavish themselves in luxuries. The judicial officer found this attitude troubling, noting it is "unfortunate" that the debtor "now paints himself as standing in the position of a victim of the incident, rather than as the cause of the incident. Such an attitude does not augur well for his economic rehabilitation."²²² In *Re Stancer*, the debtor's lack of cooperation and evasiveness during the bankruptcy was interpreted as evidence that he was not rehabilitated, resulting in the judicial officer refusing his discharge.²²³ In *Fast v. Marathon Leasing Corp*, the debtor's lack of remorse made judicial officer question the extent to which

²¹⁹ *Ibid* at para 16.

²²⁰ *Re Jabs*, *supra* note 163 at paras 27, 42-43.

²²¹ *Ibid* at paras 82-86.

²²² *Re Contu*, 2012 ONSC 2977 at para 12, 2012 CarswellOnt 6256, Brown J.

²²³ *Re Stancer*, 2009 BCSC 398 at para 10, 53 CBR (5th) 76, Young Reg; see also *Re Williams*, 2005 BCSC 289 at para 13, 10 CBR (5th) 304, Bouck Reg, where the debtor's evasiveness during cross-examination was taken of evidence that he was not yet rehabilitated, and *Re Stoion*, 2005 CarswellOnt 2845 at para 10, 140 ACWS (3d) 418 (ON Sup Ct) Nettie Reg, where the Court noted that the debtor's candor during the proceedings "augurs well for his rehabilitation."

he had been rehabilitated.²²⁴ In *Re Lynn*, the judicial officer drew the same negative inference from the debtor's lack of contrition.²²⁵ In *Re Garness*, a case of a third-time bankrupt, the judicial officer held that a debtor need not "approach the court as a penitent might approach the confessional" but "some personal acknowledgement of blame and acceptance of individual responsibility for the consequences that the bankruptcy has wrought, however, are essential."²²⁶

Where debtors reach the discharge application without having demonstrated improved financial habits, judicial officers may attempt to craft discharge orders that ensure "the process results in a meaningful education and learning experience to avoid repeat bankruptcies."²²⁷ These rehabilitative discharge orders are particularly apt where the debtor's conduct has "demonstrated that rehabilitation was of little or no concern to him."²²⁸

When crafting rehabilitative discharge orders, judicial officers may favour a large conditional payment on the premise that it has a "salutary and rehabilitative" effect.²²⁹ In *Re Fida*, the judicial officer opted to condition the debtor's discharge on a repayment obligation of \$68,400 – an amount equal to 40% of the proven liabilities - rather than refusing the discharge.²³⁰ In its reasons, the judicial officer noted that a refusal would only be punitive, whereas a conditional order could be rehabilitative, because the debtor could still obtain a discharge through "hard work and financial discipline."²³¹ In *Re Skakun*, the judicial officer

²²⁴ *Fast v. Marathon Lease Corp*, 2010 SKQB 217 at para 47, 355 Sask R 311, Schwann Reg.

²²⁵ *Re Lynn*, *supra* note 147 at para 62.

²²⁶ *Re Garness*, 2004 BCSC 1260 at para 19, 5 CBR (5th) 51, Baker Reg.

²²⁷ *Re Rotvold*, 2005 ABQB 661 at para 11, 14 CBR (5th) 218, Laycock Reg.

²²⁸ *Re Brydges*, 2009 NBQB 25 at para 24, 345 NBR (2d) 89, Gleixner Reg.

²²⁹ *Re Ledrew*, *supra* note 211 at para 29.

²³⁰ *Re Fida* (2008), 163 ACWS (3d) 692 at para 18, 2008 CarswellOnt 387 (ON Sup Ct) Nettie Reg. This amount is particularly onerous considering the debtor reported earning a monthly income of only \$2,000, para 4.

²³¹ *Re Fida*, *ibid* at para 17, see also *Re Jabs*, *supra* note 163 at para 85, see also *Nagy v. Minister of National Revenue*, *supra* note 148 at para 47.

conditioned the debtor's discharge on a modest repayment obligation of \$8,100, reasoning, that it was in the debtor's "best interests to create and maintain a payment plan for the monies due to the trustee."²³² In *Re Arsenault*, the judicial officer found that the debtor had lived extravagantly at the expense of his creditors and one of the conditions it attached to the debtor's discharge was 48 monthly payments of \$1000, reasoning that the payments would force the debtor to curtail his expenses and live within his means.²³³

Payments are not the only conditions placed on debtors to help rehabilitate them, judicial officers are creative in imposing conditions that seek to remedy debtors' behaviours. In *Re Ashbee*, a tax debtor's discharge was suspended for 12 months, and made conditional on payment of \$30,000 and the debtor providing his trustee with evidence from the Canada Revenue Agency ("CRA") that all post-bankruptcy filings, remittances and payments had been made or dealt with to CRA's satisfaction.²³⁴ In cases where gambling is a contributing factor to the debtor's financial difficulties, the judicial officer may order the debtor to attend counselling or to undertake not to gamble for a set period of time.²³⁵ In *Re Salmon*, where the judicial officer held that the debtor had lived with undue extravagance, it conditioned the debtor's discharge on attending three more counselling sessions to help the debtor learn "to avoid consumer temptation, and say no to her family so as to live within her means."²³⁶

²³² *Re Skakun*, 2012 BCSC 1838 at para 18, 6 CBR (6th) 310, Bouck Reg.

²³³ *Res Arsenault*, *supra* note 214 at paras 40-43, citing *Re Ngoka* (1998), 174 Sask R 3, 5 CBR (4th) 252 (QB) Herauf Reg.

²³⁴ *Re Ashbee*, 168 ACWS (3d) 250 at paras 12, 16, 2008 CarswellOnt 4003 (ON Sup Ct) Nettie Reg, see also *Re Arsenault*, *supra* note 214.

²³⁵ In *Re Teatro*, *supra* note 189 at para 20 the debtor's discharge was conditional upon the debtor lodging an undertaking with the Alcohol and Gaming Commission not to gamble for a 5-year period.

²³⁶ *Re Salmon* (2009), 183 ACWS (3d) 329 at para 14, 2009 CarswellOnt 7704 (ON Sup Ct) Nettie Reg. In *Re Herd*, 2009 BCSC 1627 at paras 22-23, 60 CBR (5th) 158, Bouck Reg, the trustee asked that the debtor be required to submit income and expense reports for a further 36 months to "drive home the need for financial discipline" – however, the judicial officer had even less faith in the degree to which the debtor had learned from his bankruptcy and refused a discharge altogether.

The written decisions from application for discharge hearings evidence concern with the financial literacy of bankrupts – both narrowly and broadly understood. Some debtors experience financial difficulty because they are unable to manage their borrowing and spending. To receive a discharge order, they may be required to demonstrate that they understand their problem and have developed the requisite knowledge, skills, confidence and discipline to better manage their borrowing and spending. Where another problem – such as an addiction – has contributed to the debtor’s financial difficulty, the judicial officer will be looking for evidence of the debtor acquiring the same components – knowledge, skills, confidence and discipline – brought to bear on this different problem. Where a debtor’s attitude and actions do not suggest a satisfactory degree of rehabilitation has occurred prior to the discharge hearing, a judicial officer may craft a discharge order designed to foster improved financial habits.

3.2.2.2.2. ECONOMIC RECOVERY

The most common characterization of rehabilitation offered by the judicial officers is economic: “it allows an insolvent debtor who is overburdened by debt to employ a process by which he or she can shed those debts and obtain a ‘fresh start’.”²³⁷ The discharge enables the debtor “to resume the place and business for life which he is equipped by training and experience.”²³⁸ According to this characterization, the very act of discharging an individual’s debts rehabilitates them. As newly unencumbered individuals, they are expected to engage as productive members of the workforce, consumers, and risk taking entrepreneurs.

Evidencing this type of thinking, judicial officers voice concern that impeding the debtor’s access to a discharge may be an obstacle to rehabilitation. In *Re Abda*, the debtor had borrowed money on a line of credit from the Royal Bank of Canada to pursue an engineering degree at Dalhousie, but developed health problems with both mental and physical components.²³⁹ By the time of his discharge hearing, the debtor was unemployed,

²³⁷ *Re Montalban*, *supra* note 209 at para 13.

²³⁸ *Re Cable*, 2007 BCSC 1004 at para 18, 159 ACWS (3d) 636, Masuhara J.

²³⁹ *Re Abdo*, 2009 NSSC 338, 283 NSR (2d) 398, Cregan Reg.

socially-withdrawn, and living with his mother.²⁴⁰ The judicial officer characterized the debtor's "financial difficulties as only one of several difficulties that he faces" and reasoned that a refusal or a suspension would only be "another impediment to the debtor dealing with his substantial personal problems."²⁴¹ He granted the debtor an absolute discharge.²⁴² In *Re Gray* a debtor with \$67,000 in student loans had his discharge opposed by the CRA.²⁴³ The student loans were going to be discharged by the bankruptcy, and the judicial officer held that a conditional discharge order was appropriate, given that the debtor had received what he bargained for: he had used the student loans to complete three degrees (BA, MA, PhD) and was now employed as an academic in his field.²⁴⁴ At the same time, the debtor did not have much surplus income, and a substantial conditional award would have resulted in him remaining in bankruptcy for approximately 8 years – a result which the judicial officer felt would retard his financial rehabilitation overly much.²⁴⁵ Instead, the judicial officer suspended the debtor's discharge for 14 months, during which time the debtor was required continue to make surplus income payments.²⁴⁶

In some cases, denying a debtor a discharge impairs the debtor's economic fresh start, because remaining undischarged impacts a debtor's ability to carry out productive labour. For instance, the debtor may require a professional license to carry out work, but is disentitled from holding the license while bankrupt. In *Re Maas*, the husband and wife debtors worked as insurance brokers and the evidence before the judicial officer was that remaining undischarged bankrupts could affect the licenses they required to work.²⁴⁷ The

²⁴⁰ *Ibid* at para 10.

²⁴¹ *Ibid* at paras 19, 23.

²⁴² *Ibid* at para 24.

²⁴³ *Re Gray*, 2012 NBQB 362, 397 NBR (2d) 95, Bray Reg.

²⁴⁴ *Ibid* at para 20.

²⁴⁵ *Ibid* at para 26.

²⁴⁶ *Ibid* at para 27.

²⁴⁷ *Re Maas*, 2007 NSSC 218, 257 NSR (2d) 113, Cregan Reg.

wife was granted an absolute discharge, and the husband's discharge was suspended for one day because the court recognized that a longer discharge could impact his ability to work, and reasoned that "he must be able to work, if he is to re-establish himself."²⁴⁸

When judicial officers interpret rehabilitation as requiring improved financial literacy they usually require bankrupts to show that they have learned from their experience, or, where evidence of rehabilitation is lacking, the judicial officer will craft a discharge order aimed at teaching the debtor better financial habits. The onus is on the individual debtor to demonstrate his or her deservingness by showing the degree to which he or she has been transformed by the process. Conversely, when judicial officers interpret rehabilitation as meaning the economic benefit that accrues to bankrupts when their debts are forgiven, the act of granting the discharge is itself remedial. The deservingness of an individual is less central to this type of analysis, perhaps because the economic fresh start is often touted for the benefits accruing to the broader public, including increased levels of consumption, productive labour and entrepreneurialism. Because economic rehabilitation is framed in the context of these broader benefits, the relative deservingness of any one individual recedes as an important consideration. These two different interpretations of rehabilitation will often militate in favour of conflicting judicial approaches.

3.2.2.2.3. REHABILITATION AS EMOTIONAL RELEASE

The role of the discharge in relieving debtors from the emotional burdens of being indebted does not figure prominently in the judicial officers' written decisions. The emotional relief offered by the discharge was referenced in the cases as part of some debtors'

²⁴⁸ *Ibid* at para 35. In their respective decisions of *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68, 91 Alta LR (5th) 221, and *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited*, 2013 ONCA 769, 118 OR (3d) 161, the Alberta and Ontario Courts of Appeal both considered a related issue, the importance of the discharge to an individual's ability to hold a motor vehicle license. In both cases, a discharged bankrupt was being denied a driver's license on the basis of discharged debts. In holding that the individuals could not have their licenses denied on the basis of discharged debts, the courts noted the importance of a driver's license to an individual's ability to earn an income. These cases are illuminated by the same rationale as *Maas*, but differ in that the judicial officer in *Maas* relied on the fresh start principle to justify granting the debtor a discharge. In *Moloney* and *407*, the courts relied on the fresh start principle to help interpret the scope of a discharge.

motivation for choosing bankruptcy. In *Re Morris*, the debtor made an assignment into bankruptcy shortly after getting married to address his pre-marriage indebtedness.²⁴⁹ Both the Trustee and the OSB were of the opinion that the debtor could have made a viable proposal, but the trustee's section 170 report indicated that the debtor opted for bankruptcy because he "wanted closure."²⁵⁰ The judicial officer ended up conditioning the debtor's discharge on a payment of \$10,000 – an amount designed to ensure that the creditors recovered amounts similar to what they would have received under a proposal.²⁵¹ On a similar note, in *Re Cote*, the debtor was living on a very low income and was opposed to having his discharge conditioned on making a small payment because it would take him a long time to fulfill the condition and he expressed a desire to "get on with [his] life."²⁵² In *Ostachoff v. Pinder Bueckert & Associates Inc* the debtor made an assignment into bankruptcy to discharge a 30-year-old judgment against him resulting from a drunk driving accident at a high school graduation party.²⁵³ The debtor was essentially judgment proof and the creditor had done little to collect on the judgment for a number of years.²⁵⁴ Nonetheless, the debtor desired a discharge in bankruptcy, claiming that the indebtedness "adds to his depression to the point where a cloud needs to be lifted."²⁵⁵

3.2.2.2.4. REHABILITATION OF THE CITIZEN

A fourth possible interpretation of rehabilitation emerges from the written decisions: the discharge is characterized as rehabilitating someone as a citizen. A number of judges quote from a 1960 decision of the Manitoba Court of Queen's Bench where Justice Ferguson wrote, "the Legislature has always recognised the interest that the State has in a

²⁴⁹ *Re Morris*, *supra* note 164.

²⁵⁰ *Ibid* at para 5.

²⁵¹ *Ibid* at para 25.

²⁵² *Re Cote*, *supra* note 162 at para 17.

²⁵³ *Ostachoff v. Pinder Bueckert & Associates Inc*, 2010 SKQB 171, 355 Sask R 237, Schwann Reg.

²⁵⁴ *Ibid* at para 19.

²⁵⁵ *Ibid* at para 39.

debtor being released from the overwhelming pressure of his debts, and that it is undesirable that a citizen should be so weighed down by his debts as to be incapable of performing the ordinary duties of citizenship.”²⁵⁶ This rationale is included in a list of eight principles that Justice Ferguson identified as governing discharge hearings, and while frequently recited by the judicial officers, the desire to rehabilitate a citizen does not regularly play a decisive role in the outcome of discharge hearings. It is unclear from this oft-used quote what “ordinary duties of citizenship” judicial officers have in mind. Sometimes the language used indicates that a citizen is one who engages in productive labour, noting “individuals and society generally benefit from a process by which the crushing burden of financial debt can be lifted, thereby permitting a bankrupt to resume the life of a useful and productive citizen.”²⁵⁷ This characterization of citizenship basically collapses this category of rehabilitation into the economic one: people should be rehabilitated so they can resume contributing to the economy through productive labour (and potentially consumption).

Judicial officers share the scholars’ emphasis on rehabilitation, but financial literacy and economic rehabilitation emerge as more dominant themes in the case law than emotional rehabilitation. A fourth way of understanding rehabilitation is suggested in the case law – rehabilitation of the citizen – but it is unclear whether this is actually a different strand of rehabilitation or merely a different way of talking about economic rehabilitation.

An important observation to be made of the foregoing analysis is that multiple meanings are attributed to the term rehabilitation, it is not always clear which meaning a judicial officer is applying, and the distinct meanings may support divergent outcomes. Some courts will characterize a large conditional payment as having a salutary effect on debtors,

²⁵⁶ *Re Posner* (1960), 67 Man R 288 at para 11, 3 CBR (NS) 49 (QB) Ferguson J, in turn quoting *Re Green* (1925), 5 CBR 580, 1925 CarswellNB 1 (SC) Barry CJ, in turn quoting *Ex Parte Painter; In Re Painter* (1895), [1895] 1 QB 85. This quote is sometimes misattributed to Justice Locke in *Westmore v. McAfee* (1988), 23 BCLR (2d) 273, 67 CBR (NS) 209 (CA), where he quoted from the *Posner* decision. For examples of where it was quoted, see e.g., *Re Zinkiew*, 2004 BCSC 1831 at para 55, 32 CBR (5th) 148, Bouck Reg; *Re Maxwell*, 2004 BCSC 1245 at para 16, 6 CBR (5th) 209, Pitfield J.

²⁵⁷ *Re Pitre*, 2009 SKQB 280 at para 19, 345 Sask R 68, Schwann Reg, quoting from *Re Goodman* (1995), 53 ACWS (3d) 1010, 1995 CarswellOnt 2578 (ON Ct J (Gen Div)) McCart J.

because a debtor can only gain access to the discharge by working hard and exerting financial discipline. Conversely, judicial officers who wish to foster the economic recovery of the debtor are slow to impose large payments on the debtor because such conditions impede the debtor's fresh start. According to Jackson, a debtor subject to such a condition may choose not to work, or will work under the table keeping his income beyond the reach of the trustee, the creditors – and often, CRA. The public is denied the benefit of the debtor's productive labour and the debtor's income tax contributions.

3.2.3. BANKRUPTCY AS A TOOL TO REGULATE THE CREDIT MARKET

3.2.3.1. SCHOLARS

Some scholars see links between the bankruptcy system and the credit market system, and argue that the former should be organized to promote the proper functioning of the latter. Thomas Jackson argued that the discharge was an effective tool for limiting individual over consumption of credit. Individuals over consume credit because they have impulsive tendencies that lead them to choose current gratification over longer-term interests, and they overestimate their ability to repay credit in the future.²⁵⁸ Jason Kilborn illustrated how individuals' decisions about credit are skewed. Bankruptcy is not very salient as compared to more dramatic risks (such as plane crashes), and so consumers tend to underestimate the likelihood of their own financial collapse. Consumers also suffer from an overconfidence bias, which leads them to believe that bad things will not happen to them, so they fail to plan adequately for negative events like ill health or a job loss. Finally, consumers discount future benefits more than future costs, leading them to prefer immediate gratification with long term costs to postponed gratification.²⁵⁹ People recognize their tendency to over consume credit and so embrace commitment devices that will limit their ability to behave in this undesirable, impulsive manner. The discharge is such a commitment device because it shifts the costs of default to the creditors, who are unable to enforce

²⁵⁸ Jackson, "Fresh Start", *supra* note 202 at 1408.

²⁵⁹ Jason Kilborn, "Behavioural Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions" (2005-06) 22 *Emory Bankr Dev J* 13 at 19-21.

repayment of a discharge debt. Because the discharge makes default more costly for creditors, it encourages them to restrict consumers' access to credit.²⁶⁰

Scholars have justified using the discharge to shift costs to the creditors on the basis that creditors are better situated to assess a debtor's ability to repay, to insure themselves against the risk of default and to pass along any costs arising from the default. A creditor's ability to assess the creditworthiness of an individual is informed by a wealth of experience in similar transactions.²⁶¹ Moreover, creditors can diversify their risk by lending to a large number of borrowers, whereas an individual's primary income-producing asset is his or her human capital, which is difficult to diversify.²⁶² If a debtor loses his or her job, the result can be devastating because the debtor has no other source of income, whereas default by one borrower is less devastating to a creditor as long as most other borrowers continue to satisfy their obligations. The costs of default accruing to a creditor can be passed along to other borrowers or consumers by increasing the price of the creditor's product.²⁶³

Not all thinkers agree that the creditor is a superior risk bearer. Theodore Eisenberg argued that the debtor is better placed to avoid financial collapse because (s)he has more control over his or her financial activities.²⁶⁴ If one looks at an individual case, the debtor may make decisions or act in ways that increase the risk of default, but if one looks at the credit market more generally, commercial lenders can take an actuarial approach to the risk of default: calculating the expected costs arising from non-payment and incorporating those costs into the price of credit.²⁶⁵ These calculations based on meta data are often significantly more accurate than an individual's assessment of his or her ability to repay, because of the tendency of individuals, identified by Kilborne, to make skewed decisions. Margaret Howard

²⁶⁰ Jackson, "Fresh Start", *supra* note 202 at 1410-14.

²⁶¹ Jackson, "Fresh Start", *supra* note 202 at 1400.

²⁶² Jackson, "Fresh Start", *supra* note 202 at 1400.

²⁶³ Howard, *supra* note 149 at 1064-65.

²⁶⁴ Theodore Eisenberg, "Bankruptcy Law in Perspective" (1981) 28 UCLA L Rev 953.

²⁶⁵ Howard, *supra* note 149 at 1064-65.

conceded that the debtor may have greater control over the decision of whether or not to declare bankruptcy – most bankruptcies in both Canada and the United States are voluntary – but argued debtors may have less control over the factors that lead them to the point where they are contemplating bankruptcy, such as relationship breakdown, illness, and job loss.²⁶⁶

Jackson suggested that even if one could determine definitively that one party was the superior risk bearer, that would only justify a rebuttable presumption of a discharge (or no discharge). Debtors and creditors should be able to contract out of the discharge.²⁶⁷ Moreover, if the discharge is intended to encourage lenders to restrict access to credit, this rationale can only justify discharging the debt of commercial lenders and others who are able to assess transactions as risky and avoid them, or pass along the costs of default. This rationale fails to justify discharging the debts of creditors, such as the personal injury plaintiff, who has a judgment against the debtor, or a family member, who loaned the debtor funds. These types of debts appear less frequently in bankruptcy, but their discharge can impact these creditors in significant, detrimental ways precisely because the creditor is not well placed to insure against the risk, or pass along the costs.²⁶⁸

3.2.3.2. JUDICIAL OFFICERS

Like scholars, judicial officers see an important role for bankruptcy in the regulation of credit. In application for discharge hearings, judicial officers are primarily concerned with debtor conduct, which threatens the proper functioning of the credit system. They seek to “maintain confidence in the credit system such that creditors can seek redress for the wrongdoing of debtors.”²⁶⁹ The concept of commercial morality figures prominently in the written decisions. Judicial officers see themselves as one of the guardians of commercial morality. They strive to “guard against laxity in granting discharges, so as not to offend

²⁶⁶ Howard, *supra* note 149 at 1063.

²⁶⁷ Jackson, “Fresh Start”, *supra* note 202 at 1401.

²⁶⁸ Gross, *supra* note 194 at 142.

²⁶⁹ *Re Rogers*, 2008 NUCJ 20 at para 4, 47 CBR (5th) 145, Browne J, quoting Frank Bennett, *Bennett on Bankruptcy*, 8th ed (Toronto: CCH Canadian Ltd, 2005) at 21-22.

against commercial morality”.²⁷⁰ Promoting commercial morality is identified as one of the public’s interests in bankruptcy.²⁷¹

Commercial morality, like other terms used by the judicial officers, defies a precise definition. In application, it is used to police a number of different types of behaviors that depart from the norms around how people are expected to use their credit. Bankrupts may attract censure if they speculate with borrowed funds, attempt to manipulate the credit system or otherwise engage in activities that could undermine the credit system. Less frequently, judicial officers police creditor conduct: evidence of irresponsible lending can impact the harshness of a discharge order, and the degree of blameworthiness ascribed to a debtor’s conduct. Some examples from the case law will illustrate the breadth of activities that have been viewed as a threat to commercial morality.

Judicial officers sanction bankrupts who borrowed credit that they have little hope of repaying. In *Re Connors*, the bankrupt was living on a monthly income – primarily comprising a disability pension – of \$935 per month and yet had incurred over a hundred thousand dollars in debt including \$95,730.64 in credit card debt.²⁷² Approximately half of that amount had been incurred in the 6 ½ months prior to his bankruptcy.²⁷³ The bankrupt had taken cash advances from his credit cards to pay for his daughter’s travel, to pay other credit cards and to cover his living expenses.²⁷⁴ The judicial officer found that this behavior constituted two facts under section 173: “borrowing money which he had no hope of ever being able to repay” was a form of culpable neglect, and he could be held responsible for

²⁷⁰ *Re Kiamanesh*, *supra* note 156 at para 49; *Re Lynn*, 2009 MBQB 333 at para 62, 249 Man R (2d) 43, Sharp Reg.

²⁷¹ See *Re Goulbourne*, 2005 ABQB 945 at para 28, 392 AR 385, Wilson J, quoting Lewis Duncan & John Honsberger, *Bankruptcy in Canada*, (Toronto: Canadian Legal Authors, 1961); *Re Wirick*, 2005 BCSC 1906 at para 11, 29 CBR (5th) 151, Sigurdson J [“Wirick 2”], quoting *Re Crowley*, (1984) 66 NSR (2d) 390 at para 47, 66 NSR (2d) 390 (Sup Ct) Hallett J; *Re Dzieduch*, 2005 BCSC 212 at para 7, 9 CBR (5th) 217, Bouck J.

²⁷² *Re Connors*, 2006 NSSC 23 at paras 2, 6, 240 NSR (2d) 264, Cregan Reg.

²⁷³ *Ibid* at para 6.

²⁷⁴ *Ibid* at para 7.

having less than 50 cents of assets for every dollar of debt because he had incurred “substantial debts... shortly before the assignment, which he knew or should have known he could not repay.”²⁷⁵ Recognizing that the bankrupt had little ability to pay, the judicial officer held that the integrity of the system could only be maintained by imposing a modest conditional payment and lengthy suspension.²⁷⁶ The bankrupt’s discharge was suspended for three years and conditioned on payment of \$2000.²⁷⁷

Judicial officers sanction bankrupts who speculate with borrowed funds – they take umbrage at the idea that the benefit of successful speculation would flow to the bankrupts, but losses can be discharged through bankruptcy. The *BLA* provides some support for this stance: rash and hazardous speculation is a ground for opposition under section 173. In *Re Mensab*, the debtor had borrowed \$250,000, which he claimed to have invested with an individual who was running an illegal diamond trading venture in west Africa, with expected returns on investment of 125%.²⁷⁸ The judicial officer had grave doubts about the debtor’s credibility and the truthfulness of his story, but even if his story was true, the judicial officer felt it was important to sanction the debtor for embarking on a “get rich quick scheme with other people’s money.”²⁷⁹ By making the debtor’s discharge conditional on payment of \$80,000, the judicial officer reflected that it would communicate to the public that “that the

²⁷⁵ *Ibid* at para 13, 14. In the legislation, a debtor is caught by section 173(1)(e) if he or she has shown culpable neglect of his or her business affairs. It is unclear if the court interpreted “business affairs” broadly to include an individual’s financial life. Alternatively, this case could have been characterized as one of “extravagant living” under section 173(1)(e).

²⁷⁶ *Re Connors, ibid* at para 16.

²⁷⁷ *Ibid* at para 17. See also *Re Lobrenz*, 2009 BCSC 437, 53 CBR (5th) 65, Barrow J, where a debtor was granted a discharge subject to a payment to sanction her for purchasing a number of items on consumer credit after an initial meeting with a trustee, but prior to declaring bankruptcy. The items (purchased, with her husband) included two cars, a new wedding ring and a new computer, totaling approximately \$53,000 in spending. The amount of the conditional payment was reduced, on appeal from \$26,500 to \$12,000.

²⁷⁸ *Re Mensab* (2006), 26 CBR (5th) 164 at paras 4-6, 152 ACWS (3d) 772 (ON Sup Ct) Nettie Reg.

²⁷⁹ *Ibid* at para 17.

BLA and the insolvency process are not there to be a clearinghouse for debt, or to erase the serious consequences of speculating with the money of others.”²⁸⁰ In a similar vein, in *Re Thai* the court indicated that gambling on credit was conduct that required sanction: “while it is one thing for a person to gamble away their own assets or income, it is a very different matter for someone to gamble away other people’s money.”²⁸¹ The bankrupt in that case had his discharge made subject to a number of conditions, including repaying 50% of the amount he had lost gambling.²⁸²

Malevolent intent is not a pre-requisite to a court finding that a bankrupt should be sanctioned for speculating with borrowed funds. In *Re Young*, the bankrupt worked as a handyman and was invited by a repeat client to participate in a real estate scheme.²⁸³ The bankrupt would purchase a house, the client would make all payments on the bankrupt’s mortgage, the bankrupt would carry out a number of renovations and then they would sell the house for a healthy profit.²⁸⁴ The bankrupt was an unsophisticated individual, and thought the transaction was legitimate. It was not. The client did not make mortgage payments. The bankrupt discovered the client had procured two additional loans in his name, and he made an assignment into bankruptcy.²⁸⁵ The mortgage lender opposed the bankrupt’s discharge. Despite finding that the bankrupt was the “dupe” in the mortgage scheme, the judicial officer characterized the bankrupt’s involvement as culpable neglect of

²⁸⁰ *Ibid* at para 18.

²⁸¹ *Re Thai* (2007), 154 ACWS (3d) 536 at para 13, 2007 CarswellOnt 60 (ON Sup Ct) Nettie Reg. See also *Re Hosseini*, *supra* note 218 where the debtor had not remitted taxes and instead gambled away the funds. The court held, para 14: “It is unacceptable to gamble with other people’s money. It is even more unacceptable to gamble with money involuntarily advanced by the taxpayers of Canada.”

²⁸² *Re Thai*, *ibid* at para 13. See also *Re Tang*, *supra* note 161 at para 8 where the debtor, who declared bankruptcy for a second time as a result of gambling losses, was refused a discharge to maintain the integrity of the system.

²⁸³ *Re Young*, 2006 CarswellOnt 7976 (ON Sup Ct) Nettie Reg.

²⁸⁴ *Ibid* at para 5.

²⁸⁵ *Ibid* at para 7.

his business affairs – a fact under section 173.²⁸⁶ The judicial officer criticized the debtor for entering into a sophisticated business transaction, which he did not understand, and noted that “credit is a privilege” and individuals must be held accountable for how they use it, or the integrity of the bankruptcy system would be called into disrepute.²⁸⁷ The bankrupt’s discharge was suspended for 3 months – a relatively soft outcome which reflected that the bankrupt was a naïve dupe, rather than a malevolent rogue.²⁸⁸

The bankruptcy system contains mechanisms to penalize individuals who knowingly manipulate the credit system to get new credit, or maintain existing credit facilities. A bankrupt who lies to get credit may be convicted of a bankruptcy offence and the resulting debt is not dischargeable in bankruptcy.²⁸⁹ The judicial officer can also impose conditions on a debtor’s discharge where he or she has obtained credit by lying. In *Re Duong*, the bankrupt had lied on a number of credit applications and then dissipated the borrowed funds during a gambling spree.²⁹⁰ She eventually made an assignment into bankruptcy and one of her creditors – as well as the trustee and the OSB – opposed her discharge. The judicial officer held that borrowing money that one has no real ability to repay, and doing so on the basis of falsified applications “strikes at the very heart of our credit granting system,” and that to “readily return to commercial society someone who not only falsely applies for credit, but then egregiously misuses it would... be offensive to the integrity of the insolvency system.”²⁹¹ The bankrupt’s discharge was conditioned on payment of \$30,000, even though

²⁸⁶ *Ibid* at para 11.

²⁸⁷ *Ibid* at para 11.

²⁸⁸ See also *Re Todd*, 2009 SKQB 120 at para 60, 333 Sask R 82, Schwann Reg, where the Court criticized the bankrupt couple for “the improvident decision to embark on a business venture, especially with no capital investment of their own and... on the eve of marital separation. To make matters worse, the bankrupts increased their mortgage payments concurrent with their marital separation.” The mortgage funds had been invested in their business venture, a dollar store, para 6.

²⁸⁹ *BLA*, *supra* note 11, s 178(1)(e), 198(1)(e).

²⁹⁰ *Re Duong* (2006), 151 ACWS (3d) 356 at para 9, 2006 CarswellOnt 5379 (ON Sup Ct) Nettie Reg.

²⁹¹ *Ibid* at para 14.

the judicial officer acknowledged that the debtor had little ability to pay such a large amount.²⁹²

Bankrupts may attract censure at the discharge application for other manipulative uses of credit. Credit card kiting is a concern. In a credit card kiting scheme, a debtor has a number of credit cards and takes cash advances from one to make minimum payments on another, thereby maintaining a façade of financial health – and his or her credit facilities – well beyond the point of actual insolvency. In *Re Pitre*, the court noted with disapproval that the debtor had funded his gambling problem through a “manipulative, and a concerted, conscious” credit card kiting scheme.²⁹³

Another manipulative use is where a debtor purchases goods on credit and then resells them or pawns them to raise funds. Such behavior can be punished as an offence in bankruptcy, but judicial officers will also sanction it with harsh discharge conditions.²⁹⁴ In *Re Elkarech*, the bankrupt had a gambling addiction and funded his gambling activities by taking cash advances on bad cheques, and by purchasing goods on credit and then immediately reselling them at a significant discount.²⁹⁵ The judicial officer ordered the bankrupt’s discharge subject to a number of conditions, including repayment of 50% of the amounts spent on goods purchased for resale. The judicial officer indicated that such activities “strike[] at the heart of our credit granting system, and not to sanction it would bring the integrity of the insolvency system into disrepute.”²⁹⁶

²⁹² *Ibid* at para 15.

²⁹³ *Re Pitre*, *supra* note 257 at para 32.

²⁹⁴ *BLA*, *supra* note 11, s 198(1)(g).

²⁹⁵ *Re Elkarech* (2007), 32 CBR (5th) 129 at paras 3-4, 157 ACWS (3d) 248 (ON Sup Ct) Nettie Reg.

²⁹⁶ *Ibid* at para 11; see also *Re Tran*, 2008 CarswellOnt 4033, [2008]OJ No 2708 (ON Sup Ct) Nettie Reg, a discharge application from a joint bankruptcy, where the husband had a gambling addiction which combines elements of *Re Duong* and *Re Elkarech*. The husband had bought goods on credit and resold them immediately to fund his gambling, he also dissipated proceeds from the sale of his house and his RRSPs. The wife had lied on credit applications, and the husband used the credit to gamble. The husband, as a condition of his

A final category of debtor behavior that attracts censure includes, broadly, activities that could undermine the operation of the credit system. For example in *Re Teatro*, the debtor had a gambling problem and had borrowed money from loan sharks to fund his activities.²⁹⁷ When he was unable to pay off these amounts, he became concerned for his safety and took a number of cash withdrawals from his credit cards to repay the loan sharks.²⁹⁸ As a consequence, by the time he made an assignment into bankruptcy, the loan sharks were paid off and the credit card companies were owed a significant debt. The judicial officer felt that it was not in the public interest to encourage the loan sharks “by allowing them to be paid off in preference as a result of fear.”²⁹⁹ The debtor’s discharge was conditioned on repayment of a sum, which included the amounts of the preferential payments to the loan sharks.³⁰⁰ The judicial officer discouraged informal credit relations, thereby reinforcing the formal credit system.

Bankrupts engage in the commercial system as borrowers, but also sometimes as insiders. They may imperil the effective functioning of the credit system if they take advantage of their positions to derive improper benefits. Where such a rogue subsequently ends up in bankruptcy, the judicial officer may attach harsh conditions to their discharge to reassure the public that such misfeasance it taken seriously. In *Re Jegasundaram*, the bankrupt, an accountant and financial planner, had been investing funds on behalf of a number of clients.³⁰¹ She invested funds on terms other than the ones she disclosed to her clients, and she used some of her client’s investment funds to buy investments for herself or pay her

discharge was required to repay 50% of all the debts he had incurred purchasing goods for resale, and 15% of his remaining gambling debts. The wife, as a condition of her discharge, was required to repay 100% of the credit she had received on the basis of falsified applications.

²⁹⁷ *Re Teatro*, *supra* note 189.

²⁹⁸ *Ibid* at para 12.

²⁹⁹ *Ibid* at para 14.

³⁰⁰ *Ibid* at para 17.

³⁰¹ *Re Jegasundaram* (2006), 147 ACWS (3d) 352, 2006 CarswellOnt 2072 (ON Sup Ct) Nettie Reg.

expenses.³⁰² The judicial officer ruled that this behavior was particularly egregious because the bankrupt had targeted her schemes towards elderly, unsophisticated women.³⁰³ The judicial officer held that it must protect the integrity of the bankruptcy system, and this required it to consider the commercial morality of the bankrupt's behavior.³⁰⁴ The judicial officer concluded that the bankrupt had not acted in a commercially moral manner, because "[she] has contradicted herself under oath; she has preyed upon vulnerable members of society for her own financial gain; she has failed to be truthful with and make full disclosure to her trustee; and she has been uncooperative with the creditors in attempting to get through this process."³⁰⁵

The concept of commercial morality, as judicial officers have interpreted it, seems primarily focused on policing behaviors by debtors that increase their risk of default, or that interfere with the ability of creditors to assess the risk of default. There is a countervailing tendency in the written decisions from discharge hearing where judicial officers are dismissive of the complaints of creditors because the creditor engaged in risky lending behavior. For instance, in the case of *Re Siddiqui*, the judicial officer described himself as "gob-smacked" that the Royal Bank of Canada had lent \$150,000 on an unsecured basis to a high school graduate to pursue "pre-med" studies at a school in the Caribbean.³⁰⁶ The student subsequently failed a licensing exam, used his student line of credit to start a carpet cleaning business, but was injured in a motor vehicle accident and could no longer work. The judicial officer opined that "a more careful loan underwriting review might have avoided

³⁰² *Ibid* at para 8.

³⁰³ *Ibid* at para 8.

³⁰⁴ *Ibid* at para 20.

³⁰⁵ *Ibid* at para 20.

³⁰⁶ *Re Siddiqui*, 2013 ONSC 210 at para 35, 227 ACWS (3d) 631, Short Reg. The RBC's lending practices with student lines of credit were also subject to criticism in the case of *Re Abdo*, *supra* note 239 at para 13, where the evidence was that the loan officer had extended an additional \$30,000 on a \$20,000 line of credit to help the student cover losses incurred while trading securities.

these problems for both parties.”³⁰⁷ The bankrupt was granted a conditional order on repayment of the relatively small amount of \$7,500 – equivalent to 5% of his student loan.³⁰⁸

In addition to militating in favour of a more lenient discharge order, where a judicial officer believes a creditor engaged in irresponsible lending, it may impact his or her assessment of whether or not a section 173 ground has been made out. In *Re Perpich*, AMEX opposed the bankrupt’s discharge on the ground that the bankrupt had continued to trade while insolvent. As evidence, AMEX pointed to the bankrupt’s use of his credit facility with AMEX to pay down higher interest credit cards.³⁰⁹ The judicial officer rejected AMEX’s imputation that this behavior was in any way blameworthy, and instead described it as “sound financial planning”. The judicial officer continued, “if credit card issuers do not want to bear the burden of debtors re-organizing their affairs in such a manner, then they should change their policies on lending money to pay down other card issuers. Far from this, they seemingly constantly mail to their customers cheques and other offers and incentives to transfer balances from one card to another. It does not then lie in their mouths to criticize a debtor from taking advantage of such offers.”³¹⁰

Both scholars and judicial officers see the bankruptcy system as intimately tied to the credit granting system. Scholars are more focused on how the proper operation of the credit

³⁰⁷ *Re Siddiqui*, *ibid* at para 38.

³⁰⁸ *Ibid* at paras 44-45.

³⁰⁹ *Re Perpich* (2006), 152 ACWS (3d) 776, 2006 CarswellOnt 6821 (ON Sup Ct) Nettie Reg.

³¹⁰ *Ibid* at para 8. See also *Re Young*, *supra* note 283 at para 8 where the bank was alleging that the debtor had committed fraud when he applied for credit, but in the absence of any evidence that the bankrupt had mislead the bank during the credit application process, the judicial officer concluded, “I see only a poor credit decision by the bank, not fraud by the bankrupt.” Likewise in *Re Coish*, *supra* note 174, the opposing creditor was a hardware store who sold a large number of materials to the debtor on credit to fix up a house without confirming that the debtor owned the house. He did not, it belonged to his parents. The creditor alleged that the debtor had committed fraud in not disclosing the ownership of the house, but the judicial officer rejected this characterization, noting, para 17: “Cabot initiated the credit account for Mr. Coish and set it up without making even basic inquiries into Mr. Coish's financial situation or the ownership of the home to which it was delivering the building materials. It was Cabot's own assumption that Mr. Coish owned the house. By relying on its own assumption, Cabot jeopardized its ability to protect its credit.”

granting system can be enhanced by the structure of the bankruptcy. The availability of the discharge shifts the costs of default to the creditor, which may cause them to restrict the credit available to debtors. Judicial officers demonstrate awareness of the system-level implications of their decisions, but are more focused on sanctioning individual instances of debtors and creditors who have departed from the norms of commercial behavior.

Bankrupts attract sanction when they borrow money they have no realistic hope of repaying, speculate with borrowed funds, or manipulate creditors to obtain or maintain credit facilities beyond what a fully-informed creditor would make available. Creditors attract censure when they make risky loans to people who have little objective chance of repaying or they do not take sufficient steps to investigate the riskiness of a transaction.

3.2.4. BANKRUPTCY AS A SOCIAL SAFETY NET

3.2.4.1. SCHOLARS

Bankruptcy can be likened to a form of social insurance that provides relief to individuals who are impacted by personal misfortunes such as job loss, marriage breakdown or illness and the accompanying financial burdens. Debtors who turn to credit to make ends meet following such a misfortune can release the resulting debts by making an assignment into bankruptcy. Viewed in this light, bankruptcy becomes akin to a form of social welfare and is illuminated by a similar philosophy: that there is a collective responsibility to care for vulnerable, unfortunate, and destitute members of a community.

Some scholars characterize bankruptcy as an alternative to other forms of welfare. Teresa Sullivan *et al.* argued that America has opted to address the financial failure of individuals through bankruptcy because it is more consistent with the American ethos of individual responsibility. They contrasted this approach with the approach adopted by countries where the risk of financial failure is borne communally, through greater government intervention in the form of credit regulation and an expanded social safety net.³¹¹ For example, at one extreme, when individuals lose their jobs they would turn to credit to replace the lost income and then discharge the debt through bankruptcy, whereas at

³¹¹ Teresa Sullivan, Elizabeth Warren, Jay Lawrence Westbrook, *The Fragile Middle Class*, (New Haven, CT: Yale University Press, 2000) at 76, 260.

the other extreme individuals would have the lost income replaced through a government program such as employment insurance. In practice, the approach in most western countries falls somewhere between these two extremes.

More recent scholarship indicates that, if a community takes the protection of the vulnerable, unfortunate and destitute seriously, bankruptcy is not an alternative to social security, but a necessary element of a larger social safety net. Katherine Porter and Deborah Thorne studied how bankrupts fared after discharge and found that access to debt relief in bankruptcy, without more, failed to rehabilitate many debtors. A full third of the bankrupts interviewed reported that, a year after bankruptcy, their financial situation remained unchanged or had worsened.³¹² The authors attributed these dire results to insufficient post-bankruptcy job retraining as well as inadequate medical coverage for people with chronic illnesses and employment insurance's failure to address reductions in income that fall short of a complete job loss. They concluded that unless it is embedded in a robust social safety net, the discharge will not protect vulnerable individuals from financial destitution.³¹³

Welfare programs provide free or low cost services – or income payments – to needy individuals, paid for through taxes levied on other members of a community. The bankruptcy system operates according to a similar, redistributive logic. Whereas most individuals are expected to repay their debts, the 'honest unfortunate' debtor is excused from fulfilling his or her repayment obligations. The cost of this debt forgiveness is borne directly by a bankrupt individual's creditors, and they will often pass those costs on to a broader constituency. When a tax debt to the government goes unpaid, other taxpayers are impacted because they are either called on to pay more taxes, or to make do with less funding for government services. When credit card debts or unsecured lines of credit go unpaid, the lender can spread the costs of default out amongst other borrowers through higher costs for credit.

³¹² Katherine Porter & Deborah Thorne, "The Failure of Bankruptcy's Fresh Start" (2006) 92 Cornell L Rev 67 at 87.

³¹³ *Ibid* at 119-20.

The costs of the welfare system and the bankruptcy system are both justified in terms of the needed relief they provide to the “deserving poor”; however, they also both trigger public anxiety that unscrupulous individuals are taking undue advantage of the benefits available under either system, with the costs of this abuse being borne by the other members of a community. Members of the public may be concerned that these systems turn them into honest dupes.

Michelle Dickerson illustrates this anxiety about potential abuse by presenting a colourful caricature of the welfare queen – and a similar caricature she calls the bankruptcy queen – as these stereotypes exist in the collective’s imagination. Writing for an American audience, Dickerson describes the stereotypical welfare queen, as “a long-term dependent, unmarried, urban black woman who had a herd of illegitimate children, felt she had a God-given right to stay home full-time to rear those children, steadfastly refused to work in the labor market to earn income to support those children, but wore designer clothing while driving her Cadillac to the grocery store to buy filet mignon with her food stamps.”³¹⁴ The bankruptcy queen, “is the owner of a multi-million dollar exempt mansion, [who] charges lavish trinkets on a Visa card (or takes a cash advance from the credit card to fund a gambling trip to Reno), then cavalierly files for bankruptcy rather than selling the exempt assets, curtailing spending habits, or working to repay the credit card debt.”³¹⁵ In Canada the details of the caricature may change. The welfare cheat may be recast as a seasonal worker, who works the bare minimum necessary to qualify for employment insurance. The bankruptcy cheat may visit Niagara Falls to gamble away cash advances. While the details change, the underlying anxiety about duplicity by undeserving individuals persists.

Dickerson’s caricatures and their Canadian equivalents point towards how anxiety over abuse of the bankruptcy and welfare system has permeated the public’s imagination. Stereotyped characters like the welfare and bankruptcy queens are referenced as anecdotal evidence that the public has good reason to be anxious. These imaginary rogues may bear

³¹⁴ A Mechele Dickerson, "America's Uneasy Relationship With the Working Poor" (1999) 51 *Hastings L J* 17, 42-30.

³¹⁵ *Ibid* at 48-49.

little resemblance to most of the individuals who actually make use of these social systems, but they resonate with people because they are emotionally evocative, and conform with the public's dark suspicions that abuse is a serious problem. The fact they are mostly inaccurate reflections of reality seems of little importance. And they are not entirely inaccurate, because there are always some rogues who will take advantage of public systems. When these rogues surface, they lend further credence to the view that the bankruptcy system is rife with abuse.

If the bankruptcy system is viewed as being rife with abuse, the public's appetite for shouldering the indirect costs of the system – real or perceived – may wane and legislative amendments may be put in place to restrict abuse of the system. These amendments often operate to prevent honest unfortunate debtors from accessing much needed relief. By way of example, the United States passed a series of amendments to its bankruptcy code in 2005, the tellingly named *Bankruptcy Abuse Prevention and Consumer Protection Act* ["BAPCPA"]. *BAPCPA* expanded the means-testing in bankruptcy – each individual must now fill out a large amount of paperwork, which is then used to determine how much disposable income they have each month. If they have over a certain threshold, they are not able to file for bankruptcy, but still have the option of filing a proposal.³¹⁶ This amendment was passed to restrict bankruptcy to “can't pay” by barring “won't pay” from accessing it. The evidence thus far suggests that it has caught few “won't pay”, and instead made it more time-consuming and costly for can't pay to access the system.³¹⁷ To marshal support for the *BAPCPA* Amendments, lobbyists promulgated a story of questionable accuracy that American families were each paying an annual bankruptcy tax of \$400, which was going to support a system being used opportunistically by “won't pay” and other unscrupulous debtors.³¹⁸ Public anxiety about abuse of the bankruptcy system was used to advance

³¹⁶ *Bankruptcy Code*, 11 USC s 707(b).

³¹⁷ Robert Lawless et al, “Did Bankruptcy Reform Fail: An Empirical Study of Consumer Debtors” (2008) 82 *Am Bkrptcy L J* 349; writing about an earlier proposal for means testing, see Skeel, *supra* note 123 at 202-05.

³¹⁸ Teresa Sullivan, "Debt and the Simulation of Social Class" in Ralph Brubaker, Robert Lawless & Charles Tabb, eds, *A Debtor World: Interdisciplinary Perspectives on Debt* (Oxford, UK: Oxford University Press, 2012) at 53-54 ["The Simulation of Social Class"]; and Elizabeth Warren, "Balance of Knowledge" in Ralph Brubaker, Robert Lawless & Charles Tabb, eds, *A Debtor World: Interdisciplinary Perspectives on Debt* (Oxford, UK: Oxford University Press,

legislative amendments that restricted the access of all debtors – deserving or otherwise – to debt relief. The American experience with *BAPCPA* suggests that to maintain a bankruptcy system, which makes debt relief accessible to those who need it, the public must be reassured that the system is not rife with abuse.

3.2.4.2. JUDICIAL OFFICERS

The written decisions repeatedly emphasize the importance of maintaining public confidence in the bankruptcy system, the court’s process and the manner in which the *BLA* is administered. Judicial officers recognize that it is important to maintain the integrity of the bankruptcy system “so that honest but unfortunate debtors can obtain a discharge in order to make a fresh start and resume their place in the business community.”³¹⁹ This goal is identified as part of the public interest in bankruptcy.³²⁰ At application for discharge hearings, judicial officers will impose harsh sanctions on bankrupts who have engaged in behaviors that could give observers the impression that the bankruptcy system is being used opportunistically. Most bankruptcy cases proceed in relative obscurity, with creditors being largely disengaged from the process and little scrutiny from any party outside the system, such as the media. But the open nature of court means that outside scrutiny is always a possibility. In cases where the judicial officer sets out to protect the integrity of the bankruptcy system, there is often an underlying current of concern with how a decision could impact an outside observer’s assessment of the integrity of the bankruptcy system.

Judicial officers are not only concerned with the *public’s perception* of the integrity of the bankruptcy system, but also the *actual* integrity of the system. In addition to justice being

2012) at 284.

³¹⁹ *Re Hardtke*, 2012 ONSC 4662 at para 124, 91 CBR (5th) 237, Kershman J.

³²⁰ *Re Martino* (2004), 50 CBR (4th) 132 at paras 26, 40, 29 ACWS (3d) 647 (ON Sup Ct) Lane J; *Re Stoiou*, *supra* note 223 at para 11, *Re Chaytor*, 2006 BCSC 1742 at para 65, 26 CBR (5th) 274, Bouck Reg; *Re Meehan*, 2009 NSSC 374 at para 24, 285 NSR (2d) 178, Cregan Reg; *Re Lok*, 2010 SKQB 327 at para 13, 367 Sask R 9, Schwann Reg; *Re Nehaj*, *supra* note 141 at para 6; *Re McCullough*, 2013 SKQB 92, 420 Sask R 22, Thompson Reg; *Re Maxwell*, *supra* note 256 at para 16; *Re McConnell* (2005), 144 ACWS (3d) 800 at para 12, 2005 CarswellOnt 7532 (ON Sup Ct) Nettie Reg; *Re Literowicz*, 2005 BCSC 701 at para 24, 16 CBR (5th) 65, Bouck Reg.

seen to be done, justice must be done. At application for discharge hearings, judicial officers will sanction debtors, who have attempted to subvert the proper operation of the system. These sanctions are intended to penalize wrongdoers, and deter other, prospective wrongdoers.

Like rehabilitation and commercial morality, the “integrity of the system” is often evoked in decisions, but defies easy definition. The Oxford English Dictionary provides some insight: integrity is defined in three ways as: (1) a state of wholeness, where not elements are missing, (2) a state of original perfection, where a thing has not been marred or violated, and (3) a state of moral soundness free from corruption and marked by “uprightness, honesty and sincerity”.³²¹ The third strand of the definition accords most closely with the meaning ascribed to the term by judicial officers, they are intent on denying the benefit of the discharge – in whole or in part – to debtors who have acted in ways that fall short of the dictates of honesty, uprightness and sincerity. Drawing on illustrative examples from the case law, I have identified five categories of behavior that are viewed as threats to the integrity of the bankruptcy system: debtors who use bankruptcy despite not genuinely needing the relief (i.e., “won’t pay”), debtors who attempt to manipulate the system to receive an undue benefit, debtors who receive a windfall benefit through a technical application of the rules, debtors who make insufficient effort to better themselves during bankruptcy, and debtors who display an attitude inconsistent with deservingness.

3.2.4.2.1. NEED

The integrity of the bankruptcy system is imperiled when used by individuals who do not truly need it. Elsewhere, I have drawn a distinction between the “can’t pay” and the “won’t pay”, this distinction is evident in the judicial officer’s rhetoric. Bankruptcy is not intended to be a, “convenient car wash for debt”³²² or a “means for bankrupts to escape responsibilities that they are able to assume.”³²³ If a judicial officer’s review of a bankrupt’s

³²¹ *The Oxford English Dictionary*, online ed, *sub verbo* “integrity”.

³²² *Re Montalban*, *supra* note 209 at para 78.

³²³ *Re Baum* (1988), 70 CBR (NS) 263, 12 ACWS (3d) 195 (ON Sup Ct) Saunders J, quoted in *Re Eccles*, 2010 BCSC 159 at para 3, 63 CBR (5th) 229, Young Reg.

finances suggest that the bankrupt could have repaid his or her debts, but chose not to, it will impose harsh discharge conditions to maintain the integrity of the system.³²⁴ If a bankrupt could have made a proposal but chose not to, this is considered a ground for opposing a discharge under section 173 and will often result in the judicial officer granting a discharge conditional on the creditors receiving the same amount as they would have received in a proposal.³²⁵ Judicial officers are particularly incredulous about a debtor's professed need when the debtor makes an assignment with only one significant debt or has made repeated assignments.

When debtors make an assignment into bankruptcy with only one debt – or one substantial debt coupled with some insignificant ones – they need to convince the judicial officer that they are truly in need of relief and not merely using bankruptcy to resist paying a debt that they wish to avoid. The judicial officer will “scrutinize the application for discharge very closely”, and ensure that any order preserves the integrity of the bankruptcy system.³²⁶ In *Baird v. Neeb*, the debtor had been involved in protracted family law litigation.³²⁷

³²⁴ See e.g., *Re Rahman*, *supra* note 210 at para 81: “It would be an affront to the integrity of the insolvency system to grant a discharge to such a person, on any terms. There is no reason that the Bankrupt cannot pay his debts, beyond his own choosing not to do so.”

³²⁵ *Re Vaccaro* (2010), 184 ACWS (3d) 307, 2010 CarswellOnt 678 (ON Sup Ct) Nettie Reg. But see *Re Brown*, 2010 SKQB 426 at paras 29, 35, 364 Sask R 300, Schwann Reg, where the judicial officer found that the debtor could have made a proposal, but then required a conditional payment that fell short of what would have been required in a proposal. The judicial officers preference for proposals reflects a deliberate policy of Parliament to encourage individuals to file a proposal if they can afford to pay something back. Over the past 20 years, the Court has adopted a mandatory surplus income regime in bankruptcy, that makes it less attractive as compared to proposals. In 1992, Parliament amended the *BLA* to provide for a streamlined proposal process for individuals. In the most recent round of amendments, they raised the debt limit for individuals who wish to make use of this streamlined process, *2005 Amendments*, *supra* note 84, s 46. In 1997, Parliament made filing for bankruptcy, when one could have managed a proposal, grounds for opposing a debtor's discharge, *2007 Amendments*, *supra* note 84, s 103.

³²⁶ *Baird v. Neeb* (2007), 30 CBR (5th) 293 at para 23, 157 ACWS (3d) 27 (ON Sup Ct) Diamond Reg, quoting *Re Chodos* (1992) 9 CBR (3d) 230 at 238, 31 ACWS (3d) 192 (ON Ct J (Gen Div)) Lane J.

³²⁷ *Baird v. Neeb*, *ibid*.

She fired her lawyer after receiving four years of representation, and shortly before entering into minutes of settlement with her husband. She then made an assignment into bankruptcy. Other than small debts to related parties, the “vast bulk” of her debt was owed to her former lawyers.³²⁸ Finding that her “primary motivation for making her assignment when she did” was to avoid paying her lawyer – and that she had arranged for preferential payments to be made to some creditors as part of her matrimonial settlement – the judicial officer ordered her discharge conditional on her making 30 months of surplus income payments.³²⁹

When a debtor evidences a willingness to repeatedly make use of the bankruptcy system, they need to convince the judicial officer that they are in need of relief and not merely using the bankruptcy system “as a convenient method to periodically cleanse debts.”³³⁰ It is harder for such an individual to get a discharge. Individuals who have declared bankruptcy more than twice are no longer entitled to an automatic discharge – but rather their trustee is required to bring an application to the court for a discharge.³³¹ On such applications, the judicial officers favour harsher discharge conditions, and may refuse a discharge altogether: “when faced with a third or fourth time bankrupt, the court's focus shifts from a rehabilitative one to one of concern for the integrity of the system, protection of creditors and as a brake against a future assignment.”³³²

The judicial officers’ suspicion of repeated bankruptcies played a significant role in determining the outcome in *Re Imlau*, where an individual was declaring bankruptcy for a fourth time.³³³ She had declared bankruptcy about once every ten years, and each time her

³²⁸ *Ibid* at para 24.

³²⁹ *Ibid* at paras 24-25.

³³⁰ Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *Bankruptcy and Insolvency Act*, 4th ed (Toronto, ON: Carswell, 2005) vol 3, 6-214, quoted in *Re Brown*, *supra* note 325.

³³¹ *BLA*, *supra* note 11, s 169(1)-(2).

³³² *Re Pitre*, *supra* note 257 at para 26; see also *Re Lynn*, *supra* note 147 at para 12.

³³³ *Re Imlau* (2010), 64 CBR (5th) 236, 186 ACWS (3d) 23 (ON Sup Ct) Nettie Reg.

financial position had worsened.³³⁴ The judicial officer reasoned that the debtor had not been rehabilitated by her most recent bankruptcy: her budgets showed that her expenses continued to outstrip her income by a significant amount.³³⁵ The judicial officer refused her application for a discharge, on the basis that “ordinary Canadians would be offended by the concept of bankruptcy being used as a decennial debt relief mechanism, as one slips further and further into extravagance and credit abuse.”³³⁶ In *Re Pitre*, the bankrupt made his third assignment into bankruptcy – all three assignments had been caused by the bankrupt’s inability to manage money, although the third assignment differed in that a gambling problem was also a contributing factor.³³⁷ The judicial officer was concerned that the individual had not yet “rounded the corner” either with respect to his gambling addiction or his problems with financial mismanagement.³³⁸ The judicial officer refused his discharge, and directed the bankrupt to reapply for his discharge after a year spent demonstrating that he had addressed both his issues.³³⁹

3.2.4.2.2. DISHONESTY & MANIPULATION

One of the most straightforward examples of abusive behavior is a debtor who is deliberately dishonest with a trustee or judicial officer. Bankrupts sometimes misstate their financial position because they misunderstand it or have forgotten important details – for instance, bankrupts, who have established a registered education savings program (“RESP”) to benefit a child, often do not consider the RESP to be their asset, but rather their child’s asset. Judicial officers make allowances for such moments of genuine confusion, but where

³³⁴ *Ibid* at para 5.

³³⁵ *Ibid* at paras 8-9. It should be noted that the bankrupt lived on a very modest disability pension of \$1250 per month.

³³⁶ *Ibid* at paras 9, 11.

³³⁷ *Re Pitre*, *supra* note 257 at paras 3-4.

³³⁸ *Ibid* at paras 31-33.

³³⁹ *Ibid* at paras 35-36.

deliberate dishonesty is established on the facts, they can be unforgiving.³⁴⁰ For instance, in *Re Rahman*, the bankrupt had been caught lying. He had failed to disclose a house sale and purchase made by his wife during his bankruptcy. Based on the respective income of the spouses, the judicial officer suspected that the bankrupt had contributed significantly to the wife's houses.³⁴¹ In justifying why a firm response was merited, the judicial officer advanced a "broken window theory of perjury." Broken window theory, developed by criminologists in the 1980s, "stands for the proposition that one broken window in a neighbourhood leads to an inference that the neighbourhood is uncared for and attracts further vandalism, resulting in a downward spiral for the condition and liveability of the area."³⁴² The judicial officer identified a similar pattern in the justice system, where "ignor[ing] even a small lie... leads to inferences being drawn by others that the system is uncared for, and in a sort of shambles. This attracts others to lie, on the theory that no one is looking or policing the system, and that they can get away with it."³⁴³ Like windows in a neighbourhood, lies in the justice system must be repaired "to send a strong and imperative message to all members of society that our justice system is kempt, policed, cared for and vigilant. This inspires truthfulness by all, and discourages untruthfulness by any."³⁴⁴ The judicial officer went on to note that the bankrupt's failure to be forthright was also a breach of his duties, and an insufficient response by the court would lead "to a disdain and general contempt by others for the performance of those duties if judged by them to be onerous or inconvenient."³⁴⁵

³⁴⁰ Though see in *Re Hoffman*, 2008 SKQB 363 at paras 5-6, 325 Sask R 278, Schwann Reg, where the judicial officer held that the lack of full disclosure, even if unintentional, was serious and could not be condoned without calling the integrity of the bankruptcy system into question. The bankrupt had failed to disclose a debt to his trustee because he thought it was time barred – the debt in questions was a criminal compensation order made 18 years earlier in connection with a fraud conviction arising from a previous bankruptcy.

³⁴¹ *Re Rahman*, *supra* note 210 at para 72.

³⁴² *Ibid* at para 51.

³⁴³ *Ibid* at para 53.

³⁴⁴ *Ibid* at para 54.

³⁴⁵ *Ibid* at para 56.

The judicial officer refused the discharge and directed the Attorney General to explore charging the debtor with perjury.³⁴⁶

As the judicial officer noted in *Re Rahman*, dishonesty evidences a lack of respect by the debtor for the bankruptcy system, but by failing to disclose an asset, a debt or a transaction, a debtor also hampers the operation of the system. A trustee cannot realize upon an asset or impeach a transaction if he or she is unaware of its existence. A creditor who is not included on the statement of affairs may miss out on a distribution from the estate, unless alerted to the existence of the bankruptcy proceedings through some other means.

Bankrupts can also impede the operation of the bankruptcy system by arranging their affairs to shield assets from being realized upon by the trustee or minimizing their income so as to avoid or reduce mandatory payments into the estate. *Re Martino* illustrates how bankrupts might attempt to shield their pre-bankrupt assets from their creditors. The bankrupts were brothers, who made assignments into bankruptcy after their business failed. They had guaranteed a number of the business' debts. The brothers had received monthly dividends from the business of \$25,000 for a number of years prior to its failure, even once

³⁴⁶ *Ibid* at paras 59, 82. In *Re Mathew* (2007), 39 CBR (5th) 21, 162 ACWS (3d) 537 (ON Sup Ct) Nettie Reg, the bankrupt admitted to lying under oath with respect to a real estate transaction prior to bankruptcy. The judicial officer noted, para 7 that it could “conceive of few acts so striking to the heart of the administration of justice in this country or the integrity of the justice system than the act of perjury.” In *Re Mott*, *supra* note 131, the bankrupt had not been honest with his trustee – failing to disclose a construction business started by the bankrupt in Florida. The judicial officer refused the discharge application, noting it was impossible to craft a discharge order that would protect the integrity of the system until the full facts of the bankrupt’s financial situation were known, paras 16-17. In *Re Conforti*, 2012 ONSC 2656 at paras 45-47, 91 CBR (5th) 144 (ON Sup Ct) Spence J, the bankrupt had failed to disclose to his trustee that he was the plaintiff in a motor vehicle accident. The trustee characterized this as a breach of the bankrupt’s duties, and therefore a fact under section 173(1)(o) of the *BLA*, *supra* note 11.. To preserve the integrity of the bankruptcy system in the face of this dishonesty, the judicial officer made the debtor’s discharge conditional on payment of \$15,000 – in addition to the debtor’s surplus income payments. See also *Re Sachdeva* (2008), 173 ACWS (3d) 45 at para 20, 2008 CarswellOnt 7097 (ON Sup Ct) Nettie Reg; *Re Hosseini*, *supra* note 218 at para 16; *Re Hardtke*, *supra* note 319 at para 19.

the company was experiencing extreme financial distress.³⁴⁷ The brothers claimed that these amounts had been spent entirely on living expenses, with no assets or savings left for their creditors.³⁴⁸ The trustee produced evidence that the brothers lived extravagantly, both prior to and following their assignment. The brothers claimed they were being supported by their wives. The judicial officer concluded that the large dividend payments had been diverted to the wives through a number of complex corporate and trust transactions.³⁴⁹ The judicial officer characterized the brother's conduct as "drastic steps" taken in anticipation of bankruptcy "to ensure that their eventual bankruptcy would find them without assets, yet the family assets would be sufficient to maintain the prior standard of living."³⁵⁰ To preserve the integrity of the bankruptcy process, the judicial officer conditioned their discharges on repayment of \$300,000 each.³⁵¹

Schemes by bankrupts to subvert the bankruptcy process – by putting assets out of the reach of the trustee – can be very difficult to uncover.³⁵² Consequently, judicial officers will take the position that when a debtor is found to have participated in such a scheme, the

³⁴⁷ *Re Martino*, *supra* note 320 at paras 7, 12. The evidence was that the debtors continued to direct these payments to themselves even after the company stopped remitting employee deductions to the government.

³⁴⁸ *Ibid* at para 7.

³⁴⁹ *Ibid* at para 8.

³⁵⁰ *Ibid* at para 28.

³⁵¹ *Ibid* at para 40-42. See also *Re Chronopoulos*, *supra* note 211 at para 22 where one of the reasons why the judicial officer imposed harsh discharge conditions on the bankrupt was that he had diverted funds from a company that he owned to a company owned by his niece, in which he had an undisclosed equitable interest. See also *Re Hardtke*, *supra* note 319 at paras 69-70, 127-28, where the judicial officer found that the bankrupt and his wife had entered into a sham separation to reduce the value of the bankrupt's assets at a time when he owed significant amounts to CRA.

³⁵² See *Re Centurami* (2009), 177 ACWS (3d) 627 at paras 8, 14, 2009 CarswellOnt 2843 (ON Sup Ct) Nettie Reg, where the bankrupt's application for discharge was refused after the judicial officer found a "legion" of grounds under section 173 and other instances of misconduct, including that the had "cooked up a scheme to defeat his creditors" by transferring his "failed" company to his brother.

judicial officer will only grant the discharge on very harsh conditions – or refuse it altogether - to deter other individuals.³⁵³

Creditors in a bankruptcy are not limited to the assets of the debtor at the time of bankruptcy, they may also receive distributions as a result of surplus income payments made into the estate over the course of the bankruptcy. Debtors may attempt to avoid such payments by manipulating their affairs, especially when they have the flexibility to set their own level of compensation. For instance, in *Re Hardtke*, the bankrupt was employed in a chiropractic clinic owned by his wife – he had transferred the clinic to her shortly before his assignment into bankruptcy. Under the new arrangement, he was receiving an annual salary from the clinic of \$52,000. The judicial officer found that there was a collusive agreement in place to keep the bankrupt’s salary artificially low, imputed the bankrupt an annual income of \$110,000, and made the bankrupt’s discharge subject to a number of conditions, including payment of \$75,000.³⁵⁴

Debtors may lack the sophistication or flexibility to arrange their financial affairs so as to maintain an artificially low salary; however, they may simply make less effort to earn money, remaining un- or under-employed for the period of the bankruptcy. For example, in

³⁵³ *Re Olivar* (2009), 183 ACWS (3d) 30 at para 17, 2009 CarswellOnt 7848 (ON Sup Ct) Nettie Reg.

³⁵⁴ *Re Hardtke*, *supra* note 319 at paras 74-84. See also *Re Maxwell*, *supra* note 256, where the debtor was working as an insurance adjuster for a company owned by his wife. The compensation arrangement with the company provided that his wife received a salary 150% the size of the debtor’s, though by his own admission he had much more experience as an insurance adjuster, paras 7-8. The opposing creditor argued that the debtor was keeping his income artificially low and the judicial officer acknowledged that if the allegations were true, a discharge might be neither in the public interest, nor consistent with the integrity of the bankruptcy system, paras 15, 19. After an adjournment, the judicial officer granted the debtor a discharge conditional on being up to date on all surplus income payments as calculated by the trustee, *Re Maxwell*, 2005 BCSC 23 at para 5, 2005 CarswellBC 23, Pitfield J. The judicial officer was disinclined to adopt a harsher stance because the opposing creditor had done little to investigate its allegations during the period of the adjournment, and the debtor would have made 29 months worth of surplus income payments, well in excess of the 9 months required under the *BLA* at the time, paras 3, 5. See also *Re Spadafora* (2009), 61 CBR (5th) 86 at para 15, 2009 CarswellOnt 7320 (ON Sup Ct) Nettie Reg, where the bankrupt had arranged his affairs prior to bankruptcy so that his “mother in law became the ‘bag man’ for his salary through her corporation.”

Re Stoion, the debtor had not earned any money during the bankruptcy, despite having marketable skills as a truck driver.³⁵⁵ The judicial officer suspended the discharge for a month and made it conditional on payment of \$20,000, indicating that it found “the complete lack of income and of an explanation for earning nothing to be offensive to the concept of the financial rehabilitation of the Bankrupt, and to the integrity of the insolvency system.”³⁵⁶

Bankrupts who lie, shield assets from enforcement or minimize their income during bankruptcy are manipulating the rules in the bankruptcy system to either derive some manner of advantage for themselves – such as getting a discharge more quickly – or deprive their creditors of a benefit, such as increased recovery through surplus income payments. Any attempts to manipulate the bankruptcy system can be viewed as threats to the integrity of the system and may attract a harsh discharge order.³⁵⁷

³⁵⁵ *Re Stoion*, *supra* note 223.

³⁵⁶ *Ibid*, para 11. See also *Re Stergion*, 2005 CarswellOnt 5258 at para 15 (ON Sup Ct) Nettie Reg; *Re Mashaollah* (2007), 161 ACWS (3d) 367 at para 7, 2007 CarswellOnt 6836 (ON Sup Ct) Nettie Reg; *Re Dawood* (2007), 157 ACWS (3d) 250 at para 6, 2007 CarswellOnt 2788 (ON Sup Ct) Nettie Reg; *Nagy v. Minister of National Revenue*, *supra* note 148 at para 55. Reducing one’s work during bankruptcy is also viewed as evidence of lack of rehabilitation: see *Re Kaufman* (2005), 141 ACWS (3d) 365 at para 5, 2005 CarswellOnt 3405 (ON Sup Ct) Nettie Reg, where the judicial officer held that the debtor had “willfully chosen both to stop working at the end of 2003, and to remain unemployed until his bankruptcy is completed” a course of action which the judicial officer felt bespoke “a clear lack of financial rehabilitation.” Drawing a similar link between lack of employment and lack of rehabilitation, see *Re Bromberg* (2005), 13 CBR (5th) 172 at para 15, 141 ACWS (3d) 707 (ON Sup Ct) Nettie Reg.

³⁵⁷ See for example *Re Hudjik*, *supra* note 93, where the TSX Venture Exchange Inc. was pursuing the debtor for a debt resulting from securities trading irregularities.³⁵⁷ TSX believed that this debt was non dischargeable and wanted the bankrupt to receive an absolute discharge so that it could take steps to enforce this debt, para 4. The bankrupt asked to have its discharge suspended for 12 months or conditioned on making a further 12 months of surplus income payment, indicating that he wanted a years’ reprieve from his the enforcement activities of those creditors with non dischargeable debts, paras 4-6. The judicial officer rejected the bankrupt’s request on the basis that it was improper to suspend a discharge for the purpose proposed by the debtor. The judicial officer noted, para 15: “Section 178 creditors maintain the kind of claims which society through Parliament, consider to be so egregious as to allow them to survive the normal bankruptcy discharge

3.2.4.2.3. WINDFALL BENEFIT

Bankruptcy is intended to give the individual debtor a fresh start. Exemptions advance this goal by allowing the debtor to retain a minimal amount of property, which the debtor can then use to support him or herself and earn an income. Sometimes, a technical application of these rules results in the debtor receiving a windfall benefit, such as when a bankrupt is entitled to retain a valuable piece of exempt property. The retention of valuable property amounts to a windfall for the debtor, because the bankruptcy system generally only allows the debtor to retain the bare necessities to support him or herself. The remainder of the debtor's property is realized upon for the benefit of the creditor. The limited nature of the debtor's exemptions ensures that a balance is maintained between rehabilitating the debtor and recovering value for creditors. Judicial officers have articulated a concern that debtors receiving a windfall benefit may undermine public confidence in the operation of the system. When creditors are asked to forego on their right to collect on debts, it seems inequitable to allow a debtor to retain valuable property. If the bankruptcy system allows this result, it appears to be unfairly balanced, favouring the debtor's fresh start at the expense of the creditors.

order. Society would be offended if the Bankruptcy Act were utilized for a purpose not intended by the legislators (i.e., protect the bankrupt from section 178 creditors).” Another example of manipulative use of the rules is in *Re Green*, *supra* note 146, add'l reasons at (2005), 9 CBR (5th) 226, 2005 CarswellOnt 1244 (ON Sup Ct) Sproat Reg, where the bankrupt had previously had his discharge conditioned on payment of \$100,000. The bankrupt applied to the judicial officer for clarification as to whether he could have his discharge conditioned on consenting to judgment in favour of the trustee in the amount of \$100,000. The bankrupt indicated that he could not presently pay the \$100,000 and planned to apply to vary the conditions of his discharge after a year, but in the meantime wanted to consent to judgment so as to receive a discharge. The judicial officer rejected this request, finding that it would impair the integrity of the bankruptcy system “if the court were to allow the bankrupt to consent to judgment, obtain an absolute discharge and be released of his pre-bankruptcy debts, all the while having no intention to comply with the condition of payment imposed by the court on his discharge application.” On a similar note, the court is not receptive to an application to vary an discharge order that is conditional upon payment of an amount, when the individuals have made little or no effort to pay the order: “to vary [an] order that has thus far been disrespected... would not lead to respect for the administration of justice in matters of insolvency.”

The problem of the windfall benefit arose in *Re Biblow*.³⁵⁸ The bankrupt had declared bankruptcy with unsecured liabilities of approximately \$245,000 and assets of \$838,000 including exempt RRSPs of \$765,000. Although the bulk of these RRSPs had been built up over a long period of time through regular contributions, and a pension roll-over, the bankrupt had also borrowed approximately \$20,000 in the year before bankruptcy and deposited these amounts into his RRSP.³⁵⁹ The bankrupt was described as a “seasoned employee in the financial lending sector” and the judicial officer inferred that he likely was familiar with personal exemptions and knowingly built up his exempt assets with borrowed funds while insolvent.³⁶⁰ While recognizing that exemptions play an important role in rehabilitating a bankrupt – and in this case the bankrupt was a 61-year-old man with limited opportunities for further employment – the judicial officer reasoned that the integrity of the bankruptcy system must take precedence because “reasonable people would be offended if the bankrupt... were to exit bankruptcy with such a sizeable amount of exempt assets.”³⁶¹ His discharge was made conditional on payment of \$26,000 – an amount reflecting the RRSPs acquired in the year prior to bankruptcy with loan funds, and unpaid surplus income.³⁶²

One reading of *Biblow* is that the presiding judicial officer was concerned that the debtor had deliberately arranged his affairs prior to bankruptcy, and this is less a case about windfall benefits than manipulative behavior,³⁶³ however, it was used as precedent by a

³⁵⁸ *Re Biblow*, 2009 SKQB 76 at para 2, 333 Sask R 95, Schwann Reg.

³⁵⁹ *Ibid* at paras 6, 20.

³⁶⁰ *Ibid* at para 36.

³⁶¹ *Ibid* at para 35. See also *Re Brown*, *supra* note 325, where the bankrupt was set to emerge from bankruptcy with \$500,000 in exempt assets relating to a farming operation and an off-farm income of \$120,000 to \$130,000. Even though the bankrupt had engaged in no misconduct, the court felt it would “offend the majority of people” for the debtor to emerge with such valuable exempt assets, and imposed a conditional payment of \$70,000, paras 30, 36.

³⁶² *Re Biblow*, *ibid* at para 43.

³⁶³ An alternate reading is that he was a won't pay, as opposed to a can't pay, as the value of his assets far exceeded his debts.

judicial officer to deny a debtor a windfall benefit in a subsequent case. In *Re Nebaj*, the debtor had declared bankruptcy with a vehicle worth \$18,250.³⁶⁴ Prior to the bankruptcy, a large loan was secured against the vehicle, but because the loan had not been properly registered, the lender's security interest was subordinated to the trustee when the debtor made his assignment into bankruptcy.³⁶⁵ The trustee could not realize against the vehicle, because it was exempt under provincial law. Referring to *Biblow*, the judicial officer noted that when a debtor is set to emerge from bankruptcy with a valuable exempt asset, repayment may be necessary to protect the integrity of the system, but the payment should not be so large as to reduce the debtor's exempt assets below the "bare minimum... required to assist him in becoming rehabilitated."³⁶⁶ At the time the debtor made his assignment into bankruptcy, provincial legislation in Saskatchewan did not place a ceiling on the value of a vehicle that a debtor could claim as exempt, but by the time of the discharge hearing the legislation had been amended to cap the value of an exempt vehicle at \$10,000.³⁶⁷ Even though the earlier exemption legislation applied to the debtor, the judicial officer conditioned the debtor's discharge on payment of \$8,250, reasoning that, having regard for the amendments, a "reasonable person" would now consider a \$10,000 exemption to constitute the "bare minimum" required for rehabilitation.³⁶⁸

³⁶⁴ *Re Nebaj*, *supra* note 141.

³⁶⁵ *Ibid* at para 2. Unperfected security interests are subordinated to the trustee's interest at the time of bankruptcy because of the operation of s 20 of the *Personal Property Security Act 1993*, SS 1993, c P-6.2.

³⁶⁶ *Re Nebaj*, *ibid* at para 25, quoting from *Re Biblow*, *supra* note 358 at para 26. The creditor in *Deloitte & Touche v. Estell*, 2009 SKQB 226, 338 Sask R 201, Schwann Reg, made a similar argument – that the debtor had a valuable matrimonial property claim which she had not pursued prior to her assignment, and it would bring the integrity of the bankruptcy system into disrepute if she was allowed to exit bankruptcy without making a contribution towards the creditors notwithstanding the availability of the matrimonial claim, paras 38-39. The Court disagreed, noting that in this case the bankrupt's matrimonial property claim was too uncertain to be analogized to an exempt asset, and the bankrupt was granted an absolute discharge, paras 40-46.

³⁶⁷ *Re Nebaj*, *ibid* at para 36.

³⁶⁸ *Ibid* at paras 38-42.

Windfall benefits can arise elsewhere as a result of the technical application of rules. For instance, in *Re Dugas* the bankrupt was entitled to retain a valuable license to fish crab, because it was not characterized as property and so did not pass to the trustee.³⁶⁹ Despite not owning the license, the bankrupt could earn an income from it, or alienate it for a substantial profit as soon as he emerged from bankruptcy.³⁷⁰ The judicial officer held that “public interest in the proper administration of the Act would be offended were the bankrupt to receive a discharge and be able to immediately thereafter resume business as successfully as before or alienate a right in consideration of a substantial profit while making no provisions for creditors.”³⁷¹ The judicial officer suspended his discharge for a year, and made it conditional on the debtor making surplus income payments to the trustee and – if the license was sold during the year long suspension - the debtor would be required to pay either 30% or 70% of the sale price to the trustee, depending on whether sale was arm’s length or not.³⁷²

3.2.4.2.4. EFFORT

Bankrupts do not need to engage in active wrongdoing to attract censure from judicial officers, the written decisions from application for discharge hearings reveal judicial antipathy towards bankrupts who are not making an effort to improve their financial situation. Bankrupts receive a significant benefit in bankruptcy, the discharge, and judicial officers want to see that a bankrupt is taking initiative to make the most of this benefit. The

³⁶⁹ *Re Dugas*, *supra* note 165 at paras 23, 25. The judicial officer held that the license was not property that vested with the trustee on the bankrupt’s discharge because the federal government retained ownership of the license. In *Re Saulnier*, 2008 SCC 58, [2008] 3 SCR 166, the Supreme Court of Canada held that fishing licenses should be characterized as property. In two cases currently before the Supreme Court of Canada *Moloney v. Alberta*, *supra* note 248 and *Canada v. 407 ETR Concession Company Limited*, *supra* note 248, the court was asked to opine on drivers’ licenses. The question in both cases is whether a discharged bankrupt can be denied a driver’s license on the basis of non-payment of a discharged debt. A driver’s licenses is not transferrable, and therefore has no re-sale value. It does not raise the same types of concerns about the debtor receiving a windfall benefit, as does a fishing license.

³⁷⁰ *Re Dugas*, *supra* note 165 at paras 23, 25. See also *Re Saulnier*, *supra* note 369.

³⁷¹ *Re Dugas*, *ibid* at para 27.

³⁷² *Ibid* at para 35.

underlying ethos could be summarized by modifying a familiar saying: bankruptcy helps those who help themselves. Passive debtors might be more likely to end up back in financial distress, because they have made no effort to address the underlying causes of their current distress. An outside observer might conclude that the benefit of the discharge – and the concomitant costs – are wasted on the passive debtor.

One way that bankrupts can show that they are making an effort is by reducing their spending while in bankruptcy. For instance, in *Re Vaccaro*, the judicial officer found it offensive that the debtor’s lifestyle had not changed after his assignment, even though his budget revealed monthly discretionary spending of \$855.³⁷³ The judicial officer noted that while a bankrupt is not expected to be “stripped of his last shirt buttons, he is expected to tighten his belt and make meaningful contribution to his creditors.”³⁷⁴

The debtor’s effort is specifically incorporated into a number of tests that may affect a debtor’s access to a discharge. A bankrupt’s efforts to pay his or her tax debt is one of the four factors a judicial officer is directed to consider when a personal income tax debtor applies for a discharge.³⁷⁵ A debtor who applies to discharge a government student loan on hardship grounds must show that he or she has acted in good faith with respect to the loans, which includes having made an effort to pay them.³⁷⁶ When faced with a request to vary a conditional order, one of the factors a judicial officer will consider is “whether or not there is evidence that the bankrupt has made a *bona fide* effort to comply with the discharge order.”³⁷⁷ In *Re Kanovsky*, the bankrupt was applying to vary a conditional discharge order.³⁷⁸

³⁷³ *Re Vaccaro*, *supra* note 325 at paras 14, 21.

³⁷⁴ *Ibid* at para 21; see also *Re Jabs*, *supra* note 163 at paras 69, 84; *Re Lynn*, *supra* note 147 at para 56.

³⁷⁵ *BLA*, *supra* note 11, s172.1(4)(b).

³⁷⁶ *Ibid*, s 178(1.1)(a); see e.g., *Re West*, 2009 SKQB 400 at para 16, 61 CBR (5th) 232, Schwann Reg, citing *Re Minto* (1999), 191 Sask R 1 at para 62, 14 CBR (4th) 235 (QB) Herauf Reg.

³⁷⁷ *Re Mossman*, 2005 BCSC 155 at para 11, 137 ACWS (3d) 477, Dorgan J, quoting *Peat Marwick Thorne Inc. v. Elliot* (1994), 29 CBR (3d) 174, 52 ACWS (3d) 250 (BC SC) Wilson J; *Re Kanovsky*, 2005 MBQB 264 at para 10, 199 Man R (2d) 178, Sharp Reg, quoting *Re Cowie* (1991), 6 CBR (3d) 227, 1991 CarswellOnt 194 (ON Ct J (Gen Div)) Farley J; *Re Estrin*, 2005

In the 5 years since the order was made, the debtor had made no payments towards the conditional amount. The judicial officer held that “the failure of the bankrupt to make *any* payments whatsoever to this estate since the order was pronounced suggests... a flagrant disregard by the bankrupt both for his creditors as well as for this system” (emphasis in original).³⁷⁹ To protect the integrity of the bankruptcy system, the judicial officer refused the application to vary the condition.³⁸⁰

3.2.4.2.5. ATTITUDE

Previously, in this chapter, I outlined how judicial officers will consider a debtor’s attitude when determining whether or not a debtor has been sufficiently rehabilitated by the bankruptcy process. A debtor’s attitude is also treated as a metric of deservingness when the judicial officer is primarily concerned with maintaining public confidence in the insolvency system, but the reasons for examining the debtor’s attitude shift. The judicial officer is not solely concerned about what the debtor’s attitude reveals about the extent to which the debtor has been rehabilitated, but what conclusions an outside observer might draw about the integrity of the bankruptcy system from the debtor’s attitude. The outside observer may also be concerned with debtor rehabilitation, and expect that discharges should only be available to those debtors, whose attitudes are consistent with rehabilitation. Alternatively, the outside observer may want the debtor to acknowledge that a significant benefit has been bestowed on the debtor by the bankruptcy process, and that this benefit comes at a cost to other people. The debtor may convey such an acknowledgment by showing some mix of shame and gratefulness. Were outside observers to see flippant, contemptuous, or indignant debtors easily accessing discharges, it would likely reinforce their anxiety that the bankruptcy system is rife with abuse.

ABQB 234 at para 18, 382 AR 90, Veit J, quoting *Re Whyte* (1980), 35 CBR (NS) 194 at para 20, 1980 CarswellOnt 172 (ON SC) Henry J.

³⁷⁸ *Re Kanovsky*, *supra* note 377.

³⁷⁹ *Re Kanovsky*, *ibid* at para 27.

³⁸⁰ *Ibid* at para 28.

Judicial officers are alive to the types of inferences an outside observer might draw from a debtor's attitude, and consequently limit the availability of a discharge where a debtor fails to display appropriate amounts of remorse, respect, seriousness and gratitude. In *Re Zuk*, the bankrupt had failed to be forthright with his trustee and the judicial officer, and had evidenced a "flippant manner", which suggested a "lack of regard and respect for the discharge hearing and the insolvency process."³⁸¹ For instance, when asked why he had failed to disclose a number of his creditors on his statement of affairs, the bankrupt's response was that he thought he already had enough creditors on the list.³⁸² The judicial officer concluded that "where the Bankrupt presents as altogether too flippant and lacking in regard for the process, as well as having been evasive and less than truthful with both the Trustee and the court, I am of the view that the integrity of the insolvency system requires the application to be refused."³⁸³ Likewise, the judicial officer presiding in *Re Hosseini* was unimpressed with the "cavalier attitude" of the bankrupt. When confronted with evidence he had gambled after declaring bankruptcy, the bankrupt replied that, because the casino he attended was in the United States, he did not think it counted.³⁸⁴ In *Re Lynn*, the judicial officer was of the view that "the bankrupt [had] shown himself to be contemptuous of his trustee, his creditors, and ultimately, of the bankruptcy process as a whole."³⁸⁵ His attitude had been demonstrated by failing to fulfill his duties in the bankruptcy, including he had not revealed two previous bankruptcies to this trustee, he did not assist the trustee with realizing his assets, he failed to advise the trustee when he moved, he had not attended counselling and he had made no voluntary payments towards his estate despite earning a significant income (with his monthly income ranging from \$4,500 and \$17,000, depending on the year).³⁸⁶ In addition to his non-cooperation, the judicial officer censured the bankrupt for

³⁸¹ *Re Zuk*, *supra* note 156 at para 10.

³⁸² *Ibid* at para 10.

³⁸³ *Ibid* at para 16.

³⁸⁴ *Re Hosseini*, *supra* note 218 at paras 9-10.

³⁸⁵ *Re Lynn*, *supra* note 270 at para 127.

³⁸⁶ *Ibid* at paras 12, 114-5, 123, 128.

refusing to accept blame and instead deflecting it onto the trustee and the inspectors.³⁸⁷ The bankrupt argued that they had not acted objectively, resulting in a prolonged and confrontational bankruptcy.³⁸⁸ The judicial officer disagreed, and adjourned the discharge application for six months to give the bankrupt an opportunity to demonstrate that he was prepared to fulfill his duties under the *BLA*.³⁸⁹

Judicial officers have adopted a wide view of what types of conduct risk undermining the integrity of the bankruptcy system, ranging from people who actively work to game the rule or are deliberately dishonest, to those who derive unexpected benefits from a technical application of the rules, passively acquiesce to being released from their debts, while doing little to avoid future financial difficulties, or display an insufficiently penitent attitude. Judicial officers are concerned with weeding out behaviours that undermine the efficient and fair operation of the bankruptcy system, but also with bolstering public confidence that the bankruptcy system operates in a fair and efficient manner.

3.2.5. BANKRUPTCY AS AN EXPRESSION OF IMPORTANT VALUES

3.2.5.1. SCHOLARS

Some scholars argue that the bankruptcy system is important because it expresses values that lie at the heart of the democratic ethos. Karen Gross suggested that the bankruptcy discharge promotes human dignity by clarifying that people will not be forced to labour indefinitely to pay off their outstanding obligations.³⁹⁰ Jukka Kilpi constructed a rationale for the discharge starting from the premise that the core attribute of being human is one's autonomy to choose between different courses of action. Human autonomy includes the ability to fetter the scope of one's future choices, but also limits the extent to which a community should allow such future choices to be fettered: a person can enter binding contracts, but a person cannot give a morally binding promise that completely denies a

³⁸⁷ *Ibid* at paras 120, 130.

³⁸⁸ *Ibid* at para 56.

³⁸⁹ *Ibid* at para 137.

³⁹⁰ Gross, *supra* note 194 at 100.

person's autonomy. A contract, voluntarily arrived at, to be another's slave would not be enforceable because it denies the slave's autonomy. Kilpi likened over-indebtedness to voluntary slavery because the debtor's existence becomes purely instrumental, geared towards repayment of his or her creditors. At this stage, the debtor's obligations to repay are no longer morally enforceable because they infringe too onerously on the debtor's autonomy: the discharge safeguards an individual's autonomy.³⁹¹

3.2.5.2. JUDICIAL OFFICERS

Judicial officers will often use discharge hearings for expressive purposes. Judicial officers share Gross and Kilpi's language or morality, but their stance is more punitive than aspirational. They seek to sanction behavior that they consider egregious or to require the payment of debts to which they attach some particular significance. This expressive approach is typified by the case law on pre-bankruptcy fraudulent conduct and family law debts.

3.2.5.2.1. PRE-BANKRUPTCY FRAUDULENT CONDUCT

The *BLA* provides a number of mechanisms by which fraudulent conduct can be censured. Fraud is a ground for opposition under section 173.³⁹² A debt arising from a fraud a person committed while acting in a fiduciary capacity is non-dischargeable, as is a debt resulting from services or credit fraudulently obtained.³⁹³ A number of fraudulent behaviors are offences under the *BLA* or the *Criminal Code*.³⁹⁴ Where a debtor has engaged in fraudulent behavior prior to bankruptcy, a judicial officer may impose a harsh discharge condition – or refuse the discharge – to sanction the debtor and denounce his or her conduct. For example, in *Re Lok*, the bankrupt operated a travel agency and had defrauded a number of customers, resulting in a conviction under the fraud provisions of the *Criminal Code*, an 18-month conditional sentence and non-dischargeable restitution orders totaling

³⁹¹ Jukka Kilpi, *The Ethics of Bankruptcy* (New York: Routledge, 1998).

³⁹² *BLA*, *supra* note 11, s 173(1)(k).

³⁹³ *Ibid*, s 178(1)(d), (e).

³⁹⁴ E.g., see *BLA*, *supra* note 11, s 198(1)(a), (e), (f); *Criminal Code*, *supra* note 56, s 380.

approximately \$25,000.³⁹⁵ The bankrupt had a very limited ability to pay any amounts in addition to the restitution orders, and so a sizeable conditional order would undermine her rehabilitation, but the judicial officer held that “the public must have some assurance that the bankruptcy system and the judicial oversight brought to bear at the discharge stage, are responsive to and appropriately address situations where reprehensible conduct occurs.”³⁹⁶ The bankrupt was granted a discharge suspended for 36 months and conditional on payment of \$10,000.³⁹⁷

Fraud is of particular concern to judicial officers when it is carried out by someone who occupies a position of trust in society, such as a lawyer. In *Re Wirick* a lawyer had engaged in a large mortgage fraud scheme resulting in hundreds of claims against the Law Society of British Columbia’s Special Compensation Fund with a total value in excess of \$40 million. At a hearing in 2005, the judicial officer opted to delay making a final determination on the bankrupt’s application for discharge until the Law Society had finished its audit of the matter.³⁹⁸ The judicial officer felt that it was important to have all the information available when making the discharge order, because of the degree of public interest in the case. The judicial officer characterized the public as having an interest in maintaining commercial morality, and “in the proper operation of a legal system in which residential and commercial real estate transactions take place.”³⁹⁹ When the application for discharge was brought back before the court, the judicial officer granted a discharge to the bankrupt conditional on the bankrupt consenting to judgment in favour of the Law Society of British Columbia in the amount of \$500,000. Although the judicial officer acknowledged that there was little likelihood that the bankrupt would ever be able to satisfy this judgment, he reasoned that

³⁹⁵ *Re Lok*, *supra* note 320 para 3.

³⁹⁶ *Ibid* at para 20.

³⁹⁷ *Ibid* at para 22.

³⁹⁸ *Re Wirick 2*, *supra* note 271 at para 18.

³⁹⁹ *Ibid* para 15.

“the public interest in the trust of lawyers in conveyancing matters is against a discharge without such a term.”⁴⁰⁰

Fraud can be a concern even when it has happened far in the past. In *Re Berenbaum*, a former bankruptcy trustee and chartered accountant declared bankruptcy – his second – after failing to pay taxes for 10 years.⁴⁰¹ His first bankruptcy had resulted from a criminal fraud conviction, and as a result of the conviction, he lost both of his professional designations.⁴⁰² Following his first bankruptcy, he worked as a consultant. During ten years of consulting work, he neither remitted GST nor declared his substantial personal income (~\$100,000/year).⁴⁰³ When the CRA took steps to enforce payment, the debtor made an assignment into bankruptcy.⁴⁰⁴ The judicial officer refused the bankrupt’s application for discharge, indicating that any other outcome threatened to undermine the public’s confidence in the integrity of the system. The previous conviction of fraud was one factor the judicial officer considered in reaching this outcome.⁴⁰⁵

Like the cases discussed in section on bankruptcy as a social safety net, the judicial officers in the fraud cases frame their arguments in terms of the integrity of the system, but these cases are distinguishable in an important respect. In fraud cases, the debtor’s sanctionable conduct is less closely connected to the bankruptcy: they have not attempted to subvert the operation of the bankruptcy process. These cases suggest that the deservingness of a debtor is not adjudged merely as a matter of financial need or cooperation with the system, but also the quality of the debtor’s character. People can engage in behaviors of such a serious nature that they are no longer considered worthy of debt relief.

⁴⁰⁰ *Re Wirick 3*, *supra* note 178 at para 21.

⁴⁰¹ *Re Berenbaum*, *supra* note 214.

⁴⁰² *Ibid* at para 20.

⁴⁰³ *Ibid* at paras 27-28.

⁴⁰⁴ *Ibid* at para 30.

⁴⁰⁵ *Ibid* at para 40.

3.2.5.2.2. FAMILY DISPUTES

When a relationship breaks down, there may be a number of financial obligations flowing between the parties, spousal support, child support, division of property claims, and where the parties have resorted to litigation to resolve matters, costs awards. Some of the financial obligations arising from the breakdown of a family relationship are afforded special treatment in bankruptcy. Spousal and child support payments are non dischargeable in bankruptcy, they are subject to priority pay out from a bankrupt's estate and they are not covered by the bankruptcy stay, so unlike other debts they can be enforced after a debtor makes an assignment into bankruptcy.⁴⁰⁶ Other financial obligations, such as equalization payments, are not caught by these provisions, meaning that they can be discharged through bankruptcy.⁴⁰⁷ Where costs are awarded at the end of a family law trial, they will generally be apportioned between the different types of awards – those allocated to non-dischargeable awards (i.e., support) are also non-dischargeable, whereas those allocated to dischargeable awards (i.e., equalization of property, custody) are dischargeable in bankruptcy. Even when they are not subject to special treatment in the bankruptcy legislation, the court takes a dim view of debtors who attempt to discharge their family law obligations in bankruptcy.⁴⁰⁸

In *Re O'Shaughnessy*, the debtor had moved to Alabama to marry a man she had met on a singles' cruise.⁴⁰⁹ When the relationship broke down, she moved back to Canada. Her husband received a default judgment against her in Alabama for nearly \$65,000 USD, the

⁴⁰⁶ *BLA*, *supra* note 11, s 69.41, 136(1)(d.1), 178(1)(b)-(c).

⁴⁰⁷ *Schreyer v. Schreyer*, *supra* note 97. This is an oversimplification – depending on the operation of provincial law, the creditor-spouse may have a property claim that is not defeated by the bankruptcy

⁴⁰⁸ In *Re Geddes* (2006), 26 CBR (5th) 171 at paras 9-10, 153 ACWS (3d) 25 (ON Sup Ct) Nettie Reg, the bankrupt had entered into a settlement agreement with his ex wife regarding the equalization of property, and then made an assignment into bankruptcy to obtain relief from the equalization payment. The judicial officer conditioned the bankrupt's discharge on payment of \$50,000, which was equivalent to ten years of surplus income.

⁴⁰⁹ *Re O'Shaughnessy* (2009), 177 ACWS (3d) 302, 2009 CanLII 25316 (ON Sup Ct) Nettie Reg.

judgment assigned her liability for a portion of the matrimonial debt.⁴¹⁰ Within weeks of receiving a letter demanding payment of the judgment, the debtor met with a trustee and filed an assignment into bankruptcy.⁴¹¹ The judicial officer faulted the debtor for making no informal or formal repayment proposals prior to making an assignment into bankruptcy, despite having sufficient income to make a viable proposal.⁴¹² The debtor's eagerness to resort to bankruptcy was doubly problematic in the judicial officer's view, because of the public's "stake in ensuring that the *BLA* and this court are not used to shed proper matrimonial debts, where the exercise is solely or predominantly to shed that debt."⁴¹³ Although the court noted that the ex-spouse earned significantly more than the bankrupt (\$120,000 USD per year plus a veteran's disability pension vs. the debtor's income of approximately \$50,000 per year), and the matrimonial debt could also be characterized as a business debt because it stemmed from a failed business venture by the couple, it still felt it was appropriate for the debtor to make some contribution to her estate as a condition of discharge.⁴¹⁴ The judicial officer conditioned the debtor's discharge on payment of \$42,000, which was the amount it expected she would have paid if she made a proposal.⁴¹⁵

A judicial officer adopted a more lenient approach in *Re Butterfield*, where the debtor made an assignment into bankruptcy primarily to avoid payment of a \$35,000 costs award made in favour of her ex-husband.⁴¹⁶ Although recognizing that this was essentially a single creditor bankruptcy and the debtor had made little effort to pay the costs award, the court

⁴¹⁰ *Ibid* at paras 26, 29.

⁴¹¹ *Ibid* at para 29.

⁴¹² *Ibid* at paras 31-32, 34, 39-41. The court determined a proposal would be viable if it provided for repayment at a rate of 30 cents on the dollar.

⁴¹³ *Ibid* at para 58. See also *Re Meehan*, *supra* note 320 at para 24.

⁴¹⁴ *Re O'Shaughnessy*, *supra* note 409 at paras 11, 58. The debtor's net monthly income was \$3,729/mth and she could earn an annual bonus of \$8,000 gross, para 24.

⁴¹⁵ *Ibid* at para 62.

⁴¹⁶ *Re Butterfield*, 2008 BCSC 495 at para 2, 167 ACWS (3d) 457, McCallum Reg. Her total debts amounted to approximately \$41,000.

noted that the relationship between the ex-spouses was marked by animosity and the debtor was probably correct in assuming that her ex-husband would not have been satisfied with anything less than full payment.⁴¹⁷ The court conditioned the bankrupt's discharge on payment of a further \$5,000, which brought her total contributions to her estate to \$14,000.⁴¹⁸

With respect to costs arising from family law litigation, judicial officers have held that “the court process cannot condone a situation where spouses force each other through the financially and emotionally onerous burden of matrimonial litigation, without taking responsibility for the financial consequences of losing.”⁴¹⁹ In *Re Meehan*, a separated couple with two children went through a five-day trial to get a divorce, and to decide corollary issues of support and custody.⁴²⁰ The spouses had initially entered into an agreement governing parenting arrangements, the debtor spouse then sued to overturn this agreement and rejected the creditor spouse's offers of settlement. The family court judge eventually made an order that substantially reflected the initial settlement agreement, and was less favourable to the debtor spouse than the offers of settlement.⁴²¹ The trial judge awarded the creditor spouse costs of \$24,750, \$1,000 of which he attributed to the issue of support and the remainder he allocated to custody and access.⁴²² The \$1000 award was non-dischargeable in bankruptcy, and the remainder of the costs award was dischargeable. The debtor spouse, against whom the cost award was made, assigned herself into bankruptcy about 8 months after the completion of the trial.⁴²³ The judicial officer hearing the discharge application opined that the public had an interest in “family disputes be[ing] settled in ways that

⁴¹⁷ *Ibid* at para 35.

⁴¹⁸ *Ibid* at para 37.

⁴¹⁹ *Re Kiamanesh*, *supra* note 156 at para 70, quoting *Re Underhill*, 2003 BCSC 774 at para 15, 45 CBR (4th) 307, Scarth Reg.

⁴²⁰ *Re Meehan*, *supra* note 320 at para 3.

⁴²¹ *Ibid* at paras 19, 29.

⁴²² *Ibid* at para 4.

⁴²³ *Ibid* at para 8.

minimize the emotional and financial expenses required,” and that the resources spent on litigation could have been better spent on the couple’s children’s cultural and educational activities.⁴²⁴ The judicial officer did not want to set a precedent that would encourage family litigants to pursue expensive litigation with the knowledge that, if unsuccessful, they could avoid a costs award by making an assignment into bankruptcy.⁴²⁵ The debtor spouse was required to pay \$15,000 as a condition of her discharge.⁴²⁶

Family law debt cases could be interpreted simply as single debt bankruptcies, where judicial officers scrutinize the bankruptcy because they doubt the debtor’s genuine financial need. The judicial officer in the *O’Shaughnessy* case voiced exactly this concern. Judicial officers are also aware of how restricting the availability of a discharge for costs awards might encourage family law litigants to resolve their issues without resorting to expensive litigation. But the judicial officers additionally attach special import to family debts. The genesis of these debts is intimate relationships. They are often deeply gendered, with women disproportionately relying on the court system to ensure they are compensated for their contributions to the relationship. Non-payment of the debts can have devastating consequences for the creditor – or the children of the debtor and creditor. Against this background, judicial officers attach a special moral quality to family law debts and display some reticence at discharging them.

⁴²⁴ *Ibid* at paras 26, 30.

⁴²⁵ *Ibid* at paras 31, 35. This is not only a concern in cases where the litigants are ex-partners, the judicial officer expressed a similar concern in *Re Berry* (2008), 41 CBR (5th) 122, 166 ACWS (3d) 10 (ON Sup Ct) Nettie Reg, where a large cost award had been made against the bankrupt as a result of litigation she commenced against her sister-in law regarding the administration of her step-mother’s estate.

⁴²⁶ *Re Meehan, ibid* at para 36. See also *Re Kiamanesh, supra* note 156, where the debtor and his ex-wife had been involved in an 11 day trial over the division of matrimonial property. At the end of the trial, the court awarded costs of \$185,000 against the debtor noting that he had been obstructive during the trial and failed to disclose important evidence. The court also found the ex-wife had an interest in the debtor’s company and referred the matter to a registrar for valuation. The debtor then made an assignment into bankruptcy. Noting that the bankruptcy system should not be used to discharge family law judgments, the judicial officer conditioned the bankrupt’s discharge on payment of \$150,000 and suspended for one year. The amount of the conditional payment was set having regard for the bankrupt’s imputed annual income of \$63,000.

3.3. CONCLUDING THOUGHTS

In the absence of clear direction from the legislation about what makes a debtor deserving of debt relief, judicial officers and potential opponents may turn to case law for direction. Legal actors, who have developed a familiarity with the case law on applications for discharge face two additional sources of confusion. First, a number of the terms used in the case law – like rehabilitation, commercial morality or integrity of the system – are open to multiple interpretations and applications. Ambiguity in the legal vocabulary can obscure what rationales are driving a judicial officer’s reasons. By adopting greater clarity and nuance in how they write about these terms, the legal actors in the bankruptcy system can more precisely communicate with each other about how they conceive of deservingness. Greater clarity and nuance in language may also allow for greater clarity and nuance in how legal actors think about deservingness when exercising their discretion. For example, judicial officers may still disagree about how to dispose of a discharge application so as to best enhance a debtor’s rehabilitation, but they will be able to identify the different interpretations given to the idea of rehabilitation and articulate an intelligible, transparent set of reasons identifying which interpretation they are adopting. One of the aims of this chapter has been to identify where the terminology used in application for discharge hearings becomes problematically imprecise and offer a framework for greater clarity of expression. In Chapter 5, I continue the project of examining the rationales used in bankruptcy by comparing the approach of bankruptcy trustees to three different types of debtors, with how those debtor types are characterized in written case law. This comparative exercise will provide further exposition of how judicial officers deploy the rationales identified in this chapter. It will also illustrate how trustees apply these rationales differently, with a notable focus on rehabilitation and learning.

The second source of potential confusion is that the bankruptcy system is aimed towards serving a number of competing goals, and these may militate in favour of different outcomes in the opposition to discharge process. For example, imagine that an individual was poised to emerge from bankruptcy with a valuable exempt asset. As discussed above, a potential opponent primarily concerned with maintaining public confidence in the operation of the bankruptcy system may be concerned by the bankrupt receiving a windfall benefit, would oppose on that basis, and would ask for a conditional order to show that debtors only

get the benefit of bankruptcy by giving up all property beyond the bare necessities. A potential opponent, primarily concerned with maximizing recovery for the creditors, might oppose and ask for a conditional order that captures some of the value of the exempt asset for creditors. Conversely, a potential opponent committed to the economic rehabilitation of the debtor may disagree with a limit being placed on the individual's fresh start. A potential opponent, who sees the bankruptcy system as a mechanism for expressing important values may differentiate this individual's case from those where the bankrupt has engaged in egregious conduct, such as fraud. By comparison, this individual is less deserving of sanction, and may be entitled to an absolute discharge.

This ambiguity about which outcome is appropriate could be dispelled by according one rationale pre-eminence in the bankruptcy system. Academically, elevating one rationale over the others is a useful exercise, because it allows one to evaluate different aspects of the system on the basis of whether or not they advance the pre-eminent rationale. Practically speaking, this approach may be both difficult and undesirable to implement.

First, it is difficult to imagine the different stakeholders involved in developing bankruptcy legislation – legislators, bureaucrats, lobbyists, scholars, practitioners, and non-profit organizations – agreeing on which rationale should be elevated above the others. Both Iain Ramsay and David Skeel have suggested that bright line rules result when one stakeholder group is able to control the legislative process, whereas legislators adopt more discretionary standards when they are trying to strike a compromise between competing stakeholder interests.⁴²⁷ The manifold goals of the Canadian bankruptcy system may reflect a healthy degree of influence by multiple stakeholder groups.

Second, if one group succeeded in having its preferred rationale widely adopted, the legitimacy of the bankruptcy system may be eroded. Canadian personal bankruptcy law is currently expressively over-determined, meaning that it can be justified according to a number of rationales.⁴²⁸ The downside of this over-determination is that it makes it difficult

⁴²⁷ Skeel, *supra* note 123 at 196; Iain Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003) 53 U Toronto L J 379 at 412 ["Interest Groups"].

⁴²⁸ Dan Kahan, "What's Really Wrong With Shaming Sanctions" (2006) 84 Tex L Rev 2075 at 2085, Kahan argues that shaming penalties in the criminal system failed as an alternative

to predict how the actors in the system will apply the menu of rationales when arriving at decision, but the upside is that a number of different stakeholders can see their world view and interests reflected in the operation of the discharge process. The debtors see themselves being offered a chance at financial redemption, including forgiveness of debts and other supports, such as counselling, to help them avoid future financial failure. The creditors are provided with an orderly system to minimize losses and ensure their equitable treatment. The public is reassured that the system is being policed for abuse, and honest unfortunate debtors are receiving help to address the underlying causes of their financial failure so they can rejoin the economy as labour-producing, goods-consuming, tax-paying members. If any one rationale was elevated above the others, some of the stakeholders may no longer see their interests being protected by the system, and may consequently be less interested in participating in the system, or supporting its continued existence.

But if one accepts that the complexity of rationales for bankruptcy are not only inevitable, but also desirable, that leaves one with the same problem encountered in Chapter 1: how does one ensure consistency and predictability in a bankruptcy system that incorporates such a large element of discretion? I have two answers to this question.

My first answer, upon which I expand in Chapters 4 and 5, is that potential opponents have already significantly narrowed the scope of their discretion. OSB analysts and creditors rarely lodge oppositions. Trustees are more active in lodging oppositions, but they largely restrict themselves to opposing a debtor based on his or her non-compliance during the bankruptcy process. The possibility of an opposition based on pre-bankruptcy conduct remains, but if a debtor fulfills his or her duties during bankruptcy – submitting income and expense reports, attending counselling, paying surplus income – the likelihood of any opposition is low.

My second answer, upon which I expand in Chapters 6 and 7, is that bankruptcy trustees' discretionary power is structured by their emotional labour in a way that injects predictability and consistency into their decision-making process. Bankruptcy trustees are

punishment because they are not expressively overdetermined, whereas incarceration continues to succeed, because it is.

subject to feeling rules, social norms that dictate what emotions they should experience. When their initial emotional response differs from the response mandated by the feeling rules, they may take steps to cultivate a more consonant emotional response. The effort one undertakes to comply with the feeling rules is termed emotional work, when undertaken in one's private life, and emotional labour, when undertaken as part of one's employment. A person may attempt to cultivate an emotional response, which is consonant with the governing feelings rule, by deliberately adjusting one's beliefs about a situation. The beliefs, which a trustee adopts to comply with a feeling rule, may shape the trustee's assessment of a debtor's deservingness and decision about whether or not to oppose. By understanding what feeling rules govern bankruptcy trustees, and the types of beliefs they adopt in an effort to comply with the feeling rules, one uncovers the degree to which a bankruptcy trustee's discretion is predictably and consistently structured by emotional labour. Because feeling rules encourage actors across a system to adopt similar beliefs, they may increase predictability and flexibility in a system, even absent clear direction in the legislation or case law on how one's discretion should be exercised.

4. THE ROLE OF THE TRUSTEE IN BANKRUPTCY

4.1. INTRODUCTION

At two separate moments in the opposition to discharge process, legal actors make a discretionary decision about whether a given debtor deserves debt relief: the potential opponent decides whether or not to lodge an opposition to discharge and then when an opposition is lodged, the judicial officer must decide how to dispose of the application.

This dissertation considers the role of the bankruptcy trustee in the first moment of discretionary decision-making. Trustees merit special attention because they file a significant majority of oppositions. In his empirical study of bankruptcy, Iain Ramsay found that discharges were lodged in 14% of all cases: trustees were the most likely to oppose (in 58.9% of files), followed by creditors (39.0%), and the OSB (2.1%).⁴²⁹ My analysis of data from the OSB suggests that trustees take on an even bigger role in lodging oppositions. In 87.43% of files, where an opposition was filed in 2012 (n=7082), the trustee was the sole opponent. In 94.27% of files, the trustee was one of multiple opponents.⁴³⁰

I have opted to focus on trustees and the decision about whether or not to lodge an opposition as opposed to judicial officers and the decision about how to dispose of a discharge application because trustees are a less well-studied group. Judicial officers are akin to judges and judicial decision-making is a well-studied phenomenon. Additionally, trustees play an important gate-keeping role. Judicial officers only see bankrupts if a trustee – or one of the other potential opponents – files an opposition. Judicial officers are only asked to pass judgment on the deservingness of debtors that opponents have already flagged as potentially undeserving.

I will examine the trustee's exercise of discretion from three different angles. First, I will consider how their exercise of discretion is shaped by process. In this chapter, I synthesize findings from my interviews about the processes by which trustees identify grounds for opposition, and then decide whether or not to lodge oppositions once grounds

⁴²⁹ Ramsay, "Individual Bankruptcy" *supra* note 2 at 69.

⁴³⁰ See Table 1.1 Frequency of Oppositions by Opponent Type, 2012.

have been identified. Second, in Chapter 5, I compare how trustees in my interviews approached three different types of debtors with how those debtor types are characterized in the case law. This comparison illustrates how trustees and judicial officers apply the legislation and case law discussed in Chapters 2 and 3 when fulfilling their respective responsibilities in the opposition to discharge process. It also provides some insight into how trustees think about debtor deservingness in concrete cases. Third, in Chapters 6 and 7, I consider how a trustee's exercise of discretion is shaped by emotional labour. I supplement my interviews with my analysis of data collected by the OSB's data on the 7082 oppositions filed in 2012, and my review of a decade's worth (2003-2013) of written decisions from application for discharge hearings.

This chapter explores the processes by which trustees identify grounds upon which they might lodge an opposition to discharge and the processes by which they decide whether or not to lodge an opposition once they have identified grounds for potentially doing so. Before delving into these procedural topics, this chapter provides some important context to how bankruptcy trustees operate. I explain how a person becomes a bankruptcy trustee, both the formal licensing requirements and the personal journeys my interviewees travelled to become trustees. Then I describe the variety of contexts in which bankruptcy trustees practice, as these contexts shape their work processes. As a final preliminary matter, I explain how trustees are remunerated for administering a bankruptcy file. Business pressures colour the processes adopted by trustees, and so it is important to understand them. In the balance of the chapter, I provide a thick description of the processes by which trustees identify grounds upon which they may oppose a discharge and then make the decision to oppose (or not), followed by reflections on what this description reveals about consistency, predictability, bias and flexibility in the opposition to discharge process.

In the discussion that follows, it bears considering the unique role that trustees play in the bankruptcy system. They are selected by debtors and assist them to navigate the process, but trustees do not act for the debtors. They recover value for the creditors, but trustees do not act for the creditors either. They are neutral intermediaries. Their code of ethics directs them to be impartial, and to provide "full and accurate information" to any

interested party.⁴³¹ The challenge of maintaining this neutral position informs the work processes described in this chapter.

4.2. **BECOMING A TRUSTEE**

How does a person become a bankruptcy trustee? I can offer at least two answers to this question. The first is to outline the formal licensing requirements with which candidates must comply to become trustees. The second is to describe the career trajectories of the interviewees with whom I met.

4.2.1. **FORMAL LICENSING REQUIREMENTS**

The OSB licenses trustees.⁴³² The licensing regime has changed over time. To get a license under the current system, an individual must complete training offered by the Canadian Association of Insolvency and Restructuring Professionals (“CAIRP”), pass an examination before the Oral Board of Examination and satisfy the OSB that they possess “good character.”⁴³³ The training program, called the Chartered Insolvency and Professional Qualification Program progresses through three stages, background knowledge, technical knowledge and applied knowledge, and candidates are evaluated using a mix of assignments, case studies and exams.⁴³⁴ A candidate must also complete the Insolvency Counsellor’s Qualification Course. Once a candidate has completed the training program, he or she must appear and answer questions before the Oral Board of Examination, which comprises a trustee, an insolvency lawyer and a representative from the OSB.⁴³⁵ Trustees who pass their Oral Board exams, practice for 24 months on probation. During this period they must

⁴³¹ *General Rules*, *supra* note 77, s 39.

⁴³² *BLA*, *supra* note 11, s 13.

⁴³³ Office of the Superintendent of Bankruptcy, Directive No 13R5 “Trustee Licensing” (March 17, 2014), s 5.

⁴³⁴ Canadian Association of Insolvency and Restructuring Professionals, “Program Overview”, online: Canadian Association of Insolvency and Restructuring Professionals <http://www.cairp.ca/candidates-to-the-profession/program-overview/> [June 17, 2015].

⁴³⁵ Office of the Superintendent of Bankruptcy, “How the Oral Board of Examination Works” (March 22, 2013) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03055.html> [June 17, 2015].

either practice under the supervision of another trustee or are limited to administering less complex insolvency matters.⁴³⁶

4.2.2. CAREER TRAJECTORIES

Trustees are drawn from a diversity of backgrounds. I asked each of my interviewees about how they ended up working in the insolvency field, and while each trustee had followed a slightly different route, a number of themes emerged.

Many trustees are trained as accountants, and may have an accounting certification.⁴³⁷ Amongst my interviewees, Chartered Accountants were most common, though some were certified as Chartered Management Accountants or Chartered General Accountants. These three designations are in the process of being united under the Chartered Professional Accountant designation.⁴³⁸ A common path was for accountants to start out at a large firm in the audit division, and move into the insolvency division because they did not enjoy auditing, or there were better career prospects in insolvency.

A number of trustees had worked in business prior to becoming trustees. For many – but not all - of these individuals, their careers in business were coupled with training as accountants.⁴³⁹ One interviewee had been working at a company that went through a restructuring and developed an interest in insolvency during that process.⁴⁴⁰ Another

⁴³⁶ Office of the Superintendent of Bankruptcy, Directive No 13R5, “Trustee Licensing”, *supra* note 433, s 20. During the probationary period an unsupervised trustee can administer consumer proposals, summary administration bankruptcies, ordinary administration bankruptcies with less than \$500,000 in unsecured liabilities in and \$15,000 in realizable assets and any other matters approved by the Superintendent.

⁴³⁷ I1, I8, I9, I13, I15, I21, I22, I23, I31, I26, I27, I35, I39 I34; see also I25 who moved into insolvency because he liked how dynamic it was.

⁴³⁸ Chartered Professional Accountants Canada, “Uniting the Canadian Accounting Profession” online: Chartered Professional Accountants Canada <https://www.cpacanada.ca/en/the-cpa-profession/uniting-the-canadian-accounting-profession> [June 17, 2015],

⁴³⁹ I25, I28, I32, I37, I34, I33, I43.

⁴⁴⁰ I33.

explained that one of his reasons for pursuing a career in insolvency was that his family business had gone through a restructuring when he was young. His family had a very positive experience with the insolvency professionals, who managed the process.⁴⁴¹

Accountants are not the only professionals who become trustees. A smaller number of interviewees had legal training prior to moving into bankruptcy, either as lawyers or as legal support staff.⁴⁴² Federal civil servants also transitioned into being bankruptcy trustees, after being exposed to the system while working at the OSB or as an Official Receiver.⁴⁴³

Some of the interviewees had started out at an insolvency firm in a support staff position – such as a receptionist or a file clerk - discovered they enjoyed the work and then trained to become a trustee.⁴⁴⁴ Trustees who had followed this career path tended to be women. They came to bankruptcy with a wide variety of backgrounds, including training in science and human resources.

A final theme that emerged from my interviews was that a number of trustees had come to insolvency because they had a family connection to the industry. Some of my interviewees had parents who were trustees – others had children who had become, or were becoming trustees.⁴⁴⁵ Some interviewees had family members who worked on insolvency matters at financial institutions.⁴⁴⁶ Two had been hired to work at insolvency firms by family friends.⁴⁴⁷ As mentioned previously, one interviewee had been introduced to insolvency early in life when the family business went through a restructuring process.⁴⁴⁸

⁴⁴¹ I35.

⁴⁴² I6, I7, I11, I29, I30.

⁴⁴³ I10, I16, I24, I29, I38.

⁴⁴⁴ I3, I11, I12, I20, I41.

⁴⁴⁵ I9, I5, I8, I24, I42.

⁴⁴⁶ I19, I35.

⁴⁴⁷ I9, I20.

⁴⁴⁸ I35.

4.3. PRACTICE CONTEXT

Trustees practice in the private sector and work on a for-profit basis. Apart from this similarity across the profession, there is significant variation in the contexts in which they practice. Some trustees are self-employed or co-owners of an insolvency practice, others are employees of other trustees or firms. Some work in insolvency-specific practices, others work in the insolvency division of larger, general service accounting firms. A trustee may work alone, in an office with other trustees, or in one office of a multi-office firm to which a number of trustees belong. These multi-office firms may have a regional, national, or even international presence.

In some regions of Canada, like most of Newfoundland, trustees can carry out their meetings with debtors over the telephone.⁴⁴⁹ In other regions, trustees are required to meet with the debtor in person. When a trustee wishes to regularly meet with debtors in more than one location, they may apply to the OSB to license a secondary office, where the trustee will not permanently be a resident. These offices, where no trustee is permanently located, are called non-resident offices.⁴⁵⁰ The trustee may travel to the non-resident offices on a scheduled basis (e.g., once a week for a day, once a month for a day) or only as needed. The non-resident office may be manned by support staff, such as a receptionist or full time estate administrator, or it may only be manned when the trustee is visiting. For trustees, who operate in larger, general practice firms, they may periodically travel to branch offices of their firm that do not have an insolvency practice to meet with debtors.

4.4. GETTING PAID

Trustees are faced with the seemingly daunting task of trying to extract payment from a group of individuals who, by definition, are unable to pay their bills. In this section I outline the legislation that governs how trustees are paid, I describe the types of fee arrangements they enter into with debtors and I discuss how they respond when debtors

⁴⁴⁹ Office of the Superintendent of Bankruptcy, “Designated Areas for Remote Assessments” (June 23, 2014) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03284.html> [June 17, 2015]

⁴⁵⁰ Office of the Superintendent of Bankruptcy, Directive No 28 “Non Resident Office” (August 14, 2009). Interviewees with non-resident offices included: I4, I9, I26, I28.

refuse to pay their trustees or require an extended period of time in which to pay the fees. In some jurisdictions, a trustee can oppose a debtor's discharge if the debtor has not paid all the trustee's fees and the court will make the debtor's discharge conditional on full payment of the fees. This section concludes by outlining the types of considerations that a trustee weighs when deciding whether or not to oppose.

Writing in 2007, Stephanie Ben-Ishai and Saul Schwartz reported that a simple, straightforward bankruptcy in Canada will usually cost at least \$1,500 to \$1,700.⁴⁵¹ More complex bankruptcies will cost more. The method by which a trustee's – or an administrator's – remuneration is calculated depends on the type of insolvency proceeding. A bankruptcy is a summary administration if the debtor is not a corporation and has less than \$15,000 in realizable assets.⁴⁵² A bankruptcy file that does not qualify as a summary file is called an ordinary file. In a review of files in the 1990s, Iain Ramsay found that 98% of files were summary administrations.⁴⁵³

In an ordinary administration bankruptcy, the usual practice is for the trustee to charge fees based on the number of hours spent on the file multiplied by an hourly amount.⁴⁵⁴ The *BLA* caps the amount of the trustee's bill. The trustee's bill is capped at amount equal to 7 ½ percent of the amount the trustee realizes from the debtor's assets. The 7 ½ percent is calculated from the proceeds, after deducting any secured creditors' claims.⁴⁵⁵ The trustee can apply to court for approval to charge an amount in excess of the 7

⁴⁵¹ Ben-Ishai & Schwartz, "Bankruptcy for the Poor" *supra* note 48 at 478. The fee for a simple bankruptcy was reported as being "as high as \$1500" in Canada, Industry Canada, *Fresh Start: A review of Canada's Insolvency Laws* (Ottawa, 2014) at 16, online: Industry Canada [https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/review_canada_insolvency_laws-eng.pdf/\\$file/review_canada_insolvency_laws-eng.pdf](https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/review_canada_insolvency_laws-eng.pdf/$file/review_canada_insolvency_laws-eng.pdf) [June 17, 2015].

⁴⁵² *BLA*, *supra* note 11, s 49(6), 156; *General Rules*, *supra* note 77, R 130.

⁴⁵³ Ramsay, "Individual Bankruptcy", *supra* note 2 at 68.

⁴⁵⁴ Canadian Association of Insolvency And Restructuring Professionals, *CQP Core Knowledge* (April 2012) at 72; see also Office of the Superintendent of Bankruptcy, Directive 27R "Advances of Trustee's Remuneration for Bankruptcies Under Ordinary Administration" (Feb 10, 2010) at para 7(1).

⁴⁵⁵ *BLA*, *supra* note 11, s 39(2).

1/2 percent.⁴⁵⁶

In summary administration bankruptcies, the trustee is paid on a tariff basis. The tariff, set out in the *General Rules* provides that the trustee is to receive a percentage of the receipts, once the secured creditors have been paid out: 100% of the first \$975, 35% of the receipts exceeding \$975 and up to \$2,000, and 50% of any receipts exceeding \$2,000.⁴⁵⁷ In addition, the trustee can claim a number of costs and disbursements, including the initial filing fee of \$75 or \$150, the cost of the two counselling sessions: \$85/session if done individually, \$25/session if done in a group, and a one time court fee for all court services, set at \$50 in summary administration.⁴⁵⁸

There are a number of oversight mechanisms built in to ensure that the trustee is not being overly generous in setting its remuneration. The creditors can set the remuneration of the trustee by vote at a meeting of creditors; however, this requires a level of creditor involvement that is absent in many bankruptcies.⁴⁵⁹ When a trustee is seeking to be discharged after administering a bankruptcy, he or she will send a final statement of receipts and disbursements, which will set out the trustee's remuneration, to the OSB for comment. If the OSB provides a letter of comment on the rate of the trustee's remuneration, the trustee must apply to have its fees reviewed by the taxing officer of the court.⁴⁶⁰ Creditors are also provided with a copy of the final statement of receipts and disbursements and given the opportunity to object to the trustee's remuneration.⁴⁶¹ The court retains the right to increase or decrease the trustee's remuneration in response to an application by the trustee, a

⁴⁵⁶ *Ibid*, s 39(5).

⁴⁵⁷ *General Rules*, *supra* note 77, R 128(1).

⁴⁵⁸ *Ibid*, R 131(2), 132(1)(a), Schedule Part II 1 (a). The filing fee is \$75 for a first time, summary administration and \$150 for all other bankruptcies.

⁴⁵⁹ *BLA*, *supra* note 11, s 39(1).

⁴⁶⁰ *BLA*, *ibid*, s 152(3), (4); *General Rules*, *supra* note 77, R 60, 66.

⁴⁶¹ *BLA*, *ibid*, s 152(5); *General Rules*, *ibid*, R 64.

creditor, or the debtor.⁴⁶² The court will exercise its discretion to reduce the trustee's fees if it is of the opinion that the trustee has not fulfilled its duties in administering the bankrupt's estate.⁴⁶³

The stagnation of trustees' fees was a source of concern for trustees. The tariff for summary files was set in 1998 and has not been raised since then. In 2009, the value of an estate that could be dealt with as a summary administration was raised from \$10,000 to \$15,000, consequently the maximum tariff that a trustee could recover increased from \$5333.75 to \$7833.57.⁴⁶⁴ Trustees can only take advantage of this legislative change on files where debtors have some assets. On low or no-asset files, trustees have not had their fees increased in a long time. One trustee noted, "when your costs of administering the files and paying your staff increase every year, but the fees we get paid haven't changed in two decades, it really doesn't make any sense."⁴⁶⁵

4.4.1. FEE ARRANGEMENTS

If the trustee is able to recover value for the creditors, it can pay its fees out on a preferred basis from the bankruptcy estate.⁴⁶⁶ The trustee recovers value for the estate either by realizing upon non-exempt property of the debtor or by collecting surplus income payments from the debtor. The vast majority of consumer bankruptcies are summary administrations, and there are often very few assets coming into the estate to pay the trustee's fees. In these low asset scenarios, the *BLA* makes some assets available for the estate. Many low-income people receive quarterly goods and services tax (GST) credits or harmonized sale tax (HST) credits to offset the GST or HST that they paid during the

⁴⁶² *BLA*, *supra* note 11, s 39(5); see *Re Sally Creek Environs* (2008), 45 CBR (5th) 90 at para 27-28, 169 ACWS (3d) 251 (ON Sup Ct) Nettie Reg, for a list of factors the court may consider.

⁴⁶³ Frank Bennett, "The Trustee's Role on Discharge Hearings - Taking Responsibility from the Beginning to the End" (2012) 94 CBR (5th) 167 at FN12 and accompanying text; see e.g., *Sally Creek*, *ibid* at para 88-92, where the trustee's fees were reduced from \$240,000 to \$1.

⁴⁶⁴ These amounts do not include fees for counselling or disbursements.

⁴⁶⁵ I1.

⁴⁶⁶ *BLA*, *supra* note 11, s 136(1)(b).

previous quarter. To the extent that this credit is needed to pay for trustee fees, it is non-exempt.⁴⁶⁷ The income tax refund for the year the debtor made an assignment into bankruptcy is also non-exempt.⁴⁶⁸ Trustees may also ask debtors to assign post-bankruptcy tax refunds or tax credits to them, to cover the cost of fees.⁴⁶⁹

Where a debtor has neither assets, nor surplus income to pay the trustee's fees, the trustee will require the debtor to make additional payments to cover the cost of the bankruptcy. Trustees may arrange for a third party, such as a relative of the debtor, to make the payment.⁴⁷⁰ Some trustees require payment of their full fee at the start of a file. One interviewee indicated that requiring payment up front was one way of discouraging debtors from filing for bankruptcy to get the relief provided by the stay, and then disappearing without fulfilling any of their duties.⁴⁷¹ Payment of fees up-front can be cost-prohibitive for debtors, and many trustees enter into payment agreements with debtors, which allow them to spread the cost of the bankruptcy out over a number of months. The payment agreement might provide that debtors will pay off the trustee's fees prior to receiving their discharges, for instance a first-time bankrupt with no surplus income might make 9 monthly payments of \$200 prior to receiving an automatic discharge after 9 months.

A payment agreement that provided for full payment before a debtor's discharge might be an ideal outcome for the trustee; however, there are two situations that preclude this outcome. First, the bankrupt may not make the agreed-to payments. Second, the bankrupt may not have sufficient income to pay the trustee's fees prior to when he or she is slated to receive an automatic discharge. The trustee's approach in either case may depend

⁴⁶⁷ *BLA*, *supra* note 11, s 67(1)(b.1); *General Rules*, *supra* note 77, R 59.

⁴⁶⁸ *BLA*, *ibid*, s 67(1)(c).

⁴⁶⁹ Ramsay, "The Canadian Trustee in Bankruptcy" *supra* note 19 at 428-29; see I3. I10 indicated that the template conditional order in use in his jurisdiction provided that subsequent income tax refunds would be assigned to the trustee, but not subsequent GST credits.

⁴⁷⁰ I6.

⁴⁷¹ I18: "Maybe it makes them think a little bit more seriously about these are your duties, not just you get the protection and then walk away and not comply."

on what province the trustee is operating in, and if that province allows a trustee to oppose a discharge to recover the trustee's fees. In British Columbia and Manitoba, trustees generally cannot seek a conditional order for payment of their fees.⁴⁷² In Ontario, Saskatchewan, Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick, courts will grant trustees conditional orders to secure payment of their fees. In Alberta, trustees have traditionally been able to oppose discharges for non-payment of fees, and this was common practice in Edmonton; however, in Calgary the law was in a state of flux and some fee-based oppositions had been rejected by the judicial officers.⁴⁷³

If a trustee is located in a province where he or she can oppose for non-payment of fees and a debtor does not pay the fees agreed to under the fee agreement, the trustee can apply to the court for a conditional order that makes the debtor's discharge conditional on payment of an amount equal to the outstanding fees. The court order may include provisions that make it easier for the trustee to collect payment of the conditional order amount. An order may empower a trustee to set-off conditional payments against a bankrupt's subsequent tax credits or refunds. If a debtor has surplus income, the court can also make an order allowing a trustee to garnish payments owing to the debtor.⁴⁷⁴

If a trustee is located in a province where he or she cannot oppose for non-payment of fees and the debtor does not pay the fees agreed to under the fee agreement, the trustee's options are more limited. Many trustees reported that where a debtor was not paying its fees

⁴⁷² One trustee practicing in British Columbia thought that some registrars would allow oppositions solely for fees.

⁴⁷³ The two trustees interviewed in Calgary gave conflicting reports over whether the judicial officer would grant a conditional order, when the sole reason for the opposition was non-payment of fees.

⁴⁷⁴ *BLA, supra*, note 11, s 68(13). In Alberta, judicial officers had started raising the bar for inclusion of these enforcement provisions, see I12. Trustees in Alberta use model orders of discharge, that were drafted with input from the Alberta Association of Insolvency and Restructuring Professionals (AAIRP) and judicial officers. AAIRP sent a letter to its membership, advising trustees that judicial officers would only grant orders with the enforcement provisions when the bankrupt had received prior notice. If the trustee was seeking to have subsequent tax refunds applied to the conditional order award, he or she was required to provide the court with reasons for seeking such a provision, see "Update to the AAIRP" distributed to the membership by email, a copy of which is on file with the author.

the debtor had often failed to fulfill other duties, necessitating an opposition.⁴⁷⁵ As long as the debtor remained undischarged, there was the possibility that some further payment might be forthcoming, and some registrars are willing to grant conditional orders requiring payment of the fees where there are additional grounds of opposition.⁴⁷⁶ Some interviewees reported that they would not carry out a second counselling session with a debtor if the debtor was not up-to-date on paying the fees, and a debtor could not receive an automatic discharge until the second counselling session was completed.⁴⁷⁷ One trustee, operating in a jurisdiction that did not allow for oppositions based on fees, reported that he was very frustrated by debtors who complied with all their duties – except payment of the fee agreement - and received an automatic discharge after 9 or 24 months.⁴⁷⁸

Recognizing that some individuals require a longer period of time to pay their bankruptcy fees, the *BLA* was amended in 2009 to allow bankrupts and trustees to enter into an agreement for payment of trustee's fees that will be enforceable after the debtor's discharge.⁴⁷⁹ Normally, any debt owing pursuant to an agreement entered into between a trustee and a debtor before the debtor makes an assignment into bankruptcy would be discharged at the end of the debtor's bankruptcy. This new provision gives debtors and trustees more flexibility to reach a fee payment agreement acceptable to both parties when the debtor has little in the way of savings or surplus income with which it can pay the trustee's fees before the assignment or during the bankruptcy. This agreement is only available where the debtor is a first-time, individual bankrupt, the agreement cannot provide for payments beyond 12 months after the debtor's discharge, and the payments required under the agreement cannot exceed a prescribed amount, currently \$1,800.⁴⁸⁰

⁴⁷⁵ I1, I6, I20, I22, I23, I26, I29, I31, I32, I37, I39.

⁴⁷⁶ I8.

⁴⁷⁷ I4, I14.

⁴⁷⁸ I1.

⁴⁷⁹ *2005 Amendments*, *supra* note 84, s 95.

⁴⁸⁰ *BLA*, *supra* note 11, s 156.1, *General Rules*, *supra* note 77, R 58.1.

Some trustees made use of the post-discharge payment agreement, sometimes called a section 156.1 agreements after the section in the *BLA* that provides for it.⁴⁸¹ Some reviews were positive.⁴⁸² One trustee, who had only used them four or five times, reported that they “seem to work pretty well” and was prepared to make greater use of them.⁴⁸³ Others were more critical. One felt that it was too much of a hassle to comply with the OSB’s rules: “Because, there’s too many conditions on it, so you think you’re going to set it up to get the payment over time, and then various things might happen, some other asset comes in. Now that has to come off. And it just gets too complex.”⁴⁸⁴ Others noted that enforcing the agreement would be an expensive or difficult proposition, so they either opted not to use the agreement or only entered into it with a debtor who had already demonstrated a high degree of compliance.⁴⁸⁵ Many of those who indicated that they used the agreement also indicated that they had not, and would not attempt to enforce one.

In jurisdictions where trustees can oppose based on non-payment of fees, trustees might opt to proceed by way of an opposition and a conditional order rather than a section 156.1 agreement. They would advise the debtor at the outset of the bankruptcy that they wanted to give the debtor a longer period to pay, and so they would be opposing their discharge and getting a conditional order that required the debtor to make any payments outstanding at the time of the application. The debtor would then continue to make payments for whatever period the debtor and the trustee had agreed to, and would receive a

⁴⁸¹ I1, I3, I4, I5, I6 (once), I9, I10, I12, I17, I20, I27, I31, I37, I38.

⁴⁸² I3, I4.

⁴⁸³ I1.

⁴⁸⁴ I32.

⁴⁸⁵ I25 reported he would make a decision at the second counselling session – he would oppose the discharge of debtors who had not been making their payments regularly and enter into a section 156.1 agreement with debtors who had been complying with their duties. I10 would only use the agreement where there were a few hundred dollars outstanding. I9 tried to avoid using them because it was difficult to enforce them. I29 did not use section 156.1 agreements.

discharge once all payments had been made.⁴⁸⁶ The benefit of this approach, as compared to using the section 156.1 agreements, is that the debtor would presumably be more motivated to pay the remaining fees if his or her discharge was conditional on doing so.

Where a debtor has such little income that he or she would experience significant difficulty paying the trustee's fees, the trustee might take the file on at a reduced rate.⁴⁸⁷ One trustee indicated he had two reasons for doing so, it was a way for him to give back to the community, and he might get a more lucrative referral from the debtor in the future.⁴⁸⁸ Another explained her decision to take on low-income clients more philosophically, "there's something in life called karma."⁴⁸⁹ Some of the trustees I interviewed participate in the Bankruptcy Assistance Program, where they agree to administer a bankruptcy for debtors who have been turned down by at least two other trustees.⁴⁹⁰ These debtors often have a very limited ability to pay fees and trustees may negotiate – or end up receiving – fees well below their usual rate.⁴⁹¹

4.4.2. OPPOSITIONS FOR FEES

Even where trustees are able to oppose for non-payment of fees and an individual has not paid the agreed-to fees, the trustee will not always oppose the debtor's discharge. In deciding whether or not to oppose the debtor's discharge for non-payment of fees, trustees consider the impact of non-payment on their own financial bottom line, what non-payment of fees might reflect about the debtor's attitude, the debtor's degree of financial hardship, and how the court might perceive a trustee who brings such oppositions.

⁴⁸⁶ Trustees who indicated they would get a conditional payment order to secure repayment of the fee: I14, I16, I24, I25, I30, I32, I39, I34.

⁴⁸⁷ I7, I9, I10, I20, I26, I32.

⁴⁸⁸ I32.

⁴⁸⁹ I20.

⁴⁹⁰ OSB, Directive Number 20 "Bankruptcy Assistance Program" (August 14, 2009).

⁴⁹¹ Interviewees who indicated they participate in the Bankruptcy Assistance Program: I5, I30.

Trustees were frank about the importance of getting paid for the work they do. They are business people; they need to be able to pay themselves and their staff. One trustee noted, “the registrars and the lawyers agree that a trustee has to be paid. We don’t file the bankruptcies just out of – because it’s a nice thing to do – because there are staff who work on the files.”⁴⁹² A trustee operating in Alberta indicated that because of the generous exemptions in that province, there was less money coming into the bankruptcy estate from the debtor’s assets and so it was imperative that the trustees be able to enforce payment agreements using a conditional order of discharge.⁴⁹³

When trustees are opposing discharges for non-payment of fees, they will often weigh the costs and benefits of opposing: if the amount outstanding fell below a threshold amount, it might not be worth the trustee’s time to bring an opposition.⁴⁹⁴ The amounts under which trustees said they would not bring an opposition ranged from \$200 to half the fees required (~\$900).⁴⁹⁵ One interviewee indicated that she would rarely oppose for non-payment of fees, but did not want debtors to know that she would rarely oppose, in case it resulted in higher levels of deliberate non-payment by the debtors.⁴⁹⁶ Another trustee indicated that she opposed every non-payment of fees “on principal”; not unlike a corporation, who vigorously defends every lawsuit brought against it to deter other plaintiffs.⁴⁹⁷

⁴⁹² I12, see also I24 explaining that they cannot let too many debtors go through without paying their fees or “we won’t be able to pay our payroll. Simple as that.”

⁴⁹³ I14.

⁴⁹⁴ I22, I26, I31.

⁴⁹⁵ I21 will only oppose where it is a large amount, not \$200; I33 set the threshold at \$200 to \$500; I15 set the threshold at \$300-\$400; I36 will oppose if more than \$500 outstanding; I35 will probably not oppose as long as half the fees are paid.

⁴⁹⁶ I33. I37 reported that such a danger may be materializing with respect to section 156.1 agreements: “there’s word in the community, though, that if you let it go for a year and the trustee hasn’t managed to collect on it you’re free and clear. And, uh, occasionally that’s happened.”

⁴⁹⁷ I11.

A bankrupt's commitment to pay fees is viewed by trustees as evidence that the bankrupt is taking the process seriously. One trustee explained his understanding of why courts in some jurisdictions allowed trustees to oppose based solely on fees: "[the courts] recognize you opposing a discharge for not getting your fees paid, because they're saying, well, you file an assignment in bankruptcy and the first thing you do is, well, you renege on a trustee fee agreement."⁴⁹⁸ In a similar vein, a trustee expected debtors to pay their fees unless there had been a significant change in their circumstances: "because when they sign up they know what they're going into and it's been explained all the way through, and if their budget hasn't changed, there is, in my opinion, really little reason why they should not be honouring what they've committed to at the date of the sign up. But if their income has decreased substantially, I will take that into account."⁴⁹⁹ Another trustee indicated that he would oppose where the bankrupt's non-payment of fees was "blatant", he was looking to bankrupts to demonstrate "good faith" by making most of their payments.⁵⁰⁰ Another indicated that she would not oppose a bankrupt's discharge if the bankrupt had made an effort to pay the fees: "If they've made a good college try, then we just let the automatic discharge go through."⁵⁰¹

Trustees were alive to the circumstances of a debtor and were less likely to oppose for non-payment of fees where a debtor was already experiencing hardship. One trustee indicated that he would not oppose the discharge of a debtor suffering from monetary or mental hardship, or if the debtor had died prior to the discharge.⁵⁰² Another indicated he would consider "how terrible his circumstances his are. I mentioned, the guy that – the

⁴⁹⁸ I1, see also I8, I30.

⁴⁹⁹ I15.

⁵⁰⁰ I37.

⁵⁰¹ I29.

⁵⁰² I38, see also I10, I22.

husband and wife and two or three or five kids and 1400 a month for EI.”⁵⁰³ One trustee indicated that where a person is destitute, “we have some compassion.”⁵⁰⁴

Trustees also voiced concern with how oppositions based on fees might be viewed by the judicial officer hearing the opposition. One trustee, who indicated that he would probably let non-payment slide as long as the debtor had paid at least half of the fees, expressed significant discomfort with what manner of reputation he would develop with the judicial officers if he opposed for fees: “[the judicial officers] are thinking, are you that concerned about – I don’t know what’s going through the judge’s mind. She also has to tax our fees on other motions and stuff.”⁵⁰⁵ Another trustee relayed an anecdote suggesting that the concern about being viewed negatively by a judicial officer was especially acute when the bankrupt was a sympathetic character: “I had one recently, single mom, five kids, I got nine hundred bucks and I’m probably going to get another couple hundred in GST. Do I really want to stand before [the judicial officer] and say I want a conditional order against this woman, for six hundred bucks or whatever? No.”⁵⁰⁶

4.5. THE TRUSTEE’S PROCESS

Having reviewed who becomes a trustee, the different contexts in which they practice, and how they are paid, I turn now to their role in the opposition to discharge process. I have broken my synthesis down to respond to two broad question – how do trustees identify grounds for opposition, and how do they decide whether or not to lodge an opposition. My analysis of these processes revealed a number of variations in practice between trustees. For most of these variations in practice, it is difficult to assess whether or not they lead to variations in outcome, i.e., more or fewer grounds for opposition identified, more or fewer oppositions lodged, but intuitively it seems plausible that some of these variations in practice may be hampering the consistent, predictable operation of the

⁵⁰³ I24.

⁵⁰⁴ I14.

⁵⁰⁵ I35.

⁵⁰⁶ I22.

opposition to discharge system. Moreover, some of the variations in practice do clearly impact the outcomes, such as the provincial variation in whether or not a trustee can lodge an opposition on the basis of unpaid fees. Debtors may experience bankruptcy differently depending on where they live, and with whom they file. On the other hand, my analysis of the trustees' processes also reveals a number of forces that promote consistency and predictability across the system, including the financial constraints facing trustees who administer personal bankruptcy files, the use of checklists and form, and professional networks. These factors can potentially be mobilized to further advance the goals of consistency and predictability.

4.5.1. IDENTIFYING GROUNDS FOR DISCHARGE

The different grounds upon which a trustee may choose to oppose a discharge can be roughly divided into two groups, those which exist at the time a debtor makes an assignment into bankruptcy and those which arise between the date of the assignment and the date of the discharge. The former group includes debtor misconduct such as making preferential payments to a creditor, pursuing frivolous lawsuits, living with undue extravagance or gambling. Ideally, these grounds are identified at the initial meeting with the debtor and may shape the trustee's advice about which debt relief option to pursue. When a debtor - intentionally or unintentionally - fails to disclose these grounds at the initial meeting, they may emerge through the trustee's or OSB's investigations, during counselling or from a creditor's disclosures. The latter type of grounds stem from a debtor's non-compliance during bankruptcy: failing to provide one's trustee with sufficient proof of one's income to allow for the calculation of surplus income, failing to pay surplus income - or other amounts required by the trustee (such as fees or the equity in a non-exempt asset), failing to provide one's trustee with income tax information and failure to attend the two mandatory counselling sessions. These grounds are identified when the trustee reviews a file to determine the debtor's degree of compliance.

4.5.1.1. INITIAL MEETING

The work to identify grounds for opposition begins at the first meeting with a debtor. When debtors make voluntary assignments into bankruptcy, they select the trustee,

who will administer the file. Creditors retain the right to substitute a different trustee; however, this power is seldomly used.⁵⁰⁷ Debtors will visit one or more trustees to learn about their options and take steps to address their debts. During these initial encounters, a trustee must educate the debtor about the bankruptcy process, elicit the information necessary to administer the bankruptcy – including potential grounds for discharge – and also secure the debtor’s business.

Many trustees indicated that they like to split up the initial encounter with a debtor over two meetings – a first consultation where the debtor is informed of the options and a second sign-up meeting where the debtor completes the paperwork necessary to make an assignment.⁵⁰⁸ The two meeting approach gives debtors an opportunity to reflect on their options. Sometimes a debtor will come back for multiple consultations before deciding to file.⁵⁰⁹ In rare circumstances, the two meetings will be consolidated into one if there is a pressing reason to take immediate action, such as if the debtor’s pay cheque is going to be garnished in the next day or two.

One way in which trustees’ practices differ is with respect to who carries out the initial meeting. The OSB prescribes certain steps which must be carried out by a trustee, but much of the preparatory work can be delegated to a staff member.⁵¹⁰ In some offices, the norm is for a staff person to meet initially with the debtor, and then the trustee carries out an final assessment.⁵¹¹ In other offices, the trustee handled the entire initial meeting.⁵¹² Some offices adopted a hybrid approach, depending on the availability of staff people and

⁵⁰⁷ *BLA, supra* note 11, s 14.

⁵⁰⁸ I32.

⁵⁰⁹ I4, I32.

⁵¹⁰ Office of the Superintendent of Bankruptcy, Directive 6R3 “Assessment of An Individual Debtor”, *supra* note 47, s 6-8.

⁵¹¹ I5, I8, I15, I26, I30.

⁵¹² I6, I7, I10, I33, I27, I29, I32. I3 and I9 both handled most meetings, but operated satellite offices, where an estate administrator would meet initially with the debtor.

trustees.⁵¹³ In firms where a trustee travels to service non-resident offices, there may not be a staff person available to carry out the preliminary portion of the meeting, so the trustee will do the whole meeting by him or herself.⁵¹⁴ Other trustees indicated that they would meet with the debtor initially, if the debtor had been referred to the office by the trustee's professional contacts.⁵¹⁵

In the initial meeting, the trustee or staff person must probe potentially bad behavior by a debtor, in addition to eliciting other details of the debtor's financial situation and educating the debtor about the different options available to him or her. To organize the meeting, some trustees will use an application form or checklist.⁵¹⁶ The form gives a trustee an "organized sense of what's missing."⁵¹⁷ The checklist can also be useful afterwards if the debtor disputes what was said at the meeting: "Checklist after checklist, basically to cover our ass because our clients have a total lapse in memory. And see, our clients never make a mistake, it's always us."⁵¹⁸

These documents are invariably developed in-house and often refined over many years of practice.⁵¹⁹ In some multi-office firms, standardized forms or lists are used across all the offices.⁵²⁰ In others, trustees at different offices had developed their own personal forms. One trustee working in a large firm indicated that the forms were being standardized across the different offices, but it was a work in process because the firm "is very much a collection

⁵¹³ I4.

⁵¹⁴ I16, I30, I31, I34.

⁵¹⁵ I8, I30.

⁵¹⁶ I5, I6, I7, I8, I9, I24, I25, I26, I27, I28, I31, I32, I41, I42.

⁵¹⁷ I6.

⁵¹⁸ I24, see also I9.

⁵¹⁹ I6, I8, I10, I24, I28, I32.

⁵²⁰ I26, I28. I9 reported that some of the offices were using the same form, but the forms were not standardized across all of the offices.

of individual trustee firms that have merged together.”⁵²¹ Some trustees felt that even amongst different firms the forms were quite standard, and one reported that he could run a meeting with a debtor, who brought in another firm’s form.⁵²²

Some trustees did not use a checklist in the meeting, but had a standard script that they worked through. One quipped: “I guess I have a checklist in my mind, which is subject to failure.”⁵²³ Another explained that, “I write everything down in the same way on a piece of paper to make sure I’ve caught everything.”⁵²⁴ Some trustees felt that a checklist would be a hindrance at an initial meeting. A commonly voiced concern was that a checklist might narrow a trustee’s attention so that they missed exploring promising avenues, which might lead them to uncover important information. One trustee summed it up, “I don’t want to be so focused on information gathering that... I’m not getting their true story.”⁵²⁵ One trustee expressed the concern that debtors would have less confidence in the abilities of a person working off a checklist: “They want to be comfortable that the person meeting with them knows what they’re talking about, and doesn’t have to refer to a list all the time.”⁵²⁶

In addition to the in-house forms and checklists, the forms developed by the OSB assist somewhat in the process of indentifying grounds for discharge. When making an assignment into bankruptcy, an individual will complete the Statement of Affairs, which includes questions about dispositions of property and preferential payments to creditors in the 12 months prior to bankruptcy. These dispositions and preferences may amount to grounds for opposing a debtor’s discharge – failure to account for assets, or giving a

⁵²¹ I34.

⁵²² I6, see also I28.

⁵²³ I37, see also I3 who described it as “all in the brain”.

⁵²⁴ I4.

⁵²⁵ I12. I27, who used a questionnaire, indicated that he tried to stay open to other issues that might come up and “read between the lines.”

⁵²⁶ I30.

preference while insolvent in the three months prior to bankruptcy.⁵²⁷ When filling out the Statement of Affairs, bankrupts are required to provide the reasons for their financial difficulty, and their answers may indicate another ground for opposing a discharge, such as if gambling was a contributing factor.

Some grounds for opposition will be immediately apparent during a consultation with a debtor, and can be confirmed with respect to third party records. If a debtor is making an assignment for a third (or fourth, or fifth) time or exceeds the personal income tax threshold in section 172.1, the debtor is not entitled to an automatic discharge and the trustee will need to make an application for a discharge.⁵²⁸

To identify other grounds for opposition that predate the debtor's assignment, trustees rely heavily on debtor's self-disclosing misconduct. Trustees felt that most debtors were honest, even about conduct that reflected badly on them. Sometimes debtors just appeared relieved to tell somebody about what they had done, the initial meeting can take on the air of a confession.⁵²⁹ A number of bankruptcy trustees indicated that they would encourage honesty by telling the debtor that if the trustee knows of all the problems at the outset, they can craft a solution to address the problems.⁵³⁰ For instance, where a debtor admits to misconduct, that might be a factor that weighs in favour of the debtor making a proposal instead of a bankruptcy, or, the trustee may require the debtor to make additional payments over the course of the bankruptcy to put the creditors into the same position that they would have been in, but for the debtor's misconduct.⁵³¹ Where a debtor makes such payments, a trustee may forego filing an opposition to discharge.

⁵²⁷ *BLA, supra* note 11, s 173(1)(d), (h); I36 indicated that this form helped the trustee identify grounds for opposition.

⁵²⁸ See I6, I18, I28, I30, I31, I35.

⁵²⁹ I8.

⁵³⁰ I27.

⁵³¹ **May suggest a proposal:** I6, I28, I32. **May have debtor pay amounts back in:** I6, I7, I26, I31, I32.

Sometimes debtors did not realize that the behaviors disclosed were problematic. Some trustees recalled instances of advising a debtor of the legal consequences of misconduct and having the debtor ask if the trustee could forget what had been disclosed. Trustees would advise the debtors that intentional, selective forgetfulness would breach the obligation they owed to the estate's creditors.⁵³²

Once informed of the legal consequences of their pre-bankruptcy conduct by a trustee at an initial meeting, and prior to the filing of an assignment, there is a risk that a debtor might visit another trustee and provide a sanitized version of the facts. Some trustees reported having the impression during an initial meeting that the debtor was arming him or herself with knowledge to perpetuate a well-informed deceit on the next trustee: they are "really just trying to find out information so they can probably go somewhere else and know what to leave out of the discussion."⁵³³ Other trustees reported meeting with debtors, who they felt may have already engaged in such information gathering; the debtors seemed to know "too much."⁵³⁴ Motivated debtors who plan to sanitize their factual accounts have a number of additional options for informing themselves. They may know someone who has personal experience with bankruptcy.⁵³⁵ They can access a significant amount of information online.⁵³⁶ Some trustees also reported instances of debtors being coached by credit counsellors about what they should and should not disclose to their trustee.⁵³⁷

A trustee has limited capacity to police the motivated debtor who tries to collect information so he or she knows how to sanitize his or her disclosure to avoid negative repercussions in bankruptcy. A trustee can inquire about from whom else the debtor has received advice or information. Where a debtor opts to make an assignment into

⁵³² I7, I43.

⁵³³ I4, see also I10, I14, I8 (occurs, but infrequently), I27, I30.

⁵³⁴ I5, I10, I26, I28, I32.

⁵³⁵ I25, I28.

⁵³⁶ I25.

⁵³⁷ I6, I7.

bankruptcy or to file a Division I or II proposal, the trustee is required to complete an Assessment Certificate, which lists all the people from whom the debtor received financial advice in the previous 6 months.⁵³⁸ Many debtors are upfront about having consulted other trustees, but indicate they are shopping for a trustee based on price, payment arrangements or personality.⁵³⁹ A debtor who has been shopping around on more nefarious grounds is unlikely to disclose the same voluntarily.

My interviewees indicated some other steps they might take to discourage debtors from informing themselves about the bankruptcy system with nefarious motives. Trustees may decline to discuss specific consequences with debtors who seem to be fishing for information, especially if they are unwilling to disclose their own circumstances. A number of trustees indicated they were very wary of debtors who ask about the consequences that would apply in various hypothetical scenarios.⁵⁴⁰ Determining which debtors harbour nefarious motivations and which ones are merely curious is not a straightforward endeavour and trustees must rely on their instincts. When a trustee is in an initial meeting and the debtor makes a serious disclosure, some trustees will take on the file as a preventative measure, reasoning that it is better that the file be handled by a trustee who knows about the wrongful conduct than that the debtor be given the opportunity to file with a trustee, who may not be fully informed.⁵⁴¹ Where a debtor discloses conduct that might be an impediment to an automatic discharge and subsequently does not come back, some trustees will carry out follow up searches to determine if the debtor filed with another trustee.⁵⁴² Where the debtor has made such an assignment, the first trustee may contact the second to

⁵³⁸ Office of the Superintendent of Bankruptcy, Directive No 6R3 “Assessment of An Individual Debtor”, *supra* note 47, Appendix A.

⁵³⁹ I3, I4, I6, I8, I9, I10, I14, I26, I27, I31, I43. I26 and I27 thought bankrupts might also be shopping around based on how their assets would be valued. I34 was quite confident that trustee shopping does not occur in the jurisdiction where he operates.

⁵⁴⁰ I4, I9, I30.

⁵⁴¹ I8.

⁵⁴² One interviewee indicated she would not engage in such follow up: I5.

confirm that the debtor has made full disclosure of all relevant information.⁵⁴³ Where trustees have experienced debtors being coached by credit counsellors, they may refuse to take further referrals from such counsellors.⁵⁴⁴

Where a trustee has identified at an initial meeting that the debtor has engaged in pre-bankruptcy misconduct, which might be grounds for opposing the debtor's discharge, some trustees will encourage the debtor to consider making a proposal.⁵⁴⁵ These trustees view the proposal as a preferable route because there is less uncertainty. In a bankruptcy, even if the trustee indicates it will not oppose the discharge based on the identified grounds, there is uncertainty about whether or not a creditor or the OSB will oppose the matter. When an opposition is lodged, there is uncertainty about what discharge order the court will make.⁵⁴⁶ By comparison, in a proposal the misconduct can be disclosed and an offer made to the creditors to redress them for the misconduct. The only uncertainty is whether or not the creditors will accept the proposal.⁵⁴⁷ Once the creditors accept the proposal, a debtor is entitled to a discharge as long as he or she makes the requisite payments.

4.5.1.2. INVESTIGATIONS

Trustees rely on debtors to flag potentially problematic pre-bankruptcy conduct; however, there are other ways that they might be alerted to these grounds for opposition.

⁵⁴³ I10 and I6 had been contacted by another trustee with additional information about a debtor. I10, I27 and I28 had contacted other trustees with additional information about a debtor. I10 indicated that some trustees took the position that any information disclosed at the initial meeting was confidential, and would contact the OSB to advise that there may be issues with a debtor's assignment, but without providing any specifics as to what the issues were.

⁵⁴⁴ I7.

⁵⁴⁵ I22, I11, I33.

⁵⁴⁶ I19, I20, I21, I35.

⁵⁴⁷ I35. In a consumer proposal, if the creditors reject the proposal, the stay is lifted and creditors can enforce their claims against the debtor. The debtor is not deemed to have made an assignment into bankruptcy. By comparison, if the creditors reject a commercial proposal, the debtor is deemed to have made an assignment into bankruptcy, see *BLA, supra* note 11, s 57.

They may discover them through their own investigations, the OSB might become involved on a file and carry out an investigation that turns up incriminating evidence or a creditor may alert a trustee to grounds for opposition.

4.5.1.2.1. TRUSTEE INVESTIGATIONS

Trustees may carry out investigations of their own to unearth information about a debtor's pre-bankruptcy financial activities.

Trustees will often search registries for information about a debtor's financial affairs. A trustee can uncover previous insolvencies by doing a search of the OSB's records.⁵⁴⁸ Each province maintains a number of different registries, which may contain relevant information about an individual's assets and liabilities. The personal property registry includes registration notices from creditors who have taken a security interest in the debtor's personal property.⁵⁴⁹ The land registry details information about specific parcels of land.⁵⁵⁰ The motor vehicle registry contains contact information about a debtor and lists the vehicles owned by a debtor.⁵⁵¹ Other searches that the interviewees indicated they might carry out included a

⁵⁴⁸ I15.

⁵⁴⁹ I41, I15.

⁵⁵⁰ The information available in a land or deed registry differs by province. For instance, in Alberta, a title search shows the date the property was most recently transferred and the consideration paid for the property. Purchase price is not shown on a land registry search in Nova Scotia, Telephone call to the Hants County Land Registration Office, (27 October, 2014). I31 indicated that it can be difficult to uncover transfers doing searches. In Alberta, a certificate from the land title is proof of ownership of the land. See *Land Titles Act*, RSA 2000, c L-4, s 62, there are some exceptions to this legislative provision. Nova Scotia is going through a process of converting its land registry system; ownership of parcels registered under the new system can be determined by searching the system, but ownership of parcels registered under the old system can only be determined by way of a lawyer's opinion on titles. As of 2014, about 50% of the property in Nova Scotia has been converted to the new registry, see Telephone call to the Hants County Land Registration Office, and *Land Registration Act, ibid*, SNS 2001, c 6, s 20. In some jurisdictions, the land registry can also be searched by a debtor's name to identify any lands and registered interests owned by a person.

⁵⁵¹ I41

court search to identify claims against the debtor,⁵⁵² a tax roll search to confirm the value of real property,⁵⁵³ and a search of the list of provincial lottery winners.

While a search of each of these databases could prove potentially useful, they also represent a cost to the trustee. Some trustees indicated they would carry out these searches on every file as a precautionary matter; however, a more common approach seemed to be that trustees would carry out these searches where the initial interview with the debtor suggested that there might be some property worth investigating.⁵⁵⁴ One interviewee described his decision-making process as follows:

It depends again on the circumstances. To a certain extent you get a feeling for who you are dealing with when you interview them... we wouldn't normally do that on every case. You've got a bankrupt who's renting, never owned any property. It's a smaller situation, we wouldn't do a search because we just wouldn't expect to find anything, and normally I guess our experience would be that we wouldn't find anything. So, but again you could have another case where they have lots of vehicles and they bought and sold them and there's been lots of transactions, well then again we probably would search because we want to make sure of what's owned today and what the status is.⁵⁵⁵

In addition to cost, another obstacle to registry searches were legal restrictions on when such searches could be carried out. One trustee operating in Alberta indicated that his firm had started requiring debtors to sign consents to searches of the land titles registry at the time they made an assignment into bankruptcy, and were considering having debtors

⁵⁵² I41

⁵⁵³ I5, I29.

⁵⁵⁴ I26 and I27 report doing personal property registry searches and land titles searches. I5, I7, I8 indicated that they would carry out a personal property registry search as a matter of course. I5, I7, I8, I15 and I29 will carry out a land titles search if the debtor has declared owning property. I6 and I10 will carry out both searches where the information from the debtor suggests it might be fruitful.

⁵⁵⁵ I32.

sign a similar consent for searches under the motor vehicle register.⁵⁵⁶ Under Alberta legislation, one of the situations in which a search can be carried out of these two registries is if the person, whose name is being searched, consents in writing.⁵⁵⁷

Trustees identified a number of other ways they might investigate a debtor. They might confirm the value of assets by having a market analysis done on real property or looking up the book value of vehicles.⁵⁵⁸ The trustee might also write parties to request information. For instance, one trustee reported she would write to companies managing a debtor's investments or life insurance policy to ask for more information about the assets.⁵⁵⁹ Another indicated she might use internet search engines, such as Google or search social media sites, such as Facebook, for information if her "radar is going off."⁵⁶⁰ A third practiced in a smaller community and could learn a significant amount about the debtor by phoning his business contacts.⁵⁶¹

The *BLA* bestows a number of formal powers on the trustee for investigating the financial affairs of the debtor. The trustee is required to take possession of books, deeds and records belonging to the debtor and is given a right to enter premises where such documents are located and to demand their production from third parties.⁵⁶² The trustee also has broad powers to examine debtors, and anyone who is "reasonably thought to have knowledge of

⁵⁵⁶ I14. There are no comparable privacy limitations on searching the land registration system in Nova Scotia, see Telephone call to the Hants County Land Registration Office, *supra* note 550. I6 indicated that he could not get motor vehicle searches in British Columbia.

⁵⁵⁷ *Access to Motor Vehicle Information Regulation*, AR 140/2003, s 2(1)(p); *Name Search Regulation*, AR 207/99, s 2(b).

⁵⁵⁸ I28.

⁵⁵⁹ I4.

⁵⁶⁰ I7.

⁵⁶¹ I8.

⁵⁶² *BLA*, *supra* note 11, s 16(3), (3.1), (5).

the affairs of the bankrupt.”⁵⁶³ The limiting factor for most trustees was not a deficiency in their formal powers, but rather a lack of financial resources.⁵⁶⁴ The estates in personal bankruptcies are usually of such low value that there is no money to fund investigations. Moreover, in a summary bankruptcy trustees are paid on a tariff basis, so they do not receive any additional remuneration for taking extra steps on a file. Sometimes, a motivated creditor might agree to indemnify the trustee for the costs of an individual’s bankruptcy.⁵⁶⁵ Absent this manner of financial support from a creditor, trustees were reticent to carry out potentially costly or time consuming examinations themselves.

4.5.1.2.2. OSB DEBTOR COMPLIANCE REFERRAL PROGRAM

Rather than examining debtors themselves, trustees may ask the OSB to carry out an examination. The OSB operates a Debtor Compliance Referral program, which enables trustees to ask the OSB to investigate potential misconduct by a debtor.⁵⁶⁶ The OSB may then carry out an examination of the debtor and, depending on the results of the examination, file an opposition, recommend that the trustee take action on a file, refer the matter to law enforcement for investigation or take no further action.⁵⁶⁷ Between the time it was launched in May 2011 and May 2014, trustees referred over 700 files to the Debtor Compliance Referral Program.⁵⁶⁸ This works out to less than 250 referrals a year. During that

⁵⁶³ *Ibid*, s 163. To carry out such an examination, the trustee needs an ordinary resolution from the creditors, or a vote by a majority of inspectors.

⁵⁶⁴ I40.

⁵⁶⁵ I6.

⁵⁶⁶ In September 2014, the OSB phased out the specific debtor compliance referral form and instead trustees could refer files to the Debtor Compliance Referral Program using the Estate Information Summary Form, see Office of the Superintendent of Bankruptcy, “Debtor Compliance Referral Program Made Easier” (August 5, 2014) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03300.html> [June 17, 2015]

⁵⁶⁷ Office of the Superintendent of Bankruptcy, “For Trustees – The Debtor Compliance Referral Program” (December 21, 2011) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02615.html> [June 17, 2015]

⁵⁶⁸ Office of the Superintendent of Bankruptcy, “OSB News – May 2014” (May 17, 2014) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03265.html> [June 17, 2015]

same period, there were an average of around 76,000 bankruptcies per year, meaning that referrals were being made in less than 0.4% of cases. The low referral rate could reflect that there is little debtor misconduct to report,⁵⁶⁹ however, my interviews suggest that there is also considerable dissatisfaction amongst trustees with the performance of the program and consequently a number of trustees voiced reluctance at the idea of using the program.

Trustees articulated feelings of frustration about files that were referred to the OSB, but then no action was taken on them, or action was only taken after a substantial delay.⁵⁷⁰ One felt that the OSB was slow to act if the file was not “packaged nicely” or involved small sums of money.⁵⁷¹ Another trustee indicated that apathy had built up over a number of years of the OSB not taking action on files that had been referred to it: “they say they’ve changed things around now, but we’ve just had too many rejections. And we’ve become a bit apathetic in that area.”⁵⁷² One trustee reported not using the program at all.⁵⁷³

Even when the OSB did take action, trustees still voiced concerns. A common complaint was that the Debtor Compliance Referral program lacked teeth or was unable to compel debtors to comply with their duties under the *BLA*.⁵⁷⁴ Many of the files ended up back in the trustees’ hands, and the Debtor Compliance referral program just created more work for trustees as they were required to provide the OSB with documents such as copies of correspondence with the debtor.⁵⁷⁵ Trustees related experiences where the OSB had

⁵⁶⁹I9 & I19 indicated that nothing serious enough had arisen in their practices to warrant reporting to the Debtor Compliance Referral Program. I7 and I16 indicated they rarely referred files to the Debtor Compliance Referral Program because they had few problem files. I4 indicated that the OSB usually flagged problem files for review before she could refer them to the program.

⁵⁷⁰ I24, I28.

⁵⁷¹ I39.

⁵⁷² I39.

⁵⁷³ I25.

⁵⁷⁴ I1, I40, I41.

⁵⁷⁵ I2, I41.

scheduled an examination on a referred file, but the debtor did not show up to the scheduled examination and the OSB took no further steps on the matter.⁵⁷⁶ Other trustees criticized OSB staff for conducting a perfunctory questioning of a debtor based on a standard list of questions, and not following up on promising avenues that presented themselves during the questioning: “they don’t follow the path. They will ask a question and the answer to us says well you should ask the next question, but they don’t.”⁵⁷⁷ Some trustees noted that debtors already swore their statement of affairs under oath and had little confidence that being questioned under oath by the government “is going to make them sit up and realize they need to do a change of lifestyle or something.”⁵⁷⁸ When a debtor was located far away from an OSB office, the OSB might send them a written questionnaire instead of questioning them in person, and trustees felt that this approach was not as effective as in person questioning.⁵⁷⁹

Trustees were not universally critical of the Debtor Compliance Referral Program. Some reported using it regularly.⁵⁸⁰ One indicated that the OSB’s examination could be quite revealing because for some debtors “just getting called into the government, they will tell a

⁵⁷⁶ I21.

⁵⁷⁷ I34 see also I41, I18. I10 thought that the OSB was improving the quality of its questioning. The OSB’s Form 26 sets out a list of 8 suggested questions that an official receiver may put to a debtor during an examination. These questions are: (1) What is your full legal name, by what other names are you known, and what is your date of birth? (2) Provide address. (3) Where and under what name did you carry on business? (4) Have you, within 12 months before the date of the initial bankruptcy event, sold, given away or disposed of any assets? (*if applicable*) If so, give particulars. (5) Which bank or financial institutions do you use for banking? (6) Have you been bankrupt before, or made a proposal to your creditors? (7) What do you believe are the causes of your bankruptcy? (8) When did you first become aware of your insolvency. Office of the Superintendent of Bankruptcy, “Form 26— Questions to be put to the Bankrupt/Debtor or Officer of the Corporation (or Designated Person) by the Official Receiver” (July 18, 2013).

⁵⁷⁸ I41, see also I5, who articulated a similar sentiment. But see FN 581, *infra*, for trustees, who did feel that OSB examinations could be revealing.

⁵⁷⁹ I26, I27. I8 found that the OSB employees were pretty willing to travel to his community from the nearest office to carry out examinations.

⁵⁸⁰ I10, I33, I35. I6 and I28 (1-2 times a year).

whole different story and it's like all of a sudden there's all this other stuff that comes out.”⁵⁸¹ The OSB's investigation can provide a trustee with depth and background.⁵⁸² It can be helpful to have a written record of the OSB's examination as evidence if the trustee appears in court on a discharge application.⁵⁸³ Some trustees reported that they would refer files to the Debtor Compliance Referral Program where creditors had raised an issue or where there was evidence of wrongdoing.⁵⁸⁴ Such a referral could operate as a prophylactic maneuver against future criticism for inaction.

Several trustees reported that the OSB had been soliciting more referrals,⁵⁸⁵ however, the OSB is not solely or even primarily dependent on referrals. It has its own criteria based upon which it will flag some files for further investigation. In 2013, the OSB reported that 90 percent of the 2000 examinations it carried out in the previous year had been initiated by the OSB.⁵⁸⁶ The red flags used by the OSB to identify which files it will pursue are not publicized anywhere; however, trustees have been able to identify some through their own experience. Trustees reported that debtors who run up their credit shortly before filing for bankruptcy, debtors with more than \$100,000 in credit card debt, second- and third-time filers, and gamblers are likely to attract further scrutiny from the OSB.⁵⁸⁷ Recently, the OSB seemed to be taking more of an active role on files where the debtor had made a transfer at

⁵⁸¹ I20. See also I26.

⁵⁸² I31.

⁵⁸³ I4, I8.

⁵⁸⁴ I6, I20, I36.

⁵⁸⁵ I1, I20, I42.

⁵⁸⁶ Office of the Superintendent of Bankruptcy, “OSB News – June 2013” (June 25, 2013) online: Industry Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03129.html> [June 17, 2015].

⁵⁸⁷ I4, I10, I12, I14, I29.

undervalue prior to bankruptcy.⁵⁸⁸ One interviewee thought the OSB selected some files on a random basis for examination.⁵⁸⁹

4.5.1.2.3. CREDITOR TIPS

A final way that information of pre-bankruptcy misconduct may be brought to a trustee's attention is by a creditor, or other interested party. When creditors file their proofs of claim with the trustee, they are required to file an accompanying statement of account and a list of all payments received from the bankrupt in the 3 months prior to bankruptcy.⁵⁹⁰ Sometimes trustees will be alerted to potential misconduct simply by reviewing the proofs of claim.⁵⁹¹ In other situations, a creditor might notify a trustee of an issue, for instance where there is a significant discrepancy between the assets listed by a debtor on a credit application versus the assets listed by that same debtor on his statement of affairs,⁵⁹² or if the debtor made an unusually high number of purchases on credit immediately prior to the bankruptcy, or if the creditor has some other special knowledge of the debtor's financial affairs.⁵⁹³

A reoccurring theme in my interviews was that, with a few notable exceptions, creditors are very disengaged from the personal bankruptcy process.⁵⁹⁴ "They file their claim, and that's it."⁵⁹⁵ Large institutional creditors, such as chartered banks, seem particularly

⁵⁸⁸ I12.

⁵⁸⁹ I17.

⁵⁹⁰ *BLA*, *supra* note 11, s 124(2); Office of the Superintendent of Bankruptcy, "Form 31 – Proof of Claim" (March 24, 2015), s 3, 6.

⁵⁹¹ I20 related an experience where a debtor's credit card statements showed a number of cash advances in the month before making an assignment, leading the trustee to carry out further investigations. I39 related a story about a creditor who filed a proof of security in relation to a mortgage against the debtor's house, but was unable to provide any evidence of funds advanced to the debtor. Upon further investigation, it emerged that the debtor and the creditor were brothers. See also, I10, I4.

⁵⁹² I38.

⁵⁹³ I21, I25, I33.

⁵⁹⁴ See e.g., I7, I8, I10, I19, I20, I22, I28, I30, I31, I39, I42.

⁵⁹⁵ I11, see also I10.

disengaged. Many of them hire third party bankruptcy processors, who prepare and file the proofs of the claim on their behalves. Once a third party processor becomes involved, it can be very difficult for a trustee to get any information from the creditor.⁵⁹⁶ One trustee, frustrated with creditor non-responsiveness, had taken the position that he would not enter proofs of claim until the creditor had provided the trustee with accounts for the three months prior to bankruptcy.⁵⁹⁷

Local creditors are more likely to become involved in the bankruptcy. Credit unions were identified by a few trustees as a more active creditor: “They’re more interested [than the chartered banks] in telling you about so and so, you know, sold a bunch of assets that we had security on.”⁵⁹⁸ Another active creditor was the individual with a personal connection to the debtor – the ex-spouse, the aggrieved family member, the estranged business partner or the annoyed neighbour, “someone with an axe to grind.”⁵⁹⁹ These individuals might raise allegations of debtor misconduct even when they were not owed money. One trustee related the story of a debtor, who won a small sum in the lottery. His brother and baby sitter reported the winnings to the trustee, because the debtor “was just shooting his chops off so much.”⁶⁰⁰ The tips from personal creditors tend to be less reliable, but still required investigation: “And I’d say a lot of those things are unfounded, but you’ve got to investigate. Go on a little fishing expedition and every now and again you catch a fish.”⁶⁰¹ Several

⁵⁹⁶ I1, I14.

⁵⁹⁷ I14.

⁵⁹⁸ I1, see also I4, I7, I10, I24, I32. I26 and I28 identified that credit unions were active in bankruptcy, e.g., by requesting creditors’ meetings, but were not lodging oppositions. I3, I6, and I31 had not experienced credit unions being more active than other creditors. I8’s experience was that that credit unions were more involved than other creditors in corporate bankruptcies, but not personal ones. I26’s experience was that credit unions had been active in the past, but were no longer.

⁵⁹⁹ I3, see also I4, I5, I6, I7, I8, I9, I10, I14, I16, I20, I21, I24, I26, I28 (some), I29, I30, I31, I40, I41.

⁶⁰⁰ I24. Another trustee related a similar story about a brother who reported to the trustee when the debtor received an inheritance, I38.

⁶⁰¹ I3, see also I4, I10.

trustees encourage creditors to provide their complaints in writing, before the trustee investigates its foundations; most will investigate anonymous complaints.⁶⁰²

The consistent exception to the general trend of creditor disengagement is the CRA.⁶⁰³ When CRA became involved in a bankruptcy file, trustees reported that it was able to deploy significant powers to investigate the debtor's conduct and affairs.⁶⁰⁴ One trustee related a story of CRA appearing at a creditors' meeting on a Division I proposal with a large amount of previously undisclosed information:

Finally, CRA attended the meeting and I was just sideswiped. They came in they had his credit bureau. Which, I understand, big brother and everything, but, they knew exactly when he transferred the house out of his name, where he was living, the fact that his father owned the house where he was living now, and by the way, he had 15 other credit cards that he opened up in the three months before filing his division 1 proposal that he didn't tell us about in his statement of affairs.⁶⁰⁵

4.5.1.3. FILE REVIEWS PROCEDURES

Trustees interviewed for this project indicated that most of their oppositions stemmed from the failure of debtors to fulfill their duties during bankruptcy.⁶⁰⁶ The list of duties that might result in an opposition if not completed included attending the two mandatory counselling sessions,⁶⁰⁷ providing satisfactory proof of income, filing monthly

⁶⁰² **Encourages written complaints:** I1, I5, I9, I10, I14, I24, I25.

⁶⁰³ I3, I4, I5, I6 I7, I9, I22, I28, I31. The federal government was also identified by some interviewees as being active on student loan files, see I3, I22, I26, I27.

⁶⁰⁴ I6, I25.

⁶⁰⁵ I20.

⁶⁰⁶ I1, I2, I19, I21, I31, I38.

⁶⁰⁷ Some trustees took the position that a debtor who failed to attend counselling lost his or her entitlement to an automatic discharge, and so the trustee did not need to file an opposition, but did need to bring an application for discharge.

income and expense reports,⁶⁰⁸ making surplus income payments, making payments pursuant to a fee agreement with the trustee, making payments pursuant to an agreement with the trustee to purchase exigible assets from the estate, and providing the information necessary for the trustee to file the in-bankruptcy tax return. These grounds for opposition are easily identifiable by a trustee when a file is reviewed.

My analysis of OSB data is consistent with trustees opposing more frequently on the basis non-compliance during bankruptcy than on the basis of pre-bankruptcy misconduct. I coded a smaller subset of the 2012 oppositions (n=708) for the grounds raised in each file where an opposition was lodged. There are often multiple grounds of opposition for each file. My results are shown below in Table 4.2. The most common grounds for opposition were non-completion of duties (raised in 75.99% of files) and non-payment of surplus income (raised in 19.92% of files).

Table 4.1 Frequency of Opposition by Ground of Opposition, 2012

Ground of Opposition	Percentage of Files where Ground Raised (n=708)
Section 173(1)(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible	12.01% (n=85)
Section 173(1)(b) - the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included	0.14% (n=1)
Section 173(1)(c) - the bankrupt has continued to trade after becoming aware of being insolvent	0.85% (n=6)

⁶⁰⁸ Not all trustees required monthly income and expense reports, see I29.

Ground of Opposition	Percentage of Files where Ground Raised (n=708)
Section 173(1)(d) - the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities	2.26% (n=16)
Section 173(1)(e) - the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs	1.69% (n=12)
Rash and hazardous speculation	0.00% (n=0)
Unjustifiable extravagance in living	0.14% (n=1)
Gambling	0.56% (n=4)
Culpable neglect of the bankrupt's business affairs	0.14% (n=1)
Section 173(1)(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt	0.42% (n=3)
Section 173(1)(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action	0.00% (n=0)
Section 173(1)(h) - the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors	0.00% (n=0)
Section 173(1)(i) - the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities	0.14% (n=1)

Ground of Opposition	Percentage of Files where Ground Raised (n=708)
Section 173(1)(j) - the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors	1.27% (n=9)
Section 173(1)(k) - the bankrupt has been guilty of any fraud or fraudulent breach of trust	0.71% (n=5)
Section 173(1)(l) - the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder	0.28% (n=2)
Section 173(1)(m) - the bankrupt has failed to comply with a requirement to pay imposed under section 68 (i.e., surplus income)	19.92% (n=141)
Section 173(1)(n) - the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness	0.28% (n=2)
Section 173(1)(o) - the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court	75.99% (n=538)
Opposition brought because debtor has a student loan	1.84% (n=13)
Opposition brought because debtor a "personal income tax debtor", s 172.1	3.11% (n=22)
Opposition brought based on tax debt, debtor not a "personal income tax debtor"	0.42% (n=3)
Other Grounds	0.85% (n=6)
No Info	6.50% (n=46)

One variation in practice between different trustees was how often they reviewed a file to identify whether or not debtors were complying with their duties. At the bare minimum, trustees are expected to review the file a month prior to the automatic discharge

and determine whether or not a section 170 report is required.⁶⁰⁹ Other trustees had regularly scheduled reviews earlier, so that they could contact the debtor and give him or her an opportunity to address the non-compliance before the trustee was required to make a decision about opposing a file. For instance, one trustee interviewed reported that files were reviewed at regular intervals, for instance on a 9-month summary bankruptcy, the file would be reviewed after 3, 5 and 7 months.⁶¹⁰ One interviewee indicated her office had software that allowed her to track a debtor's compliance on a monthly basis.⁶¹¹ Trustees also used the counselling sessions, discussed below, as an opportunity for file review.

⁶⁰⁹ *General Rules, supra* 77, R 121 sets out that a section 170 report should be prepared according to the following schedule:

Bankrupt	When Automatic Discharge Take Effect	When 170 Report Should be Prepared
1 st time, no surplus income	9 months after date of bankruptcy	In 8 th month after date of bankruptcy
1 st time, surplus income	21 months after date of bankruptcy	In 20 th month after date of bankruptcy
2 nd time, no surplus income	24 months after date of bankruptcy	In 23 rd month after date of bankruptcy
2 nd time, surplus income	36 months after date of bankruptcy	In 35 th month after date of bankruptcy
3 rd (or more) time	No automatic discharge	Between 10-60 days before the date of the discharge hearing

A number of trustees indicated that it was around the 7th or 8th month that they would know whether or not they needed to oppose a debtor's discharge: I3, I6, I21, I22, I28, I36, I38, I40.

⁶¹⁰ I1. See also I32 (4-month review), I42 (6-month review), I24 (3 and 6-month reviews), I9 (reviews every 6 month).

⁶¹¹ I5. See also I10 who reported monitoring surplus income payments on a monthly basis.

Some trustees felt that the more frequently they followed up with the debtors to remind them of their obligations, and either encourage or coerce cooperation,⁶¹² the fewer oppositions they would need to file on compliance matters. They also felt that some debtors would not comply, no matter how many times they were reminded. One interviewee indicated that she saw the cost of opposing as an incentive to address compliance issues outside of court. For instance, she would have debtors come into the office to get help preparing their budgets sheets.⁶¹³ On the other hand, adopting a more hands-on approach with debtors to encourage compliance can be time consuming and, consequently, costly. Ultimately trustees must decide how active a role they wish to adopt in the process: “I mean you could always limit [the number of oppositions] by spending more time on the file, more and more contact to the debtors. Some that wouldn’t make any difference, some that would, you know, if they had five reminders. So we’ve got to strike a balance.”⁶¹⁴

4.5.1.4. COUNSELLING SESSIONS

The first and second counselling sessions are aimed at instilling better financial habits in the debtor, they are also an opportunity to identify potential grounds for an opposition.

Trustees vary in their approach to who does the counselling session. The counselling session can be administered by anyone who is a “qualified counsellor.”⁶¹⁵ CAIRP offers a qualification course for insolvency counsellors, which includes both online components and

⁶¹² I43.

⁶¹³ I5, see also I8.

⁶¹⁴ I23, see also I22 who had taken over management of a very “old school” practice where “if they don’t do what they’re supposed to do we’ll just sort of oppose them and throw the file in the cabinet and wait for court”, but had adopted a new approach that was more proactive, regularly contacting the debtor and reminding them of their obligations. She reported that under the new approach, they were opposing fewer files on compliance issues.

⁶¹⁵ Office of the Superintendent of Bankruptcy, Directive 1R3 “Counselling in Insolvency Matters”, *supra* note 206, s 2.

in-person observation of counselling sessions.⁶¹⁶ Trustees, their staff or independent contractors may all be qualified counsellors. In many offices, licensed staff will carry out the bulk of the counselling, with the trustee doing counselling infrequently, or not at all.⁶¹⁷ Some offices had a dedicated staff person who did the bulk of the counselling, whereas in other offices, it was a responsibility shared amongst a number of staff.⁶¹⁸ In a small number of offices, the trustee did a large amount of counselling, though usually this responsibility was still shared with one other staff person.⁶¹⁹ A few trustees, all of whom worked in smaller offices, reported doing all the counselling themselves.⁶²⁰ A number of trustees reported that if a credit counsellor had referred a debtor's case to them, they would outsource the counselling sessions back to that same credit counsellor.⁶²¹ One trustee reported outsourcing all counselling to a credit counsellor.⁶²² Another reported initially outsourcing the second counselling session because "we weren't comfortable doing the second sessions... that was delving more into the social root causes... we wanted to keep the distinction between trustee and counsellor very clear."⁶²³ The trustee reported that the firm's comfort level with the role of counsellor had increased and they now did both sessions in-house. Trustees might also outsource counselling if the debtor had moved, the trustee might arrange for a trustee's office in the debtor's new location to carry out the counselling.⁶²⁴

⁶¹⁶ Canadian Association of Insolvency and Restructuring Professionals, "Insolvency Counsellor's Qualification Course" online: Canadian Association of Insolvency and Restructuring Professionals <http://www.cairp.ca/insolvency-professionals/additional-industry-courses/insolvency-counsellor-s-qualification-course/> [June 17, 2015].

⁶¹⁷ I1, I2, I8, I9, I10, I11, I14, I15 I20, I24, I26, I28, I30, I31, I34, I35, I42.

⁶¹⁸ Dedicated staff person: I5, I18 w/ I40, I21, I20, I19, I31.

⁶¹⁹ I37, I25, I33.

⁶²⁰ I3, I27, I29, I32.

⁶²¹ I5, I19, I21, I26, I30, I36.

⁶²² I6.

⁶²³ I41.

⁶²⁴ I10, I31.

When a qualified counsellor sits down with a debtor to discuss money management, and the causes of the debtor's financial difficulty, there is a possibility that the debtor might disclose instances of pre-bankruptcy misconduct. Iain Ramsay flagged this risk as evidence of a conflict in the role of the trustee: "Trustees may inform the debtor at the outset that they do not represent them and that a debtor cannot provide them with confidential information since they will be acting as the representative of the creditors. At the same time the trustee will later counsel the debtor and it is usually assumed that a counselling relationship is confidential."⁶²⁵ The counselling relationship is not confidential. Pre-bankruptcy misconduct disclosed at the counselling session could become a ground for opposing the debtor's discharge.

The trustees interviewed for this research were split on whether or not debtors made disclosures during counselling that became grounds for opposing their discharge. A number of trustees reported that such disclosures were infrequent, "rare," or "never" occurred.⁶²⁶ Some felt that any disclosures made during counselling would have been disclosed earlier in the process – at the initial meetings – or would come out anyway through other routes.⁶²⁷ Other interviewees reported that such disclosures did occur. These interviewees reported that debtors would admit to having gambling problems or having engaged in credit abuse, they would submit budgets that showed regular contributions to previously undisclosed investments, or payments made to insure a previously undisclosed asset, they may admit to having a credit card that had not been surrendered to the trustee, or they may disclose acquiring a post-assignment asset, such as an inheritance that needs to be transferred to the estate.⁶²⁸ The budgets submitted during counselling may also show a higher income than previously disclosed, resulting in a recalculation of any surplus income owing.⁶²⁹ Where such

⁶²⁵ Iain Ramsay, "The Canadian Trustee in Bankruptcy" *supra* note 19 at 454.

⁶²⁶ I1, I2, I3, I8, I9, I11, I16, I22, I26, I27, I29, I32, I39, I42.

⁶²⁷ I3, I8, I19, I27, I34, I41.

⁶²⁸ I4, I6, I7, I10, I17, I18, I13, I14, I15, I16, I20, I24, I28, I31.

⁶²⁹ I21, I28, I32, I34.

disclosures were made, the trustee may still be able to resolve the issue short of lodging an opposition.⁶³⁰

In his research on mandatory counselling, Saul Schwartz found that many trustees used the counselling sessions as an opportunity to identify outstanding compliance issues on a file and encourage the debtor to address them.⁶³¹ My interviews provide further support for this finding. Trustees acknowledged that “it’s another opportunity to take a look at the administration and see if there are some other things that are needing to be resolved.”⁶³² One trustee indicated that they had moved up how early in the process they were carrying out the second counselling session, with the hope that they would identify compliance issues earlier and therefore give the bankrupt more of an opportunity to rectify the problem before the trustee had to decide whether or not to oppose the debtor’s discharge.

4.5.2. THE DECISION TO OPPOSE

Even where a trustee has identified grounds to oppose the discharge, the trustee often retains discretion to oppose or not. The marginal note for section 173 describes the section as “facts for which discharge *may* be refused, suspended or granted conditionally.”⁶³³ In federal legislation, ‘may’ is used when a provision is permissive, whereas ‘shall’ is used when a provision is mandatory, or imperative.⁶³⁴ The legislation sets out that when such a fact is proven at an application for discharge hearing, the judicial officer is limited in the types of orders it can make (i.e., it cannot order an absolute discharge); however, nothing in the legislation mandates that a trustee lodge an opposition to discharge where a section 173 fact has been established. Moreover, a number of the facts in section 173 are drafted loosely

⁶³⁰ I14, I16, I25.

⁶³¹ Saul Schwartz, "Counselling the Overindebted: A Comparative Perspective" (Ottawa: Office of the Superintendent of Bankruptcy, 2005) at 2.

⁶³² I41, see also I8, I29, I31, I32. I6, who now referred the counselling out of office, missed this as an opportunity for carrying out a file review.

⁶³³ *BLA*, *supra* note 11, s 173(1).

⁶³⁴ *Interpretation Act*, RSC 1985, c I-21, s 11.

enough that the trustee must exercise discretion in deciding whether or not they are even present.

The trustee's discretion is not unlimited. Personal income tax debtors and third-time bankrupts are not entitled to an automatic discharge, and the trustee must bring an application for a discharge.⁶³⁵ If debtors refuse or neglect to attend the two mandatory counselling sessions, they lose their entitlement to an automatic discharge and the trustee must bring an application for discharge.⁶³⁶ Some trustees were very deliberate to point out that in such a situation they were not opposing the debtor's discharge, but rather that the automatic discharge was no longer available due to the operation of the legislation. One trustee had managed to reintroduce an element of discretion into the assessment of whether or not a debtor had complied with the mandatory counselling requirement. Where a debtor had a good reason for missing counselling sessions, the trustee was unwilling to find that the debtor had "refused or neglected" to attend counselling and, in such situations, did not intervene to prevent the debtor from receiving an automatic discharge.⁶³⁷

Despite the wide discretion accorded to trustees under the legislation, many of them were quick to assert that in the actual administration of the process, a substantial majority of their oppositions stemmed from "non-discretionary grounds", these non-discretionary grounds referred to compliance issues, debtors who had failed to fulfill their duties.⁶³⁸ I consider first how trustees decide whether or not to lodge oppositions in these instances of 'straightforward' non-compliance. Although the trustees characterized these oppositions as mechanical, I found variations in the practices of trustees which suggest that trustees have some latitude to decide what amounts to opposition-worthy non-compliance. Next, I consider how trustees decide whether or not to lodge an opposition in less straightforward

⁶³⁵ *BLA*, *supra* note 11, s 168.1(1), 172.1.

⁶³⁶ *Ibid*, s 157.1(3), 168.1(1), 169(1),(2).

⁶³⁷ I33.

⁶³⁸ I40 (100% of the time), I2 (99% of oppositions). See also: I4, I5, I7, I8, I9, I10, I26, I27, I28, I30. I6 was the only trustee who indicated he was opposing for more conduct than compliance issues, and he described these grounds as non-discretionary: he felt he had to file an opposition if an offence had been committed.

cases by considering what background knowledge they draw on and what steps they take to inform their decision.

4.5.2.1. ‘STRAIGHTFORWARD’ OPPOSITIONS

Trustees repeatedly characterized the decision to oppose for non-compliance as “easy,” “black and white”, or “very mechanical”: “it’s just straight clear they haven’t done their duties.”⁶³⁹ My analysis of OSB data, outlined above in Table 4.2, is consistent with the trustees’ assertion that they lodge oppositions primarily for compliance issues, as opposed to pre-bankruptcy misconduct issues. Within the smaller sample of oppositions from 2012 (n=708), the most common grounds for opposition were failure to perform duties (75.99%) and failure to pay surplus income (19.92%). I coded the instances of opposition for non-compliance according to the duty that had not been fulfilled. My results are displayed in the following table. The most common forms of non-compliance were non-payment of a trustee’s fees (57.20%), not providing proof of income (40.25%), and not attending counselling (25.42%).

Table 4.2 Frequency of Opposition for Non-Compliance, by Duty, 2012

Ground	Percentage of Files where Grounds Raised (n=708)
Counselling	25.42% (n=180)
Missed one counselling session	16.67% (n=118)
Missed both counselling sessions	8.76% (n=62)
Did not pay trustee’s fees	57.20% (n=405)
Did not provide information	14.69% (n=104)

⁶³⁹ I10, I13, I16, I24, I25, I26, I34.

Ground	Percentage of Files where Grounds Raised (n=708)
Did not provide proof of monthly income	40.25% (n=285)
Did not pay out equity in non-exempt property	12.43% (n=88)
Did not attend OSB Exam	0.56% (n=4)

The interviewees evidenced a variety of interpretations about what duties debtors needed to fulfill to avoid an opposition. Notably, the most common duty which attracted a trustee’s opposition was non-payment of the trustee’s fees. Unlike missing a counselling session, which the *BLA* stipulates disentitles a person from a discharge, trustees have complete discretion about whether or not to lodge an opposition on the basis of unpaid fees (assuming they live in a province where they can oppose for unpaid fees). I examine the considerations a trustee weighs when deciding to oppose for fees below in section VI(C). Of course, as noted above, trustees can even interpret the mandatory mediation requirement to reintroduce an element of trustee discretion about whether the debtor should receive an automatic discharge.

Another duty that afforded trustees a significant element of discretion was the requirement that debtors submit monthly income and expense statements. These statements are mandated under the OSB’s directive on surplus income, which reads:

In determining the bankrupt's personal and family situation for the purposes of subsection 68(3) of the Act, it is necessary to establish the earnings and expenses of both the bankrupt and the bankrupt's family unit. The bankrupt must disclose the earnings and expenses of each member of the family unit by providing the trustee with income and expense statements for the entire period of bankruptcy.⁶⁴⁰

⁶⁴⁰ Office of the Superintendent of Bankruptcy, Directive No 11R2-2014 “Surplus Income”, *supra* note 66, s 3. The form of the income and expense report is prescribed, see Office of

The directive goes on to allow that a trustee can “use their professional judgment in exercising their duty to apply due diligence when determining the bankrupt's average monthly income.”⁶⁴¹ Trustees often rely on income and expense reports, supported by pay stubs, to calculate a debtor’s surplus income, but they can rely on other records. Trustees viewed income and expense reports as fulfilling a second role; they help bankrupts to better understand their finances.

Trustees had different interpretations of whether or not income and expense reports are mandatory.⁶⁴² Some will lodge an opposition where a debtor has failed to file monthly income and expense reports.⁶⁴³ Some trustees do not require the debtors to complete monthly budgets as long as they are providing sufficient proof of their income to allow for the trustee to calculate the debtor’s surplus income obligations, if any.⁶⁴⁴ One trustee, who required that monthly income and expense reports be filed, reported that he would not object to a debtor’s discharge as long as the statements were filed before the application for discharge, but he saw other trustees in court objecting where the reports had not been filed each month.⁶⁴⁵ Some trustees indicated that they would relax the requirement to file income

the Superintendent of Bankruptcy, Form 65 “Monthly Income and Expense Statement of the Bankrupt/Debtor and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt” (May 29, 2012).

⁶⁴¹ Office of the Superintendent of Bankruptcy, Directive No 11R2-2014 “Surplus Income” *supra* note 66, s 3.

⁶⁴² I4, I15.

⁶⁴³ Trustees requiring income and expenses reports: I4, I5, I6, I8, I9, I10 I14, I19 I23, I24, I26, I27.

⁶⁴⁴ Trustees not requiring income and expense reports: I29. I31 required income and expense reports, but would only oppose if he could not figure out the amount owing from the debtor’s tax returns.

⁶⁴⁵ I14. I9 took the same position, that she would not lodge an opposition as long as the income and expense reports were handed in before the end of the bankruptcy.

and expense reports for debtors who were elderly, disabled or very poor.⁶⁴⁶ One trustee indicated that instead of income and expense reports, he required the debtors to provide proof of their income, and to track 6 months of expenses in an excel spreadsheet and bring that to the second counselling session.⁶⁴⁷ Some trustees reported that their practice with respect to income and expense reports reflected requirements set by either the local judicial officer(s), or the local OSB office.⁶⁴⁸

The different approaches to income and expense reports reveal that even if a trustee is not making a discretionary determination on a case-by-case basis about which debtors to oppose with respect to compliance issues, they have exercised their discretion at some point in establishing guidelines about which types of non-compliance will attract an opposition.

4.5.2.2. 'DISCRETIONARY' OPPOSITIONS

Some of the trustees interviewed acknowledged that the decision to oppose a discharge could be highly discretionary, or require an exercise of judgment.⁶⁴⁹ When trustees exercise their discretion to decide whether or not to proceed with an opposition to discharge, they may draw on both their background knowledge of an area, and they may seek new information to help inform their decision. To better understand how they make the decision to oppose, I asked trustees about their current awareness regimes, i.e., how they stay abreast of new developments in bankruptcy law, and the resources that they would draw on when making a decision where the proper outcome requires an exercise of judgment. It should be noted that some interviewees maintained that the decision to oppose was almost

⁶⁴⁶ I4, I10, I27. But see I26 who indicated that she would require income and expense reports even from a person on a pension, because the local OSB office required them.

⁶⁴⁷ I16.

⁶⁴⁸ Local judicial officer: I13; Local OSB office: I26 – interestingly I29 was governed by the same local OSB office as I26, but did not require bankrupts to submit income and expense reports.

⁶⁴⁹ I14.

always cut and dried, so they would not be actively seeking new information to assist with their decision.

4.5.2.2.1. CURRENT AWARENESS

When trustees exercise their discretion to oppose a discharge – or not – they draw on their background knowledge. Trustees develop and maintain their background knowledge through a number of activities. For those trustees who are members of CAIRR, this continuing professional development is mandated. Members of CAIRP are required to complete 20 hours of professional development activity in every year.⁶⁵⁰ A trustee need not be a member of CAIRP, though many are. Most, but not all, of the trustees I interviewed were members. Many of my interviewees had other designations, which require continuing professional development hours. For instance, Chartered Professional Accountants operating in Ontario must complete 120 hours of continuing professional development every three years, with no less than 20 hours in any one year.⁶⁵¹ A few of my interviewees were also certified fraud examiners.⁶⁵² The Association of Certified Fraud Examiners regulates this designation, which is bestowed on individuals who pass an initial exam, and then complete 20 hours of professional development every 12 months.⁶⁵³

Trustees can pick from a number of continuing education programs. CAIRP offers continuing education opportunities to its members. Every year it puts on an annual

⁶⁵⁰ Canadian Association of Insolvency and Restructuring Professionals, Bylaws, s 8.2 online: Canadian Association of Insolvency and Restructuring Professionals <https://cairp.blob.core.windows.net/media/18187/CAIRP-Complete-Bylaws.pdf> [June 17, 2015]. The professional development requirement must be completed every financial year, which for CAIPR runs April 1-March 30.

⁶⁵¹ Chartered Professional Accountants Ontario, Regulations, R 4-5, online: Chartered Professional Accountants Ontario <http://www.cpaontario.ca/Resources/Membershandbook/1011page6645.pdf> [June 17, 2015].

⁶⁵² I19, I27.

⁶⁵³ Association of Certified Fraud Examiners, “Get Certified”, “Maintaining the Credential” (2014) online: Association of Certified Fraud Examiners <http://www.acfe.com/> [June 17, 2015].

conference, as well as a series of forums. The forums occur in communities across Canada. Many trustees indicated that they attended either the annual conference or the forum, with attendance at the forums being more common.⁶⁵⁴ A typical response, offered by a trustee working in a large firm, was he would attend the forum every year, but the trustees in his firm were on a rotation and would attend the annual conference every few years.⁶⁵⁵ Some of the trustees also attended the Annual Review of Insolvency Law, a conference organized by Janis Sarra, an academic working at the University of British Columbia.⁶⁵⁶ In some, but not all provinces, the provincial association of insolvency and restructuring professionals or bar associations were active in organizing professional development events.⁶⁵⁷ In some communities, trustees could attend monthly insolvency discussion groups, which combined a formal education program with informal networking opportunities.⁶⁵⁸ Trustees working at some of the larger firms indicated that their firms organized training sessions and annual conferences, which might include an educational component.⁶⁵⁹ Trustees also took advantage of continuing education opportunities offered through their other professional associations, such as accounting.⁶⁶⁰

⁶⁵⁴ I2, I3, I4, I6, I8, I9, I10, I11, I12, I13, I14, I15, I16, I19, I20, I22, I25, I26, I27, I28, I29, I31, I32, I34, I38, I39, I42. I24 sent trustees from his firm to attend, but had not attended a CAIRP event in a number of years.

⁶⁵⁵ I1.

⁶⁵⁶ I3, I6, I8, I25. I20 indicated she had attended ARIL in the past but had ceased attending because she found the content weighted too heavily towards commercial matters. She still read the consumer articles in the ARIL publication every year. I8 had also attended the Canadian Bar Association's Pan-Canadian Insolvency Conference.

⁶⁵⁷ I9, I10, I29, I31, I32, I36, I38, I42. I3 and I26 indicated that the provincial association in the provinces where they practiced were not active in putting on continuing education events. I28 indicated that the provincial association in the province where he practiced put on a seminar approximately every two years.

⁶⁵⁸ I4, I5, I20.

⁶⁵⁹ Training sessions I9, I13, annual conference I1, I2, I4, I9, I13, I34.

⁶⁶⁰ I8, I27.

Trustees might also stay current on new developments by reading periodic bankruptcy publications, like Houlden and Morawetz’s weekly insolvency newsletter, the Canadian Bankruptcy Reports, or the bankruptcy section of the Canadian Abridgement Digests, or by scanning through recent case law from their jurisdiction to identify relevant decisions.⁶⁶¹ A number of trustees reported that one or two trustees in their firm took the lead on reviewing these periodic publications or case law and alerting other firm members to important information: “we have a couple of our trustees who will do sort of an analysis of anything and they will send around sort of an email blast to the trustees and the insolvency staff within the firm about case updates.”⁶⁶² This manner of knowledge sharing occurred informally both within the same firm, and between different firms. During meetings – in person or on the telephone – trustees might flag new developments for each other, or they might send out an email to their colleagues when they encountered new issues in their practice.⁶⁶³ One trustee noted that his professional contacts would share new updates over social media.⁶⁶⁴ As part of their marketing to trustee clients, lawyers would send updates to trustees about new legal developments.⁶⁶⁵ One trustee indicated he followed a bankruptcy blog run by a law firm.⁶⁶⁶ Some trustees also reported that CAIRP or its provincial counterparts would alert them to important legal developments.⁶⁶⁷

⁶⁶¹ **Newsletter:** I2, I4, I11, I21, I25, I28, I40; **Canadian Bankruptcy Reports:** I33, I36 did when he was more junior, but not any more; **Canadian Abridgement Digests** I8; **Recent Case Law:** I3, I6, I29, I39. I34 indicated he stayed up to date by reading *Lawyers Weekly*, a general Canadian newspaper that tracks legal developments and provides other information of interest to lawyers.

⁶⁶² I19, see also I42, I35. I26’s firm sent around a weekly update to all the trustees.

⁶⁶³ I2, I3, I4, I9, I15, I19, I21, I28, I29, I31, I40.

⁶⁶⁴ I3, the social media site he used was LinkedIn: <https://www.linkedin.com/nhome/>

⁶⁶⁵ I3, I5, I9, I10, I15, I20, I24, I29, I27, I36, I38.

⁶⁶⁶ I3, Wiley on Bankruptcy run by Wiley Rein, an American law firm: <http://www.wileyonbankruptcy.com/>

⁶⁶⁷ I5, I6, I14, I16, I36; I15 reported not receiving this type of information from CAIRP. I3 indicated that CAIRP was working towards providing this type of information more consistently, “but it’s a slow process.”

A number of trustees indicated that attending court was an important educational opportunity. Sometimes the judicial officer will advise a trustee of a change in the law or the court's practice: "you're standing there and you're trying to do something and the Registrar says, oh no we're not doing that anymore."⁶⁶⁸ Trustees could learn by observing other trustees. A significant amount of what occurs in court is pretty standard, "but occasionally something will come up, and, oh geez, better make a note of that so I don't get hung up on that myself."⁶⁶⁹ One trustee reported that, where a judicial officer had reserved his or her decision, he would often follow up with other trustees after seeing a matter in court to find out how the matter had ultimately been resolved.⁶⁷⁰ Court also presents an opportunity for trustees to chat informally amongst themselves – and with any lawyers in attendance – about new legal developments and other matters affecting their businesses.⁶⁷¹

Not all trustees had the same opportunity to learn at the courthouse. Some trustees rarely appeared in court because they had another trustee or an estate administrator who did most of their court work.⁶⁷² In Saskatchewan, the judicial officers decided many discharge matters by way of a desk order – a trustee submits the paperwork to the court, but does not appear personally to make representations to the judicial officer. A trustee operating in this jurisdiction indicated he only appeared in court about three times a year. In some jurisdictions, judicial officers heard from each trustee separately at an individually appointed time, so the trustees did not have the opportunity to observe or mingle with their colleagues.⁶⁷³ In a jurisdiction where multiple trustees appear in court at once, one trustee reported that he scheduled his court dates so far in advance that his matters were always

⁶⁶⁸ I14, see also I15.

⁶⁶⁹ I37, see also I3, I9, I10, I17, I16, I22, I31, I35, I36, I37, I38, I39, I42.

⁶⁷⁰ I10.

⁶⁷¹ I10, I14, I16, I35.

⁶⁷² Another trustee: I4, I19, I22; an estate administrator I36. I16 was in the process of transferring the court work to a trustee in training, who worked at the same office. Conversely, I7, I10, I14 and I31 did all the court work for their firms.

⁶⁷³ I2, I26, I28.

heard first, and he did not wait around to hear other matters.⁶⁷⁴ Conversely, in another jurisdiction, the trustee reported that the order of trustees was always rotated so he regularly had the opportunity to observe other trustees in action.⁶⁷⁵

A final way that trustees kept abreast of new developments was through their volunteer work for CAIRP and its provincial counterparts. By sitting on different committees or by helping out with tasks such as exam-marking they were alerted to evolutions in the law.⁶⁷⁶ Two trustees reported that members of the provincial association of insolvency and restructuring professionals regularly exchanged court cases of note and asked each other questions.⁶⁷⁷

4.5.2.2.2. LEGAL RESEARCH

Sometimes in deciding whether or not to oppose, trustees want to see if trustees have opposed discharges in similar cases, and if so, how judicial officers disposed of those cases. The trustees interviewed indicated that they will carry out legal research themselves. Keeping with the characterization of oppositions as straightforward and non-discretionary, some trustees indicated that it was unlikely they would do research on an opposition matter, or the research might be more circumscribed.⁶⁷⁸ One indicated that he would do research, “If I know there’s going to be some opposition or I’m asking something really unusual. Then I’ll go and I’ll find something that supports it.”⁶⁷⁹ One sole practitioner indicated he regularly did legal research because he had no one “down the hall” who he could easily ask for advice.⁶⁸⁰

⁶⁷⁴ I13. I31 reported that he might be the only person on the docket list, or the first one.

⁶⁷⁵ I32.

⁶⁷⁶ I3, I15, I22, I27, I29, I33, I40.

⁶⁷⁷ I31, I32.

⁶⁷⁸ I14, I33.

⁶⁷⁹ I13.

⁶⁸⁰ I32. He reported having colleagues at other firms who he felt comfortable contacting to discuss difficult questions.

A reoccurring theme across my interviews was the heavy reliance placed by trustees on *The Annotated Bankruptcy and Insolvency Act*, a nearly 2000-page book edited by Justice Lloyd Houlden, Justice Geoffrey Morawetz, and Dr. Janis Sarra.⁶⁸¹ The book provides annotated case law organized thematically, according to the related section of the *BLA* or *General Rules*. Practitioners who purchase a subscription receive updated copies of the book twice a year. The interviewees referred to it alternatively as their “primary resource”, their “default” or “the bible”.⁶⁸² Tellingly, a number of interviewees even brought a copy of it into the interview with them as a reference.⁶⁸³

No other textbook attracted the same kind of following as the *Annotated Bankruptcy and Insolvency Act*. Houlden, Morawetz, and Sarra also produce a longer, loose-leaf service entitled, *Bankruptcy and Insolvency Law in Canada*.⁶⁸⁴ This service is contained in 5 binders, and a person who subscribes to the loose-leaf service gets 11 to 12 updates a year, which means they will receive a number of pages with new information that are added to the binder or exchanged with existing, outdated pages in the binder. Some interviewees referred to hard copies of the loose-leaf service.⁶⁸⁵ Others subscribed to Westlaw/Carswell’s legal resource website, and could access the loose-leaf service online.⁶⁸⁶

⁶⁸¹ Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *The Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2014). Interviewees who indicated they used it: I1, I3, I4, I5, I6, I7, I8, I9, I10, I11, I12, I13, I15, I16, I19, I20, I21, I22, I24, I25, I26, I27, I28, I29, I31, I32, I33, I34, I35, I36, I37, I38, I39, I40, I42.

⁶⁸² **Default:** I21; **Primary resource:** I19; **The Bible:** I2, I8, I20, I36. I16 reported: “I kind of live in Houlden and Morawetz”.

⁶⁸³ I2, I14, I35.

⁶⁸⁴ Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, *supra* note 330.

⁶⁸⁵ I1, I37.

⁶⁸⁶ Interviewees with subscriptions to Westlaw/Carswell: I4, I7, I8, I9, I12, I15, I20, I21, I22, I25, I28, I32, I42. I31 and I27 had previously had subscriptions, which they had decided to discontinue.

Bennett on Bankruptcy by Frank Bennett is organized along similar lines to *The Annotated Bankruptcy and Insolvency Act*, with annotations organized thematically according to the related sections of the legislation.⁶⁸⁷ A new version of the book, with updated information, is made available every year. Several trustees indicated that they would regularly refer to this text.⁶⁸⁸ One indicated that he used it, and further noted, “the Registrar here, I know he reads that quite a bit.”⁶⁸⁹ Interviewees who carried on a mixed corporate-commercial practice indicated that they used Frank Bennett’s other volume, *Bennett on Receiverships*.⁶⁹⁰

Robert Klotz, a lawyer in Ontario, wrote a one-volume loose-leaf service entitled *Bankruptcy, Insolvency and Family Law*, which is updated one to two times a year.⁶⁹¹ The service focuses on the legal questions arising from the intersection of family and bankruptcy law. A few trustees indicated that they would use this volume when doing legal research.⁶⁹²

The *Canadian Bankruptcy Reports* include written decisions on bankruptcy issues, as well as case notes, and short articles.⁶⁹³ A number of volumes are published each year, and people who subscribe to the reports also receive periodic emails with summaries of new cases. As discussed above, some trustees relied on these reports to stay current on new

⁶⁸⁷ Frank Bennett, *Bennett on Bankruptcy*, 17th ed (Toronto: CCH Canadian, 2014).

⁶⁸⁸ I1, I6, I9, I18, I27, I31.

⁶⁸⁹ I1.

⁶⁹⁰ Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto: Carswell, 2011), I26, I31.

⁶⁹¹ Robert Klotz, *Bankruptcy, Insolvency and Family Law*, 2nd ed, looseleaf, (Toronto: Carswell, 2001).

⁶⁹² I8, I9, I21, I22, I34. I1 had a copy visible on his book self, but indicated that he did not use it “a whole lot”.

⁶⁹³ Geoffrey Morawetz, Kelly Bourassa & Philippe Belanger, eds, *Canadian Bankruptcy Reports* (Toronto: Carswell).

developments. Some also reported using the Reports in their legal research.⁶⁹⁴ They are also available online to individuals with a subscription to Westlaw/Carswell.⁶⁹⁵

Other texts that trustees mentioned when asked about the resources they drew on while doing legal research included M. A. Springman's *Fraud on Creditors: Fraudulent Conveyances and Preferences*⁶⁹⁶, *Kerr & Hunter on Receivers & Administrators*,⁶⁹⁷ *Canadian Forms and Precedents*,⁶⁹⁸ and *Black's Law Dictionary*.⁶⁹⁹

Trustees were making use of online tools to research case law. A number used Westlaw/Carswell which gave them access to online versions of Houlden, Morawetz and Sarra's loose-leaf service and the *Canadian Bankruptcy Reports*, as well as a number of other non-bankruptcy specific resources.⁷⁰⁰ Users can search for case law using key words, or for cases that have considered a specific provision of the *BLA*. Westlaw/Carswell offers a number of levels of service, and the resources a practitioner can access will vary depending on which subscription they purchase. Practitioners may have the option of paying an additional price per item to access material outside of the service for which they subscribe. One trustee indicated that it no longer made financial sense for him to have a Westlaw/Carswell subscription and he would call a lawyer-friend of his to pull material from the website if the need arose.⁷⁰¹ Another trustee indicated that having to use a password to

⁶⁹⁴ I26, I27, I33, I39, I42. I37 said he would use them "rarely".

⁶⁹⁵ See FN 686, *supra* for list of interviewees with a subscription to Westlaw/Carswell.

⁶⁹⁶ M A Springman, *Fraud on Creditors: Fraudulent Conveyances and Preferences*, looseleaf (Toronto: Carswell, 2009), used by I36.

⁶⁹⁷ Sandra Frisby & Malcolm Davis-White, *Kerr & Hunter on Receivers and Administrators*, 19th ed (London: Sweet & Maxwell, 2009), used by I8.

⁶⁹⁸ Although the interviewee did not specify which volume, he presumably meant Jennifer Babe, et al, *Canadian Forms and Precedents – Debtor/Creditor*, 2nd ed (Markham, ON: Carswell, 2008), used by I36.

⁶⁹⁹ *Black's Law Dictionary*, 7th ed, used by I3.

⁷⁰⁰ Online: Westlaw/Carswell <http://westlaw.com/> See FN 686, *supra* for list of interviewees with a subscription to Westlaw/Carswell.

⁷⁰¹ I37.

sign into Westlaw/Carswell was a disincentive to using the service.⁷⁰² One trustee indicated that he found he had more luck locating cases using Google than Westlaw/Carswell.⁷⁰³

CanLII – which is short for the Canadian Legal Information Institute - is a free online service that allows users to search for case law using key words, or for cases that have considered a specific provision of the *BLA*.⁷⁰⁴ Although it has recently been expanding the secondary commentary available on the website, CanLII does not provide as much commentary as Westlaw/Carswell and has no bankruptcy specific commentary. Some trustees used CanLII to locate cases when carrying out legal research.⁷⁰⁵ Others turned to free government websites.⁷⁰⁶

A final resource that trustees indicated they used frequently when carrying out research was other legislation, including provincial personal property security legislation, exemption legislation, insurance legislation and lien legislation (e.g., construction and vehicle liens).⁷⁰⁷ Some kept a hard copy of the legislation handy for ease of reference, but the legislation is also available freely online through government websites or CanLII.⁷⁰⁸

4.5.2.2.3. CONFERRING WITH OTHER TRUSTEES

When faced with a difficult decision, trustees will frequently confer with other trustees to help them determine how to proceed. This conferral process may occur when a trustee is truly confused about how to proceed – one interviewee indicated that his starting point when doing legal research was often to speak with other trustees at his firm.⁷⁰⁹ The

⁷⁰² I12.

⁷⁰³ I21.

⁷⁰⁴ Online: Canadian Legal Information Institute <https://www.canlii.org/>

⁷⁰⁵ I3, I12, I13, I25, I27, I29, I33.

⁷⁰⁶ I7.

⁷⁰⁷ I2, I3, I8, I9, I11, I19, I22, I16.

⁷⁰⁸ I16 indicated he had hard copies of the legislation he referred to in his office.

⁷⁰⁹ I15.

conferral process may also sometimes be driven more by a trustee's need for reassurance than for information: "Generally everybody has an idea of what they want to do. But then they're just seeking some affirmation that it's the right approach."⁷¹⁰

Trustees working in offices with other trustees had regular, easy venues for conferring with other trustees, and many reported that this was part of the process by which they would resolve a difficult question on a file.⁷¹¹ Depending on the trustee, they might also confer with the staff in the office.⁷¹² Two interviewees indicated they conferred with their trustee or trustee-in-training colleagues daily.⁷¹³ One interviewee described how this informal consultation would occur: "The [estate administrator] would come and talk to me. She prepares the 170 reports, and then if I'm like 50-50, then we'll all talk... we'll probably talk about it for 15 or 20 minutes, all five of us, and you'll see us just standing in the hall. And, everybody will give their input."⁷¹⁴

In addition to informal consultations between trustees working in the same office, some offices had adopted formal practices that foster intra-office collaboration. One interviewee worked in an office with two other trustees, and they each took turns going to court. Each trustee would be making submissions on the other two trustees' files, and so they regularly conferred before hand to ensure they agreed with the approach.⁷¹⁵ Another interviewee indicated that, in addition to daily interactions with the other trustees, her office had monthly insolvency team meetings where they would strategize about problem files: "we discuss the troublesome files just to see if we're all going off on a tangent, and getting all

⁷¹⁰ I1.

⁷¹¹ I3, I4, I8, I9, I11, I16, I17, I30, I42. I24, the most senior trustee in the office indicated that other trustees approached him for advice, but he would not approach them for advice.

⁷¹² I16.

⁷¹³ I17, I41.

⁷¹⁴ I35.

⁷¹⁵ I12. Likewise I4 worked in a firm where another trustee did the bulk of the court work, and she would report back on what was occurring in court.

emotional and personal and taking something personally, or whether there's really something relevant here. So we keep each other accountable on those files.”⁷¹⁶

Trustees working at multi-office firms reported regularly conferring with trustees working in other offices of the same firm.⁷¹⁷ Regular monthly calls between all the trustees in a firm, or a given group of trustees (e.g., those operating in Western Canada) gave trustees the opportunity to raise troublesome issues with their colleagues.⁷¹⁸ In addition, trustees may send firm-wide emails asking for advice. These emails allowed the inquiring trustee to get some ideas about how to solve the problem: “it’s not uncommon at all for us to get an email from some trustee in the firm saying, here’s the issue I’ve got, what do you guys think, and things like that.”⁷¹⁹ The resulting email discussions also helped other trustees in the firm increase their knowledge of the subject matter.⁷²⁰ One trustee, who belonged to a large firm, but was the sole consumer trustee working in his office, indicated that an informal “buddy system” existed within the firm: “Like I talk to my colleague in [city] quite often. She’ll call me. We’ll call each other at least two or three times a week. So we discuss certain issues, law cases, what’s going on. And ethics issues as well. Quite important. But we just have to make sure we’re on the same page as well.”⁷²¹

Not all trustees adopted a collaborative approach to decision-making. One interviewee indicated that he would only confer with the other trustee in his office, the named-partner, if he thought the decision to oppose might reflect on the reputation of the firm.⁷²² Another trustee indicated that he had been working on bankruptcies for 20 years

⁷¹⁶ I41. Other trustees that reported regular office meetings: I30.

⁷¹⁷ I1, I2, I7, I9, I28, I29. I4 reported she would not contact other trustees in her firm “a lot”, but did when she had questions about how bankruptcy operated in different provinces.

⁷¹⁸ I2, I15, I28, I34. I26’s firm had two firm-wide meetings a year.

⁷¹⁹ I34, see also I7, I26, I28.

⁷²⁰ I1, I13, I40.

⁷²¹ I15. See also I34 who indicated that informal communication between trustees at his firm was the norm.

⁷²² I14.

and rarely encountered issues that required him to confer with other trustees in his firm; he thought he might call his colleagues to discuss an issue on a file a couple of times a year.⁷²³

Trustees at small firms, and especially sole practitioners, have limited opportunities to confer with other trustees in their office or their firm, but they seek out such opportunities elsewhere. A number of interviewees reported having close relationships with trustees at other firms and regularly conferring with these individuals.⁷²⁴ One trustee, in a sole practice reported, “for myself, it’s a group of a few trustees that we trust each other’s judgment, and perspective on things and listen to what each other has to say. Try to figure out the best approach.”⁷²⁵ Another, who managed a practice, which also included one part-time and one inactive trustee, indicated that in hard case she would “very often... use the phone a friend option I call it. Phone another trustee and say hey, here’s the situation, I’m really torn on what to do with this.”⁷²⁶ A trustee who had previously been a sole practitioner and subsequently joined a large firm noted that when he was on his own he had relied on a network of trustees at other firms.⁷²⁷ A trustee currently operating a sole practice recalled that there had once been “an effort by sole practitioner trustees in Southwestern Ontario to form sort of an informal organization that would be that sort of office down the corridor, which is what the larger firms have, where you can go and ask somebody, what do you think about that.”⁷²⁸

Trustees who had other options within their office or within their firm were generally less inclined to look outside their firm for advice, though some reported looking beyond their firm for advice despite having in-firm options.⁷²⁹ Where an individual was the

⁷²³ I19.

⁷²⁴ I3, I6, I10, I22, I27, I32, I33, I37.

⁷²⁵ I33.

⁷²⁶ I22.

⁷²⁷ I13.

⁷²⁸ I37.

⁷²⁹ I1, I7, I9, I11, I26, I28, I40, I42.

only trustee from a firm in a given province, they might contact trustees from other firms within the same province to discuss province-specific issues. A trustee working on his own in one office of a larger, multi-trustee firm reported that he would speak to trustees at other firms – former colleagues of his, or trustees he had met through his involvement with the provincial association of insolvency and restructuring professionals. He indicated that such consultations took place less often than monthly.⁷³⁰ Another trustee, who also worked alone in an office as part of a bigger firm, had a group of three trustees at different firms to whom she regularly turned for advice.⁷³¹

4.5.2.2.4. CONSULTING A LAWYER

Trustees might consult a lawyer when deciding whether or not to file an opposition to discharge, but practice on this point varied. A number of interviewees suggested that they would rarely or never consult a lawyer with respect to an opposition.⁷³² These respondents indicated, alternatively, that the grounds for opposing a discharge were straightforward, or that they did not view lawyers as having better expertise than themselves on when an opposition was appropriate. One interviewee shared this perspective: “having done it for 30 years I don’t - maybe I’m too proud of myself but I think I can do it. So on an application for discharge, no.”⁷³³

On the other hand, a sizeable group of trustees indicated a willingness to approach lawyers for advice.⁷³⁴ Most trustees who consulted lawyers on any type of matter did so informally – they had enough of a relationship with the lawyer that they could call him or her up for a chat: “I talk with the people I’ve known for many many years. They don’t start the clock until I tell them to.”⁷³⁵ More than one trustee indicated that they might have an

⁷³⁰ I19.

⁷³¹ I29, see also I26.

⁷³² I2, I9, I13, I22, I33, I37, I38. I9, I13, I22, I24, I28 and I33 indicated they might contact a lawyer for advice on another matter.

⁷³³ I13, see also I6, I24, I33, I34, I38.

⁷³⁴ I3, I4, I6, I7, I8, I10, I17, I15, I19, I20, I26, I27, I35, I36, I40.

⁷³⁵ I21, see also I3, I4, I6, I7, I16, I29, I34.

informal discussion over lunch.⁷³⁶ In some cases, trustees indicated that they had developed these relationships by hiring lawyers for court work, or by being part of the insolvency community for a lengthy period of time.⁷³⁷ Some trustees characterized these lawyer-trustee relationships as reciprocal or “mutual learning”, where the lawyer would also approach the trustee for advice.⁷³⁸

Formal opinions from lawyers are less common than informal discussions.⁷³⁹ Cost was a serious impediment to getting a formal legal opinion.⁷⁴⁰ Trustees might pay for a legal opinion on one file – and take a loss - if they thought it might be useful on a number of cases going forward, or in an ordinary administration bankruptcy where there were funds to cover the cost of the opinion.⁷⁴¹ One trustee reported requesting a formal legal opinion to resolve a disagreement in interpretation amongst a number of trustees at her firm.⁷⁴² Two interviewees indicated they might hire a lawyer on a contingency basis.⁷⁴³ An informal discussion with a lawyer might lead a trustee to retain the lawyer to handle matter.⁷⁴⁴ One interviewee indicated a willingness to hire a lawyer when a file took on an air of acrimony:

I’ve had enough experience I know when to back off. And if there’s an agitated creditor or - and you don’t want to escalate it. So, the best thing is, just hire the lawyer. Let him put our position in front of the creditor, and then just deal with it,

⁷³⁶ I3, I8, I29.

⁷³⁷ **Hiring for Consumer:** I10, I15, **Hiring for Commercial:** I19, I39, **Part of Community:** I32.

⁷³⁸ I13, I19.

⁷³⁹ I3, I4, I6, I7, I8, I9, I10, I19, I26, I27, I34. I16 could not recall the last time he had commissioned a formal opinion regarding an opposition to discharge.

⁷⁴⁰ I1, I3, I10, I11, I26, I25.

⁷⁴¹ I9, I26, I27, I35.

⁷⁴² I7.

⁷⁴³ I10, I15.

⁷⁴⁴ I16.

I'd rather pay the – so when you're bigger you have the luxury of not having to go through the aggravation... It's going to escalate, they're going to make a complaint regardless. And this way, just catch it right at the beginning. The lawyer will take care of it and then you never hear about it again.⁷⁴⁵

A number of interviewees indicated that they might refer the parties, especially the debtor, to a lawyer.⁷⁴⁶ If the parties took the trustee's advice, they would be responsible for the cost of their own legal counsel.

4.5.2.2.5. CONSULTING THE OSB

The Official Receiver or personnel at the OSB office can also provide trustees with information about the bankruptcy system and suggestions about how to proceed. Some interviewees indicated that they would draw on these resources when faced with difficult decisions in their practice.⁷⁴⁷ This may be done informally, by way of a phone call to the OSB, or one trustee indicated that she would refer a file for an Official Receiver exam as a way of soliciting the Official Receiver's opinion on the file.⁷⁴⁸ Some trustees expressed reluctance to approach the OSB for assistance with a hard decision, because of the OSB's role as regulator, or because of doubts about the OSB's level of expertise: "They're the regulator. They're going to cite whatever the act says. I already know what the act says."⁷⁴⁹ One interviewee indicated he felt the OSB personnel were too bureaucratic and "lacked business sense."⁷⁵⁰ Another indicated he felt that his relationship with the OSB had gone

⁷⁴⁵ I35.

⁷⁴⁶ I4, I5, I32, I36.

⁷⁴⁷ I4, I5, I6, I7, I9, I11, I12, I17, I22, I28, I31.

⁷⁴⁸ **Informal:** I5, I9, I11, I16, I28, I31, I40; **Referral for Examination:** I22. I4 & I32 indicated they would approach the OSB informally for advice, but not regarding an opposition to discharge.

⁷⁴⁹ I3, see also I29. I28 indicated he would ask for input from the OSB but, "I'm not necessarily going to do what they recommend."

⁷⁵⁰ I25.

from being consultative and cooperative to being quite conflictual.⁷⁵¹ One interviewee indicated that frequent changes in staff, and ambiguity around the OSB’s positions made him reluctant to approach the OSB for assistance.⁷⁵² Conversely, another trustee regularly reached out the OSB to demonstrate to the regulator that she was a conscientious practitioner: “So they know, me as a trustee, that I do my homework...they’re not going to question me if there was ever a dispute between he said, she said. Because they know that I do my research or my investigations before.”⁷⁵³

4.5.2.2.6. CONSULTING THE JUDICIAL OFFICER

When uncertain about how to proceed, trustees may consult with judicial officers on a formal or informal basis. Some trustees had a close relationship with the judicial officers in their area, and reported they could call up the judicial officer and ask for advice on a “no-names” basis.⁷⁵⁴ One trustee even reported receiving phone calls from the Registrar to discuss general matters, though never specific cases.⁷⁵⁵ Conversely, some trustees indicated that they felt it would be highly improper or impractical to have an informal conversation with the judicial officer: “I wouldn’t do it. Because then you say, okay judge here’s a no-name basis. And then the judge says you can’t hear it before me then. And then the other judge may decide differently. So no.”⁷⁵⁶

Trustees may also have formal avenues for seeking the judicial officer’s opinion. In some jurisdictions the judicial officer may sit on a court committee with representatives from the trustee community, and general issues can be raised in this setting.⁷⁵⁷ For specific issues,

⁷⁵¹ I24.

⁷⁵² I15.

⁷⁵³ I12.

⁷⁵⁴ I28, I32.

⁷⁵⁵ I32.

⁷⁵⁶ I3, see also I6, I9. I8 had specifically avoided having conversations with the judicial officers in his jurisdiction that might border on consultations.

⁷⁵⁷ I7, I31, I32.

trustees can seek the advice and direction of the court.⁷⁵⁸ One trustee indicated that this is a tool he would use: “And sometimes if I’m not too sure I’ll go into court and seek advice and direction of the court. So the courts are willing to go along with that as long as we give them two or three conclusions to decide on. So they don’t mind that.”⁷⁵⁹ However, it is unlikely that a trustee would seek preliminary advice from the court on whether or not to file an opposition, as this could ultimately result in two court hearings, one for advice and direction and one on the substance of the opposition. A more straightforward approach would be to oppose the discharge and let the court decide whether or not an absolute discharge was warranted. A number of trustees indicated that in instances of uncertainty, they would err on the side of opposing, and let the judicial officer decide the proper disposition.⁷⁶⁰

4.6. DIFFERENCES

It became evident in my interviews that the procedures trustees use to identify grounds for opposing discharges – and then making the decision of whether or not to oppose the discharge – vary. In addition to teasing out these variations between the responses offered by different trustees, I asked interviewees whether or not they thought that trustees approached oppositions to discharge consistently. This proved to be a provocative question.

How do trustees know about the practices of their colleagues in the profession? Trustees see very little of each other’s practice, and some indicated that it was consequently difficult to comment on other trustees’ practices.⁷⁶¹ As previously discussed in the context of continuing legal education, a number of trustees had the opportunity to observe other trustees in court, and some of them were able to draw conclusions about different

⁷⁵⁸ *BLA*, *supra* note 11, s 34.

⁷⁵⁹ I15.

⁷⁶⁰ I14, I19, I34, I37.

⁷⁶¹ I2, I26, I37.

approaches to discharges based on these observations.⁷⁶² Some trustees worked in multi-trustee offices and knew, from their interactions with their colleagues, that they adopted different approaches to some aspects of discharges, or had disagreed about how to proceed on specific files.⁷⁶³ Some trustees had worked in more than one office and noted discrepancies between the approaches of the trustees in the different offices.⁷⁶⁴ Some trustees met with debtors who had visited more than one trustee and heard, second-hand from the debtor, how other trustees were approaching discharges.⁷⁶⁵ Finally, some attributed their awareness of other's practice to gossip: "I hear many stories, there's all kinds of stories that would make your hair curl in terms of things that reportedly other trustees are doing. I guess you're always going to hear those sorts of things."⁷⁶⁶

Some interviewees saw little difference in how trustees handle oppositions to discharge.⁷⁶⁷ As mentioned previously, many trustees characterized the decision to oppose a debtor's discharge as requiring very little in the way of an exercise of discretion, because most oppositions are filed in response to compliance issues. Unsurprisingly, many trustees who characterized the decision to oppose as non-discretionary saw little room for difference in how trustees approach oppositions.⁷⁶⁸

Some trustees felt that inconsistency was a problem of the past that had been addressed through legislative amendments. Discussing the surplus income regime, these trustees took the position that by narrowing a trustee's scope of discretion with respect to

⁷⁶² I3, I6, I7, I12, I16, I17, I18, I21, I25, I35, I37.

⁷⁶³ I12, I21.

⁷⁶⁴ I4, I12, I20, I23.

⁷⁶⁵ I19, I20. One trustee heard stories third hand from an employee, whose friend had filed for bankruptcy at another office, see I41.

⁷⁶⁶ I22, see also I6.

⁷⁶⁷ I1, I2, I15, I17, I18, I28, I31, I32, I42.

⁷⁶⁸ I2, I15.

how surplus income is calculated and for how long it is paid, the legislative amendments had increased consistency across trustees.⁷⁶⁹

Trustees would often describe each other generically as being more debtor or creditor friendly.⁷⁷⁰ More than one interviewee thought that the difference was generational.⁷⁷¹ One interviewee, who was quite junior, offered the observation that more experienced trustees tended to be more “pro-debtor”.⁷⁷² Another thought that it had to do with the trustee’s professional background, “if you have a background as a fraud examiner, you’re suspicious of everyone.”⁷⁷³

Frequency of opposition was one area where interviewees noted differences in trustee’s practices.⁷⁷⁴ One trustee indicated that he was in court about once a month, whereas other trustees seemed to be there more often, as frequently as once a week, and he inferred that they might be opposing more files.⁷⁷⁵ One trustee had started his career in an office with a senior trustee “who opposed basically nobody.”⁷⁷⁶ Another had a friend in the profession who, prior to the 2009 amendments, had refused to take on second-time bankrupts, because he wished to avoid going to court.⁷⁷⁷ One trustee, who had a strong preference for proposals, indicated that she filed significantly fewer oppositions than other trustees because she had so few bankruptcy files.⁷⁷⁸ One interviewee commented that if

⁷⁶⁹ I37, I34.

⁷⁷⁰ I3, I4, I9, I12.

⁷⁷¹ I3, I4.

⁷⁷² I4.

⁷⁷³ I6.

⁷⁷⁴ I3, I5, I6, I7, I9, I10, I11, I20, I23, I38.

⁷⁷⁵ I3.

⁷⁷⁶ I23.

⁷⁷⁷ I38.

⁷⁷⁸ I11.

trustees wished to avoid bringing an opposition, they could manipulate the process by not reporting causes of bankruptcy that require an opposition, such as gambling – although he could not say if trustees were engaging in such manipulations.⁷⁷⁹

Whether a trustee pushed debtors towards making a bankruptcy or a proposal was another big difference on which a number of interviewees commented.⁷⁸⁰ Some trustees espouse a strong preference for proposals. Proposals are more certain: “in a bankruptcy I tell the clients, I can’t guarantee what’s going to happen in the end. It’s a creditor driven process. If you do everything that’s required, then you’ll have a favourable report from me but I can’t guarantee you that the creditors won’t oppose. Where in a proposal once it’s court deemed or court approved I can guarantee you what will happen.”⁷⁸¹ One trustee indicated that her firm encouraged debtors to file proposals because bankruptcy should be a last resort, not the first one: “it’s legal, it’s available, it’s an acceptable means, but just because it’s legal doesn’t mean it’s the right thing.”⁷⁸² Some trustees articulated a concern that other trustees were pushing debtors to declare bankruptcy when they could or should do a proposal.⁷⁸³

Other trustees are more skeptical of proposals, and note that debtors get very little benefit from doing a proposal if they do not have sufficiently certain income to make all the payments, because they will default, may end up in bankruptcy, and ultimately have paid more money and taken more time than if they had initially filed for bankruptcy.⁷⁸⁴ These proposal skeptics voiced the concern that other trustees may be pushing debtors into proposals because they result in higher fees for the trustee.⁷⁸⁵ When acting as an

⁷⁷⁹ I38.

⁷⁸⁰ I11, I19, I20, I34, I37.

⁷⁸¹ I11.

⁷⁸² I41.

⁷⁸³ I20, I37.

⁷⁸⁴ I24, I38.

⁷⁸⁵ I24, I34, I38.

administrator in a proposal, a trustee receives \$750 when the proposal is filed, \$750 when the proposal is deemed approved by the creditors and then 20% of any amount disbursed to the creditors.⁷⁸⁶ In effect, an administrator is getting 100% of the first \$1500 paid by the debtor, this is generally more lucrative than a bankruptcy, where trustees get 100% of the first \$975 realized for the estate, 35% of amounts realized between \$975 and \$2,000, and 50% of any amounts realized in excess of \$2,000.⁷⁸⁷ Additionally, debtors normally contribute more to their creditors over the duration a proposal, then they would in a bankruptcy.

Pushing debtors to make proposals was not the only way that trustees could be pushing up their fees. They might lodge oppositions on spurious grounds in the hopes of getting a conditional order that requires further payment into the estate. For instance, one interviewee reported that some trustees will oppose any bankruptcy where the debtor has a tax debt – and debtors frequently have tax debt – but she suspected that these oppositions were intended to increase the trustee’s recovery.⁷⁸⁸ Another interviewee reported that some trustees were much more aggressive about going after assets, but again saw this behavior as primarily about the trustee’s recovery: “they say we act for the creditor, but really it’s all about fees, right?”⁷⁸⁹ Other interviewees reported that some trustees were much more aggressive about ensuring that they received full payment of their fees from the debtor. One interviewee described another trustee, who operated in the same community as him: “[the trustee] will chase \$5. There doesn’t seem to be any sort of practical sense as to cost versus benefit. [The trustee]’s very creditor-focused in making sure that everyone pays every last nickel.”⁷⁹⁰

In addition to increasing their recovery on any given file, trustees can increase their profits by attracting more debtors to file with them. Interviewees suggested that some

⁷⁸⁶ *General Rules*, *supra* note 77, R 129.

⁷⁸⁷ *Ibid*, R 128.

⁷⁸⁸ I33.

⁷⁸⁹ I11.

⁷⁹⁰ I25, see also I24.

trustees may engage in questionable conduct to encourage debtors to file with them. Many of the trustees I spoke to emphasized how important it was to be honest with a debtor at the outset of the file about how a bankruptcy was going to unfold, including disclosing any grounds upon which the trustee may need to oppose the discharge.⁷⁹¹ Telling a debtor about the obstacles to getting a discharge may make the debtor less likely to file bankruptcy at all, or with the trustee who has identified the ground for opposition.⁷⁹² Some interviewees aired the concern that other trustees might not be telling the debtor about such grounds until after they had signed the debtor up for bankruptcy.⁷⁹³ Another questionable tactic that trustees might use to attract debtors is to arrange for low appraisals of the debtor's assets, or insufficiently scrutinize the appraisal provided by the debtor.⁷⁹⁴ A low appraisal benefits a debtor because the asset might fall under a value-limited exemption (e.g., in Ontario a motor vehicle not exceeding \$5,650 is exempt), or if not exempt, the debtor can re-purchase the asset from the estate at the artificially low price.⁷⁹⁵

Another difference that trustees identified in the profession was the degree to which trustees adopted a standardized or personalized approach to debtors. Some firms were likened to “machine operations,” “assembly lines” or “insolvency factories”, where debtors are moved through in large volumes, according to pre-set rules with little attention being paid to an individual's specific circumstances.⁷⁹⁶ One trustee was concerned that when such an approach was adopted, debtors would get automatic discharges without a trustee ensuring that they had undergone a sufficient degree of rehabilitation: “you know just sign here and

⁷⁹¹ I6, I9, I29.

⁷⁹² I29.

⁷⁹³ I6, I33. I35 indicated that he saw a number of cases being opposed in court where the debtor seemed surprised by the opposition, and indicated it must be either because the debtor's understanding had not been clear at the outset or the trustee had changed his or her approach mid-way through the file.

⁷⁹⁴ I22. I7 thought some debtors shopped around for this manner of favourable treatment.

⁷⁹⁵ *Execution Act*, *supra* note 42, s 2; *Exemptions*, OReg 657/05, s 1.

⁷⁹⁶ I6, I33, I41.

pay this and you can get done, and people haven't learned anything."⁷⁹⁷ Another felt that in machine operations, the firm's business structure will lead them to oppose (even where an opposition is not warranted), because "it's tariff driven, so if they get additional funds, they get a percentage of it."⁷⁹⁸ A third interviewee felt that it was easier to make an "unbiased judgment" about whether or not to oppose "when you've been actually dealing with the debtor, and actually remember their name, and actually recognize them."⁷⁹⁹

One senior trustee, with 20 years of experience, took pride in the degree to which he crafted personalized approaches when appearing in court. He recounted that the normal practice in his jurisdiction, with respect to third-time bankrupts, was to bring an application for discharge before the court, and recommend that their discharge be refused. He resisted this standardized approach and instead crafted recommendations tailored to the bankrupt. Once he had taken on the case of a fourth-time bankrupt who was in his seventies. The trustee felt that a refusal was inappropriate in the circumstances and instead recommended a five-year suspension: "This was a person who was getting up in age, at some point they want some closure. Yeah they shouldn't have been here. Yeah the creditors shouldn't have given them. I get all the other side things. But at the end of the day what's the right resolution? If we suspend it 5 years, at the end of that time he's 80 years old, if the creditors still give him credit, I don't think there's much more I can do."⁸⁰⁰

Trustees evidenced different degrees of rigidity and creativity when interpreting their role under the legislation.⁸⁰¹ On the one hand, an interviewee who had quite recently received her license indicated that she felt some trustees bend the rules too much. She gave the example of a trustee she had observed in court asking for a debtor to be discharged

⁷⁹⁷ I41.

⁷⁹⁸ I33.

⁷⁹⁹ I6.

⁸⁰⁰ I16. See also I6.

⁸⁰¹ I8 discussed the related idea of thoroughness, "Some I would say don't look at a lot of stuff, and others, I think, nit pick too much."

notwithstanding his unpaid surplus income.⁸⁰² On the other hand, a interviewee who had been practicing for over three decades critiqued junior colleagues for too rigidly following the letter of the law: “I think that some people – especially those without sufficient experience – will go by the book to the detriment of everybody. This is what the book says. But yeah, the book doesn’t make sense here.”⁸⁰³ Another interviewee agreed with this assessment, to the extent that she noted that as a junior trustee she would be “extra conservative” in her approach.⁸⁰⁴

Some trustees viewed the inconsistencies in the system as normal, and not problematic.⁸⁰⁵ One interviewee summarized a common sentiment: “every time you have the human element in it, there’s always some subjectivity.”⁸⁰⁶ Others were more concerned about the lack of consistency.

4.7. CONSISTENCY & PREDICTABILITY

I return to the question of how to promote consistency and predictability in a highly discretionary system. This thick description of the trustee’s processes for identifying grounds for opposition and making the decision to oppose suggest that there are already forces promoting consistency and predictability– standardized checklists and forms, and consultative networks of professional ties. One may wish to enhance consistency and predictability by drawing on these forces. Additionally bankruptcy trustees, creditors and the OSB all face financial constraints and incentives which shape their activities in the opposition to discharges system. These constraints and incentives are largely consistent across Canada and may promote consistent and predictable decision-making.

⁸⁰² I12.

⁸⁰³ I13. See also I7.

⁸⁰⁴ I4.

⁸⁰⁵ I3, I29.

⁸⁰⁶ I29, see also I8: “Everybody’s human and they have their own perception of right and wrong.”

4.7.1. CHECKLISTS AND FORMS

Other professions make use of standardized checklists and precedents to increase consistency in how different tasks are carried out. There is a growing body of evidence in the medical fields that a professional's performance can be improved through the use of checklists, even in very complex contexts such as intensive care units. When checklists for catheter insertion were introduced into 108 intensive care units in Michigan (103 of whom reported data), the rate of catheter related bloodstream infections was reduced by up to 66%.⁸⁰⁷ One study found a 75% reduction in error rates when medical teams used a checklist in simulated crisis scenarios.⁸⁰⁸ The power of checklists may be attributable to their ability to help professionals remember important steps, and also to raise the baseline for minimum performance.⁸⁰⁹

The benefits of checklists are not uncontested. In a study of Ontario hospitals, where the adoption of checklists during surgical procedures had been mandated, there was no significant change in the mortality and complications rate during surgery.⁸¹⁰ Commentary on this study suggests that checklists alone are not effective without buy-in from the people, who are expected to abide by the checklists, and the actual completion of tasks listed on the checklist. Physician resistance is a serious impediment to the effectiveness of checklists. Physicians complain “checklists undermine their claims to expertise, are infantilising, and an unnecessary impediment to the swift decision-making and action required for effective

⁸⁰⁷ Peter Pronovost, et al, “An Intervention to Decrease Catheter-Related Blood Stream Infections in the ICU” (December 28, 2006) 355 N Engl J Med 2725.

⁸⁰⁸ A Arrianga et al, “Simulation Based Trial of Surgical Crisis Checklists” (January 17, 2011) 368 N Engl J Med 246. Medical teams using checklists missed “critical” steps in 6% of cases, those not using checklists missed steps in 23% of cases. 97% of the participants in the study indicated they would want the treating medical team to use a checklist if they experienced one of the crises.

⁸⁰⁹ Atul Gawande, “The Checklist” (December 10, 2007) *The New Yorker*, np, online: *The New Yorker* <http://www.newyorker.com/magazine/2007/12/10/the-checklist> [June 19, 2015].

⁸¹⁰ David Urbach et al, “Introduction of Surgical Safety Checklists in Ontario, Canada” (March 13, 2014) 370 *New England J of Medicine* 1029.

care.”⁸¹¹ Buy-in requires providing individuals with sufficient resources to comply with the checklist, offering them the opportunity to collaborate in adapting the checklist to their local context, and ensuring that they have the skills or knowledge to carry out the tasks listed on the checklist.⁸¹²

Checklists, forms and other standardized documents are already in use in the consumer bankruptcy system. Some individuals indicated they used checklists or forms to standardize their practice over time. Some firms used checklists or forms to standardize practice amongst different trustees or offices. In some jurisdictions, trustees used model orders when appearing in court. The OSB has developed some mandatory checklists that apply to trustees practicing in Canada, such as its directive, which sets out questions to be asked and matters to be explained at an initial meeting with a debtor.⁸¹³

A potential solution for increasing consistency in the bankruptcy system is to further standardize the processes used by trustees by developing checklists and forms that reflect best practices. There are challenges to implementing such a solution. First, it may not be possible to identify best practices. Trustees had intuitions about which practices were best, but between trustees these intuitions sometimes contradicted each other. For instance, some trustees felt that they were able to get the most information out of a debtor by handling the whole initial meeting themselves, whereas others felt that a debtor was more likely to disclose information if they were interviewed sequentially by two people, an estate administrator and then a trustee. More research might confirm which of these intuitions is correct; however, even this project would prove difficult because in the opposition to discharge process there is no easily identified optimal outcome. For instance, a trustee with a high frequency of oppositions may be better at identifying instances of pre-bankruptcy misconduct, may be less adept at engineering solutions that recover value for the creditors without necessitating an opposition, may be opposing on spurious grounds to try to increase

⁸¹¹ Charles Bosk et al, “Reality Check for Checklists” (2009) 374:9688 *The Lancet* 444.

⁸¹² Lucian Leape, “The Checklist Conundrum” (March 13, 2014) 370 *N Engl J Med* 1063.

⁸¹³ Office of the Superintendent of Bankruptcy, Directive Number 6R3, “Assessment of an Individual Debtor”, *supra* note 47.

recovery for the estate, or may be serving a population with a higher frequency of abusive debtors. There is not even a consensus amongst trustees on what constitutes abuse by a debtor, and consequently disagreement over whose discharge is properly opposed.

Having regard for this uncertainty over what constitutes a best practice, I would be reticent to mandate an approach that compelled trustees to use a given checklist or form. Moreover, mandatory checklists or forms raise additional concerns. As the experience in Ontario hospitals suggests, imposing checklists on an unwilling audience is unlikely to improve practice significantly. Enforcing use of a checklist also requires a regulator with resources – the OSB is working with limited resources and policing proper compliance with a host of new checklists is probably not the best use of these resources. Instead model checklists and forms could be developed and provided to trustees to adapt for use in their own practices. These checklists would be designed to operate more as a tool for reminding trustees of issues or steps to consider as opposed to a baseline for minimum performance. For instance, a list of registries that a trustee may want to search, along with an explanation of the types of information available in each registry and any restrictions on a trustee’s ability to carry out the search (e.g., under applicable privacy legislation) could be a useful tool for trustees. Well-designed, voluntary checklists and forms could serve to both enhance the competence of trustees and the consistency across the system.

4.7.2. NETWORK OF PROFESSIONAL TIES

The thick description of trustees’ practices reveals that trustees operate within a dense network of professional ties, and these ties can promote consistency within a given constituency. When faced with questions about how to interpret the *BLA*, trustees across Canada turn to the same book, *The Annotated Bankruptcy and Insolvency Act*. They attend CAIRP events, which include a mix of region specific and nationally standardized content. Some belong to larger firms, which seek to standardize practices across their various offices. Within a judicial district, trustees will respond to direction given by the judicial officers about what types of oppositions should be made, as evidenced by the disparate approach to oppositions for fees across Canada. Trustees will also respond to direction from the local branch of the OSB – one trustee explained the variety of approaches amongst trustees to income and expense reports as resulting from OSB offices having different requirements. Trustees also regularly interact with each other, within and between offices and firms, and

with other individuals involved in the bankruptcy system: lawyers, regulators and judicial officers.

Describing a trustee's ties as homogenizing forces may not be entirely accurate. There are a few situations in which a trustee may be compelled to adopt a given practice. For instance, a firm may be able to mandate a given practice and then develop a process for auditing the work of its trustees to ensure that the practice is being employed. Likewise, in a judicial district, where the judicial officer has - or a group of judicial officers have - agreed on an approach, they can compel trustees to adopt the approach through the orders they grant, or refuse to grant, on application for discharge hearings. These ties bind, others merely persuade. For instance, when a trustee consults *The Annotated Bankruptcy and Insolvency Act*, another trustee or a lawyer, the trustee may be persuaded by the advice she receives, but she may equally find reasons to disregard it. The network of ties may increase consistency, but cannot be said to ensure it.

These ties reinforce consistency across a constituency, but they may equally reveal fault lines along which inconsistencies can emerge. Within a network practices may be standardized, but between networks practices may vary significantly. One trustee may belong to overlapping constituencies, and the practices reinforced in each may differ, or even conflict. For instance, a trustee operating in a region where the OSB office does not require income and expense sheets may still be required to collect income and expense sheets from bankrupts by firm policies. Or a trustee may consult colleagues who encourage her to oppose on the basis of fees, but she might be practicing in a judicial district where judicial officers do not award conditional discharge orders for fees.

If one wishes to improve consistency across the system, one may want to foster these networks of professional ties. The monthly insolvency discussion group meetings in Vancouver are an example of how these ties can be nurtured, by creating a space for trustees and lawyers to meet each other and discuss a wide range of issues. The insolvency discussion group has been running for a number of decades and currently a lawyer and a trustee has taken the initiative to organize it. In Nova Scotia, the provincial association of insolvency and restructuring professionals has taken on a similar role, organizing regular professional development sessions where trustees have the opportunity to meet and interact.

Regular meetings along the model of the insolvency discussion group are not the only method for fostering stronger professional ties. Technology offers a number of opportunities to increase interactions amongst trustees across Canada. For example, trustees could use a listserv to share items of interest with a group of other trustees. Membership in the listserv might include trustees working primarily on consumer matters, located within a geographic region, or operating at small or solo practice offices, or in any other way the listserv manager wanted. One model for this type of network building activity is the Canadian Association of Legal Ethics listserv. The listserv was founded in 2010 and has over 100 members including academics, lawyers, regulators and judges.⁸¹⁴ Members use the listserv to share articles and news items of interest, as well as to engage in more extended discussions about legal ethics topics. Like the Vancouver Insolvency Discussion Group, the success of the listserv is largely attributable to the personal initiative of its organizers, a small group of academics who regularly post material.

4.7.3. FINANCIAL CONSTRAINTS AND INCENTIVES

This chapter's thick description of the role of the trustee in the opposition to discharge process reveals financial constraints and incentives, which limit a trustee's ability to identify pre-bankruptcy misconduct and discourages them from bringing forward oppositions. Creditor disengagement may be driven, in part, by the lack of a financial upside to involvement in the opposition to discharge process. The OSB's disappointing level of involvement on many files, may be due in part to a lack of funding.

Trustees are constrained in their ability to investigate pre-bankruptcy misconduct due to a lack of money. Most consumer bankruptcy estates are of quite low value and the debtors have little ability to pay large additional amounts for a trustee's fees. This is a reality of personal bankruptcy; however the rules about how these small amounts are distributed may exacerbate the problems caused by the lack of value.

Andrew Diamond, who worked as a judicial officer in Toronto, suggested that the

⁸¹⁴ Adam Dodek, "A Dodek: CALE Listserv Report for 2013" (December 15, 2013) Canadian Association for Legal Ethics, online: Canadian Association of Legal Ethics <http://ethicsincanada.com/2013/12/15/a-dodek-cale-listserv-year-end-report-for-2013/> [June 17, 2015].

fee structure for trustees disincentivizes them from carrying out investigations into debtor misconduct or lodging oppositions to discharge. In a summary case, the trustee does not receive any additional remuneration for carrying out investigations.⁸¹⁵ In an ordinary case, the trustee's remuneration is tied to a percentage of the value of the assets in the estate, "leaving estates with few assets, but potentially very large and dishonestly obtained debts, free from official scrutiny."⁸¹⁶ He suggested that the fee structure for all trustees should be tied to the amount of debts held by a bankrupt, as this might be a better proxy for the complexity of the case and amount of work required by a trustee administering it.⁸¹⁷

Diamond's concerns were shared by a number of the trustees I interviewed. Trustees reported they lacked the financial wherewithal to carry out investigations where they suspected debtors of bad behavior: "when you're doing small bankruptcy files where you're getting fees of \$1800 or whatever, there's no money, so we don't have the resources to do that."⁸¹⁸ Money was the "limiting factor."⁸¹⁹ Many trustees indicated that they referred files to the OSB's Debtor Compliance Referral Program, because then the OSB's staff could carry out the investigations without any costs accruing to the estate, or the trustee.⁸²⁰ Trustees might also alert creditors to suspicious circumstances, and leave it to them to pursue matters further should they wish to do so.⁸²¹

Because trustees lack the funds necessary to carry out rigorous investigations of suspected misconduct, they rely on debtors being truthful, creditors being vigilant and the OSB energetically pursuing files referred to them. When debtors fail to be honest, the role of creditors and OSB becomes even more important. But creditors often see little financial

⁸¹⁵ Diamond "Emphasizing the Criminal", *supra* note 114 at FN 12 and accompanying text.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ I15, see also I5, I14, I25, I35, I40.

⁸¹⁹ I40.

⁸²⁰ I14, I15, I35.

⁸²¹ I15, I35.

upside to becoming actively involved in the bankruptcy process, unless they have a goal other than recovery, such as deterring future debtor misconduct by the same debtor or other individuals. The OSB's pursuit of debtors has been criticized for being languid – a shortcoming that may also stem from a lack of resources and staff. In the absence of meaningful assistance from creditors or the OSB, many trustees are restricted to bringing oppositions on easily identified compliance issues, as opposed to more difficult to identify conduct issues.

With respect to the decision to file an opposition, both the lack of potential recovery and the un-reimbursed cost of bringing the opposition may dissuade trustees from filing oppositions. Filing an opposition can be lucrative for a trustee if the judicial officer grants a conditional order that requires the debtor to make a further payment into the estate, the amount of the conditional order exceeds the costs of administering it, and the debtor actually makes the payment. The trustee's remuneration is tied to the value of the debtor's estate. On a summary file, when the value of the estate increases, the trustee's remuneration automatically increases. On an ordinary file, when the value of the estate increases, the maximum amount a trustee can charge also increases. This benefit, which is contingent on the judicial officer's willingness to grant a conditional order, and the debtor's willingness and ability to pay, is off-set by the costs of bringing an opposition.

When asked if potential recovery was a factor that affected their decision about whether or not to oppose a discharge, a number of trustees answered in the negative.⁸²² Trustees bring most of their oppositions in response to the debtor's lack of compliance and many view these oppositions as non-discretionary: they must oppose regardless of the potential for recovery.⁸²³ A number, however, agreed that they would consider whether an opposition would benefit the estate financially. These interviewees felt it was important to use "practical sense"⁸²⁴, "put a business spin on this stuff"⁸²⁵ or "determin[e] if there's any

⁸²² I21, I22, I25, I36.

⁸²³ I1, I20, I21, I29, I33.

⁸²⁴ I16.

⁸²⁵ I34.

benefit to anyone in terms of opposing.”⁸²⁶ For instance, trustees reported that where a debtor owed a small amount of money to the estate for the repurchase of a non-exempt asset, the trustee would likely not oppose the debtor’s discharge.⁸²⁷ Some trustees indicated that they were less inclined to oppose where a debtor had little ability to pay,⁸²⁸ but others felt that the debtor’s ability to pay would only make them less inclined to recommend a conditional discharge order, they would still bring the matter before the court.⁸²⁹

Trustees agreed that recovery to creditors was not the only “benefit” that could result from an opposition, sometimes behavior needed to be sanctioned and they would oppose a discharge regardless of the recovery: “it’s not any amount of money, it didn’t matter. It’s the behavior that has to stop.”⁸³⁰ One interviewee summarized the importance of sanctioning conduct: “I have one whereby we went to an awful lot of work for somebody who – there won’t be a lot of money there, but she’s done a lot of things that aren’t right and you can’t let her out of bankruptcy until the creditors and the courts have had a good look at her.”⁸³¹

The cost of bringing an opposition can be substantial. Trustees only need to pay a one-time court fee of \$50 on a file, but oppositions require staff time and trustee time: reviewing the file, preparing the section 170 report, preparing supplementary reports for the court, carrying out research, and educating the debtor about the court process. Some interviewees had no estimate of how much it cost to oppose a discharge.⁸³² Others felt the

⁸²⁶ I19.

⁸²⁷ I2, I19, I31. With respect to non-exempt assets being repurchased by a debtor, trustees might take a security interest in the asset to secure repayment and seize the asset if the debtor failed to make payments, see I31, I34. I31 described this approach as expeditious as compared to an opposition.

⁸²⁸ I2.

⁸²⁹ I22, I27, I33, I37.

⁸³⁰ I20, see also I1, I16, I38, I39,

⁸³¹ I38.

⁸³² I5, I11, I29, I31.

cost varied significantly depending on the file, both how much preparatory work was required, and whether or not it was heard in conjunction with a number of matters or required a special court appearance.⁸³³ Estimates of cost varied. One trustee described the cost as minimal, a \$50 filing fee and an hour of his time.⁸³⁴ Others estimated the amount of time required as between 4 and 15 hours, with total costs ranging from \$300 to \$2000.⁸³⁵

Although the summary file tariff does not provide any extra compensation to trustees if they oppose a file, some trustees made a practice of charging debtors extra fees if they did not comply with their duties, or otherwise behaved in ways that necessitated an opposition.⁸³⁶ These fees ranged from \$100 to \$1000. When debtors pay these fees, it increases the total recovery of the estate, and consequently the trustee's recovery under the tariff. Some trustees felt it was unfair that they had to bear the cost of an opposition, when most oppositions were triggered by the debtor's non-compliance: "And it feels like the trustee's being punished a lot. Because it's the trustee's time, paper, mailing, everything, right."⁸³⁷ Some trustees felt that they should receive some additional remuneration when required to oppose a file to compensate them for the time required to do so.⁸³⁸ Conversely, some saw the cost of opposing discharges as simply a "cost of doing business."⁸³⁹

An financial analysis of the decision to oppose suggests that in some cases it may be to a trustee's advantage to lodge an opposition, but in other the trustee will incur costs with little likelihood of a financial upside. Trustees acknowledged that sometimes the decision to

⁸³³ I32, I18, I22, I40.

⁸³⁴ I27.

⁸³⁵ I1 (\$1000-2000), I2 (\$1000), I9(\$1000), I10 (\$800-\$1000), I4 (\$500-600), I42 (\$500-\$1000), I22 (\$300-\$400, based on 4-5 hours of staff time), I26 (\$300-\$400). I20 reported that appearing to court to oppose a file would take "a whole day".

⁸³⁶ I9, I10, I16, I38, I42. I14 disagreed with the practice of charging these types of fees for non-compliance, but had seen them awarded in court.

⁸³⁷ I42, see also I21, I40.

⁸³⁸ I1, I40.

⁸³⁹ I33.

oppose was driven by an analysis of costs and benefits, but they also reported lodging oppositions where there was no financial rationale for doing so. Moreover, a number of trustees had no estimate of how much it costs to lodge an opposition suggesting that at least some trustees are not carrying out a sophisticated cost-benefit analysis when deciding whether or not to lodge an opposition.

The trustees' fee structure could be adjusted to increase a trustee's remuneration if the trustee carries out investigations or brings an opposition. Such modifications would reward conscientious trustees, but they might also have unintended consequences. For instance, unscrupulous trustees may carry out spurious investigations to drive up their recovery from a file, and the corresponding cost of the bankruptcy for the individual. Moreover, a trustee's entitlement to further payment is meaningless if there is no value in the estate and the debtor has little or no ability to pay the larger bill.

One might try to modify the behaviour of creditors and the OSB by addressing the financial constraints and incentives they face. Creditors could be encouraged to engage in the bankruptcy process by increasing the financial upside of their involvement. Under the current legislation, the financial upside for creditors, who oppose, is quite limited. The creditor may be awarded costs by the judicial officer hearing the discharge application and these costs are paid out in preference to other debts.⁸⁴⁰ To the extent that a creditor's involvement results in increased recovery for the estate, that amount is distributed amongst the whole creditor group according to the scheme of distribution set out in the *BLA*. Amendments brought forward in 2005 would have allowed creditors, who oppose discharges, to get conditional orders requiring payment directly to the opposing creditor rather than to the estate for the benefit of all the creditors. This amendment was criticized for undermining the principle of equal treatment of creditors and never passed into law.⁸⁴¹ Some of the interviewees opined on whether or not they thought such a provision should be reintroduced and the bulk of the feedback was critical: "I think it sort of violates the

⁸⁴⁰ *BLA*, *supra* note 11, s 136(1)(b)(ii), 197(6.1).

⁸⁴¹ Ben-Ishai, "Discharge", *supra* note 144 at 369.

fundamental 'all creditors are treated equal' principle. So I have some difficulty with that.⁸⁴² One trustee was in favour of granting opposing creditors preferential payout from any resulting conditional order.⁸⁴³

An oft-repeated complaint by trustees is that creditors contribute to bankruptcies through irresponsible lending practice, but remain disengaged from the bankruptcy system because they have already incorporated the cost of potential default into their initial cost of lending.⁸⁴⁴ This complaint gestures towards an economic critique of the current system: by shirking their role in policing debtor abuse in the bankruptcy system, large creditors have externalized the costs of their lending practices, and the resulting defaults. The costs of investigation and opposition then fall to the OSB and trustees.

This critique suggests a solution that could both shift the creditor's incentives in the broader lending system and remove the financial constraints faced by the OSB. Creditors could be required to fund the cost of policing the bankruptcy system, but have the policing function be carried out by someone else. Belgium offers one model for how to do this. In Belgium, consumer lenders are charged an annual amount equal to a percentage of their consumer credit portfolio, which has fallen into arrears. They pay a levy equal to 0.02% of mortgages in arrears and 0.2% of other consumer loans in arrears. These annual contributions are then placed into a Fund for the Treatment of Over Indebtedness, which finances debt counsellors, mediators and public awareness campaigns.⁸⁴⁵ The benefit of the Belgian approach is that it disincentivizes lenders from advancing credit where the risk of default is high, and makes available funds for government programs. In the context of

⁸⁴² I34.

⁸⁴³ I39.

⁸⁴⁴ See the discussion in Chapter 5, Section 5.2.5.

⁸⁴⁵ Micheline Gleixner, "Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency" in Janis Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto, ON: Carswell, 2014) 587 at 633; Jason Kilborn, "Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg" (2006) 14 *Am Bankr Inst L R* 69 at 105-106; Law Reform Commission, *Personal Debt Management and Debt Enforcement* (Dublin: Law Reform Commission, 2009) at paras 687-701, online: Law Reform Commission <http://www.lawreform.ie/fileupload/consultation%20papers/cp56.htm> [June 17, 2015].

policing abuse in the Canadian consumer bankruptcy system, some of these funds could be devoted to increasing the capacity of the Debtor Compliance Referral Program. This benefit would need to be weighed against the impacts such a levy would have on the cost of credit, and accessibility of credit for vulnerable consumers.

The financial constraints faced by trustees, creditors and the OSB could be viewed as another force promoting consistency across the Canadian personal bankruptcy system. Trustees lack the funds to investigate misconduct, or a strong financial incentive to lodge oppositions. The lack of financial upside ensures most creditors remain disengaged. The OSB lacks funds to investigate or oppose. These financial constraints and incentives are the same across the country.

4.8. CONCLUDING THOUGHTS

The financial explanation that emerges from my close analysis of process casts some light on the pattern of trustees' oppositions. The financial account suggests that trustees rarely oppose based on pre-bankruptcy misconduct, because they lack the resources and incentives to carry out the investigations necessary to uncover such misconduct. But the financial approach fails to explain some aspects of how the system operates. In particular, trustees continue to oppose for compliance reasons despite the fact that oppositions cost money, and any further recovery is uncertain. The financial explanation does not capture the breadth of factors that shape a trustee's actions in the opposition to discharge process. In the next chapter I consider how trustees think about three different types of debtors, all of whom have been characterized in the case law as potentially culpable of pre-bankruptcy misconduct. This chapter suggests that the trustee's reluctance to oppose on the basis of a debtor's pre-bankruptcy conduct may not result solely from the financial obstacles to identifying such misconduct, but also because trustees are slow to characterize the misconduct as blameworthy. Then, in the following two chapters, I put forward an alternative explanation of the pattern of trustee's oppositions, which focuses on how their emotional labour shapes their discretionary decision-making.

5. THREE DEBTOR TYPES: HOW TRUSTEES APPROACH PRE-BANKRUPTCY MISCONDUCT

5.1. INTRODUCTION

Trustees file oppositions to discharge more frequently in response to a debtor's non-compliance during bankruptcy, rather than to a debtor's misconduct prior to bankruptcy. A thick description of the practices of trustees reveals a financial explanation for this pattern: instances of non-compliance are easy and inexpensive for a trustee to identify, whereas pre-bankruptcy misconduct is more difficult and potentially expensive to identify. On most files, trustees lack the financial resources to investigate the debtor's pre-bankruptcy conduct, and there is little or no financial reward for carrying out such investigations. On the other hand, the financial explanation fails to fully account for why trustees continue to lodge oppositions for non-compliance, when seeing the opposition through to court can be costly, and the likelihood of a financial benefit is remote.

In this chapter, I point to a second shortcoming of using financial factors to explain the pattern of oppositions lodged by trustees: even when the elements of a debtor's pre-bankruptcy conduct are not in dispute, and the conduct in question has been identified in written decisions as sanctionable, trustees are reluctant to characterize the conduct as blameworthy, or meriting an opposition. This finding suggests that the reluctance of trustees to lodge oppositions on the basis of pre-bankruptcy misconduct does not result solely from the fact that such misconduct is expensive and difficult to identify.

This chapter examines the attitudes of trustees towards a debtor's pre-bankruptcy misconduct in the context of three different types of debtors: the profligate spender, the tax debtor, and the judgment debtor. These three types of debtors appeared with relative frequency during my review of the written decisions from application for discharge hearings. All three have engaged in pre-bankruptcy conduct, which judicial officers have decided may disentitle them from receiving an absolute discharge. For each debtor type, I compare how the trustees approach the question of whether or not to oppose the debtor with how judicial officers respond once an opposition has been filed. Assessing the culpability of any one of these debtor types is a complex undertaking, and there was variation across the judicial

decisions and amongst the trustees I interviewed, but this comparison suggests that trustees regularly assess the debtors as not being culpable, notwithstanding written case law indicating that the conduct in question is blameworthy. Trustees approach the different debtors in a way that suggests they are more oriented towards rehabilitative aims, whereas the case law is more geared towards deterrence and retribution.

This chapter serves the secondary purpose of illuminating how the legislative context set out in Chapter 2 and the policy rationales described in Chapter 3 are applied in specific scenarios. The legislation and the case law leave a significant amount of discretion with trustees, about whether or not to oppose a discharge, and with judicial officers, about how to dispose of a case when an opposition is lodged. Despite this wide grant of discretion they do shape these decisions, including how the parties frame their arguments about the deservingness of debtors. The role of legislation and case law can be difficult to understand in the abstract, and these three different debtor types provide an opportunity to illustrate how they are applied to real scenarios.

5.2. THE PROFLIGATE SPENDER

A Mechele Dickerson identified excessive spending by debtors as one of the behaviors that is associated with opportunistic use of the bankruptcy system. Her stereotypical “bankruptcy queen” is a profligate spender: she “charges lavish trinkets on a Visa card and... then cavalierly files for bankruptcy rather than selling the exempt assets, curtailing spending habits, or working to repay the credit card debt.”⁸⁴⁶

The *BLA* contains provisions designed to deny the benefit of the bankruptcy discharge to the profligate spender. One of the grounds upon which a discharge may be opposed is if an individual contributed to his or her bankruptcy through unjustifiable extravagance in living.⁸⁴⁷ The language of unjustifiable extravagance invites trustees and judicial officers to make determinations about the blameworthiness of the debtor’s pre-bankruptcy spending. These determinations are highly discretionary and engage the decision-

⁸⁴⁶ Dickerson, *supra* note 314 at 48-49.

⁸⁴⁷ *BLA*, *supra* note 11, s 173(1)(e).

maker's beliefs about the limits of individual responsibility within a larger context of easily available, and aggressively marketed credit. The trustees and judicial officers approaches reflect commonly held and conflicting beliefs about credit-fuelled consumption. Trustees, in particular, expressed opinions suggesting they viewed debtor spending as less sanction-worthy because of the role creditors play in contributing to high personal debt loads by lending irresponsibly.

In this section, I will consider how judicial officers and trustees determine when a debtor's extravagance crosses the line into the realm of unjustifiable, the responses they adopt when extravagance has been made out, and some of the reasons why making determinations of the blameworthiness of spending can be complex. Judicial officers and trustees adopt similar indicators to determine if a debtor's pre-bankruptcy spending passes the threshold of "undue extravagance" – debt loads which are disproportionate to a debtor's income, discretionary purchases, especially of luxury goods, borrowing while insolvent, and admissions proffered by the debtor. Despite embarking from similar starting points, the responses of trustees and judicial officers, once extravagance is established, can differ. Trustees evidence reluctance to engage the opposition to discharge process, and instead use alternative methods to address the overspending. Moreover, they emphasize irresponsible lending on the part of creditors as a factor mitigating the culpability of debtors. They are also sensitive to the plight of impoverished debtors, who have relied on credit to meet their basic needs. Overall, their approach to the profligate spender suggests a sympathetic approach, aimed at the rehabilitation of the debtor, which is not reflected to the same degree in the written decisions of judicial officers.

5.2.1. ESTABLISHING EXTRAVAGANCE

The *BLA* attempts to delineate when consumption crosses over the line from permissible to problematic. An individual's discharge may be opposed if the debtor contributed to his or her bankruptcy through unjustifiable extravagance in living. But what exactly constitutes "unjustifiable extravagance in living"? Is there such a thing as justifiable extravagance in living – and when does extravagance cross the line from justifiable to unjustifiable? One judicial officer offered this interpretation of the phrase:

The phrase "unjustifiable extravagance in living" must be interpreted in the context in which it finds itself in paragraph 173(1)(e) — "rash and hazardous speculation", "gambling", "culpable neglect". These words all imply behavior significantly beyond what society should be expected to tolerate. Thus the extravagances covered in this paragraph must be significantly more than minor self indulgences or lapses in frugality.⁸⁴⁸

In the cases where unjustifiable extravagance in living is raised as ground of opposition, judicial officers and trustees have adopted a variety of methods for measuring extravagance: (i) comparing an individual's debt load to his or her income, (ii) scrutinizing his or her purchases for evidence of discretionary, or luxury purchases, (iii) looking to the presence of other unpaid bills to color the propriety of the debtor's spending, and (iv) relying on an individual's admission of extravagant spending.

One interpretation is that a person lives with unjustifiable extravagance when the cost of his or her lifestyle outstrips his or her means. The judicial officer may decide that a person has been living beyond his or her means if his or her liabilities greatly exceed the debt load that the person could be expected to carry with his or her income. For instance, in *Re Rahayi*, the debtor incurred \$200,000 in credit card debt over 4 years, the judicial officer commented that "this is tantamount to a lifestyle based upon \$50,000 per year net income. Clearly the bankrupt earned nothing like this and should not have been living at this level."⁸⁴⁹ In *Re Doiron*, the OSB argued that credit card debt of almost \$72,000 when the annual family income was \$42,000 "shows maintenance of a lifestyle far above that which is reasonable."⁸⁵⁰ In *Re Ledrem*, the judicial officer was prepared to find the bankrupt's assumption of mortgage payments equal to 45% of the debtor's net monthly income was "excessive."⁸⁵¹

⁸⁴⁸ *Re Maas*, *supra* note 247 at para 17.

⁸⁴⁹ *Re Rahayi*, 2007 CarswellOnt 3576 at para 4 (ON Sup Ct) Nettie Reg.

⁸⁵⁰ *Re Doiron*, 2009 NBQB 282 at para 10, 59 CBR (5th) 228, Bray Reg. The judicial officer did not directly respond to this argument.

⁸⁵¹ *Re Ledrem*, *supra* note 211 at para 17.

Trustees indicated that they would consider the bankrupt's debt load in light of the income that the bankrupt had been making at the time the debt was incurred.⁸⁵² Many agreed that a high consumer debt load did not evidence misconduct if the bankrupt had previously been earning at a higher level and then had his or her income reduced.⁸⁵³ Conversely, if the debt load was grossly disproportionate to the bankrupt's income, that might raise red flags for the trustee. A disproportionately high debt load may spur a trustee to investigate whether the bankrupt misrepresented his or her financial affairs when applying for credit.⁸⁵⁴ A trustee's investigation into high debt loads may also reveal another ground for opposition such as evidence of gambling, buying goods on credit and selling them at a discount, or preferential payments – including paying out a loan that a family member has guaranteed.⁸⁵⁵

Judicial officers may determine that a debtor has engaged in undue extravagance by examining the items on which the debtor spent money. Some types of purchases are repeatedly identified by opponents, and regularly accepted by judicial officers, as evidence of extravagance. Large or fancy houses, new or luxury vehicles, television sets, computers, alcohol, vacations, jewelry, restaurant meals, and cosmetic surgery have all been identified as the markings of an extravagant lifestyle.⁸⁵⁶ These purchases are all discretionary in nature, they are not the necessities of life.⁸⁵⁷

⁸⁵² I3, I6, I7, I14, I15, I20, I31, I33, I38.

⁸⁵³ See e.g., I7, I31, I38.

⁸⁵⁴ I10, I15. A number of trustees indicated that they would oppose a debtor with high levels of consumer credit, where the credit had been incurred on the basis of a misrepresentation, I3, I33, I35, I38.

⁸⁵⁵ **Gambling:** I3, I10, I11, I12, I13, I15, I26 (addiction), I27. **Buying goods and selling them:** I22, I27. **Paying off a loan guaranteed by a family member:** 25.

⁸⁵⁶ **Houses:** *Re Arsenault*, *supra* note 214 at para 15. See *Re Ledren*, *supra* note 211 at para 17, where the bankrupt purchased a house in the fancy Toronto neighbourhood of Rosedale. In *Re Rowe* (2007), 154 ACWS (3d) 280 at para 8, 2007 CarswellOnt 241 (ON Sup Ct) Nettie Reg, the bankrupt had purchased a large house with his ex-wife, and he and his ex-wife had to borrow from her parents to afford the house. In *Re Lobrenz*, *supra* note 277 at para 34, the couple rented a home in a nice area of Westbank and the judicial officer felt they could reduce their budget by moving to less expensive accommodation. **Vehicles:** In *Re Dykes*, 2013 ABQB 597 at para 14, 234 ACWS (3d) 551, Prowse Reg, the debtor purchased and

Like judicial officers, trustees have also identified a list of purchases that they consider problematically extravagant: vacations, vehicles, designer clothes, jewelry, televisions, cosmetic surgery, alcohol, cigarettes, and gifts.⁸⁵⁸ A theme identified in the last chapter, creditor disengagement, hampered a trustee's ability to address this type of extravagant spending. When asked whether or not he would oppose a debtor's discharge on the basis of specific, discretionary purchases, one trustee bemoaned: "I'd have to know about it... if we're not alerted by creditors, how do we know?"⁸⁵⁹

An individual's spending will draw special scrutiny from a judicial officer if it is carried out when the debtor is unable to satisfy all his or her liabilities. In *Re Dykes* the bankrupt had borrowed large amounts of money from her boyfriend and his parent's company, but made no efforts to repay them and instead purchased and then customized a

customized a Hummer. In *Re Lobrenz*, *supra* note 277 at paras 19-20, the husband purchased a new Ford FreeStar Van worth \$43,995 and the wife purchased a new Ford Taurus worth \$30,899. In *Re Insley*, 2007 SKQB 383 at para 18, 308 Sask R 136, Schwann Reg, the debtor purchased a used Mercedes Benz. In *Re Labonte*, 2008 NLTD 58 at para 5, 171 ACWS (3d) 256, Hoegg J, the bankrupt and his wife purchased a new Mitsubishi Outlander with a loan in the amount of \$45,000. **Television sets:** *Re Martino*, *supra* note 320 at para 25; *Re Literowicz*, *supra* note 320 at para 11; *Re Salmon*, *supra* note 236 at para 6. **Computers**, see *Re Lobrenz*, *supra* note 205 at para 14. **Alcohol:** *Re Vettese*, [2006] WDFL 2929 at para 7, 2006 CarswellOnt 4142(ON Supt Ct) Nettie Reg. The creditor in *Re Dolgetta*, *supra* note 179, pointed to spending on alcohol as evidence of extravagant living, a contention the court rejected. **Vacations:** *Re Literowicz*, *supra* note 320 at para 11; *Re Rudzki* (2007), 29 CBR (5th) 237 at para 6, 154 ACWS (3d) 279 (ON Sup Ct) Nettie Reg; *Re Lobrenz*, *supra* note 205 at para 14; *Re Insley*, *supra* note 856 at para 18; *Re Doiron*, *supra* note 850 at para 10; *Re Skakun*, *supra* note 232 at para 2; *Re Gray*, *supra* note 243 at para 11. **Jewelry:** *Re Lobrenz*, *supra* note 205 at para 14. **Restaurant meals:** *Re Insley*, *supra* note 856 at para 18; *Re Doiron*, *supra* note 850 at para 10; *Re Lobrenz*, *supra* note 277 at para 34; **Cosmetic surgery:** *Re Skakun*, *supra* note 232 at para 2.

⁸⁵⁷ But see *Re Maas*, *supra* note 247, where the judicial officer was unwilling to find that the debtors had lived extravagantly, even though they had purchased a number of these luxury items.

⁸⁵⁸ **Vacations:** I1, I6, I7, I8, I9, I14, I25, I26, I27, I31, I35, I36, I39. **Vehicles:** I35, I39 "expensive cars". **Designer clothes:** I39. **Jewelry:** I9, I35. **Televisions:** I16. **Cosmetic surgery:** I8. **Alcohol & cigarettes:** I26. **Gifts:** I36.

⁸⁵⁹ I3.

Hummer.⁸⁶⁰ The judicial officer characterized the bankrupt's purchase of the Hummer while the loans remain unpaid as "reprehensible".⁸⁶¹ Bankrupts also invite judicial criticism – and a finding of unjustifiable extravagance – when they make discretionary purchases while failing to pay their taxes, while they know themselves to be insolvent, or shortly before bankruptcy.⁸⁶² Even where individuals use money for meritorious purposes, they may be subject to scrutiny if their spending is done while insolvent. For instance, in *Re Fida*, the bankrupt was criticized for sending \$100,000 in borrowed funds to Pakistan to pay for his father's medical care and eventually his father's funeral, while at the same time working as a taxi driver and earning merely \$2,000 per month.⁸⁶³ The judicial officer characterized the bankrupt's support of his family as a "laudable moral goal," but cautioned that "one cannot perform charity, private or public, with other people's money."⁸⁶⁴

Like judicial officers, trustees voiced concern about spending carried out by debtors when they were incapable of paying their other bills. In my interviews, the trustees focused

⁸⁶⁰ *Re Dykes*, *supra* note 856 at para 14.

⁸⁶¹ *Ibid* at paras 21-22. See also *Re Vettese*, *supra* note 856 at para 7.

⁸⁶² **Failure to pay taxes:** *Re Martino*, *supra* note 320 at para 25; *Re Mott*, *supra* note 131 at paras 5, 13. **Admitted insolvency:** *Re Rayabi*, 2007 CarswellOnt 3576 at para 4 (ON Sup Ct) Nettie Reg. In *Re Lobrenz*, 2007 BCSC 1822, 38 CBR (5th) 50, Young Reg, and *Re Lobrenz*, *supra* note 205, the bankrupts visited a trustee but then waited another 6 months before filing for bankruptcy. The judicial officer scrutinized the expenditures made during this six month period, and conditioned each of the husband's and wife's discharges on repayment of 1/2 of the value of these expenditures, an amount equal to \$26,500. On appeal, the wife's conditional payment was reduced to \$12,000, see *Re Lobrenz*, *supra* note 277. **Shortly before bankruptcy:** in *Re Insley*, *supra* note 856 at para 18, the bankrupt purchased an "expensive dog" the week before she made an assignment into bankruptcy. In *Re Labonte*, *supra* note 856 at para 5, the bankrupt couple purchased a new vehicle with financing of \$45,000 just a few weeks before making an assignment into bankruptcy.

⁸⁶³ *Re Fida*, *supra* note 230 at paras 3-4.

⁸⁶⁴ *Ibid* at para 5. See also *Re Orser*, 2004 NBQB 238 at para 14, 278 NBR (2d) 95, Bray Reg, where the court noted that "generosity is a praiseworthy virtue," but "during the period of the bankruptcy responsibilities toward the estate should take priority." At issue in that case was \$260 spent by the bankrupt on gifts during bankruptcy. The judicial officer declined to find section 173(1)(e) as a fact because spending during bankruptcy cannot be said to have contributed to one's bankruptcy. See also *Re Rudzki*, *supra* note 856 at para 6, where the bankrupt was criticized for giving gifts with borrowed funds.

on the situation where a debtor ramps up his or her spending in the period prior to bankruptcy. A significant number of my interviewees agreed that this might be grounds for an opposition.⁸⁶⁵ Many focused on spending in the three months before bankruptcy. This is the period for which trustees are provided statements of account by creditors, and consequently trustees have more information to assess an individual's financial choices during this period. In the three months before bankruptcy one might also expect debtors to be aware that they are insolvent, or on the verge of insolvency.⁸⁶⁶

The bankrupt may admit to extravagant spending. In *Re Mott*, the debtor explained that his large tax debt was the result of continued non-payment of taxes and “high living.”⁸⁶⁷ In *Re Ament*, the debtor had incurred \$150,000 in living expenses on his student line of credit over three years of medical school.⁸⁶⁸ He had originally budgeted \$20,000 per year. In explaining the difference between his budget and his actual expenditures, he admitted to “lavish spending.”⁸⁶⁹ In *Re Brydges*, the bankrupt admitted, while being examined by an official receiver, that he had lived beyond his means, and this was one of the contributing factors to his bankruptcy.⁸⁷⁰ In *Re Rowe*, the bankrupt also admitted that he and his ex-wife had lived beyond their means, contributing to the bankruptcy, but he denounced his ex-wife as having been the driving force behind their spending.⁸⁷¹

⁸⁶⁵ I3, I4, I6, I10, I11, I13, I14, I15, I16, I19, I25, I26, I30, I32, I35, I37. I29 and I32 both agreed it would be grounds for opposing, but clarified that it was something that they seldomly or never saw.

⁸⁶⁶ But I9 indicated she would look for a build up of credit in the 6-12 months prior to bankruptcy.

⁸⁶⁷ *Re Mott*, *supra* note 131 at para 5. See also *Re Arsenault*, *supra* note 214 at paras 3, 15.

⁸⁶⁸ *Re Ament* (2006), 24 CBR (5th) 284, 151 ACWS (3d) 358 (ON Sup Ct) Nettie Reg.

⁸⁶⁹ *Ibid* at para 7.

⁸⁷⁰ *Re Brydges*, *supra* note 228 at para 6.

⁸⁷¹ *Re Rowe*, *supra* note 856 at para 5. The ex-wife was called as a witness at the discharge hearing, and told a similar story, but blamed the bankrupt for driving the spending. The judicial officer accepted the husband's version of events, para 11. In some cases debtors admitted to high levels of spending, but argued that it was not extravagant because of a

5.2.2. LODGING AN OPPOSITION

The trustees I interviewed were reluctant to file oppositions in situations of questionable spending. This reluctance can be traced, in part, to their belief that the onus was on the creditor, not the trustee, to lodge an opposition in cases of profligate spending. Trustees also had other, more attractive options, for responding to problematic pre-bankruptcy spending. They described a number of interventions short of an opposition, which allowed them to recover value for creditors, and assist the debtor to learn better financial habits, without derailing the debtor's economic rehabilitation.

Trustees looked to the lenders to take action: "we would look to the creditors to express some concerns... we don't hear from them. So we're not going to spend a lot of time on that stuff if creditors aren't interested."⁸⁷² For some, they wanted lenders to take the lead because lenders will often have better information than the trustee about the debtor's pre-bankruptcy spending patterns including records of specific 'extravagant' purchases, and whether the volume or value of transactions increased significantly in the lead up to bankruptcy.⁸⁷³ But getting information from creditors could be quite difficult.⁸⁷⁴ Some trustees also explained their lack of concern by citing the lenders' ability to pass along the losses to other consumers by pricing credit. One interviewee opined: "I don't see oppositions from credit card companies... because they've figured out whatever the algorithm is to maximize their profit with risk... it's just the way they've set things up for

mitigating factor. In *Re Insley*, *supra* note 856 at para 21, the debtor acknowledged she would sometimes spend money inappropriately to ease the stress of attending medical school. The judicial officer found another section 173 ground had been established and did not decide whether the debtor's spending amounted to unjustifiable extravagance, para 28. In *Re Dolgetta*, *supra* note 179 at para 11, the debtor explained her high levels of spending as resulting from weight gain, anxiety, depression and efforts to please her (ex) common law spouse. The judicial officer determined there was no evidence of extravagance, though the bankrupt "could have been more cautious," para 39.

⁸⁷² I14. See also: I10, I15, I18, I28.

⁸⁷³ I33.

⁸⁷⁴ I3, I14.

themselves, and if they don't care, why do I?"⁸⁷⁵ Another offered, "obviously, the banks are making enough money off it that they haven't tightened the screws down."⁸⁷⁶ The trustees' responses suggest they view creditors as being in a better position to assess where problematic overspending has occurred, or that the creditors are not suffering harm as a result of the debtor's spending and so an opposition is not as warranted.

Where a trustee identifies spending that he or she views as problematic, the trustee may try to craft a solution that compensates the creditors, but obviates the need for a court opposition. The trustee might arrange to have the debtor reimburse the estate for the value of the improper spending through voluntary payments during the bankruptcy, or they might encourage the debtor to file a proposal that provides for repayment of the improper spending.⁸⁷⁷

Trustees also emphasized the importance of helping the debtor to learn to avoid the temptation of overspending in the future. One trustee indicated that her response to problematic spending might be an opposition, "but if not an opposition, a really strong discussion at the counselling about budgeting and money management, and really keeping track of their spending."⁸⁷⁸ Another trustee felt that "helping people to understand why they're there and not to go there again is more productive than punishing them."⁸⁷⁹ Others indicated that in situations where pre-bankruptcy spending was problematic, they would like to see the debtor get more counselling, including potentially as a condition of the debtor's discharge.⁸⁸⁰ Trustees indicated that they would be more likely to oppose a discharge, where

⁸⁷⁵ I22. See also I16: "You rarely ever see creditor objections at all... well, if they don't really care, you know?"

⁸⁷⁶ I24.

⁸⁷⁷ I21, I30, I32, I35, I38.

⁸⁷⁸ I4.

⁸⁷⁹ I37.

⁸⁸⁰ I2, I40.

a debtor made multiple assignments into bankruptcy as a result of overspending.⁸⁸¹ Repeat assignments suggest a failure to rehabilitate oneself.

Another possible response, short of an opposition, when there is evidence of questionable spending, is for a trustee to refer the file to the OSB's Debtor Compliance Referral Program.⁸⁸² The trustee would then defer the investigation of the matter and determination of blameworthiness of the spending to another party, but still be seen to have taken action.

5.2.3. DISPOSITION

Where an opposition is lodged and extravagance in living is established at the resulting application for discharge hearing, judicial officers are unable to grant an absolute discharge, but can craft a conditional, suspended, or conditional and suspended discharge order to respond to the extravagance, or refuse a discharge altogether. In most cases where a judicial officer finds that a debtor has brought about his or her bankruptcy through extravagance, there are other instances of pre-bankruptcy misconduct, or non-compliance during bankruptcy, and so it can be difficult to delineate what aspect of the discharge order responds specifically to the debtor's extravagance. This difficulty notwithstanding, some commonalities emerge from the case law with respect to the types of orders granted. Conditional orders are common, with repayments ranging from nominal amounts to 50% of the debt. Where a debtor has little ability to pay, the judicial officer may sanction the pre-bankruptcy spending with a suspension. Judicial officers will attach conditions to the orders aimed at limiting the debtor's future access to credit, or helping the debtor learn better financial skills.

Judicial officers commonly grant a conditional order requiring a payment. The case law suggests that a number of judicial officers use a rough rule of thumb, and set the amount of the conditional payment at approximately 10% of the debts incurred through "extravagance". In *Re Literowicz*, the bankrupt's discharge was conditioned on payment of

⁸⁸¹ I19, I32, I42.

⁸⁸² I12, I34. I29 indicated that files with high levels of consumer credit may be flagged by the OSB for investigation.

\$15,000, which was 11% of the bankrupt's credit card spending in the 15 months prior to his assignment.⁸⁸³ In *Re Rudzki*, the bankrupt had incurred \$300,000 in credit card debt in the 2 ½ years prior to bankruptcy, \$210,000 of which was attributed to living extravagantly.⁸⁸⁴ As a condition of his discharge he was required to repay 10% of this second amount.⁸⁸⁵ In *Re Rahayi*, the opposing creditor asked that the bankrupt be required to repay 10% of the debt he had incurred.⁸⁸⁶ The judicial officer reduced this to 7.5% of the debt incurred by the bankrupt after the date he realized he should have made an assignment into bankruptcy. The judicial officer justified the reduction on the basis that the creditors bore some responsibility for the default, because they continued to grant credit to someone who had no ability to repay.⁸⁸⁷ In *Re Skakun*, the OSB and trustee had recommended a conditional payment amount equal to 15% of the debtor's liabilities, but the debtor had little ability to pay and so the judicial officer ordered a lump sum payment equal to 3¾% of the debtor's liabilities.⁸⁸⁸

In other cases, judicial officers have required a higher level of repayment: in *Re Dykes* the debtor's discharge was conditioned on repayment of 50% of her total unsecured debt.⁸⁸⁹ In *Re Fida*, the debtor was required to pay an amount equal to 40% of proven liabilities in his

⁸⁸³ *Re Literowicz*, *supra* note 320 at paras 10-11, 26-27, the bankrupt was additionally required to pay \$30,000 representing non exempt equity in his house, for a total conditional payment award of \$45,000.

⁸⁸⁴ *Re Rudzki*, *supra* note 856 at para 8. It is unclear how the judicial officer distinguished between these two amounts, according to the bankrupt's testimony 10% of his debt resulted from a business failure, and 90% was the result of his own stupidity and ignorance, para 3. The bankrupt was required to repay an additional \$5,000, representing a preferential payment, para 12.

⁸⁸⁵ *Ibid* at para 12.

⁸⁸⁶ *Re Rahayi*, *supra* note 849 at para 8.

⁸⁸⁷ *Ibid* at paras 7-8. The bankrupt was also required to repay an additional amount for goods he had purchased and transferred preferentially to a creditor.

⁸⁸⁸ *Re Skakun*, *supra* note 232 at paras 4-5, 12-14.

⁸⁸⁹ *Re Dykes*, *supra* note 856.

bankruptcy.⁸⁹⁰ In *Re Lobrenz*, as a condition of their discharges, a bankrupt wife and husband were each required to repay 50% of the debts they had incurred between the time they first met with a trustee, and when they made an assignment into bankruptcy 6 months later.⁸⁹¹ The wife's payment was reduced on appeal to an amount equal to 22% of the debt, because the court recognized she had little ability to pay.⁸⁹²

Judicial officers may adopt a different approach to setting the terms of the discharge where an "extravagant" debtor has a limited ability to pay. They may still employ a conditional order requiring repayment, but instead of linking the repayment amount to the value of the bankrupt's debt, they may use the debtor's ability to pay to calculate the amount due. In *Re Salmon*, one of the terms of discharge was that the bankrupt pay \$12,000 into her estate. The judicial officer thought she could manage \$200 a month and felt that 5 years of payments at that level was appropriate.⁸⁹³ Alternatively, the judicial officer may grant a suspension to reflect disapprobation for the extravagance. Suspensions seem particularly common where the debtor is of modest means *and* engaged in little misconduct other than living beyond his or her means.⁸⁹⁴

Judicial officers attach other conditions to the bankrupt's discharge to help them address possible causes of the extravagance: access to credit and lack of budgeting skills. In some cases the judicial officer may require the debtor to forego credit for a number of years. To enforce this condition, the judicial officer will order the debtor to lodge an undertaking

⁸⁹⁰ *Re Fida*, *supra* note 230.

⁸⁹¹ *Re Lobrenz*, *supra* note 205 at para 59.

⁸⁹² *Re Lobrenz*, *supra* note 277 at para 36.

⁸⁹³ *Re Salmon*, *supra* note 236 at paras 11-13.

⁸⁹⁴ *Re Vettese*, *supra* note 856 at paras 24-26 (6-month suspension); *Re Rabayi*, *supra* note 849 at para 10 (6-month suspension coupled with a payment, see FN887); *Re Rowe*, *supra* note 856 at para 11 (1-month suspension); *Re Salmon*, *supra* note 236, (1-month suspension coupled with a payment, see FN893). In *Re Fida*, *supra* note 230 at para 20, the judicial officer ordered a lengthy 24-month suspension coupled with a sizeable repayment obligation of \$68,400, reflecting what the judicial officer considered to be more serious conduct.

not to seek credit with the national credit bureaus, Equifax and TransUnion.⁸⁹⁵ The undertaking would then be visible to any creditor who did a credit search on the debtor. The judicial officer may also require the debtor to attend further counselling sessions as a condition of discharge: in *Re Salmon* the debtor was required to attend 3 further counselling sessions to help her “learn to avoid consumer temptation and say no to her family so as to live within her means.”⁸⁹⁶

Judicial officers will refuse a discharge if they believe that a bankrupt has not rehabilitated him or herself, and is continuing to live beyond his or her means. In *Re Imlau*, a case of a fourth time bankrupt, the judicial officer ruled that “it would be entirely inappropriate to discharge her from bankruptcy on any terms until she can demonstrate some hope of not coming back to the *BLA* in her sixties and seventies and beyond.”⁸⁹⁷

5.2.4. EXTRAVAGANCE IN PRIVATION

Living beyond one’s means is relatively easy to do when one’s means are meager. Determinations about the blameworthiness of overspending can be complex because individuals in situations of financial privation may use credit to finance spending that they could otherwise not afford. Overspending may be on non-discretionary purchases, such as groceries or life saving medicine. Some individuals have insufficient means to cover the basic necessities of life and decades of cuts to social programs have reduced the public supports available to these individuals. Kathleen Porter has made the point that “debt fills the gap when social programs erode.”⁸⁹⁸ As discussed in Chapter 3, bankruptcy is sometimes likened

⁸⁹⁵ See *Re Fida*, *supra* note 230 at para 18 (5-year suspension); *Re Skakun*, *supra* note 232 at para 15 (2-year suspension). In *Re Rahayi*, *supra* note 849 at para 9, the judicial officer felt a ban on credit was unnecessary.

⁸⁹⁶ *Re Salmon*, *supra* note 236 at para 14.

⁸⁹⁷ *Re Imlau*, *supra* note 333 at para 9. See also *Re Brydges*, *supra* note 228 at para 27. In *Re Mott*, *supra* note 131 the judicial officer refused the discharge order because he felt the bankrupt had provided insufficient disclosure to allow him to craft an appropriate order, para 17-18.

⁸⁹⁸ Kathleen Porter, "Driven By Debt" in Kathleen Porter, ed, *Broke: How Debt Bankrupts the Middle Class* (Stanford: Stanford University Press, 2012) 1-21, 16.

to a form of social welfare: instead of providing welfare programs, it provides forgiveness for debts incurred to pay for the basic necessities of life.⁸⁹⁹ For example, in Canada, instead of establishing a national pharmacare program to ensure that all Canadians have access to affordable medication, individuals may purchase medication on credit and then, if they are unable to shoulder the resulting debt load, use bankruptcy to discharge it. Overspending may also be on items that are not clearly a necessity, but which constitute an ordinary expenditure for many Canadians, such as a vehicle, a television or internet access. Trustees and judicial officers are then placed in the unenviable position of adjudicating whether such purchases constitute an unjustifiable extravagance. The case law reveals that people in situations of relative privation are sometimes found to have contributed to their bankruptcy through extravagant living.

In *Re Salmon*, the bankrupt lived modestly – she was a part time census worker with the federal government making a net income of \$2,000 to \$2,2000 each month, had separated from her husband and lived in a rent-geared-to-income apartment with her two children.⁹⁰⁰ The judicial officer found that she had brought about her bankruptcy through extravagant living, by which he meant living beyond her means:

... she first started taking out credit cards and using them to buy goods, apparently beyond her means to repay. No doubt she was caught up in trying to provide a lifestyle for her children in line with what is marketed to Canadians as the ideal or necessary lifestyle. This included electronics and large television purchases with retailers on the well known "don't pay until 20XX" plan. Eventually, it appears that her extravagance caught up with her, and she ended up using credit cards to pay credit cards, and buying everything on credit so that she could parcel out her pay cheque on minimum payments on the cards.⁹⁰¹

⁸⁹⁹ Sullivan et al, *The Fragile Middle Class*, *supra* note 311 at 76, 175.

⁹⁰⁰ *Re Salmon*, *supra* note 236 at para 2.

⁹⁰¹ *Ibid* at para 6.

An extreme case of ‘extravagance’ in privation arises in the case of *Re Imlau*.⁹⁰² The bankrupt was a 59-year-old divorced woman, who was unable to work due to a disability.⁹⁰³ She lived on permanent disability payments of \$1,250 a month.⁹⁰⁴ She had declared bankruptcy four times, and each time she had more debt.⁹⁰⁵ The judicial officer noted that she had received some large injections of funds in the years before bankruptcy: a \$13,000 lump sum for disability back payments received 12 years before her most recent assignment, a \$70,000 inheritance received 9 years before her most recent assignment, and an unspecified amount received for the equity in her former-home at an unspecified time before bankruptcy.⁹⁰⁶ Most of these funds had been dissipated, only \$7,000 was transferred to her trustee. The judicial officer concluded that “from all this I find not only a penchant for living extravagantly and beyond her means... but also that the Bankrupt seems trapped in a downward economic spiral.”⁹⁰⁷ The judicial officer was very concerned that the debtor was not rehabilitated: her expenses continued to outstrip her meager income, even though she claimed to get all her groceries from food banks.⁹⁰⁸ The judicial officer suggested she could cut her expenses by applying for rent-g geared housing, giving up her automobile or cutting her telephone and internet expenses.⁹⁰⁹ Her discharge was refused.⁹¹⁰

When asked about overspending by debtors, trustees were alive to this welfare dynamic and indicated they would not oppose in instances where a “debtor needed to use

⁹⁰² *Re Imlau*, *supra* note 333.

⁹⁰³ *Ibid* at paras 2-3.

⁹⁰⁴ *Ibid* at paras 3, 8.

⁹⁰⁵ *Ibid* at paras 4-5.

⁹⁰⁶ *Ibid* at paras 6-7.

⁹⁰⁷ *Ibid* at para 8.

⁹⁰⁸ *Ibid* at para 8.

⁹⁰⁹ *Ibid* at para 10.

⁹¹⁰ *Ibid* at para 11.

credit to meet their basic living expenses. That's not an abuse, that's survival."⁹¹¹ Poverty may necessitate survival spending: "you get people who are on a very modest income, and they're trying to feed their family, and they're going to Walmart and Superstore and different places and they're buying groceries on credit, with the idea they are going to pay it down, but they can't, they're servicing [the debt]."⁹¹² Medical issues might also necessitate survival spending. The debtor might use credit to make ends meet while ill: "what do you do when, I had cancer and I lived on my credit cards for a year' right? Frankly, I'd do the same thing if it happened to me."⁹¹³ Alternatively, the debtor might be supporting a family member who was ill: "they've had to take credit to send money back to their ancestral country. The family member was ill, they were off work or whatever."⁹¹⁴

Questions about the relative culpability of an impoverished over spender are complex, and people can reasonably disagree over what amounts to necessary spending on basics and what is a discretionary luxury that a person of limited means should forego. This complexity notwithstanding, the trustees with whom I spoke expressed a clear understanding of the dire financial realities facing many debtors – an understanding which seems absent from the written decisions in cases like *Re Salmon* and *Re Imlau*. In both cases, the evidence before the court suggested the individuals were leading meager financial existences. In *Re Salmon* the debtor had bought a television and some electronics. These are discretionary expenses, but are also so common place in Canadian households that it is a stretch to characterize them as undue extravagances. In *Re Imlau*, the facts reported in the decision evidence no extravagance. She had dissipated lump sum payments received many years earlier, and was making use of the bankruptcy system for a fourth time, both factors which understandably raised alarm bells for the judicial officers. But for a person like Ms Imlau, the discharge of her debts may do little to address the underlying causes of her financial

⁹¹¹ I3.

⁹¹² I1. I24 expressed frustration at trying to counsel debtors who found themselves in these situations: "What are we supposed to do – teach them how to make chicken soup out of chicken feathers? It's bullshit."

⁹¹³ I34.

⁹¹⁴ I15.

difficulties, i.e., a disability which prevented her from working. To meet her needs, she seems to have eroded her own savings and then turned to credit. When judicial officers interpret undue extravagance to mean spending beyond one's means, debtors like Ms. Imlau risk being characterized as culpable.

5.2.5. REASONS FOR DISAPPROBATION

It comes as no surprise that determinations about the blameworthiness of those people who rely on credit to consume are complex. Credit and consumption evoke competing cultural narratives. Credit-fuelled consumption is linked to eroding morality, conspicuously communicating one's income (and intrinsic worth) to one's neighbours, and stimulating the economy. The trustees' and judicial officers' assessments of profligate spenders reflect these narratives.

The rise of credit-fuelled consumption has been tied to the erosion of morality. In his book *Financing the American Dream*, Lendol Calder traces the myth of lost economic virtue, the belief that prior to 1950, Americans practiced thrift and then, starting in 1950 they were overwhelmed by the temptation of consumer credit and began to live hedonistically, and beyond their means. Two key elements make up the myth of lost economic virtue: "first, that before consumer credit people 'rarely went into debt and always lived within their means'; and second that consumer credit destabilized traditional moral values by making it easier for people to live lives devoted to instant gratification and consumer hedonism."⁹¹⁵ Calder shows that credit has a long history in America and that this narrative has re-emerged time and time again (with different times being identified as the baseline turning point).⁹¹⁶ The narrative may not be historically accurate, but it captures the collective anxiety that people have forgotten the value of thrift and instead embraced financially unsustainable, consumptive lifestyles. Though Calder's book studied the American experience, the myth of lost economic virtue resounds in Canadian discussions of credit, linking credit-fuelled consumption to a culpable lack of self control in the pursuit of pleasure.

⁹¹⁵ Lendol Calder, *Financing the American Dream: A Cultural History of Consumer Credit* (Princeton, NJ: Princeton University Press, 1999), 26.

⁹¹⁶ *Ibid* at 22-25.

Consumption is a means by which individual's signal their worth to one another. Humans have a deep desire to be seen as praise worthy,⁹¹⁷ but as Canadian communities become increasingly atomistic and individualistic, there are fewer and fewer opportunities to connect with each other and appreciate each other's good qualities.⁹¹⁸ Instead, consumption becomes a stand in for actual valuation of worth: what one consumes reveals who one is. According to this logic, income bespeaks merit because the greater one's abilities, the more people will be willing to pay for one's work. Most people in Canada do not publicly discuss their income, instead they indirectly communicate their income to others through their purchases.⁹¹⁹ Consumption, especially visible consumption, becomes an important way of communicating one's praiseworthiness to others.⁹²⁰ This set of logical leaps is premised on the belief that Canada is a meritocracy, where the wealthy earn their rewards through hard work or ingenuity, and poverty evidences a lack of work ethic.⁹²¹ Despite the glaring evidence to the contrary, the narratives of meritocracy and just (material) rewards for a job well done persist.

Credit confuses the logic of conspicuous consumption. People judge the class of others based on visible consumption of goods: what neighbourhood do they live in, what type of car do they drive, what clothing do they wear? Visible consumption plays such a large part in how people judge the class of other people that individuals can use debt-financing to acquire goods that, at least temporarily, allow them to claim membership in a

⁹¹⁷ See e.g., Adam Smith, *The Theory of Moral Sentiment* (Kapaau, HI: Gutenberg Publishers, 2011) at 116-7.

⁹¹⁸ Robert Frank, *Falling Behind: How Rising Inequality Harms the Middle Class* (Berkeley, CA: University of California Press, 2007) at 72 [*Falling Behind*]. See also Clive Hamilton & Richard Denniss, *Affluenza: When Too Much is Never Enough* (Crows Nest, NSW: Allen & Unwin, 2005) at 96, where the authors argue that people who engage with their communities and families derive validation from being recognized for their contributions and service and have less need to demonstrate their worth through consumption. Frank writes about the United States of America and Hamilton and Deniss write about Australia, but many of their observations apply to Canada.

⁹¹⁹ Frank, *Falling Behind*, *supra* note 918, at 72.

⁹²⁰ *Ibid* at 68.

⁹²¹ Alain de Botton, *Status Anxiety* (Toronto, ON: Penguin Canada, 2004), at 59-67, 181-2.

higher class than would be suggested by traditional measures of class such as income, education and occupational prestige.⁹²² Individuals risk censure when they use credit to acquire the indicia of membership in a higher class than they would be able to afford without credit. Other people may perceive such spending as deceptive, dishonest or self-aggrandizing.

In the popular imagination, credit-fuelled consumption may evidence moral degeneration, or deceptively obscure the assessment of an individual's meritocratic worth, but it is also viewed as a macro-economic good. One of the rationales offered for why debtors are able to discharge their obligations in bankruptcy is that it encourages consumption. As the Canadian economy is currently structured, the consumption of products and services by individuals is vitally important to economic growth.⁹²³ Some have gone so far as to suggest that consumption is a citizen's patriotic duty.⁹²⁴ When over-indebted consumers try to repay their obligations, then tend to reduce their consumption levels. When they are granted a discharge from their past debts, these debtors re-enter the economy as consumers and the resulting increase in consumption is beneficial for the economy.⁹²⁵

In a society where credit-fuelled consumption is not only easy, but encouraged, Roderick Wood has suggested the conception of what amounts to an honest unfortunate debtor is in a state of flux. While initially, the honest unfortunate debtor was "an individual who suffered financial setbacks due to events beyond his control" the notion has expanded and "now encompasses individuals whose financial distress is attributable to poor financial

⁹²² Sullivan, "The Simulation of Social Class" *supra* note 318 at 48; Frank identifies debt as one of the tools that members of the middle class use to maintain a level of consumption similar to their reference group, see Frank, "Falling Behind", *supra* note 918 at 79.

⁹²³ Buckland, *supra* note 199 at 18-21; See also George Ritzer, "'Hyperconsumption' and 'Hyperdebt': a 'Hypercritical' Analysis" in Ralph Brubaker, Robert Lawless & Charles Tabb, eds, *A Debtor World: Interdisciplinary Perspectives on Debt* (Oxford, UK: Oxford University Press, 2012) 60-80 at 61.

⁹²⁴ See the discussion in Hamilton & Denniss, *supra* note 918 at 102.

⁹²⁵ Gross, *supra* note 194 at 100.

management as well.”⁹²⁶ Part of this shift may be attributable to growing recognition of the power imbalance between those institutions who make credit available and the consumers, who make use of the credit. In Chapter 3, I traced how the notion of commercial morality includes an onus on creditors to avoid engaging in acts of irresponsible lending.

Concern with irresponsible lending does emerge in some of the cases on extravagant living. For instance, in *Re Rabayi* the judicial officer found that the bankrupt has lived extravagantly – he had incurred \$200,000 of credit card debt in 4 years when he knew he was insolvent.⁹²⁷ At the same time, the judicial officer expressed concern about the creditor’s complicity in the debtor’s extravagance:

That said, there was no evidence, beyond the approximately \$5,700.00 in goods bought and sold without being paid for, that the Bankrupt did anything with the consumer credit other than what the consumer credit grantors intended him to do which was to acquire for himself the consumer lifestyle which he saw all around him, as we all do every single day in our society. While a Bankrupt must shoulder responsibility for misusing credit, one wonders what responsibility credit grantors have when they continue to grant credit over an extended period of time to a person who clearly has no ability to service the debt load which is being permitted by them. No evidence was proffered that the Bankrupt misrepresented his affairs at any time in applying for credit either from the opposing creditor or from any other credit grantor. Neither was this a case where gambling was involved. The Bankrupt simply continued to plug away at his various jobs whilst attempting to make a go of his life in this country.⁹²⁸

As a condition of his discharge, the judicial officer required the debtor to repay 100% of the \$5,700 he had been spent on electronic goods, which he then shipped overseas

⁹²⁶ Wood, *supra* note 187 at 275. One interviewee offered a strikingly similar analysis, I16: “I don’t know if the word unfortunate applies so much anymore because it’s a different world and I think credit is so accessible. And unfortunate because you qualified for a bunch of credit and you shouldn’t have qualified? So that unfortunate argument – but I think most of them are pretty honest.”

⁹²⁷ *Re Rabayi*, *supra* note 849 at para 4.

⁹²⁸ *Ibid* at para 7.

as a preferential payment to a friend, and 7 ½ % of the remaining indebtedness incurred during the time the debtor knew he was insolvent.⁹²⁹ The trustee had asked that the debtor be required to pay 10% of the remaining indebtedness, but the judicial officer lowered this amount noting “the absence of misconduct in the obtaining of the credit or the use of the credit so obtained, other than unjustifiable extravagance in living.”⁹³⁰

In their assessments of the profligate spender, the trustees whom I interviewed expressed views that reflect some of the popular beliefs about credit, but characterized debtors more as hapless blunderers, rather than sanctionable rogues. Echoing Calder, they noted that credit is prevalent, much more so that it was even a few decades ago. Trustees observed that “consumer credit has become part of the economic fabric,”⁹³¹ and “society has evolved, everything is credit, credit, credit.”⁹³² Coupled with the increasingly accessible credit is the pervasive messaging promoting consumption, “and if you don’t have whatever it is, your life will be unfulfilled.”⁹³³ Comparisons with others fuel this consumptive drive, “the expectation gap, people see their friends, they must have it.”⁹³⁴ Easy access to credit means these consumptive impulses can be immediately satisfied. “The truth is that people want what they want now, and they don’t save money anymore.”⁹³⁵ “So you’re bombarded with stuff, reminders that you need to have this, and my goodness, when you want to buy it, here’s somebody willing to lend you the money to buy it.”⁹³⁶ “The marketing is not that you’re incurring debt, it’s that your life is going to be better if you take this on.”⁹³⁷

⁹²⁹ *Ibid* at para 8.

⁹³⁰ *Ibid* at para 8.

⁹³¹ I36. I19: “The truth of the matter is that consumer credit is a reality in our society.”

⁹³² I42.

⁹³³ I37.

⁹³⁴ I39.

⁹³⁵ I19.

⁹³⁶ I37.

⁹³⁷ I21.

A remarkably consistent theme across my interviews with trustees was the view that creditors, who lend money to consumers, bear significant responsibility for facilitating irresponsible spending and fostering personal insolvency. Credit is too easy to get, lenders make “silly”, ill-advised lending decisions, and they are much too aggressive about pushing credit onto individuals.⁹³⁸ Some felt that the lenders were primarily to blame: “you know who is at fault there? The bank. The banks shouldn’t be extending credit to [the debtors].”⁹³⁹ A more common sentiment was that both lenders and spenders had acted inappropriately: “there’s two to tango here.”⁹⁴⁰ Reflecting this mixed take on responsibility, one interviewee opined, “the system begs people to get into trouble. Doesn’t matter, it’s still their choice, but some of it is the choice of ignorance.”⁹⁴¹ Another offered that “yeah, these people shouldn’t be getting credit, but stick a popsicle in my face on a hot day and chances are I’m going to take it.”⁹⁴²

Trustees may be less likely to lodge oppositions in situations of questionable spending, because they see creditors as complicit in creating the problem. One interviewee pointed out that the creditors are “the ones creating a lot of the problems by lending the

⁹³⁸ I8: “They should be held accountable for their lending. Like why is a pensioner given a \$25,000 balance on their Mastercard when their only income is \$1400 a month?” I25: “And some of these creditors almost push money on them.” I32: “Credit is so easy to get, it’s virtually thrust upon people.” I38: “Credit lenders are being silly in granting credit.” I34: “Everybody’s throwing credit cards at you and if you get one and your credit ratings are good, all of a sudden, six more arrive.” I13: “The stupidest thing in the world is you have a good credit rating because you made your minimum payments. Because if that’s what you’re doing, it means you’re in very serious financial difficulty.”

⁹³⁹ I24.

⁹⁴⁰ I21. See also I19: “Part of that lies with the creditors, as well, in terms of their credit granting.” I21: “As much as yes, they incurred the debt, the creditors also have to accept responsibility for the fact that in their marketing they pretty much push onto people.” I28: “I take the position that if they got credit and there were not issues with what they disclosed to the creditors when they made the application and they were approved for the credit, then it’s as much the creditor’s fault as it is the debtor’s fault.”

⁹⁴¹ I13.

⁹⁴² I41.

money... They should be held accountable for their lending.”⁹⁴³ If creditors were truly concerned about overspending, they could restrict their credit granting practices: “they’re big boys and they make their own decisions to how they’re going to lend money.”⁹⁴⁴ “That’s a business issue between the person borrowing the money and the creditor lending it... if the guys says I make 12 hundred a month, I already owe a hundred and twenty thousand, and you send him another credit card for twenty thousand, that’s your problem.”⁹⁴⁵ These responses suggest that trustees either view debtors as less culpable because they have been lead astray by over zealous lenders, or do not see it as their place to enforce responsible borrowing, because the lenders are in a position to do so at the outset of the commercial transaction.

5.3. TAX DEBTORS

A second type of debtor who frequently appears in the case law is the individual with tax debts. This section compares how trustees and judicial officers approach the question of whether or not tax debtors are entitled to seek debt relief in bankruptcy, starting with the trustee’s decision to oppose, followed by how judicial officers characterize tax debts as a ground for limiting the bankrupt’s access to the discharge under section 173, then how judicial officers dispose of applications for discharge when a bankrupt has tax debts, and finally reflections on why tax debtors are the subject of disapprobation by judicial officers, but not trustees. This comparison will illustrate that trustees adopt a more sympathetic approach to tax debtors than is suggested by the judicial officer’s written reasons, and the difference is more marked than it was with respect to profligate spenders.

Tax debts can arise in a number of different ways. An individual may fail to pay taxes altogether, they may under report how much tax they are required to pay and be reassessed for a larger amount, or they may be charged with collecting and remitting a tax payable by a third party and find themselves liable if they fail to remit the funds. Directors of

⁹⁴³ I8.

⁹⁴⁴ I25.

⁹⁴⁵ I35.

corporations may also be vicariously liable for tax debts incurred by the corporations they control.

Commonly in bankruptcy, individuals present with debts resulting from non-payment of income tax.⁹⁴⁶ A self-employed individual may fail to file tax returns at all, or he or she may file the tax return but fail to remit the tax owing. An individual may be reassessed after paying taxes on the basis of inaccurately reported income, or the individual may have claimed deductions, which are subsequently disallowed. The risk of a salaried employee incurring such debts is lessened, because the employer deducts income tax payments from the employee's pay cheque, and remits it directly to the government; however, income tax may be payable on investments or the proceeds from the sale of assets, and these types of debts can be incurred by self-employed or salaried individuals.⁹⁴⁷ Employers are liable for any amounts that they deduct, but then fail to remit to the government.⁹⁴⁸ Businesses that are having cash flow issues will often finance their operations out of such deductions as a last-ditch effort to keep the business afloat.⁹⁴⁹ When a corporation deducts but fails to remit employee's income tax, the directors of the corporation can be held personally liable for the amounts not remitted.⁹⁵⁰

⁹⁴⁶ Income tax debt is the most common debt in the case law, but not the only kind of debt. Individuals present with unremitted sales tax debt, e.g., *Re Stoklosa*, 2008 CarswellOnt 4293 at para 11 (ON Sup Ct) Nettie Reg; *Re Mashaollah*, *supra* note 356 at para 5.

⁹⁴⁷ See *Re Fleury*, 2005 BCSC 1309 at para 6, 16 CBR (5th) 38, Baker Reg, where the bankrupt incurred a large tax debt as the result of selling land belonging to a fully-owned company and transferring the proceeds of the sale to himself. In *Re Alexander*, 2007 BCSC 564 at para 4, 34 CBR (5th) 139, Tysoe J, the debtor incurred a large tax debt because he had invested money in a tax shelter which lost value and used the losses to offset his income. The CRA disallowed the offsets resulting in a large tax debt. In *Re Rahman*, *supra* note 210 at para 12, the debtor was reassessed by CRA after being involved in a tax avoidance scheme where he received a grossly inflated charitable donation receipt for donating goods.

⁹⁴⁸ *Income Tax Act*, RSC 1985, c 1, (5th Supp), s 227.

⁹⁴⁹ See e.g., *Re Cormier*, 2009 NBQB 285 at para 20, 349 NBR (2d) 260, Bray Reg.

⁹⁵⁰ *Income Tax Act*, *supra* note 948, s 227.1.

Tax debts attract special scrutiny in the opposition to discharge process. This is true for at least three different reasons. First, there are special limits on a “personal income tax debtor’s” ability to access a discharge. A personal income tax debtor is someone who owes at least \$200,000 in personal income tax (i.e., not amounts he or she owes as a result of director’s liability), where the personal income tax makes up 75% or more of his or her total debt load.⁹⁵¹ A personal income tax debtor is not entitled to an automatic discharge, instead the trustee must apply for a discharge. At the application, the judicial officer is not allowed to grant an absolute discharge, but only a suspended, conditional or refused discharge order.⁹⁵² Second, even where tax debtors do not hit the thresholds set out in section 172.1, they may still find that their access to the discharge is constrained, because they may have their discharge opposed on the basis that their bankruptcy is tax driven. Unlike most creditors, who are disengaged from the discharge process, CRA is quite active and regularly opposes the discharge of tax debtors. Third, judicial officers view tax debtors with significant skepticism. Not only are tax debtors more likely to have their discharges opposed, when an opposition is filed, they are more likely to get a harsh discharge order.

5.3.1. LODGING AN OPPOSITION

Trustees necessarily approach tax debtors differently depending on whether or not the tax debtor qualifies as a personal income tax debtor under section 172.1 of the *BLA*. When a tax debtor qualifies under section 172.1, the trustee must apply to the court for a discharge order. The CRA may opt to appear at the hearing and make submissions as to how the judicial officer should dispose of the matter. When a tax debtor falls below the section 172.1 threshold, a court hearing will only be triggered if a potential opponent lodges an opposition. The personal income tax debtor provision came into force in 2009. Prior to that time, tax debtors would only be subject to judicial scrutiny if someone opposed their discharge. Many of the cases reviewed for this project predate the 2009 amendment, and so a discharge hearing was only triggered if someone lodged an opposition.

⁹⁵¹ *BLA*, *supra* note 11, s 172.1(1), (8).

⁹⁵² *BLA*, *supra* note 11, s 172.1(2), (3).

In my interviews, carried out after the 2009 amendments were in force, the trustees indicated they were reticent to oppose a debtor's discharge solely on the basis of tax debt, if a person fell below the personal income tax threshold.⁹⁵³ One outlier indicated the he would oppose a tax debtor, but because he tells the individuals this before signing them up, he suspects they opt to file with different trustees.⁹⁵⁴ A number indicated that they would only oppose if there was some additional misconduct.⁹⁵⁵ One pointed to "deliberate" non-filing or non-payment of taxes, extravagant living, or claiming dubious business expenses as examples of the misconduct that might attract an opposition.⁹⁵⁶ Another indicated that where a debtor had made more than one tax-driven assignment, she might oppose the discharge.⁹⁵⁷ Two indicated that they would consider an opposition where the debtor had used unremitted GST/HST funds to fund business operations – "that's maybe not an appropriate way to run your business."⁹⁵⁸ Several indicated that they would not oppose as long as the bankrupt completed his or her duties, but added that people with large tax debts often fail to complete their duties.⁹⁵⁹ A number indicated that they were more focused on rehabilitating bankrupts, and ensuring compliance on a go-forward basis, then penalizing them for past misconduct.⁹⁶⁰

The 2009 amendments that established mandatory court hearings for "personal income tax debtors" may fuel some trustees' reluctance to oppose the discharges of

⁹⁵³ E.g., I9, I10, I27, I28.

⁹⁵⁴ I39.

⁹⁵⁵ I6, I8, I32, I38.

⁹⁵⁶ I6.

⁹⁵⁷ I26. Conversely, I27 indicated he would not lodge an opposition even in the case of a repeat bankrupt.

⁹⁵⁸ I32, I38.

⁹⁵⁹ I4, I10, I14, I22, I33, I41.

⁹⁶⁰ I3, I4, I5.

individuals who do not meet the legislative threshold for a mandatory opposition.⁹⁶¹ Some indicated that they would not oppose where a debtor does not meet the threshold.⁹⁶² One even indicated that he felt that the threshold was over-inclusive, and the CRA should be given more discretion about whether or not a court application was necessary when the threshold was exceeded.⁹⁶³ Conversely, one interviewee felt that 75% was an arbitrary number and would oppose as long as the personal income tax debt amounted to more than 70% of the debtor's total unproven claims.⁹⁶⁴ Another felt that the threshold number was probably both over and under-inclusive – catching some debtors who were truly honest and unfortunate, and not catching some who had engaged in sanction-worthy conduct.⁹⁶⁵

One remarkably consistent sentiment amongst the interviewees was that where a bankrupt had tax debt, they would leave it to CRA to lodge an opposition.⁹⁶⁶ For some, they indicated that they did not need to oppose because they could “almost count on a CRA opposition anyway.”⁹⁶⁷ Others felt that the onus to oppose fell on CRA: “Would I oppose? That’s CRA’s job. That’s not my job.”⁹⁶⁸ My interviewees characterized CRA as a sophisticated, powerful creditor, who can make an informed decision about whether or not to oppose and has the resources to support such an opposition: “the tax department is very well staffed, paid for from our tax dollars.”⁹⁶⁹ One trustee indicated that she avoided lodging oppositions on behalf of the CRA, for fear of being perceived as too positional, instead of as

⁹⁶¹ *BLA*, *supra* note 11, s 172.1.

⁹⁶² I15, I31.

⁹⁶³ I43.

⁹⁶⁴ I35.

⁹⁶⁵ I33.

⁹⁶⁶ I1, I4, I3, I6, I8, I10, I11, I20, I21, I25, I27, I36, I40.

⁹⁶⁷ I6, see also I1, I4 I5.

⁹⁶⁸ I3, see also I8, I20, I25, I36.

⁹⁶⁹ I36, see also I10, I20, I24: “CRA has more power than god”, I28.

a neutral arbiter.⁹⁷⁰ A few trustees placed some blame on the CRA for the tax debt – they noted that CRA may have exacerbated the situation by delaying collection efforts for several years, their reassessments could be arbitrary, and the debts increased precipitously because of the CRA’s penalty and interest provisions.⁹⁷¹ These critiques notwithstanding, the CRA was not subject to the same ferocity of censure as were the consumer lenders, discussed in the context of profligate spenders.

5.3.2. CHARACTERIZING THE GROUNDS FOR OPPOSITION

When an opposition is lodged and a matter comes before the court, judicial officers generally accept that tax debtors should be denied access to the bankruptcy discharge. In some cases the mere fact that the bankruptcy is “tax driven” is cited by the CRA as a ground for opposing the discharge and sufficient for the judicial officer to deny the debtor access to an absolute discharge.⁹⁷² Alternatively, they characterize tax debts – or the conduct that resulted in them – as a number of different grounds under section 173(1).

Individuals who incur a large tax debt, without being able to offer an exculpatory explanation, are frequently found to have “less than fifty cents on the dollar on the amount of the bankrupt’s unsecured liabilities,” where the low asset to debt ratio resulted “from circumstances for which the bankrupt can[] be justly held responsible,” which is a ground under section 173(1)(a).⁹⁷³ Often the lack of an exculpatory reason for incurring the large

⁹⁷⁰ I21.

⁹⁷¹ I38, I24.

⁹⁷² *Nagy v. Minister of National Revenue*, *supra* note 148 at para 24; *Wutzke v. Minister of National Revenue*, *supra* note 148 at para 3.

⁹⁷³ *BLA*, *supra* note 11, s 173(1)(a). See e.g., *Re Wagner* (2013), 232 ACWS (3d) 35 at para 4, 2013 CarswellOnt 12182, Wilton Siegel J; *Re McKinney*, 2013 BCSC 1311 at para 17, 2013 CarswellBC 2235, McDiarmid Reg; *Re Crischuk*, *supra* note 212 at para 28; *Re Zinkiew*, *supra* note 256 at para 65; *Re Rideout*, 2004 NSSC 155 at para 20, 3 CBR (5th) 139, Cregan Reg; *Re Williams*, *supra* note 223 at para 19; *Re Doucet*, 2007 NBQB 408 at paras 14-18, 325 NBR (2d) 200, Bray Reg; *Re Arsenault*, *supra* note 214 at paras 14-15; *Wutzke v. Minister of National Revenue*, *supra* note 148 at para 14; *Re Braithwaite*, 2005 NBQB 344 at para 24, 16 CBR (5th) 17, Bray Reg; *Re Boucher*, *supra* note 178 at para 8; *Re Oakes*, 2006 NBQB 169 at para 9, 303 NBR (2d) 266, Bray Reg; *Re Tam*, 2007 BCSC 1779 at para 19, 38 CBR (5th) 58, Goepel J; *Re Furlotte*, 2007 NBQB 37 at para 10, 309 NBR (2d) 173, Bray Reg; *Re Legge*, 2005 NBQB 352

tax debt is sufficient for a judicial officer to find section 173(1)(a) is made out, but sometimes the judicial officer will point to specific blameworthy behavior that makes it just to hold the bankrupt responsible for the tax debt.⁹⁷⁴ For instance, in *Re Lobrenz*, the judicial officer held that the bankrupt must “share some of the responsibility for aggressively writing off expenses”, which eventually resulted in a large reassessment against the bankrupt.⁹⁷⁵ In *Re Alexander*, the judicial officer thought it was blameworthy for an individual to invest \$600,000 in a speculative oil and gas venture when he knew he owed a sizeable debt to the CRA. The investment failed leaving the individual unable to pay his tax bill.⁹⁷⁶

Judicial officers most frequently characterize tax debts as having run afoul of section 173(1)(a), but they may find other grounds for limiting a tax debtor’s access to the discharge. In *Re McKinney*, the debtor had incurred large liabilities when the corporation, of which he was a director, had failed to remit employee deductions. The judicial officer ruled that operating a business “in a way that utilized monies generated by them for purposes other than living up to statutory obligations to remit unpaid employee withholding” amounted to culpable neglect of the bankrupt’s business affairs, a ground under section 173(1)(e).⁹⁷⁷ Where individuals spend money on themselves instead of paying their taxes, a judicial officer may find that they contributed to their bankruptcy through unjustifiable extravagance in living, another ground under section 173(1)(e).⁹⁷⁸ For example, in *Re Rideout*, the judicial officer found that the debtor – a lawyer - had contributed to his bankruptcy through

at para 19, 289 NBR (2d) 295, Bray Reg; *Re Doucet*, *supra* note 973 at paras 14-16; *Re Alexander*, *supra* note 947 at para 16; *Re Jolin* (2008), 170 ACWS (3d) 237 at para 13, 2008 CarswellOnt 5626 (ON Sup Ct) Pierce J; *Re Cormier*, 2009 NBQB 286 at para 12, 349 NBR (2d) 257, Bray Reg; *Re Brydges*, *supra* note 228 at para 9; *Re Paine*, 2011 BCSC 309 at para 14, 81 CBR (5th) 85, Cameron J; *Re Hardtke*, *supra* note 319 at para 117.

⁹⁷⁴ See the discussion below about the three ways section 173(1)(a) has been applied to judgment debtors – the reverse onus approach, the culpability of the act underlying the judgment and the culpability of the debtor’s use of the bankruptcy system.

⁹⁷⁵ *Re Lobrenz*, *supra* note 862 at para 23.

⁹⁷⁶ *Re Alexander*, *supra* note 947 at para 16.

⁹⁷⁷ *BLA*, *supra* note 11, s 173(1)(e); *Re McKinney*, *supra* note 973 at para 22.

⁹⁷⁸ *Re Arsenault*, *supra* note 214 at paras 7, 15.

extravagant living.⁹⁷⁹ The judicial officer reasoned the bankrupt “must have been making a reasonable living from his practice, instead of being content with his share, he also kept a significant portion of CRA’s share.”⁹⁸⁰

The same conduct which results in a debtor having a large tax debt may also result in the debtor being convicted of an offence under tax legislation.⁹⁸¹ For instance, failing to file an income tax return or filing a false income tax return are both offences under the *Income Tax Act*.⁹⁸² Committing an offence under the *BLA* or “or any other statute in connection with the bankrupt’s property” or the bankruptcy proceedings is a ground for opposing under section 173(1)(l).⁹⁸³ In *Re Oakes*, the CRA argued that a conviction under tax legislation for evasion of taxes amounted to fraud, a ground under section 173(1)(k).⁹⁸⁴ The judicial officer avoided deciding this point, finding that section 173(1)(a) was made out and that the conviction was “an aggravating factor... whether or not this particular offence falls within the strict definition of fraud.”⁹⁸⁵

In many of the written decisions where an individual’s discharge is opposed on the basis of a large tax liability, the individual has declared bankruptcy more than once, which is a further fact under section 173(1)(j).⁹⁸⁶

⁹⁷⁹ *BLA*, *supra* note 11, s 173(1)(e).

⁹⁸⁰ *Rideout*, *supra* note 973 at para 22.

⁹⁸¹ Cases where the debtor was convicted of a tax offence, *Re Oakes*, *supra* note 973 at para 7; *Re Furlotte*, *supra* note 973 at para 3; *Re Jolin*, *supra* note 973 at para 9; *Re McKinney*, *supra* note 973 at para 12.

⁹⁸² *Income Tax Act*, *supra* note 948, s 238-239.

⁹⁸³ *BLA*, *supra* note 11, s 173(1)(l); *Re Furlotte*, *supra* note 973 at para 21.

⁹⁸⁴ *BLA*, *ibid*, s 173(1)(k); *Re Oakes*, *supra* note 973 at para 7.

⁹⁸⁵ *Re Oakes*, *supra* note 973 at para 12. Other judicial officers have concurred that a conviction is an aggravating factor, see also *Re Furlotte*, *supra* note 973 at para 8; *Re Arsenault*, *supra* note 214 at para 29.

⁹⁸⁶ *BLA*, *supra* note 11, s 173(1)(j). **Second-time bankrupts:** *Re McCullough*, *supra* note 320; *Re Crischuk*, *supra* note 212; *Re Williams*, *supra* note 223; *Re Boucher*, *supra* note 178; *Re*

5.3.3. DISPOSITION

In a tax driven bankruptcy, a judicial officer will generally require “a substantial payment to the trustee”⁹⁸⁷ or a “significant period of surplus income payments.”⁹⁸⁸ The CRA will often ask for a conditional order requiring the debtor to pay an amount equivalent to 50% (or more) of the tax debt. Judicial officers frequently quantify the payment required under the conditional order as a percentage of the tax debt; however, the calculations vary widely. The percentage used fluctuates. The “total” amount from which the payment is derived also fluctuates. In some cases it is the total amount of the CRA debt, including interest and penalties. In others, it is the principal amount of the debt. In still others, it is only the personal income tax debt and not the amounts owing for other tax liabilities, such as GST or director’s liability for unremitted source deductions. The following table captures the diversity of orders made by the judicial officers.

Table 5.1 Summary of Conditional Orders Granted to Tax Debtors

Case Name	Tax Debt (Rounded to nearest 1000)	Conditional Order	Conditional Order as a Percentage of Tax Debt (Approx)
<i>Wutzke v. Minister of National Revenue</i> , 2011 SKQB 270	\$760,000 in income tax debt, \$121,000 in unremitted GST	\$7,200	<1%
<i>Gilbert Estate v. Gilbert</i> , 2012 ONSC 2368	\$1,270,000 in income tax, the principal amount is \$70,000	\$3,250	<1% of the total, 4% of the principal amount

Chronopoulos, *supra* note 211; *Re Jolin*, *supra* note 973; *Re Cormier*, *supra* note 949; *Re Berenbaum*, *supra* note 214; *Re Sturby*, 2012 MBQB 337, 286 Man R (2d) 138, Sharp Reg. **Third-time bankrupts**: *Re Doucet*, *supra* note 973; *Re Baylis*, 2007 BCSC 1055, 36 CBR (5th) 71, Bouck Reg.

⁹⁸⁷ *Re McKinney*, *supra* note 973 at para 18. See also, *Re Braithwaite*, *supra* note 973 at para 26; *Re Tam*, *supra* note 973 at para 30.

⁹⁸⁸ *Re Legge*, *supra* note 973 at para 24; *Re Arsenault*, *supra* note 214 at para 25.

Case Name	Tax Debt (Rounded to nearest 1000)	Conditional Order	Conditional Order as a Percentage of Tax Debt (Approx)
<i>Nagy v. Minister of National Revenue</i> , 2010 SKQB 124	\$1,300,000 unsecured, \$25,000 secured	\$28,500, had already paid \$140,000 under a proposal	Conditional order = 2% of unsecured debt, Conditional order + amount paid under proposal = 13% of unsecured debt
<i>Re Hardtke</i> , 2012 ONSC 4662	\$919,000 comprising \$425,000 in income tax and \$494,000 in penalties and interest	\$75,000	8% of total debt, 18% of the principal amount
<i>Re Rideout</i> , 2004 NSSC 155	\$223,000 comprising \$122,000 in income tax, \$97,000 in GST/HST, \$4,000 in employee withholdings	\$19,200	9% of total, 16% of income tax.
<i>Re Arychuk</i> , 2005 BCSC 1288	\$143,000 in income tax debt, fully secured	\$15,000	10%
<i>Re Jolin</i> (2008), 170 ACWS (3d) 237	\$98,000	\$10,000	10%
<i>Re Tam</i> , 2007 BCSC 1779	\$643,000 in income tax, the principal amount is \$220,000	\$70,000	11% of total debt, 32% of the principal amount
<i>Re McCullough</i> , 2013 SKQB 92	\$205,000	\$25,000	12%
<i>Re McKinney</i> , 2013 BCSC 1311	\$750,000 comprising \$28,000 in income tax, \$707,000 in director's liability, \$15,000 in costs for tax court proceedings	\$95,000	13% of total debt, >100% of personal income tax debt.

Case Name	Tax Debt (Rounded to nearest 1000)	Conditional Order	Conditional Order as a Percentage of Tax Debt (Approx)
<i>Re Wagner</i> (2013) ACWS (3d) 35	\$922,000, the principal amount is \$371,000	\$150,000	16% of the total amount, 40% of the principal amount
<i>Re Arsenault</i> , 2008 NBQB 134	\$297,000 comprising \$117,000 in unremitted GST/HST and \$180,000 in income tax	\$59,000 made up of \$11,000 in unpaid surplus income and an additional \$48,000	20%
<i>Re Braithwaite</i> , 2005 NBQB 344	\$537,000 in income tax debt, the principal amount is \$426,000	\$105,000	20% of total debt, 25% of the principal amount
<i>Re Chronopoulos</i> , 2007 CarswellOnt 6981	\$92,000 to Ontario Government, \$34,000 to CRA	\$28,000	20%
<i>Re Zinkiev</i> , 2004 BCSC 1831	\$133,720.33 comprising both personal income tax and unremitted GST/HST	\$36,000	27%
<i>Re Legge</i> , 2005 NBQB 352	\$176,000	\$64,000	36%
<i>Re Williams</i> , 2005 BCSC 289	\$544,000	\$231,000	43%
<i>Re Ashbee</i> (2008), 168 ACWS (3d) 250	\$775,000 comprising both personal income tax and director's liability	\$30,000	Judicial officer described the conditional order as amounting to 50% of personal income tax

Case Name	Tax Debt (Rounded to nearest 1000)	Conditional Order	Conditional Order as a Percentage of Tax Debt (Approx)
<i>Re Ledrew</i> (2005), 13 CBR (5 th) 63	\$493,000 in income tax debt, \$172,500 of which was secured and some of which was contested	\$96,000	Judicial officer described the conditional order as amounting to 50% of the unsecured, uncontested personal income tax
<i>Re Furlotte</i> , 2007 NBQB 37	\$139,000	\$69,500	50%
<i>Re Doucet</i> , 2007 NBQB 408	\$102,000	\$51,000	50%
<i>Re Paine</i> , 2011 BCSC 309	\$111,000 comprising \$82,000 in income tax and \$29,00 in GST	\$55,000	50% of total CRA debt
Case Name			
Tax Debt		Length of Period for Surplus Income Payments	
<i>Re Oakes</i> , 2006 NBQB 169	\$640,000	10 months of surplus income payments ⁹⁸⁹	
<i>Re Cormier</i> , 2009 NBQB 286	Not recorded	18 months of surplus income payments	
<i>Re Baylis</i> , 2007 BCSC 1055	\$107,000	24 months of surplus income payments	

When a conditional order is granted, CRA will often ask for – and the judicial officer will grant – a term requiring the bankrupt to comply with his or her tax obligations on a go-

⁹⁸⁹ In *Re Oakes*, *supra* note 973 at para 15, the bankrupt's discharge was also conditional on payment of \$9,000 in unpaid surplus income and \$175,000 reflecting the value of a property wrongfully mortgaged and sold.

forward basis. This term may be drafted quite specifically, requiring the debtor to comply with his or her filing and reporting obligations under the *Income Tax Act*, the *Excise Tax Act* or another piece of tax legislation, or it might be drafted very broadly, such as “the bankrupt shall remain current with all obligations to the CRA.”⁹⁹⁰ The compliance obligation may be imposed for a set period of time,⁹⁹¹ until the debtor makes an application for discharge,⁹⁹² or until the debtor receives an absolute discharge.⁹⁹³ Where a conditional order requiring payment is granted, a judicial officer may further order that any pre-discharge income tax refunds be used to satisfy the payment.⁹⁹⁴

Judicial officers will refuse to grant a discharge in extreme cases, where the debtor evidences a lack of rehabilitation or engaged in misconduct in addition to non-payment of taxes.⁹⁹⁵ For instance, in *Re Crischuk*, the bankrupt was a tax protestor who felt that the *Income Tax Act* “derogates the faith and the principles of the Holy Bible and his religious beliefs, and it is therefore of no force and effect.”⁹⁹⁶ The judicial officer held that there “is no point

⁹⁹⁰ *Re McCullough*, *supra* note 320 at para 38; *Re Hardtke*, *supra* note 319 at para 131. Using similar language, see *Re Ledrem*, *supra* note 211 at para 30. In *Re Furlotte*, *supra* note 973 at para 28, the judicial officer required the debtor to comply with “all relevant Income Tax and Excise laws.” In *Re Ashbee*, *supra* note 234 at para 16, and *Wutzke v. Minister of National Revenue*, *supra* note 148 at para 17, the judicial officers specifically cited the *Income Tax Act* and *Excise Tax Act*. In *Re Arsenault*, *supra* note 214 at para 40, and *Re Paine*, *supra* note 973 at para 24, the judicial officers identified the income tax and GST/HST obligations separately and required compliance with each. In *Re Cormier*, *supra* note 973 at para 15, the debtor was only instructed to comply with her obligations under the *Income Tax Act*.

⁹⁹¹ *Re Rideout*, *supra* note 973 at para 29; *Re Braithwaite*, *supra* note 973 at para 37; *Re Furlotte*, *supra* note 973 at para 28; *Re Ashbee*, *supra* note 234 at paras 3, 14; *Re Arsenault*, *supra* note 214 at para 2; *Re Paine*, *supra* note 973 at para 24.

⁹⁹² *Re Cormier*, *supra* note 973 at para 14.

⁹⁹³ *Re Legge*, *supra* note 973 at para 29; *Re Arsenault*, *supra* note 214 at para 40; *Re Wagner*, *supra* note 973 at para 16.

⁹⁹⁴ *Wutzke v. Minister of National Revenue*, *supra* note 148 at para 17; *Re Paine*, *supra* note 973 at para 24; *Re Sturby*, *supra* note 986 at para 38.

⁹⁹⁵ *Re Crischuk*, *supra* note 212.

⁹⁹⁶ *Ibid* at para 7.

in talking about the prospect of rehabilitation when the bankrupt does not acknowledge that he is a person or that he has any obligation to pay tax.”⁹⁹⁷ The judicial officer refused the application for discharge, with no right to reapply for 3 years.⁹⁹⁸ In *Re Brydges*, where the bankrupt had incurred post-assignment liabilities and was unable to offer an exculpatory reason for his ongoing non-compliance, the judicial officer opined, “I am not satisfied that the bankrupt has any real commitment to his financial rehabilitation” and went on to refuse the bankrupt’s discharge, noting he could reapply “upon further proof of his financial rehabilitation.”⁹⁹⁹ In *Re Fleury*, the debtor had taken a number of steps prior to bankruptcy to put his assets out of the reach of his creditors, including transferring large amounts of money to Mexico. The judicial officer refused his discharge, noting that his pre-bankruptcy conduct revealed “considerable planning and thought.”¹⁰⁰⁰

A judicial officer’s approach to an application for discharge may be softened if the debtor attempted a proposal prior to making an assignment into bankruptcy. The CRA had a policy at one point to vote against any proposal where they were receiving less than 100 cents on the dollar.¹⁰⁰¹ The case law reveals a number of debtors who only turned to bankruptcy after unsuccessfully making repayment offers through the *BLA* proposal process.¹⁰⁰² Judicial officers are significantly more sympathetic to tax debtors whose

⁹⁹⁷ *Ibid* at para 23.

⁹⁹⁸ *Ibid* at paras 27-8.

⁹⁹⁹ *Re Brydges*, *supra* note 228 at paras 21, 28. Judicial officers place special weight on whether or not the debtor has complied with their post-assignment tax obligations – lack of compliance justifies harsher discharge conditions, see e.g., *Re Arsenault*, *supra* note 214 at paras 37-38; *Re Wagner*, *supra* note 973; *Re Ledrem*, *supra* note 211 at para 29.

¹⁰⁰⁰ *Re Fleury*, *supra* note 947 at paras 46-47.

¹⁰⁰¹ In *Re Arychuk*, 2005 BCSC 1288 at para 4, 15 CBR (5th) 169, Taylor Reg, the CRA raised the fact that the debtor did not make a proposal as a factor that should militate against the debtor receiving an absolute discharge, and the debtor responded that “there was no point in making a proposal because CRA has a policy of insisting of recovery of 100 cents on the dollar.” See also I5, I8.

¹⁰⁰² *Re Tam*, *supra* note 973 at para 10-11; *Re Alexander*, *supra* note 947 at para 9; *Re Legge*, *supra* note 973 at para 25; *Re McKinney*, *supra* note 973 at paras 3-4. I8 expressed frustration that he had “filed proposals that should have been accepted, but CRA opposes and they’re the

proposals have been rejected. In *Re Legge*, the judicial officer held that the CRA cannot “precipitate the debtor’s assignment by such procedures and then profit from an extended condition, such as a term of 48 months, which would be imposed otherwise for the purposes of deterrence.”¹⁰⁰³ An attempt to make a proposal is viewed as a mitigating factor.¹⁰⁰⁴ Several trustees indicated that most of their high tax debtors have sufficient income to do a proposal and a trustee will encourage them to pursue that route.¹⁰⁰⁵ If successful, the individual avoids a court hearing. If unsuccessful, the individual can point to the attempt to do a proposal as a mitigating factor at a discharge hearing.

5.3.4. REASONS FOR DISAPPROBATION

Trustees evidence reluctance to oppose a tax debtor’s discharge absent evidence of further misfeasance, whereas judicial officers are prepared to hand out onerous conditional discharge orders. How does one explain these conflicting attitudes? Part of the explanation may be that the judicial officers and trustees evidence different ways of thinking about the culpability of the tax debtor. Judicial officers judge tax debtors to be blameworthy because they exhibit a degree of control when incurring the tax debt, unpaid tax debts impair a community’s ability to fund public services, and the Crown is an involuntary creditor. On the other hand, trustees characterize tax debtors as being more hapless than willful. While trustees acknowledge the necessity of tax revenue for public spending, they note that the CRA is a very power creditor, and is well equipped to protect itself. Deterrence looms large in the judicial officers’ rhetoric, but trustees are more focused on rehabilitation.

majority creditor so it fails.” He might then go on to reach a settlement with the Department of Justice, which provided for a similar amount to what had been offered in the proposals.

¹⁰⁰³ *Re Legge*, *supra* note 973 at para 25.

¹⁰⁰⁴ *Re Tam*, *supra* note 973 at para 28. This is true even where the proposal was accepted by creditors and the debtor subsequently defaulted because of an unforeseeable change in his financial circumstances, see *Nagy v. Minister of National Revenue*, *supra* note 148 at para 61. The mitigating effect of making a proposal will be dissipated where a debtor engages in misconduct in bankruptcy, such as deliberately reducing his or her income, see e.g., *Re Ashbee*, *supra* note 234 at para 14.

¹⁰⁰⁵ I19, I29, I34, I36.

The archetypical honest, unfortunate debtor brings to mind someone who faced an unexpected calamity that triggered the individual's financial collapse. In their written decisions, judicial officers describe tax debtors as having exerted significant control over the conduct that resulted in them incurring large levels of debt. The written decisions emphasize that the conduct resulting in the liability was "conscious," "deliberate", "willful" and a matter of "choice."¹⁰⁰⁶ The degree of control exercised by tax debtors is inconsistent with characterizing the debtor as honest and unfortunate.¹⁰⁰⁷ Judicial officers place emphasis on the fact that an individual is only required to pay income taxes on amounts actually earned, "so it is clear that money was available to pay taxes at the time the liability was incurred."¹⁰⁰⁸ The decision not to set aside these amounts for payment to the government is perceived as especially blameworthy. As Master Funduk characterized the matter: "This is not a case of cannot. It is a case of will not. The money was there to pay taxes when they were incurred."¹⁰⁰⁹

Trustees revealed a more sympathetic stance towards debtors. When asked about bankrupts with high levels of income tax, a number of the interviewees attributed these debts to a lack of financial literacy instead of deliberate or conscious efforts to avoid payment of taxes.¹⁰¹⁰ One interviewee captured this sentiment when he described many tax

¹⁰⁰⁶ **Conscious:** *Re Ledrew*, *supra* note 211 at para 19; *Re Legge*, *supra* note 973 at para 19; *Re Arsenault*, *supra* note 214 at paras 19, 31. **Deliberate:** *Re Tam*, *supra* note 973 at para 30; *Re Furlotte*, *supra* note 973 at para 8; *Re Arsenault*, *supra* note 214 at para 31; *Re Cormier*, *supra* note 949 at para 21; *Re Zinkien*, *supra* note 256 at para 58. **Willful:** *Re Chronopoulos*, *supra* note 211 at para 3; *Re Zinkien*, *supra* note 256 at para 73. **Choice:** *Re Tam*, *supra* note 973 at para 30.

¹⁰⁰⁷ Decisions in which judicial officers point out that the debtor was not honest and unfortunate, include *Re Ledrew*, *supra* note 211 at para 19; *Re Tam*, *supra* note 973 at para 30; *Re Chronopoulos*, *supra* note 211 at para 26; *Re Arsenault*, *supra* note 214 at para 20; *Re Paine*, *supra* note 973 at para 13; *Re Hardtke*, *supra* note 319 at para 125.

¹⁰⁰⁸ *Re Crischuk*, *supra* note 212 at para 19; see also see *Re Zinkien*, *supra* note 256 at para 59 quoting from *Re Emmerton* (1995), 163 AR 393 at 22-24, [1995] AJ No 4 (QB) Funduk Reg; *Re Braithwaite*, *supra* note 973 at para 25; *Re Furlotte*, *supra* note 973 at para 10.

¹⁰⁰⁹ *Re Martens*, [1994] AJ No 1265 (QB) at para 29 quoted in *Re Williams*, *supra* note 223 at para 25.

¹⁰¹⁰ I2, I15, I16, I22, I42.

debtors as “self-employed. Simply did know how to do their taxes. So they just worked for the last 10 years and did nothing. Revenue Canada caught up with them.”¹⁰¹¹

Judicial officers place emphasis on the public nature of tax debts.¹⁰¹² In the case law, judicial officers used two quotes to drive home this point. Oliver Wendall Holmes Jr. is quoted as saying, “I like to pay taxes, with them I buy civilization.”¹⁰¹³ Similarly, Franklin Delano Roosevelt is quoted as saying, “Taxes, after all, are dues that we pay for the privileges of membership in an organized society.”¹⁰¹⁴ Taxes pay for many public services: “an education system, roads and a healthcare system... when an individual makes a choice not to pay his taxes, he does so on the backs of those around him who do not have the same choice,” i.e., salaried employees.¹⁰¹⁵ Tax debts have been described as a “debt owed to all the members of the public of Canada” because “everyone in Canada must share in this tax burden.”¹⁰¹⁶ A bankrupt’s default “place[s] a greater burden on other, honest tax payers.”¹⁰¹⁷

¹⁰¹¹ I16. See also I9, who described tax debtors as “kind of hopeless.”

¹⁰¹² See e.g., *Re Furlotte*, *supra* note 973 at para 27.

¹⁰¹³ Cited in *Re Paine*, *supra* note 973 at para 23; *Re Pinc*, 2007 BCSC 380 at para 18, 32 CBR (5th) 119, Baker Reg.

¹⁰¹⁴ Cited in *Re Berenbaum*, *supra* note 214 at para 1.

¹⁰¹⁵ *Re McCullough*, *supra* note 320 at para 36; Judicial officers will often quote the decisions of Registrar Funduk, from Alberta, who repeatedly opined on the inequity of tax debtors attempting to use bankruptcy to escape their repayment obligations, see *Re Emmerton*, *supra* note 1008 at paras 18-24 quoted in *Re Zinkiew*, *supra* note 256 at para 59; *Re Legge*, *supra* note 973 at para 17; *Re Oakes*, *supra* note 973 at para 8.

¹⁰¹⁶ *Re Miller*, [1998] NSJ No 135 at para 12, 1998 CarswellNS 271(SC) Hill Reg, quoted in *Re Arsenault*, *supra* note 214 at para 23; *Re Braithwaite*, *supra* note 973 at para 26; *Re Legge*, *supra* note 973 at para 16; and *Re Oakes*, *supra* note 973 at para 8. See also *Re Alexander*, *supra* note 947 at para 16, where the judicial officer characterized the debtor’s decision to invest funds while he owed a large liability to CRA as “gambling with the money of Canadian taxpayers. At a minimum, he was indifferent to sharing the tax responsibility with other Canadians.” The judicial officer in *Re Hosseini*, *supra* note 218, made similar statements, para 14. See also, *Re Steward* (1991), 53 BCLR (2d) 190 at para 12, 4 CBR (3d) 240 (BC CA): “In my opinion, if there is shown to have been a persistent ignoring of tax obligations, and an indifference to sharing the tax responsibility with other Canadians, then that would be a significant factor in determining the conditions which should be attached to a conditional discharge from bankruptcy.” Quoted in *Re Tam*, *supra* note 973 at para 27. See Also *Re Brydges*, *supra* note 228 at para 12.

Bankruptcy should not be used by a “tax avoider... to escape their obligation as a citizen of this country.”¹⁰¹⁸

Judicial officers repeatedly characterize individuals, who try to use bankruptcy to avoid paying tax debts, as free riders or free loaders – especially when they make use of public programs.¹⁰¹⁹ For instance, in *Re Berenbaum*, the judicial officer noted disparagingly that the debtor had not paid tax for a 10-year period, during which “9 members of his family have obtained all or part of their post-secondary education at the expense of the CRA and Canadian tax payers.”¹⁰²⁰ In *Re Crischuk*, the judicial officer noted that, despite the bankrupt’s unwillingness to pay taxes, his wife was receiving Canadian Pension Plan payments, and concluded that the debtor “was a freeloader who was quite content to have other citizens of Canada pay for the services he enjoys.”¹⁰²¹

A few trustees acknowledged the public interest in the payment of taxes. One suggested that maybe he was wrong in not opposing tax debts to the extent that “if these debts aren’t getting discharged then maybe my taxes will go down.”¹⁰²² Another indicated that he had some sympathy for CRA as a taxpayer, because “if Joe, sitting in that chair, is not paying his taxes, that means the rest of us have to pay a bit more.”¹⁰²³ A third mused that if

¹⁰¹⁷ *Re Chronopoulos*, *supra* note 211 at para 26; see also *Re Berenbaum*, *supra* note 214 at para 37.

¹⁰¹⁸ *Re Williams*, *supra* note 223 at para 25.

¹⁰¹⁹ *Re Crischuk*, *supra* note 212 at para 24: “I am not dealing with a well intentioned but unfortunate debtor, but with a freeloader, who is quite content to have other citizens of Canada pay for the services he enjoys.” *Re Williams*, *supra* note 223 at para 33

¹⁰²⁰ *Re Berenbaum*, *supra* note 214 at para 33.

¹⁰²¹ *Re Crischuk*, *supra* note 212 at paras 23-24. In *Re Zinkien*, *supra* note 256 at para 95, the judicial officer held that the bankrupt, a tax protestor, “wants all the privileges offered by the laws of Canada without accepting the responsibilities of citizenship.” In *Re Boucher*, *supra* note 178 at para 13, the judicial officer noted that the bankrupt “and his family continue to reap the benefits of the provincial medical services plan even though they owe over \$6,000 in unpaid premiums.”

¹⁰²² I43.

¹⁰²³ I37, see also I8.

he was faced with an individual who refused to pay taxes, “I’d also give him a lecture, like don’t walk on my sidewalk or use my hospital or something like that.”¹⁰²⁴ Although they acknowledged the public dimension of taxes, these trustees still indicated they would not oppose a tax debtor’s discharge.

Judicial officers are alive to the fact that the crown is an involuntary creditor in tax debt matters: “CRA does not get to assess credit worthiness and refuse to extend credit. CRA must rely on the honesty of each citizen to report income and apply the tax law fairly and reasonably.”¹⁰²⁵ Moreover, when a debtor collects tax payments from others on behalf of the government (such as GST/HST or employee remittances for income tax), the debtor holds these amounts in trust for the government and the Canadian public.¹⁰²⁶ Some of the trustees acknowledged that the CRA is an involuntary creditor.¹⁰²⁷ As a counter-point, the trustees emphasized CRA’s level of sophistication, powers and ability to protect its own interests in bankruptcy proceedings.¹⁰²⁸ One opined: “CRA doesn’t have the ability to say yes or no we’re going to deny you this money... And then on the other side, CRA has powerful arms to collect this debt... So it’s hard to balance the two.”¹⁰²⁹

Deterrence looms large in the rhetoric used by judicial officers when disposing of applications for discharge by tax debtors, and it often takes precedence over any concern with rehabilitation.¹⁰³⁰ Judicial officers do also voice an interest in rehabilitation in tax debtor

¹⁰²⁴ I3.

¹⁰²⁵ *Re Berenbaum*, *supra* note 214 at para 39. See also *Re Hosseini*, *supra* note 218 at para 14: “It is unacceptable to gamble with other people’s money. It is even more unacceptable to gamble with money involuntarily advanced by the taxpayers of Canada.”

¹⁰²⁶ *Re Arsenault*, *supra* note 214 at para 19; see also *Re Paine*, *supra* note 973 at para 16.

¹⁰²⁷ I17, I37.

¹⁰²⁸ See FN 969.

¹⁰²⁹ I17.

¹⁰³⁰ *Re McCullough*, *supra* note 320 at para 25; *Re Crischuk*, *supra* note 212 at para 27; *Re Williams*, *supra* note 223 at para 33; *Re Furlotte*, *supra* note 973 at para 27; *Re Cormier*, *supra* note 949 at para 25; *Re Brydges*, *supra* note 228 at para 12; *Re Berenbaum*, *supra* note 214 at para 46; *Re Zinkiev*, *supra* note 256 at para 59.

cases – and they are primarily concerned with the extent to which the tax debtor has learned from the process. Like in other cases, a debtor’s attitude towards his or her duties is used as evidence about the degree to which the debtor has been rehabilitated.¹⁰³¹ But deterrence, not rehabilitation, is identified as the “driving factor... not just for the bankrupt but more importantly for others who might be tempted to evade tax liability by conveniently using bankruptcy as a financial planning tool.”¹⁰³² The judicial officers want to deter the debtor, and others, from using the bankruptcy system as “the proverbial clearinghouse” to avoid paying tax debts.¹⁰³³ They recognize that if tax debtors are allowed to make use of the bankruptcy system to avoid their tax obligations, it might “undermine the integrity of the bankruptcy process and the confidence of the Canadian public in the manner in which the Act is administered.”¹⁰³⁴

Perhaps because they tend to see tax debt as the result of ignorance instead of misfeasance, trustees tend not to speak about deterrence and focus instead on rehabilitation, on getting the individuals, “to be all productive tax paying citizens again.”¹⁰³⁵ One interviewee captured this ethos colourfully, he would, “Kick their butts to make sure they are squeaky clean during [the bankruptcy]” because “get[ting] them back on track going forward is at least as valuable as trying to collect a few extra bucks.”¹⁰³⁶ Bankrupts are encouraged to become salaried employees, where someone else is deducting and remitting their income tax on a regular basis.¹⁰³⁷ If they remain self-employed, the trustee may require them to hire a

¹⁰³¹ *Re Williams*, *supra* note 223 at para 9.

¹⁰³² Master Funduk in *Re Trueman*, 2001 ABQB 377 at paras 15-16, 25 CBR (4th) 124, Funduk Reg, cited in *Re Braithwaite*, *supra* note 973 at para 27. See also *Re Furlotte*, *supra* note 973 at para 27; *Re Arsenault*, *supra* note 214 at para 22; *Re Cormier*, *supra* note 949 at para 25; *Re Brydges*, *supra* note 228 at para 12; *Re Berenbaum*, *supra* note 214 at para 46.

¹⁰³³ *Re Williams*, *supra* note 223 at para 29.

¹⁰³⁴ *Re Furlotte*, *supra* note 973 at para 27. See also *Re Doucet*, *supra* note 973 at para 18.

¹⁰³⁵ I29, see also I3.

¹⁰³⁶ I34.

¹⁰³⁷ I7, I9, I20, I41, I42.

bookkeeper, adopt a budgeting system or make regular installment payments so that they remain up to date on their tax liabilities.¹⁰³⁸ Cooperating with respect to providing information so the trustee can file the bankrupt's taxes is also interpreted as evidence of rehabilitation.¹⁰³⁹ Trustees indicated a willingness to oppose a discharge on the basis of tax debt when a bankrupt refuses to take steps that evidence a rehabilitative intent.¹⁰⁴⁰

Even more dramatically than in the case of the profligate spender, trustees seem to assess the tax debtors as being less culpable than do judicial officers. Trustees characterize tax debtors as hapless, not conniving, and indicate an unwillingness to lodge oppositions based on the debtor's non-payment of taxes before bankruptcy. Notwithstanding this unwillingness to lodge oppositions, trustees do take steps to address the underlying behavior, i.e., non-payment of taxes, but these steps are rehabilitative and not punitive.

5.4. JUDGMENT DEBTORS

A judgment is a court order confirming the liability of one person to pay a specified amount to another person. A judgment may result from different types of litigation. A significant number of the written decisions reviewed for this project involved debtors who sought relief in bankruptcy after having a large judgment awarded against them, and these cases illustrate the diversity of different obligations, which may result in a judgment being awarded to one party. Lenders frequently get judgments as part of their efforts to collect on unpaid loans – these creditors may be institutional lenders, or private persons who loaned money.¹⁰⁴¹ People injured or otherwise damaged by the tortious conduct of others have sued

¹⁰³⁸ I4 wants to see the bankrupt “making installments, or putting away funds and really keeping track of what their tax debt is.” I5 has the bankrupt make tax installment payments to I5's office, and then remits them to the CRA on behalf of the bankrupt. I7, I9, I22, and I41 mentioned installments. I14 wants to see them up-to-date on their post-assignment liabilities.

¹⁰³⁹ I2, I14, I41.

¹⁰⁴⁰ I4: “It would depend potentially on what they've done afterwards”, I5, I7, I22, I41, I42, I43.

¹⁰⁴¹ **Institutional:** *Re Burroughs*, *supra* note 177; *Re Bhullar*, *supra* note 177; *Funston v. Gelberman* (2004), 5 CBR (5th) 223, 134 ACWS (3d) 31 (ON Sup Ct) Cumming J, (shortfall on

successfully for a judgment.¹⁰⁴² Employees have sued successfully for damages arising from their wrongful dismissal.¹⁰⁴³ Landlords had sued successfully for unpaid rent, or the costs of repairing rental premises that a tenant damaged.¹⁰⁴⁴ Parties to a sale contract may sue each other when the contract is not completed as expected.¹⁰⁴⁵ Parties involved in construction sue each other when the work is not done, or is done and payment is not forthcoming.¹⁰⁴⁶ Ex spouses may get awards against each other, for support, or division of property.¹⁰⁴⁷ Parties

mortgage), **Other:** *Re Dykes*, *supra* note 856 (bankrupt's boyfriend's parents); *Re Maxwell*, *supra* note 256 (former employer).

¹⁰⁴² **Motor vehicle accidents:** *Re Dery*, 2012 NBQB 35, 90 CBR (5th) 160, Bray Reg; *Ostachoff v. Pinder Bueckert & Associates Inc.*, *supra* note 253; *Re George*, 2008 NSSC 304, 269 NSR (2d) 355, Cregan Reg (claim brought by Workers Compensation Board); *Re Sidhu*, 2008 BCSC 90, 163 ACWS (3d) 693, Young Reg; *Re Schmidt*, 2007 BCSC 1572, 164 ACWS (3d) 924, Bouck Reg; *Re Chaytor*, 2006 BCSC 1743, 26 CBR (5th) 288, Bouck Reg. **Other:** *Re Spadafora*, *supra* note 354 (creditor was physically assaulted by bankrupt's wife, while on a date with the bankrupt); *Re Gettlich*, *supra* note 141 (defamation).

¹⁰⁴³ *Re Juce*, 2004 MBQB 18, 185 Man R (2d) 161, Harrison Reg.

¹⁰⁴⁴ *Re Vu*, 2010 NSSC 119, 186 ACWS (3d) 599, Cregan Reg; *Re England*, 2009 BCSC 438, 53 CBR (5th) 209, Bouck Reg (included a large costs award); *Re Kuss*, 2009 ABQB 295, 55 CBR (5th) 289, Layton Reg; *Re Kunkel*, 2013 ONSC 6348, 233 ACWS (3d) 290, Short Reg; *Re Karim*, *supra* note 174.

¹⁰⁴⁵ *Re Robson*, 2009 BCSC 1392, 59 CBR (5th) 274, Young Reg (vendor sues over whether price of \$15,000 covered equipment and inventory or just equipment); *Re Maas*, *supra* note 247 (vendor sues after purchasers of custom built house do not purchase the house); *Re Brawn*, 2004 BCSC 923 at paras 6-20, 2 CBR (5th) 81, Bauman J (purchaser of a dental practice sues vendor over misrepresentation of number of active patients); *Re Dugas*, *supra* note 165 (purchasers of a crab fishing license sue vendor when vendor accepts money, but is then unable to transfer the license); *Re Wickstrom*, 2004 SKQB 326, 252 Sask R 198, Herauf Reg (home purchasers sue the vendors for deficiencies in the sale of the house).

¹⁰⁴⁶ *Re Sabourin* (2006), 25 CBR (5th) 70, 2006 CarswellOnt 5642 (ON Sup Ct) Diamond Reg; *Re Mott*, *supra* note 131.

¹⁰⁴⁷ *Re O'Shaughnessy*, *supra* note 409; *Re Kiamanesh*, 2008 BCSC 398, 41 CBR (5th) 21, Bouck Reg (included a large costs award); *Re Reimer*, 2008 BCSC 948, 45 CBR (5th) 155, Hyslop Reg; *Re Timant*, 2008 ABQB 428, 46 CBR (5th) 299, Smart Reg; *Re Trepanier* (2007), 157 ACWS (3d) 25, 2007 CarswellOnt 2898, Diamond Reg; *Re Geddes*, *supra* note 408; *Re Jefferson*, 2004 BCSC 144, 1 CBR (5th) 209, Baker Reg.

involved in litigation may get costs awards made against them.¹⁰⁴⁸ A litigant may get a costs award against it when it loses a lawsuit, or when it wins a lawsuit, but rejected a reasonable pre-trial settlement offer.¹⁰⁴⁹ Defrauded investors have sued fraudulent investment advisors.¹⁰⁵⁰ Individuals have been awarded monetary judgments by Human Rights Tribunals as compensation for discriminatory treatment.¹⁰⁵¹ Clients have successfully applied for a reduction in a legal bill, and received a judgment against the lawyer equivalent to the amount of any over-payment.¹⁰⁵²

Some judgments are non dischargeable. For instance, where a bankrupt is subject to a judgment as a result of sexual assault or intentional infliction of body injury, that debt will survive bankruptcy.¹⁰⁵³ Child and spousal support judgments are non-dischargeable, but these should not be confused with equalization or division of property judgments which

¹⁰⁴⁸ *Re Jabs*, *supra* note 163; *Re Meehan*, *supra* note 320; *Re Berry*, *supra* note 425; *Re Butterfield*, *supra* note 416; *Re Calogheros*, 2008 BCSC 1695, 49 CBR (5th) 219, Baker Reg; *Re Hughes* (2007), 162 ACWS (3d) 536 at para 2, 2007 CarswellOnt 8083 (ON Sup Ct) Nettie Reg; *Re Swerid*, 2007 MBQB 173, 216 Man R (2d) 300, Cooper Reg; *Re Ganden*, 2006 ABQB 806, 428 AR 287, Waller Reg; *Re Butler* (2005), 143 ACWS (3d) 625, 2005 CarswellOnt 6437, Lederman J; *Re Scobak* (2005), 145 ACWS (3d) 766, 2005 CarswellOnt 8015, Pierce J; *Lewis Spencer Law Corp v. Tutschek*, 2004 BCSC 1565, 5 CBR (5th) 250, Edwards J. In some cases the awards against the bankrupt included a small amount of damages for the underlying cause of action coupled with a very large costs award. For instance in *Re Gettlich*, *supra* note 141 at para 4, the bankrupt was successfully sued for defamation, and the creditor received \$15,000 in damages and \$180,000 in costs.

¹⁰⁴⁹ Bankrupts who were subject to costs awards because they rejected settlement offers and failed to best them: *Re Paesch*, 2008 ABQB 357 at para 2, 452 AR 232, Veit J; *Re Youssef* (2007), 32 CBR (5th) 313 at para 3, 2007 CarswellOnt 4320 (ON Sup Ct) Diamond Reg; *Re Goulbourne*, *supra* note 271 at para 2.

¹⁰⁵⁰ *Re Werbeniuk*, 2005 MBQB 156, 198 Man R (2d) 72, Lee Reg; *Re Jegasundaram*, *supra* note 301.

¹⁰⁵¹ *Re Lynn*, *supra* note 270.

¹⁰⁵² *Re Walker*, 2010 BCSC 1368, 71 CBR (5th) 84, Burnyeat J (Included a large costs award).

¹⁰⁵³ *BLA*, *supra* note 11, s 178(1)(a.1)(i). Awards for wrongful death resulting from a sexual assault or intentional infliction of body harm are also non-dischargeable.

currently are dischargeable in some provinces.¹⁰⁵⁴ Debts resulting from the fraudulent acquisition of property or services, or fraudulent acts by a fiduciary are non-dischargeable.¹⁰⁵⁵ As discussed in Chapter 2, a creditor with a non-dischargeable debt may wish to have a debtor discharged from bankruptcy so that he or she can take steps to enforce the debt.

In this section I consider how judicial officers and trustees respond when a judgment debtor makes an assignment into bankruptcy, including the trustee's decision to oppose, how that opposition is characterized under the legislation, how judicial officers dispose of cases when an opposition has been lodged, and a comparison of how judicial officers and trustees think about the culpability of debtors. Trustees and judicial officers espouse the belief that when a debtor is subject to a judgment arising from culpable misconduct, that debtor may not be entitled to a discharge; however, they differ in that judicial officers (in their written decisions) are prepared to characterize the act of using the bankruptcy system to avoid paying a judgment as culpable, whereas trustees do not share this view.

5.4.1. LODGING AN OPPOSITION

Like with profligate spenders and tax debtors, trustees felt that it was not their role to oppose the discharge of a judgment debtor.¹⁰⁵⁶ Many indicated that they would leave it up to the judgment creditor.¹⁰⁵⁷ The trustee would look to the judgment creditor to take some initiative, to “com[e] forward with an opposition or even a letter saying this isn't right.”¹⁰⁵⁸ A few indicated that whether or not they would oppose was a moot point because the creditor

¹⁰⁵⁴ *BLA, ibid*, s 178(1)(c). In a 2014 consultation paper, Industry Canada reported that there was significant support for amending the *BLA* to protect equalization of property claims against exempt property, see Canada, Industry Canada, *Fresh Start: A Review of Canada's Insolvency Laws*, *supra* note 451 at 13.

¹⁰⁵⁵ *BLA, supra* note 11, s 178(1)(d), (e).

¹⁰⁵⁶ Interviewees who indicated they would not oppose: I2, I4, I5, I9, I10, I11, I14, I15, I25, I27, I29, I38, I42. I6 indicated he would not oppose unless there were other issues involved.

¹⁰⁵⁷ I4, I8, I11, I19, I21, I35, I36, I39, I40, I41.

¹⁰⁵⁸ I14. See also I3, I7, I43.

would typically oppose the discharge.¹⁰⁵⁹ They might advise a judgment debtor “that the likelihood the discharge ends up in court is pretty high.”¹⁰⁶⁰

In the case of the profligate spender and tax debtors, one of the reasons that a trustee might not oppose is because they viewed the affected creditor as sophisticated enough to bring an opposition, if it felt one was warranted. This rationalization was offered with respect to judgment debtors, too. Some of the trustee’s characterized judgment creditors as sophisticated or well financed, or noted they had been represented by lawyers in the process of getting a judgment, and so they were well positioned to advance their interests.¹⁰⁶¹ However, it is possible for creditors to get judgments and not have the funds, knowledge or counsel to help them navigate the bankruptcy process. Trustees had different approaches towards helping these unsophisticated creditors navigate the opposition to discharge process. A number indicated they would advise the creditor of the option of opposing the discharge; however, several would only provide this information to the creditor if asked, or otherwise involved with the creditor in the bankruptcy.¹⁰⁶² Trustees reported that they would become involved with a creditor, because a creditor did not understand the effect of the stay and was trying to enforce its claim, or because it required assistance completing its proof of claim.¹⁰⁶³ These interactions might lead to a discussion about the creditor’s rights in bankruptcy and the availability of an opposition.

Trustees varied with respect to the amount of information they would provide to a judgment creditor about the opposition to discharge process. They might provide an overview of the opposition process, including the deadline by which an opposition needed

¹⁰⁵⁹ I1, I19 (especially if the judgment related to a personal injury).

¹⁰⁶⁰ I7, I24, I39.

¹⁰⁶¹ I11, I15, I32, I38. I14 indicated he would often be contacted by counsel and be required to explain the opposition process to them.

¹⁰⁶² Indicated they would inform the creditor about their right to oppose: I1, I4, I9, I10, I15, I27, I42. Indicated they would inform the creditor about their right to oppose if asked or the creditor was otherwise involved in the bankruptcy: I3, I6, I8, I11, I14, I41, I21.

¹⁰⁶³ I9, I20, I27, I42.

to be filed.¹⁰⁶⁴ One trustee indicated she might send unsophisticated creditors a standard form of opposition, so they knew what theirs should look like.¹⁰⁶⁵ Two trustees indicated they would advise a creditor that it needed reasonable grounds to lodge an opposition, “you can’t go to court just because you don’t like somebody.”¹⁰⁶⁶ Moreover, “you’ve got to have some evidentiary basis for your opposition, and you’ve got to file an affidavit and materials.”¹⁰⁶⁷ One indicated that she would send a creditor a copy of the section 170 report, even if the creditor had not requested it.¹⁰⁶⁸ The information in the report might alert the creditor to grounds for opposition. Two interviewees indicated they would inform the creditors of their right to examine the debtor.¹⁰⁶⁹ One pointed out that he would explain to a creditor how proceeds from realizing on the debtor’s assets were distributed amongst the creditor group as a whole, because creditors often did not understand how little they were likely to recover by opposing.¹⁰⁷⁰ One interviewee indicated that he might recommend to a judgment creditor that he would benefit more from arguing that a debt was non-dischargeable, than that a debtor should not be discharged.¹⁰⁷¹

A small group of interviewees felt that it was not their place to advise a creditor – even an unsophisticated one – about the opposition to discharge process, because doing so threatened their position as neutral arbiter. One interviewee said his involvement with creditors did not go much beyond helping them to fill out their proofs of claim, “because then you’re bordering on acting as agent.”¹⁰⁷² Another allowed that he only would provide

¹⁰⁶⁴ **Overview of process:** I8, I20, I21, I25, I27. **Deadline:** I21.

¹⁰⁶⁵ I7.

¹⁰⁶⁶ I5, see also I9, I25.

¹⁰⁶⁷ I25.

¹⁰⁶⁸ I20. I9 would advise the creditor to request a section 170 report.

¹⁰⁶⁹ I3, I36.

¹⁰⁷⁰ I8.

¹⁰⁷¹ I30.

¹⁰⁷² I40.

information where a creditor made “overtures”, “because as an officer of the court, I have to be very careful and evenhanded throughout this whole thing.”¹⁰⁷³ Another worried that “I’m not sure it’s my role to advise them”, and felt the point was moot because they usually had lawyers.¹⁰⁷⁴ Finally, one trustee pointed to a different obstacle: sometimes creditors were not receptive to receiving information from the trustee because they thought the trustee was acting for the debtor.¹⁰⁷⁵

5.4.2. CHARACTERIZING THE GROUNDS FOR DISCHARGE

Judicial officers may determine that a judgment debtor with less than 50 cents of assets for each dollar of unsecured liability, can justly be held accountable for his deficiency of assets, which is a ground for limiting his access to discharge under section 173(1)(a).¹⁰⁷⁶ There are at least three different ways that judicial officers apply section 173(1)(a) to judgment debtors. First, once it is established that the debtor’s assets are worth less than 50% of his or her unsecured liabilities, a judicial officer may take the position that the onus shifts to the debtor to establish that it would be unjust to hold the debtor responsible for this deficiency. Any debtor, who fails to discharge this onus by offering an exculpatory reason for his or her low asset to debt ratio will have limits placed on his or her access to a discharge.¹⁰⁷⁷ Under the second approach, the judicial officer may take the position that

¹⁰⁷³ I41.

¹⁰⁷⁴ I32.

¹⁰⁷⁵ I9.

¹⁰⁷⁶ **Argued successfully:** *Re Dykes*, *supra* note 856 at para 15; *Re Morin*, 2013 MBQB 70 at para 28, 289 Man R (2d) 250, Sharp Reg; *Re Montalban*, *supra* note 209 at para 39; *Re Burroughs*, *supra* note 177 at para 24; *Re England*, *supra* note 1044 at para 24; *Re Hernandez* (2009), 176 ACWS (3d) 331 at para 9, 2009 CarswellOnt 2072 (ON Sup Ct) McDermid J; *Re Meehan*, *supra* note 320 at para 33; *Re George*, *supra* note 1042 at para 35; *Re Schmidt*, *supra* note 1042 at para 21; *Re Sverid*, *supra* note 1048 at para 21; *Re Chaytor*, *supra* note 320 at para 59; *Re Chaytor*, *supra* note 1042 at para 28; *Re Geddes*, *supra* note 408 at para 8; *Funston v. Gelberman*, *supra* note 1041 at para 28; *Re Dugas*, *supra* note 165 at para 30; *Re Juce*, *supra* note 1043 at para 41; **Argued unsuccessfully:** *Re O’Shaughnessy*, *supra* note 409 at para 61; *Wolverton Securities Ltd. v. Schemel*, 2009 BCSC 1048 at para 68, 56 CBR (5th) 47, Brown J; *Re Hughes*, *supra* note 1048 at para 15; *Re Wickstrom*, *supra* note 1045 at para 21.

¹⁰⁷⁷ *Re Montalban*, *supra* note 209 at paras 39-44; *Ostachoff v. Pinder Bueckert & Associates Inc.*, *supra* note 253 at para 33. In *Re Burroughs*, *supra* note 177 at para 24, the bankrupt, a farmer,

section 173(1)(a) only applies where the judgment arises from the debtor's culpable misconduct. For instance, in *Re Chaytor*, the bankrupt had struck and killed a pedestrian while driving a motor vehicle without a valid license, which was considered blameworthy conduct.¹⁰⁷⁸ In *Re Brawn*, the bankrupt had made a misrepresentation in the sale of a business resulting in the purchaser acquiring a large judgment against the bankrupt. The court held that the misrepresentation was a fact for which the debtor can justly be held responsible.¹⁰⁷⁹ Third, the judicial officer may find that the debtor acts culpably when he or she attempts to discharge a judgment through bankruptcy, and that section 173(1)(a) is established on this basis.¹⁰⁸⁰ In *Re England*, the bankrupt had made no attempt to settle and

explained that his financial failure resulted from a drought and the bovine spongiform encephalopathy (BSE) crisis. The judicial officer rejected this explanations, holding that they had occurred too far in the past to excuse the bankrupt's low assets.

¹⁰⁷⁸ *Re Chaytor*, *supra* note 1042 at para 28. In *Re Chaytor*, *supra* note 320 at para 59, the bankruptcy of the driver's husband, the husband was found to have engaged in blameworthy conduct by consenting to his wife's use of the motor vehicle when he knew she did not have a valid license. See also *Re Montalban*, *supra* note 209 at para 45. In *Wolverton Securities Ltd. v. Schemel*, *supra* note 1076 at para 68, where the debtor was a investment trader and had been sued on an indemnity with respect to losses on her trading accounts, section 173(1)(a) was not made out because the judicial officer was not satisfied that the debtor had behaved improperly with respect to the trading accounts. In *Re George*, *supra* note 1042 at para 35 the debtor had struck and injured a pedestrian while driving a car, which he had borrowed from a friend. He knew the friend's mom's rules precluded lending out the car. He also fled the scene and tried to cover up the accident afterwards. In *Re Schmidt*, *supra* note 1042 at para 21, the debtor had be found criminally responsible for a motor vehicle accident and was incarcerated for 3 months, during which time he earned no income.

¹⁰⁷⁹ *Re Brawn*, *supra* note 1045 at paras 39-48. Somewhat stretching the concept of blameworthiness, in *Re Geddes*, *supra* note 408 at para 8, the court held that a debtor could justly be held responsible for "spending an entire life working well employed with a reasonable pension and having no assets of any meaningful value to show for it at the end." Conversely in *Re Hughes*, *supra* note 1048 at para 15, the judicial officer held that the failure to accumulate assets was not blameworthy: "[The bankrupt] like millions of Canadian is living on a bit too much credit while struggling to get by on a bit too little income. His is not the kind of economic life where one might expect a cushion of assets to be built up against a fiscal rainy day." In *Re O'Shaughnessy*, *supra* note 409 at para 61, the judicial officer found no culpability in the dissipation of the bankrupt's assets because they were dissipated in furthering a business which "was an appropriate venture considering [the bankrupt's] background and experience."

¹⁰⁸⁰ *Re Hernandez*, *supra* note 1076 at para 9.

continued to deny the legitimacy of the judgment and then made an assignment into bankruptcy, 6 days after the judgment was entered, to avoid paying it – this was found to constitute a section 173(1)(a) fact.¹⁰⁸¹

Judgment debtors have necessarily been involved in litigation at some point prior to their bankruptcy, often as a defendant. Creditors may argue that the bankrupt has put the creditor “to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt” a ground upon which the bankrupt’s discharge should be limited under section 173(1)(f).¹⁰⁸² Judgment debtors may have also been involved in litigation as plaintiffs. They may have been unsuccessful and had costs awarded against them, or they may have been subject to a successful counterclaim. Incurring unjustifiable expense by pursuing a frivolous or vexatious action is a ground upon which the bankrupt’s discharge can be limited under section 173(1)(g), but only if the expenses are incurred in the three months before the assignment.¹⁰⁸³

A frivolous action or defence is “one lacking any legal merit”, and a vexatious one is “put in to annoy or embarrass the creditor.”¹⁰⁸⁴ Judicial officers are slow to find these grounds, because litigants are entitled to have their claims adjudicated by the court: “It is not frivolity or vexatiousness where two or more parties disagree on the facts and outcome to insist on one’s ancient right in our Dominion to put the matter before her Majesty’s Courts

¹⁰⁸¹ *Re England*, *supra* note 1044 at para 24.

¹⁰⁸² **Argued successfully:** *Re Dykes*, *supra* note 856 at para 15; *Re Montalban*, *supra* note 209 at paras 70-73; *Re Burroughs*, *supra* note 177 at para 24; *Re Karim*, *supra* note 174 at para 12; *Re Trepanier*, *supra* note 1047 at para 5; *Re Beindorff*, *supra* note 156 at paras 12-14; *Funston v. Gelberman*, *supra* note 1041 at para 26; *Re Orser*, *supra* note 864 at para 15. **Argued unsuccessfully:** *Wolverton Securities Ltd. v. Schemel*, *supra* note 1076 at para 69; *Re Hughes*, *supra* note 1048 at para 12; *Re Ganden*, *supra* note 1048 at paras 9-10; *Re Bhullar*, *supra* note 177 at para 11; *Re Dugas*, *supra* note 165 at para 21. **Raised by not decided:** *Re Paesch*, *supra* note 1049 at para 5.

¹⁰⁸³ **Argued successfully:** *Re Orser*, *supra* note 864 at para 15; *Re Beindorff*, *supra* note 156 at para 15. **Argued unsuccessfully:** *Re Wickstrom*, *supra* note 1045 at para 18.

¹⁰⁸⁴ Lloyd Houlden & Geoffrey Morawetz, *The Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2005) at 759, cited in *Re Bhullar*, *supra* note 177 at para 9

of Law.”¹⁰⁸⁵ Judicial officers are also alive to the financial constraints facing many litigants – which may preclude them from retaining a lawyer to assess the merit of their claims, or to seriously advance meritorious claims.¹⁰⁸⁶ The judicial officer may require proof of the lack of merit of the bankrupt’s action or defence, including copies of the pleadings from the impugned court proceedings.¹⁰⁸⁷ In *Re Butler*, the judicial officer rejected that a lawsuit could be frivolous or vexatious, because it had survived summary judgment.¹⁰⁸⁸

If a judgment relates to fraudulent behavior by the bankrupt, the creditor may argue that the bankrupt is guilty of fraud, a ground upon which the bankrupt’s discharge can be limited under section 173(1)(k).¹⁰⁸⁹ Application for discharge proceedings are summary in nature and the judicial officer will usually only find section 173(1)(k) where there has been a prior judicial determination finding fraud, such as a prior conviction or civil award based on fraud.¹⁰⁹⁰ There are exceptions to this rule. In *Re Wirick*, the judicial officer made a finding

¹⁰⁸⁵ *Re Hughes*, *supra* note 1048 at para 12. See also *Re Ganden*, *supra* note 1048 at paras 10-11. In *Re Scobak*, *supra* note 1048 the creditor had claimed that the bankrupt’s unsuccessful litigation amounted to rash and hazardous speculation, another ground under section 173(1)(e). The judicial officer disagreed, para 10: “Litigants do take a chance when they seek adjudication from the courts, but access to justice cannot be equated with speculation or gambling... To characterize litigation as speculation is to do great violence to the intended meaning of the statute.”

¹⁰⁸⁶ *Re Burroughs*, *supra* note 177 at para 35; *Re Bhullar*, *supra* note 177 at para 11: “A party may not seriously defend a claim for reasons other than absent of merit, lack of resources being one of them.”

¹⁰⁸⁷ *Re Bhullar*, *supra* note 177 at para 9; *Re Wickstrom*, *supra* note 1045 at para 18.

¹⁰⁸⁸ *Re Butler*, *supra* note 1048 at para 16.

¹⁰⁸⁹ **Argued successfully:** *Re Sachdeva*, *supra* note 346 at para 3; *Re Sabourin*, *supra* note 1046 at para 30; *Re Mott*, *supra* note 131 at para 14 **Argued unsuccessfully:** *Re Morin*, *supra* note 1076 at paras 19-26; *Re Montalban*, *supra* note 209 at paras 74-77; *Wolverton Securities Ltd. v. Schemel*, *supra* note 1076 at para 70; *Re Brawn*, *supra* note 1045 at paras 28-30.

¹⁰⁹⁰ *Re Montalban*, *supra* note 209 at para 77; *Wolverton Securities Ltd. v. Schemel*, *supra* note 1076 at para 70; *Re Brawn*, *supra* note 1045 at para 30. This reticence to make a finding of fraud also applies when a judicial officer is asked, at a discharge hearing, to make a determination about whether or not a debt is non-dischargeable because there was an element of fraud, *BLA*, *supra* note 11, 178(1)(d)-(e). In *Re Werbeniuk*, *supra* note 1050 at paras 11, 19-20, the judicial officer was prepared to find that a debt was non-dischargeable because the bankrupt had plead guilty to 11 securities offences and spent 4 months in jail. But see *Re Robson*, *supra*

of fraud at an application for discharge hearing, where the debtor admitted to all the constituent elements of fraud.¹⁰⁹¹ In *Re Sabourin*, the judicial officer was prepared to find fraud on the basis of a deemed admission. In the course of pre-bankruptcy litigation, the creditor had served the debtor with a request to admit a number of facts, including the fact that the debtor had deceived the creditor. The creditor never responded and under the rules of court was deemed to have admitted to the deception.¹⁰⁹² Conversely, in *Re Morin*, the opposing creditor had received a default judgment against the bankrupt after alleging negligent or fraudulent misappropriation of funds, but was not entitled to rely on the judgment as evidence of fraud at the discharge hearing.¹⁰⁹³

Where creditors perceive that a judgment debtor could have paid some or all of the judgment, but opted instead for bankruptcy, they will frequently raise section 173(1)(n) as a ground upon which the bankrupt's discharge should be limited: the debtor could have made a proposal, but chose bankruptcy instead.¹⁰⁹⁴ A debtor can rebut such an argument by producing evidence that the creditor would not have accepted a proposal, if one had been made. In many cases where the parties have turned to litigation to resolve a question of liability, feelings have been hurt and the parties may adopt an acrimonious stance. Acrimony is a hallmark, but not the exclusive purview, of matrimonial litigation – judicial officers have commented on the high emotional stakes in a number of different contexts.¹⁰⁹⁵ Judgment

note 1045 at paras 30-32, where the judicial officer was prepared to find that the debtor had acquired property from the creditor on false pretences or by fraudulent misrepresentation and so the debt survived bankruptcy under section 178(1)(e).

¹⁰⁹¹ *Re Wirick*, 2004 BCSC 1826 at paras 27, 43, 35 BCLR (4th) 132, Sigurdson J.

¹⁰⁹² *Re Sabourin*, *supra* note 1046 at paras 19-20, 30.

¹⁰⁹³ *Re Morin*, *supra* note 1076 at paras 19-26.

¹⁰⁹⁴ **Argued successfully:** *Re O'Shaughnessy*, *supra* note 409 at para 34-41; *Re Berry*, *supra* note 425 at para 5; *Re Mathew*, *supra* note 346 at para 15; *Re Beindorff*, *supra* note 156 at para 22; *Funston v. Gelberman*, *supra* note 1041 at para 27. **Argued unsuccessfully:** *Re Kuss*, *supra* note 1044 at para 5; *Re George*, *supra* note 1042 at para 17; *Re Morrison*, 2007 BCSC 738 at paras 19-21, 34 CBR (5th) 21, Bouck Reg. **Raised but not decided:** *Re Butterfield*, *supra* note 416 at para 34; *Re Dugas*, *supra* note 165 at para 33; *Re Jefferson*, *supra* note 1047 at para 41.

¹⁰⁹⁵ **Matrimonial:** *Re Robson*, *supra* note 1045 at para 23; *Re Jefferson*, *supra* note 1047 at para 41; *Re Juce*, *supra* note 1043 at paras 42-43. **Other:** *Re Wickstrom*, *supra* note 1045 at para 7.

debtors may argue, and judicial officers may agree, that the level of acrimony between the parties would have precluded the debtor from successfully making a proposal.¹⁰⁹⁶ This argument is particularly resonant when a judgment creditor holds the majority of a bankrupt's debt, and can single-handedly defeat a proposal. In a handful of the cases where a judgment creditor opposed a discharge, the debtor had previously made a proposal that was rejected by the creditors.¹⁰⁹⁷ Alternatively, where a creditor complains that the debtor filed for bankruptcy without attempting any form of settlement, the judicial officer may point out that it was in the creditor's control to "offer a compromise before the assignment."¹⁰⁹⁸

One ground for limiting a bankrupt's access to a discharge is failure to "perform duties or comply with any order of the court."¹⁰⁹⁹ In *Re Scoback*, the creditor argued that failure to pay a judgment amounted to failure to comply with an order of the court. The judicial officer disagreed, finding that the legislative language was limited to non-compliance with an order "in relation to the bankruptcy proceeding, not to previous orders of a court."¹¹⁰⁰

5.4.3. DISPOSITION

Where a judgment debtor's discharge is opposed, the judicial officer will typically grant a discharge conditional on a payment by the judgment debtor. A review of the case

¹⁰⁹⁶ *Re Kuss*, *supra* note 1044 at para 5; *Re Butterfield*, *supra* note 416 at para 34; *Re Jefferson*, *supra* note 1047 at para 41. In *Re Dugas*, *supra* note 165 at para 33, the judicial officer was "not convinced that a proposal would not have succeeded" but the debtor said it was unlikely to in this context because of the "strained business relations with the creditors" and "the opposing creditors did not negate the bankrupt's reasoning in reply." But see *Re O'Shaughnessy*, *supra* note 409 at paras 43-44, where the judicial officer held that nothing corroborated the bankrupt's claim that her ex-husband was "a professional litigant and would litigate all issues to the bitter end without reason", he found that the bankrupt could have made a proposal.

¹⁰⁹⁷ *Re Lynn*, *supra* note 270 at paras 5-7; *Re Smith*, 2009 NSSC 261 at para 2, 281 NSR (2d) 379, Cregan Reg; *Re Brawn* *supra* note 1045 at paras 22-23.

¹⁰⁹⁸ *Re Meehan*, *supra* note 320 at para 15.

¹⁰⁹⁹ *BLA*, *supra* note 11, s 173(1)(o).

¹¹⁰⁰ *Re Scoback*, *supra* note 1048 at para 13.

law reveals judicial officers using a number of different rules of thumb for determining the amount of the payment. In the 1973 case of *Kozack v. Richter*, the Supreme Court of Canada ordered a debtor to repay an amount equal to 50% of the principal amount of the judgment.¹¹⁰¹ This has been cited in subsequent cases for the proposition that debtors should be required to pay an amount equal to 50% of the judgment as a condition of their discharge.¹¹⁰² Some judicial officers have made awards in this range,¹¹⁰³ but other awards have varied widely from repayment of 100% of the debt to payment of a nominal amount.¹¹⁰⁴ Another rule of thumb is that debtors with judgments should be required to make surplus income payments for a period of time – 3 years or more.¹¹⁰⁵ Longer periods,

¹¹⁰¹ *Kozack v. Richter*, [1974] SCR 832 at 837, 36 DLR (3d) 61.

¹¹⁰² *Re Spadafora*, *supra* note 354 at para 26. In cases where the judgment in question is for costs, one judicial officer proposed a rule of thumb of a conditional order of 50-60%. The judicial officer in *Re Kiamanesh*, *supra* note 1047 at para 71, cited *Re Underbill*, *supra* note 419, for this proposition. The judicial officer did not apply this rule of thumb because the resulting amount (between \$442,000 and \$530,000) was too high given the debtor's income (\$63,000/year) and age (58), para 75.

¹¹⁰³ *Re Dykes*, *supra* note 856 at para 22. In *Re Hernandez*, *supra* note 1076 at paras 4-5, the judicial officer initially ordered the debtor to pay surplus income payments until 50% of proved unsecured claims were paid. The debtor had been in a motor vehicle accident and the litigation was ongoing at the time of the discharge hearing. The conditional award was subsequently varied to an amount equal to just under 10% of the judgment, including costs and interest.

¹¹⁰⁴ *Re Mathew*, *supra* note 346 at paras 18-19 (payment in full); *Funston v. Gelberman*, *supra* note 1041 (100% of original debt, 32% of judgment creditor's claim); *Re Reimer*, *supra* note 1047 at paras 14, 39 (conditional order requiring payment of 100% of judgment not varied); *Re Jefferson*, *supra* note 1047 (98% of proven, unsecured claims); *Re Kiamanesh*, *supra* note 1047 at para 77 (81% of judgment, 17% of proven unsecured claims); *Re Kuss*, *supra* note 1044 at paras 14-15 (75% of proven, unsecured claims); *Re Ganden*, *supra* note 1048 at para 27 (~65% of judgment); *Re Meehan*, *supra* note 320 at para 36 (61% of judgment, 37% of proven, unsecured claims); *Re Swerid*, *supra* note 1048 at para 24 (43% of proven, unsecured claims); *Re Jabs*, *supra* note 163 at para 91-92 (20% of judgment, <4% of total debt); *Re Burroughs*, *supra* note 177 at para 50 (14% of judgment, 7% of proven, unsecured claims); *Re Butterfield*, *supra* note 416 at para 37 (13% of judgment; 12% of unsecured claims); *Re Kunkel*, *supra* note 1044 at para 48 (10% of original debt, 6% of judgment creditor's claim); *Re Butler*, *supra* note 1048 (3% of judgment).

¹¹⁰⁵ *Ostachoff v. Pinder Bueckert & Associates Inc.*, *supra* note 253 at para 42 (3 years); *Re Jabs*, *supra* note 163 at para 89 (3 years); *Re Chaytor*, *supra* note 320 at para 68 (3-5 years), quoted with approval in *Re Sidhu*, *supra* note 1042 at para 23.

such as seven years, “would be for more horrendous acts such as sexual assault.”¹¹⁰⁶ But again actual discharge orders honour this rule more in the breach than in the observance, with conditional payment orders ranging from 9 months to ten years of surplus income payments.¹¹⁰⁷ The judicial officers also differ as to whether they calculate a set amount based on what the debtor could pay over a given period of time, or if they order surplus payments for a given period of time. For instance, in *Re Sidhu* the bankrupt was required to pay \$30,000, calculated based on the debtor’s ability to pay \$500 per month and the judicial officer thinking a 6 year payment period was reasonable, but the debtor was entitled to expedite his discharge by paying off the amount sooner.¹¹⁰⁸ Conversely, in *Re Trepanier*, the judicial officer directed the bankrupt to make surplus income payments, as calculated under the OSB’s guideline, for 9 months, without stipulating a set amount that needed to be paid.¹¹⁰⁹

Where section 173(1)(n) is made out, the judicial officer may require debtors to pay in an amount equal to what they would have paid under a proposals. In *Re O’Shaughnessy*, the judicial officer made the debtor’s discharge conditional on paying the same amount as she

¹¹⁰⁶ *Re Sidhu*, *supra* note 1042 at para 32. In *Re Kuss*, *supra* note 1044 at para 14, the debtor had two judgments against her for damage to rental properties and the court held that these judgments amounted to exceptional circumstances meriting a longer payment period, because the “bankrupt is either guilty of deliberate acts of vandalism or, at least, a total disregard for the rights of others.”

¹¹⁰⁷ *Re Geddes*, *supra* note 408 at para 10 (10 years); *Re Berry*, *supra* note 425 at paras 9-12 (8 years); *Re Sidhu*, *supra* note 1042 at para 35 (6 years); *Re Ganden*, *supra* note 1048 at para 27 (5-6 years); *Re Behich* (2007), 155 ACWS (3d) 511 at para 10, 2007 CarswellOnt 1139 (ON Sup Ct) Nettie Reg (5 years); *Re Beindorff*, *supra* note 156 at para 37 (3-4 years); *Ostachoff v. Pinder Bueckers & Associates Inc.*, *supra* note 253 at para 42 (3 years); *Re Hughes*, *supra* note 1048 at para 20 (2 years); *Re Sabourin*, *supra* note 1046 at paras 36-38 (18 months, but judgment was non-dischargeable); *Re Dugas*, *supra* note 165 at para 35 (1 year); *Re Smith*, *supra* note 1097 at para 63 (9 months); *Re Trepanier*, *supra* note 1047 at para 7 (9 months).

¹¹⁰⁸ *Re Sidhu*, *supra* note 1042 at para 35.

¹¹⁰⁹ *Re Trepanier*, *supra* note 1047 at para 7.

would have paid under a proposal: 5 years of payments of her surplus income of \$694.50 per month.¹¹¹⁰

In a number of cases the judicial officer gave significant weight to the debtor's inability to pay. For instance, in *Re England*, the debtor's only source of income was her pension and a small home-based business that brought in about \$200 per month.¹¹¹¹ Although she owed \$105,000 on the judgment, her discharge was made conditional on payment of a mere \$3,000 (i.e., <3%) and suspended for one year.¹¹¹² In *Re Chaytor*, the debtor worked as a seasonal salal picker earning \$500 per month.¹¹¹³ She owed approximately \$205,000 on a judgment to the Insurance Corporation of British Columbia from a motor vehicle accident, where she was at fault.¹¹¹⁴ Her discharge was made conditional on payment of \$2,000.¹¹¹⁵ Her husband was jointly liable for the debt and required to pay \$5000 as a condition of his discharge, resulting in a combined payment of <4% of the total judgment.¹¹¹⁶

In other cases, the debtor's ability to pay was highly dependent on contingent events, such as the sale of a valuable asset or the receipt of inheritance. The judicial officer might craft a discharge order that would recover value for the estate if the contingency was realized. For instance, in *Re Dugas*, the debtor had a crab fishing license, which was not considered property, but could be sold for a significant amount of money. The judicial officer suspended the debtor's discharge for a year, and indicated that if the debtor sold his license during his suspension, a percentage of the proceeds must be paid into the estate: 30%

¹¹¹⁰ *Re O'Shaughnessy*, *supra* note 409 at paras 62-63.

¹¹¹¹ *Re England*, *supra* note 1044 at paras 14, 29.

¹¹¹² *Ibid* at para 30.

¹¹¹³ *Re Chaytor*, *supra* note 1042 at para 33.

¹¹¹⁴ *Ibid* at para 2.

¹¹¹⁵ *Ibid* at para 34.

¹¹¹⁶ *Ibid* at para 77.

if the sale was arm's length and 70% if the sale was non-arm's length.¹¹¹⁷ In *Ostachoff v. Pinder Bueckert & Associates Inc.* the debtor lacked the financial wherewithal to make any significant contribution towards the creditor's judgment. He had been receiving psychiatric care for 30 years and his mental health issues prevented him from maintaining steady employment – he lived on a disability pension of \$707 a month, supplemented by intermittent income from occasional odd jobs.¹¹¹⁸ There was some suggestion he might be coming into an inheritance. The debtor's discharge was granted conditional on him paying \$1800 and assigning 20% of any future inheritance, up to a maximum of \$40,000, to the trustee.¹¹¹⁹

Where the judgment creditor's debt is non-dischargeable, the judicial officer may weigh this as a factor in favour of a less harsh discharge order, because the creditor retains the right to recover the debt after the discharge.¹¹²⁰

Where a section 173 fact is established, a judicial officer has the power to grant a discharge conditional on the bankrupt consenting to judgment.¹¹²¹ Where the bankrupt is a judgment debtor, judicial officers may be more reticent to condition the discharge on the debtor consenting to judgment. Judicial officers reason that where a debtor has a history of not paying a judgment, the debtor is unlikely to pay off a judgment imposed as part of a

¹¹¹⁷ *Re Dugas*, *supra* note 165 at para 35.

¹¹¹⁸ *Ostachoff*, *supra* note 253 at paras 8-9.

¹¹¹⁹ *Ibid* at para 44. See also *Re Hernandez*, *supra* note 1076, which was an application to vary a conditional discharge order on facts that were quite similar to those in *Ostachoff*, except that the judgment was more recent and the debtor was in a better position to repay some of the amounts. The debtor's discharge was varied to be conditional on payment of \$50,000, which was less than 10% of the creditor's judgment. See also *Re Spadafora*, *supra* note 354, where the bankrupt had gone on a date with the opposing creditor during a period of marital strife. His wife showed up on the date and beat the opposing creditor, severely injuring her. The opposing creditor had sued the bankrupt and his wife successfully. The bankrupt then undertook a number of schemes to defeat the opposing creditor's collection efforts before finally making an assignment into bankruptcy. The judicial officer refused his discharge and indicated that he could not apply again until he had paid at least 50 cents on the dollar of proven claims.

¹¹²⁰ *Re Werbeniuk*, *supra* note 1050 at para 21.

¹¹²¹ *BLA*, *supra* note 11, s 172(2)(c).

conditional discharge order. In *Funston v. Gelberman*, the judicial officer found that the judgment debtor had “done everything possible to frustrate” the creditor’s attempts to collect her judgment, including lying about his employment situation.¹¹²² The judicial officer made the bankrupt’s discharge conditional on repayment of \$20,000, an amount equal to 100% of the original debt owed to the judgment creditor.¹¹²³ The debtor was not entitled to receive an earlier discharge by consenting to judgment, because, the judicial officer’s view was that the bankrupt “would not voluntarily make payment of any obligation imposed through a judgment following upon a discharge.”¹¹²⁴ In *Re Ganden*, the bankrupt’s discharge was conditional on payment of \$40,000 at a rate of \$600 per month.¹¹²⁵ He could get a discharge earlier by consenting to judgment, but only after he had made timely payment for a period of two years (at which point \$25,600 would remain outstanding on the conditional order).¹¹²⁶ Conversely, in *Re George*, the judicial officer ordered that the debtor consent to judgment in the amount of \$100,000, because he had little ability at present to pay a conditional order, but if he came into money later, the judgment would enable the trustee to recover some value for the creditors.¹¹²⁷

Judicial officers will refuse discharges where they think a bankrupt’s conduct merits a heightened level of censure.¹¹²⁸ A refusal is commonly used where a judgment debtor had engaged in additional misconduct or serious non-compliance during the bankruptcy process.

¹¹²² *Funston v. Gelberman*, *supra* note 1041 at para 37.

¹¹²³ *Ibid* at para 40.

¹¹²⁴ *Ibid* at para 44.

¹¹²⁵ *Re Ganden*, *supra* note 1048 at para 27. The bankrupt was required to pay trustee’s fees of an additional \$2,000.

¹¹²⁶ *Ibid* at para 27.

¹¹²⁷ *Re George*, *supra* note 1042 at paras 43-44.

¹¹²⁸ *Re Montalban*, *supra* note 209 at para 152; *Re Herd*, *supra* note 236 at para 23; *Re Spadafora*, *supra* note 354 at para 31; *Re Sachdeva*, *supra* note 346 at para 21; *Re Karim*, *supra* note 174 at para 16; *Re Youssef*, *supra* note 1049 at para 12; *Re Jegasundaram*, *supra* note 301 at para 22; *Re Brawn*, *supra* note 1045 at para 56.

5.4.4. REASON FOR DISAPPROBATION

JM Ferron, a Master of the Supreme Court of Ontario and registrar in bankruptcy, considered the issue of judgment debtors declaring bankruptcy in a 1986 article.¹¹²⁹ He traced two different approaches to how judicial officers handle the discharge applications of debtors who come to bankruptcy with large judgments. Under the first approach, the judicial officer considers whether or not the debtor assigned him or herself into bankruptcy for the express purpose of avoiding a judgment, and if the question is answered in the affirmative, the judicial officer will "critically scrutinize the application for discharge."¹¹³⁰ Under the second approach the judicial officer considers the degree of culpability of the debtor in incurring the liability that resulted in the judgment and stipulates harsher discharge conditions if the debtor behaved culpably.¹¹³¹ For instance, a debtor with a judgment arising from a motor vehicle accident would be subject to harsher conditions if (s)he caused the accident through her gross negligence, than if she was found liable on the basis of statutory liability.¹¹³² Trustees and judicial officers both espouse the second approach, but diverge on the topic of whether or not it is culpable to use bankruptcy to avoid paying a judgment with trustees again adopting a more sympathetic stance.

The rhetoric of judicial officers continues to reflect these dual approaches. On the one hand, they are concerned that the bankruptcy system not be used "as a fiscal car wash... to avoid a particular debt obligation, particularly if the debt arises from a judgment."¹¹³³ The judicial officer will bring special scrutiny to a case where the debtor's "motivation is simply to escape a particular judgment."¹¹³⁴ In determining whether the motivation of a bankrupt is

¹¹²⁹ J M Ferron, "The Approach of the Courts to the Discharge of Bankrupt Judgment Debtors" (1986) 61 Canadian Bankruptcy Rev 134.

¹¹³⁰ *Ibid* at 130. The first approach is typified by the case of *Re Buell* (1954), 35 CBR 53, [1955] OWN 421 (ON Sup Ct) Smily J.

¹¹³¹ The second approach is typified by the case of *Kozack v. Richter*, *supra* note 1101.

¹¹³² Ferron, *supra* note 1129 at 141.

¹¹³³ *Re Jefferson*, *supra* note 1047 at para 43.

¹¹³⁴ *Re Chodos*, *supra* note 326 at 238, quoted in *Re Trepanier*, *supra* note 1047 at para 5, and in *Re Youssef*, *supra* note 1049 at para 11. See also *Re Hernandez*, *supra* note 1076 at para 9.

to avoid judgment, judicial officers will look to a number of different types of indicia. For instance, it suggests that an assignment was motivated by the debtor's intent to avoid repayment when a debtor makes an assignment into bankruptcy shortly after a significant step in the litigation. The debtor may have filed an assignment shortly after judgment was entered.¹¹³⁵ The assignment might be precipitated by another step in the litigation, such as being served with the other party's commencing documents, or being subject to enforcement proceedings.¹¹³⁶ A judicial officer will also look at whether the debtor is discharging a large number of debts, or if the judgment debt is the only or the only significant debt being discharged by the bankruptcy.¹¹³⁷ When a judgment is the only or only

¹¹³⁵ *Re Dykes*, *supra* note 856 at para 4 (day after judgment); *Re England*, *supra* note 1044 at para 1 (6 days after judgment); *Re Chaytor*, *supra* note 1042 at 14 (2 weeks after judgment pronounced, before order entered); *Re Dugas*, *supra* note 165 at paras 11-2 (within 2 months of consent judgment); *Re Jefferson*, *supra* note 1047 at para 7 (within 2 months); *Re Kiamanesh*, *supra* note 1047 at para 23 (4 months after costs award, reference to registrar on division of property claim had not yet been heard); *Re Vu*, *supra* note 1044 at para 8 (within 4 months); *Re Meehan*, *supra* note 320 at para 5 (8 months); *Wolverton Securities Ltd. v. Schemel*, *supra* note 1076 at para 21 (1 year and two months after judgment); *Lewis Spencer Law Corp. v. Tutsbek*, *supra* note 1048 at para 2 (1.5 years after certificate of costs entered).

¹¹³⁶ *Re Dery*, *supra* note 1042 at paras 6-11 (bankrupt filed an assignment within 2 weeks of being served with a statement of claim); *Re O'Shaughnessy*, *supra* note 409 at para 29 (bankrupt filed an assignment within 2-3 weeks of receiving notice of a judgment against her in Alabama); *Funston v. Gelberman*, *supra* note 1041 at para 8 (bankrupt filed an assignment the same day that the creditor served the bankrupt with an examination in aid), *Re Walker*, *supra* note 1052 at para 10 (bankrupt filed an assignment in face of house being sold to satisfy judgment). In *Re Dugas*, the debtor argued that it was not the judgment, but the aggressive collection actions of the creditors, which pushed him into bankruptcy – but the judicial officer found that there was nothing wrongful about the collection actions of the creditors, see *Re Dugas*, *supra* note 165 at para 20.

¹¹³⁷ Cases where the judicial drew a negative inference because the debt was the only or only substantial debt: *Re Montalban*, *supra* note 209 at para 126 (2 judgments were 70% of claims), *Re Kunkel*, *supra* note 1044 at para 8; *Ostachoff v. Pinder Bueckert & Associates Inc.*, *supra* note 253 at para 37; *Re England*, *supra* note 1044 at para 4; *Re Berry*, *supra* note 425 at paras 3-5; *Re Paesch*, *supra* note 1049 at para 3; *Re Tinant*, *supra* note 1047 at para 8; *Re Mathew*, *supra* note 346 at para 15; *Re Trepanier*, *supra* note 1047 at para 4; *Re Youssef*, *supra* note 1049 at para 5; *Funston v. Gelberman*, *supra* note 1041 at para 21; *Re Jefferson*, *supra* note 1047 at para 7 (judgment was 77% of unsecured debts). Cases where the judicial officer noted that it was not the only debt: *Re Calogheros*, *supra* note 1048 at para 32; *Re Maas*, *supra* note 247 at para 29 (Judgment debt was 1/3rd of total debts); *Re Morrison*, *supra* note 1094 at para 23 (Judgment

significant debt being discharged, a judicial officer may infer that the debtor's motivation in making an assignment was to avoid payment of the judgment. The bankrupt may also admit that his or her assignment into bankruptcy was caused by the judgment.¹¹³⁸

Reflecting Ferron's second approach, judicial officers are prepared to deny a bankrupt access to discharge where the judgment results from the censure-worthy behavior by the bankrupt. Tortfeasors are apt to attract this manner of judicial censure, especially where an individual has been injured. A tortfeasor is "the author of his own misfortune, rather than the honest but unfortunate."¹¹³⁹ In these situations the judicial officer will focus on the "moral turpitude" of the debtor's behavior and determine if it would "be contrary to accepted morality or, more specifically, the objects of the *BLA* to allow the bankrupt to totally avoid the claim."¹¹⁴⁰ "It would hardly engender public respect for the bankruptcy system if an individual causing this traumatic injury to another were to use the procedure to walk away with minimal consequences."¹¹⁴¹

Like judicial officers, trustees will examine the conduct underlying a judgment when

debt was 1/3rd of total debts); *Re Ganden*, *supra* note 1048 at para 21; *Re Wickstrom*, *supra* note 1045 at para 19.

¹¹³⁸ *Re Chaytor*, *supra* note 1042 at para 2; *Re Beindorff*, *supra* note 156 at para 26.

¹¹³⁹ *Re Chaytor*, *supra* note 320 at para 66. In *Re Gettlich*, *supra* note 141 at para 12, the judicial officer emphasized that the bankrupt's conduct was deliberate, noting the *BLA* should not be used as "a clearinghouse... for liability for voluntary tortious conduct."

¹¹⁴⁰ *Re Maas*, *supra* note 247 at paras 26-7. But see *Re Lynn*, *supra* note 270 at para 51 where the judicial officer described details of the underlying human rights award as superfluous, and *Re Sidhu*, *supra* note 1042 at para 21, where the judicial officer quotes *Re Chodos*, *supra* note 326, for a proposition which rejects this second approach in favour of the first: "if [the debtor's] motivation is simply to escape a particular judgment the Court will scrutinize his application for discharge closely to determine whether he should be permitted merely to get rid of the judgment or whether he can afford to pay something on it in the light of his financial situation as a whole...[I]t is not dependent upon the judgment having arisen out of circumstances for which the debtor can be regarded as morally responsible. It is simply a question of whether or not he has made legitimate use of the bankruptcy process."

¹¹⁴¹ *Re Dery*, *supra* note 1042 at para 28.

assessing a bankrupt's deservingness.¹¹⁴² Where a debtor had been in a motor vehicle accident, the trustee might look at the debtor's degree of fault – were they texting, impaired or intentionally trying to hurt someone at the time or did they just slide into a ditch?¹¹⁴³ One trustee indicated he may oppose where a debtor had been sued successfully in a series of construction lawsuits, because it suggested the bankrupt has caused “a lot of trouble in the community.”¹¹⁴⁴ Personal injury judgments, or judgments based on quasi-criminal behaviour were also flagged by trustees as particularly censure-worthy.¹¹⁴⁵ On the other hand, trustees flagged judgments from failed business ventures, default judgments acquired in a foreign jurisdiction, if the bankrupt did not have the opportunity to defend him or herself, and Canadian Mortgage Housing Corporate deficiency judgments as non-censure-worthy claims.¹¹⁴⁶ A few trustees described themselves as colour blind when it came to a bankrupt's debts, they would not distinguish between debts based on whether they arose as a result of an unpaid credit card or a personal injury lawsuit.¹¹⁴⁷ Another group indicated that they did not think it was their role, as the trustee, to “judge” the debtor.¹¹⁴⁸

The motivation of a judgment debtor in filing for bankruptcy emerged as a less important consideration for trustees than the conduct underlying the judgment. A few trustees acknowledged that a discharge could be opposed where a debtor makes an assignment into bankruptcy primarily to discharge a single debt.¹¹⁴⁹ Others noted that a creditor opposition was more likely where the debtor had only one – or only one significant – debt.¹¹⁵⁰ Only two indicated that they might file an opposition if they suspected that the

¹¹⁴² I3, I6, I9, I14, I19, I26, I30, I32.

¹¹⁴³ I19.

¹¹⁴⁴ I32.

¹¹⁴⁵ I3, I30.

¹¹⁴⁶ I3, I14, I19, I10.

¹¹⁴⁷ I14, I25, I43.

¹¹⁴⁸ I3, I8, I20, I43.

¹¹⁴⁹ I6, I24, I28, I14, I41.

¹¹⁵⁰ I1, I7.

bankrupt's sole reason for making the assignment was to avoid a judgment debt.¹¹⁵¹ A few indicated that they would consider the ability of the debtor to pay the judgment.¹¹⁵²

Generally, the trustees did not see judgment debtors turning to bankruptcy as a problematic phenomenon. A common theme in my interviews was that debt relief was “what the bankruptcy system is for”¹¹⁵³ and “opposing [a judgment debtor’s] discharge seems to fly in the face of how the act works.”¹¹⁵⁴ When asked about how they would handle a judgment debtor, a number of the interviewees offered up examples of specific debtors they had dealt with, where they felt an opposition to discharge was not warranted.¹¹⁵⁵ Like with tax debtors and high consumer credit debtors, the trustees wanted to see evidence that the debtor was rehabilitated, including compliance with his or her duties during the bankruptcy process, “claiming responsibility” or expressing remorse. They were prepared to relieve the rehabilitated individual from past indebtedness.¹¹⁵⁶

Both trustees and judicial officers agree that it may be appropriate to sanction a judgment debtor in the opposition to discharge process if the judgment results from the debtor’s culpable conduct. They disagree over whether debtors act culpably when they use the bankruptcy system to avoid paying a judgment debt. Judicial officers will submit debtors to special scrutiny if they think this is the motivation. Trustees were of the view that the point of the bankruptcy system is to allow debtors to avoid paying debts, and debtors should not be penalized for using it for this purpose.

¹¹⁵¹ I1, I26 (comment made with respect to a costs award against a family litigant).

¹¹⁵² I6, I17, I24.

¹¹⁵³ I25. See also I24: “That’s what it’s all about” and I30: “That’s their right.”

¹¹⁵⁴ I19.

¹¹⁵⁵ I8, I9, I20, I38. I32 provided a hypothetical example of a judgment debtor, whom he thought deserved a discharge.

¹¹⁵⁶ I26 (rehabilitation), I5 (compliance), I4 (claiming responsibility), I20 (remorse).

5.5. CONCLUDING THOUGHTS

Across all three debtor types, trustees expressed a reluctance to lodge oppositions, notwithstanding strong language in the judicial decisions suggesting that these debtor types might not be deserving of unimpeded access to the discharge. In part, they felt it was not their role to lodge oppositions in these scenarios, but rather up to the affected lender, judgment creditor or the CRA. Trustees also voiced a range of opinions that mitigated the culpability of the debtor types. In the case of the profligate spender, trustees were alive to the way credit sometimes fills gaps in the social safety net and how irresponsible lending practices may contribute to an individual's over-indebtedness. Trustees characterized tax debtors as hapless blunderers, rather than conniving rogues. They might oppose the discharge of a judgment debtor whose judgment stemmed from blameworthy behavior, but trustees did not negatively assess a judgment debtor who filed for bankruptcy to avoid paying the judgment. In their written decisions, judicial officers did not share the same degree of sympathy for any of the three debtor types.

There is a structural explanation for the difference between the judicial officer's rhetoric and the trustee's expressed views. Judicial officers only see bankrupts who have had their discharges opposed by a potential opponent, or who fall into the small category of debtors who have no entitlement to an automatic discharge, i.e., third (or more) time bankrupts and bankrupts who qualify as "personal income tax debtors." Judicial officers only release written reasons in a small number of the cases they hear. On the other hand, trustees see a much larger number of bankrupts, including both those whose discharges are opposed, and those who receive automatic discharges. One might expect that those who have their discharges opposed have generally engaged in more egregious conduct than those who receive automatic discharges. The rhetoric of judicial officers may reflect the more serious misconduct of the debtors that appear before them. The trustees' more charitable view of these debtor types may reflect that they are exposed to more debtors who have engaged in the impugned behavior, but otherwise closely track the "honest unfortunate" archetype. The fact remains that even when faced with debtor-types who have been identified in the case law as blameworthy, trustees seem oriented away from characterizing the pre-bankruptcy conduct as sanctionable. This finding raises the possibility that the rarity of oppositions based on pre-bankruptcy conduct does not result solely from the obstacles trustees face in

trying to identify the conduct, but also from the fact that trustees are less likely to characterize such conduct as blameworthy.

Another aspect of trustees' responses should be considered: although they are reluctant to lodge oppositions, trustees often take steps to address the debtor's conduct. With profligate spenders, they may have the debtor pay back some of the frivolously spent money and they counsel the debtor about how to avoid such overspending in the future. With income tax debtors, they advise debtors to take a salaried position, where taxes are deducted and remitted by the employer, to hire a bookkeeper or to make periodic remittances to avoid an unworkably large annual tax bill. These alternative remedies evidence that trustees are taking a rehabilitative approach to debtors. This emphasis on rehabilitation persists even where other rationales are implicated, such as the public interest in the payment of taxes, or recovery by a creditor. The focus on rehabilitation leads trustees to view pre-bankruptcy conduct more charitably, as long as the debtor demonstrates their rehabilitation by complying with their duties during the bankruptcy. Where bankrupts fail to comply with their duties, or otherwise demonstrate a lack of rehabilitation, e.g., by repeatedly filing bankruptcy for the same reason, trustees are more willing to lodge an opposition.

In the following two sections, I develop the claim that the pattern of trustee oppositions can be explained by looking at the emotional labour they carry out. This explanation supplements the financial one, and addresses some of the financial explanation's shortcomings, including why trustees are reluctant to oppose on the basis of pre-bankruptcy misconduct even when it is factually uncontested, and why they continue to oppose on compliance grounds, despite the costs and uncertain benefits of bringing an opposition. The sympathetic approach of trustees to debtors, and their orientation towards rehabilitation are important elements of the emotional account of their work. In Chapter 7, I will identify two additional elements of the emotional account, their frustration at non-compliance and the constraining force of the ethos of professionalism on the emotions they allow themselves to feel. Before delving into the details of the trustees' work lives, I provide some background on the concepts of emotional labour, and previous sociological research carried out in this area. I turn to this task in the next chapter.

6. EMOTIONAL LABOUR

6.1. INTRODUCTION

The operation of the consumer bankruptcy system comprises a multitude of small interactions between different actors: the debtor, the creditors, the trustee, the judicial officers and staff from the OSB. The law in the books – discussed in Chapters 2 and 3 – delegates responsibility to the potential opponents and the judicial officers to police abuse in the system, and it does so in a way that leaves the potential opponents and judicial officers with significant discretion. The doctrinal law alone does not reveal what is happening on the ground. The thick description of the practice of trustees in Chapter 4 suggested that the trustees' decisions to oppose (or not) may be shaped by the lack of financial resources available for investigating pre-bankruptcy misconduct, and the lack of financial incentives for opposing. But this financial explanation is not wholly satisfactory because it fails to account for why trustees continue to oppose for non-compliance. The picture becomes more complex in Chapter 5. An examination of how trustees approach three specific debtor types suggests that trustees adopt a sympathetic approach to debtors, even when they have engaged in pre-bankruptcy conduct that the case law identifies as sanctionable. In this chapter and the next, I offer a different account of how trustees exercise their discretion in the opposition to discharge process by looking at how their emotions might shape the judgments they make about debtors.

The project of understanding the bankruptcy system through the lens of emotions fits within a larger body of law and emotions scholarship. The traditional view is that law and emotions are separate categories: the former being rational and dispassionate, the latter being “anarchic, unbounded and associated with a lack of control.”¹¹⁵⁷ Law and emotion scholarship has sought to erode the binary framing of these concepts by illustrating the many ways in which they interact. For instance, the legal system can evoke emotion.¹¹⁵⁸ Consider

¹¹⁵⁷ Bettina Lange, "The Emotional Dimension in Legal Regulation" (2002) 29:1 J of L and Soc'y 197 at 199.

¹¹⁵⁸ *Ibid* at 209.

how the legalization of same sex marriage in Canada may have resulted in homosexual individuals feeling vindicated and proud. Emotions may also shape the content of specific legislation or regulations.¹¹⁵⁹ Consider how public fear can be mobilized when criminal law is reformed. Of particular interest here, a legal actor's emotions can influence and inform their performance of an assigned legal task.¹¹⁶⁰ In the balance of my dissertation I explore how emotions influence and inform the trustee's exercise of discretion in the opposition to discharge process.

My analysis of the emotional terrain of bankruptcy draws on the work of Arlie Hochschild and subsequent thinkers researching in the field of the sociology of emotions at work. These thinkers identified social norms, or feeling rules, that can structure people's emotional responses with some consistency. Individuals doing similar work are often subject to the same feeling rules, because the feeling rules are shaped by instrumental goals and workplace challenges that the individuals share. To some extent, the emotions of the legal actor will be tied to variable, individualized circumstances independent of his or her workplace – a fight with a spouse, grief over an ailing parent, a rousing victory the night before in an old timers' hockey league. Because of their variability between individuals and across time, these idiosyncratic experiences are more difficult to study and presumably their impact is less consistent. I have chosen to focus instead on the shared emotional experiences of trustees, as shaped by feeling rules.

This chapter provides a backgrounder on the sociology of emotions at work, which sets up my analysis of the emotional labour of bankruptcy trustees in Chapter 7. I begin by introducing the idea that people carry out emotional work to comply with social norms, or feeling rules, that dictate what emotional responses are appropriate. People carry out this work in their personal lives, but also their professional ones. Emotional labour describes emotional work done as part of one's job. I introduce Arlie Hochschild's seminal study of emotional labour and identify the kinds of questions that have illuminated subsequent

¹¹⁵⁹ *Ibid* at 209 .

¹¹⁶⁰ Terry Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field" (2006) 30 *L & Human Behavior* 119 at 131, 135.

studies. My question, how emotional labour might shape discretionary decision-making, is different from those that traditionally have interested sociologists, and to answer it, I require a model of how reasons and emotions interact. To develop this model of the cognitive affective interface, I turn to scholars working in the philosophy of emotions. Once I have more clearly drawn the link between emotional labour and the judgments, I end the chapter by identifying some of the determinants that shape the feeling rules to which trustees are subject. I identify the determinants by synthesizing the research on two types of workers – professionals and individuals working in debt collection occupations. Trustees could be grouped with either of these types of workers, and many of the determinants that shape feeling rules in these fields also apply to trustees. This literature review sets the scene for my discussion of the emotional labour of trustees in Chapter 7, and also locates my research in the broader literature on the sociology of emotions at work.

6.2. EMOTIONAL RULES & EMOTIONAL WORK

What constitutes an emotion is a contested question across a number of disciplines. Different definitions place emphasis on the “thoughts, bodily changes, action tendencies [and] modulations of mental processes such as attention and conscious feelings” that accompany an emotion.¹¹⁶¹ My aim here is not to resolve this debate, nor is such a resolution necessary for my analysis of discretionary decision-making in the bankruptcy system. The definition of emotions that I employ throughout this dissertation starts from the basic premise that emotions include both cognitive and physiological components.¹¹⁶² For instance, when one is angry, one may think that one has been slighted, or subjected to unfair treatment. One may also experience bodily changes, such as redness in one’s face, or rising blood pressure.

¹¹⁶¹ Jesse Prinz, *Gut Reactions: A Perceptual Theory of Emotion* (Oxford: Oxford University Press, 2004) at 3. Prinz provides a useful overview of some of these competing theories in Chapter 1 of his book.

¹¹⁶²Jeremy Blumenthal "Emotional Paternalism" (2007-08) 35 Fla St U L Rev 1 at 24 concedes that management may occur, but notes that emotions are the result of unconscious cognitive stimuli and defy management; Lange, "The Emotional Dimension", *supra* note 1157 at 198.

Emotions can be managed. One may judge one's initial emotional response to stimuli as appropriate or inappropriate and, in the latter circumstance, take steps to alter one's response.¹¹⁶³ A person will assess the appropriateness of his or her emotional response as against internalized rules about how one is supposed to feel in a given situation. These rules can be externally imposed, reflecting community norms about proper behaviors, or internalized, reflecting one's own values. For instance, I may have adopted a basic human rights ethos and believe that all workers have the right to have a safe workplace. When I find out that my clothing may have been made at a Bangladeshi garment factory, which collapsed killing over a thousand workers, I should be outraged that workers have been treated so poorly. Despite this sense of what I "should" feel, my actual emotional responses may not align with my prescriptive beliefs. I may feel only small pangs of easily silenced guilt over my complicity in a system that contradicts my own values.

Where a person's initial reaction differs from how one believes one is supposed to feel, that person may take steps to cultivate a more appropriate reaction. A person may respond in one of two ways: surface acting or deep acting. When one surface acts, one tries to display a different emotion outwardly than what one feels inwardly. When one deep acts, one tries to change how one feels inwardly, either by evoking a feeling which is absent or suppressing an undesired emotional response.¹¹⁶⁴

Consider my example of the Bangladeshi garment workers. Imagine that a friend is telling me about the factory collapse in Bangladesh and I do not feel the degree of indignation, which I consider appropriate to the situation. If I engage in surface acting, I will work to ensure that my outward appearance does not betray the shallowness of my own emotional response. I may frown, raise my voice or pound my fist on a table to demonstrate my indignation at the global economic system, which allowed for this tragedy to occur.

¹¹⁶³ Arlie Hochschild, "Emotional Work, Feeling Rules and Social Structure", (1979) 85:3 *American Journal of Sociology* 551 at 552 ["Emotion Work, Feeling Rules and Social Structure"].

¹¹⁶⁴ Arlie Hochschild, *The Managed Heart: Commercialization of Human Feeling* (Berkeley, CA: University of California Press, 1983) at 40-1 [*The Managed Heart*]; Hochschild, "Emotion Work, Feeling Rules and Social Structure", *ibid* at 562.

If I engage in deep acting, I will try to change how I actually feel about the situation, rather than merely attempting to shape how others perceive my emotional response. Arlie Hochschild identifies three different deep acting techniques: cognitive, bodily and expressive.¹¹⁶⁵ If I engage in cognitive deep acting, I will try to evoke the desired indignation by changing how I think about the situation.¹¹⁶⁶ I might imagine how I would feel if the people who died in the factory were not strangers living on the other side of the globe, but people to whom I am intimately connected. If I engage in bodily deep acting, I will try to evoke the desired emotional response by deliberately adopting bodily responses associated with the emotion.¹¹⁶⁷ For instance, if I am trying to work myself up into an indignant rage, I may take short, forceful breaths. If I engage in expressive deep acting, I will adopt the outward indicia of an inner emotional state in the hope that this might help cultivate the desired inner emotional state.¹¹⁶⁸ The expressions of emotion that I adopt may be the same as the expressions I would adopt if I were engaged in surface acting; however, expressive deep acting is distinguishable from surface acting because they have different goals. When I engage in surface acting, I adopt the outward expressions of an emotion that I do not feel, because I want others to perceive me as having an appropriate emotional response. When I engage in expressive deep acting, I adopt the outward expressions of an emotion that I do not feel in an attempt to cultivate that emotion. The most commonplace example of expressive deep acting might be smiling, despite not feeling happy, and then finding that one's mood slowly improves to fit the outward expression of happiness. In the factory-collapse example, I may find that I can reverse engineer an appropriate sense of indignation by frowning, raising my voice and pounding my fist on the table.

The foregoing are examples of self-focused emotional work, which is when one tries to change how one feels; however, there is a second important type of emotional work, when one tries to evoke a particular emotion or set of emotions in another person by

¹¹⁶⁵ Hochschild, "Emotion Work, Feeling Rules and Social Structure", *ibid* at 562.

¹¹⁶⁶ *Ibid* at 562.

¹¹⁶⁷ *Ibid* at 562.

¹¹⁶⁸ *Ibid* at 562.

engaging in surface or deep acting. This is other-focused emotional work.¹¹⁶⁹ Self-focused and other-focused emotional work are often closely connected because, in interactions with others, one's emotions shape the other's emotional response and vice versa. For example, a person may express delight (authentic or otherwise) at the receipt of a gift, with the intention of evoking relief or joy in the gift-giver. However, emotional work can be entirely self-focused, such as when a person must engage in deep acting to overcome fear that is preventing him or her from carrying out an important or pressing task.

Arlie Hochschild has described deep acting as a form of emotional work or emotional management; however, more recent treatments of the subject have grouped both surface and deep acting under the label of emotional work.¹¹⁷⁰ I adopt this broader use of the term, because I am interested in both individuals who feign a required emotion, and also those who genuinely try to cultivate or suppress it.

6.3. UNSUCCESSFUL EMOTIONAL WORK: HARMONY, DISSONANCE, AND DEVIANCE

One's attempts at emotional work are not always successful. One may attempt to shape how one feels in response to a situation, but fail in changing one's feelings. These moments of failed emotional work can be insightful because they point to the feeling rules with which one is struggling to comply.¹¹⁷¹ In this section, I examine different types of unsuccessful emotional work. I contrast emotional dissonance and emotional deviance with emotional harmony. In the former two situations, a person's expressed or experienced emotions deviate from the feeling rules, whereas in the latter the person has achieved consonance.

¹¹⁶⁹ Sharyn Roach Anleu & Kathy Mack, "Magistrates Everyday Work & Emotional Labour" (2005) 32:4 J of L & Soc'y 590 at 606; Hochschild, "Emotion Work, Feeling Rules and Social Structure", *supra* note 1163 at 562.

¹¹⁷⁰ Hochschild, "Emotion Work, Feeling Rules and Social Structure" *ibid* at FN2.

¹¹⁷¹ *Ibid* at 561; Emily Meanwell, Joseph Wolfe & Tim Hallett, "Old Paths and New Directions: Studying Emotions in the Workplace" (2008) 2:2 Sociology Compass 537 at 539.

Table 6.1 Emotional Harmony, Dissonance & Deviance

	Experienced Emotion	Expressed Emotion
Emotional Harmony	Matches feeling rules	Matches feeling rules
Emotional Dissonance	Does not match feeling rules	Matches feeling rules
Emotional Deviance	Does not match feeling rules	Does not match feeling rules

Unsuccessful emotional work can take different forms. Anat Rafaeli and Robert Sutton point to four different elements that a person may wish to harmonize: a person’s experienced emotions, a person’s expressed emotions, external feeling rules (i.e., how a person is told she should feel) and internal feeling rules (i.e., how a person believes he or she should feel). When all four of these elements are consonant, a person experiences emotional harmony.¹¹⁷² For example, imagine a traveller comes home after a long trip and feels happy to see her family (experienced emotion). She thinks it is appropriate to feel happy (internal feeling rule). She knows the expectation is that she should feel happy (external feeling rule). She greets her family with a large smile on her face (expressed emotion). She is experiencing emotional harmony.

This same scenario can be used to illustrate emotional dissonance and emotional deviance. Emotional dissonance occurs when the expressed emotion complies with a feeling rule, either internal or external, but differs from a person’s experienced emotions.¹¹⁷³ If a traveller comes home after a long trip, but is sad to be back and resents her family for rejoicing in the end of her adventure (experienced emotion), she may greet them with a large smile on her face (expressed emotion), because she thinks it is appropriate for her to feel happy (internal feeling rule) or she knows the expectation is that she should feel happy (external feeling rule). She has engaged in surface acting to outwardly comply with the feeling rules, but has not managed to cultivate compliant emotions through deep acting. By

¹¹⁷² Anat Rafaeli & Robert Sutton, "Expression of Emotion as Part of the Work Role" (1987) 12:1 *Academy of Management Review* 23 at 32 ["Expression of Emotion"].

¹¹⁷³ *Ibid* at 32.

contrast, emotional deviance occurs when the expressed emotion departs from a feeling rule, either internal or external.¹¹⁷⁴ If a traveller returns from a trip feeling resentful and sad (experienced emotion), she may greet her family with something other than a warm, welcoming smile, thereby letting them know that she is not happy to see them (expressed emotion), even though she thinks it would be appropriate to feel happy at their reunion (internal feeling rule), or she knows that she is expected to feel happiness (external feeling rule). She is refusing to undertake any form of emotional work. The emotionally dissonant traveller appears to comply with the feeling rules, whereas the emotionally deviant one evidently departs from them.

In their analysis of harmony, dissonance and deviance Sutton and Rafaeli distinguish between internal from external feeling rules. A person might think it is appropriate for her, in a given situation, to feel a certain way. This is an internal feeling rule. She might also know that it is expected of her or others will think it is appropriate for her, in that same situation, to feel a certain way. This is an external feeling rule. The internal and external rules need not be consonant. In the example of the returning traveller, she may know that others expect her to feel happy about reuniting with her family, but she may feel justified in her own feelings of resentment and sadness.

Distinguishing between internal and external feelings rules assists one to identify some of the reasons why people carry out emotional work. When a person deviates from external feeling rules, the person risks reprimands or social isolation. The returning traveller, who greets her family with a glower and a harsh work may be castigated by her relatives or shunned. People may engage in emotional work to avoid these externally imposed sanctions. When a person's emotions do not align with an internal feeling rule, she is likely to assess herself unfavourably, and may even question if she is suffering from a character flaw or mental disorder. The returning traveller who does not feel happy to see her family may feel like a bad daughter or selfish individual. People can internalize social norms about how they are supposed to feel, and will work to cultivate harmonious emotional responses even when there is no external audience to police their emotional displays.

¹¹⁷⁴ Rafaeli & Sutton, "Expression of Emotion", *supra* note 1172 at 33.

6.4. EMOTIONAL LABOUR

Emotional work becomes emotional labour when the emotional work is required by a person's paid position. Arlie Hochschild coined the term emotional labour to describe the paid emotional work done by flight attendants and debt collectors working for Delta Airlines. Hochschild found that both flight attendants and debt collectors try to cultivate specific emotions in themselves (self-focused) and the travellers or recalcitrant debtors with whom they dealt (other-focused); however, the emotional rules of these two occupations were drastically different. Flight attendants were expected to be sympathetic, patient and friendly, and they attempted to elicit feelings of trust and enjoyment in their passengers. Bill collectors were expected to display aggression, and mistrust and elicit fear in the debtors.¹¹⁷⁵

Hochschild argued that once emotional work becomes bought and sold as labour, it is transformed in important ways. Workers cede significant control over their emotional work to their employer, who sets and enforces feeling rules (how the employees *should* feel). The emotional work becomes deskilled, because employers increasingly codify not only what feeling rules apply, but also how employees should comply with them.¹¹⁷⁶ For instance, an employee may be provided with scripts to be used in various situations, that are designed to help the employee surface act the desired emotion. The relationships within which emotional work is carried out become structurally unequal. In most private relationships, if a person feels that he or she is not receiving sufficient value in exchange for his or her emotional work, the person can withdraw the work or renegotiate the terms of the exchange. A person, who is being poorly treated by her friend, may advise the friend that her behavior is inappropriate and must be changed or she will withdraw from the friendship. In a work setting, this option is not open to most employees. A flight attendant who is being poorly treated by a customer is subject to strict policies promulgated by her employer requiring continued friendliness.¹¹⁷⁷

¹¹⁷⁵ Hochschild, *The Managed Heart*, *supra* note 1164 at 146-47.

¹¹⁷⁶ *Ibid* at 118-20.

¹¹⁷⁷ *Ibid* at 110.

A flurry of research has been carried out on emotional labour since Hochschild's book was published. The key topics of interest have included how employers shape their employees' emotional labour, who carries out the emotional labour and what the consequences of emotional labour are for employees.¹¹⁷⁸

6.4.1. HOW EMPLOYERS SHAPE EMPLOYEES' EMOTIONAL LABOUR

Employers can benefit significantly from controlling the emotional labour of their employees because emotional labour carried out by employees can advance the instrumental aims of an employer. The friendly flight attendant may make a positive impression on a customer, resulting in repeat and referral business. The appropriately aggressive bill collector may have a higher rate of recovery from recalcitrant debtors.¹¹⁷⁹ This manner of emotional labour is often other-focused. Emotional labour may also allow an employee to carry out work that would be too difficult absent deep acting. Bill collectors, for instance, may find taking adversarial positions against impoverished debtors very difficult, and only be able to carry out the work effectively, or at all, by engaging in emotional labour to shift how they feel about the debtor. This manner of emotional labour is self-focused.

Employers have different tools for directing the emotional labour of their employees. They can hire employees who are well suited to carry out the emotional labour required by the job.¹¹⁸⁰ Sometimes this is done by purposefully recruiting employees, who appear to have certain emotional skills, but a position may also have a high turnover rate, and only those people able to carry out the work remain.¹¹⁸¹ Employees are also socialized into emotional scripts – they learn the feeling rules of a job through explicit training, as well as observing and imitating their co-workers, and hearing the war stories of seasoned

¹¹⁷⁸ Kathryn Lively, "Emotions in the Workplace" Jan Stets & Jonathan Turner, eds, *Handbook of the Sociology of Emotions* (New York: Springer Science and Business Media, 2006) 569-590 at 569-90 ["Emotions in the Workplace"].

¹¹⁷⁹ Rafaeli & Sutton, "Expression of Emotion", *supra* note 1172 at 29-30.

¹¹⁸⁰ *Ibid* at 26.

¹¹⁸¹ Hochschild, *The Managed Heart*, *supra* note 1164 at 139.

employees.¹¹⁸² Finally, employers may monitor the employees' behavior and attempt to reinforce or modify it through rewards and punishments such as pay increases or decreases, promotions or demotions, contests, and in more serious cases of emotional deviance, termination of employment.¹¹⁸³

Arlie Hochschild described one of the key differences between emotional work and emotional labour as being that the latter was directed by an employer, and employers do play an important role in policing emotional labour, but employees may also self regulate. When an employee has internalized a feeling rule on the job, the employee will strive to foster consonant feelings so as to avoid a negative self-assessment. For instance, a flight attendant might work to feel sympathetic while on the job, because she believes that complying with the feeling rule makes her a good employee or a good person.

6.4.2. WHO CARRIES OUT EMOTIONAL LABOUR?

Hochschild, and subsequent researchers, have been interested in how employees' experiences of emotional labour differ depending on their demographic characteristics such as gender, class and race. The differences may emerge in the types of feeling rules to which the employee is expected to adhere, and the consequences of compliance or deviance.

Hochschild argued that there were gender differences in who carried out emotional labour and what types of labour were carried out. Men were protected by more of a "status shield" – they were not expected to carry out as much positive emotional work, and they were not subject to as many negative emotional outbursts.¹¹⁸⁴ Not only do women carry out more emotional work than men, but also Hochschild identified differences in the types of emotional work done by workers of different genders. Comparing the predominantly male bill collectors with the predominantly female flight attendants at Delta, Hochschild suggested that women are more frequently required to perform emotional labour associated

¹¹⁸² Rafaeli & Sutton, "Expressions of Emotion", *supra* note 1172 at 26-27.

¹¹⁸³ *Ibid* at 28.

¹¹⁸⁴ Hochschild, *The Managed Heart*, *supra* note 1164 at 174; Jennifer Pierce, "Emotional Labor Among Paralegals" (1999) 561 *Annals of the American Academy of Political and Social Science* 127 at 132-34.

with niceness, whereas men are required to perform emotional labour associated with aggression.¹¹⁸⁵

Hochschild also identified class differences in emotional labour. She suggested that middle class individuals and working class women carried out more emotional labour than other people.¹¹⁸⁶ She explained this difference in part by linking emotional labour to class-specific child rearing practices, arguing that children raised in middle class families were better prepared for careers requiring emotional labour.¹¹⁸⁷

Since Hochschild's work, a significant amount of work has considered the intersection between gender and emotional labour. The results are ambiguous, with some finding marked gender differences in the emotional demands placed on workers, but others finding negligible differences.¹¹⁸⁸ The study of class differences has been somewhat limited given that much of the research has looked at lower status occupations, such as fast food workers, and estheticians, but there has been a growing awareness that professional workers also carry out emotional labour.¹¹⁸⁹ The impact of race or ethnicity on emotional labour has been largely absent from the research agenda.¹¹⁹⁰

Emotional work may vary according to an employee's demographic factors; it may also vary over time. Some have argued that emotional labour has become a more important factor in many jobs as manufacturing work has been replaced by service work.¹¹⁹¹

¹¹⁸⁵ Hochschild, *The Managed Heart*, *supra* note 1164 at 162-64.

¹¹⁸⁶ *Ibid* at 21.

¹¹⁸⁷ *Ibid* at 157-58.

¹¹⁸⁸ Meanwell, Wolfe & Hallett, *supra* note 1171 at 543-44; Lively, "Emotions in the Workplace", *supra* note 1178 at 574.

¹¹⁸⁹ Amy Wharton, "Sociology of Emotional Labour" (2009) 35 Annual Rev Sociol 147 at 152-54.

¹¹⁹⁰ Lively, "Emotions in the Workplace", *supra* note 1178 at 574-75.

¹¹⁹¹ Lloyd Harris, "The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals" (2002) 39:4 J of Management Studies 553 at 556.

Alternatively, the demand for emotional labour may increase as more of the interactions a worker has are framed as client service, where the worker must attend to the client's emotions.

6.4.3. WHAT EFFECTS DOES EMOTIONAL LABOUR HAVE ON EMPLOYEES?

Hochschild voiced concern that employees suffered as a result of the commodification of their emotional work. She identified three possible negative outcomes: an employee might feel burnt out by the emotional demands of his or her job, an employee might struggle with feeling that his or her work persona is inauthentic, or an employee might perceive the emotional demands of his or her job cynically.¹¹⁹² Subsequent researchers have drawn more ambiguous conclusions, with some finding that people see emotional labour as an important tool for carrying out their job successfully, or a rewarding part of their job.¹¹⁹³

6.4.4. A NEW QUESTION: EMOTIONAL LABOUR & DISCRETION

My research question differs from those which traditionally animate the work of sociologists of emotional labour: I am interested in the impact of emotional labour on how legal actors exercise their discretion.

Robert Sutton, in his research on bill collectors, found that workers used emotional labour to avoid emotional dissonance. As part of his research, he underwent the training to become a debt collector and worked a few shifts calling recalcitrant debtors. He found that the more he worked, the easier it became to comply with the outward feeling rules. He posited that employees found it uncomfortable to express a feeling that they did not genuinely feel, i.e., surface acting. Some support for this contention comes from other researchers, who have found that employees required to engage in surface acting are more likely to suffer burnout than those required to engage in deep acting.¹¹⁹⁴ Sutton suggested

¹¹⁹² Hochschild, *The Managed Heart*, *supra* note 1164 at 132-36; Lively, "Emotions in the Workplace" *supra* note 1178 at 571

¹¹⁹³ Lively, "Emotions in the Workplace", *ibid* at 577-79; Wharton, *supra* note 1189 at 154.

¹¹⁹⁴ Wharton, *ibid* at 159-60.

that to avoid experiencing emotional dissonance, employees had an incentive to carry out the deep acting necessary to genuinely feel the emotion required by their job.¹¹⁹⁵

If employees are engaging in deep acting to avoid emotional dissonance while at work, they might go about this one of three ways: cognitive, bodily or expressive deep acting. Those who engage in cognitive deep acting may reframe how they think about situations that arise at work in ways that help them to genuinely feel the emotions they are required to display. I suspect that this process of cognitive reframing could affect their subsequent judgments about the deservingness or blameworthiness of an individual. If employees are carrying out this reframing effort in response to feeling rules, and if these rules remain relatively constant across a number of different geographic and organizational contexts, they might shape a trustee's judgments about deservingness and blameworthiness – and subsequent exercises of discretion premised on these judgments – in predictable ways.

To illustrate how this dynamic may be impacting the exercise of discretion by trustees in the opposition to discharge process, I need to lay some groundwork. First, I will tease out the connection between emotions and beliefs. To do this, I will draw on scholars working in the field of the philosophy of emotions. Emotions contain beliefs. When a worker engages in cognitive deep acting, they adopt a cognitive frame to evoke or suppress an emotion and this framing device might shape a worker's subsequent judgments. Additionally, once the worker successfully evokes the desired emotion, that emotion may orient the worker towards making some types of judgments and away from others.

When I consider how the bankruptcy system structures the emotional experiences of trustees, I am not studying the idiosyncratic emotional experiences of individual trustees, but rather the emotional experiences shared by a large number of trustees, as they engage in emotional labour to comply with feeling rules that permeate the bankruptcy system. In attempting to identify what feeling rules structure the emotional experiences of bankruptcy trustees, I was able to draw on two streams of research on emotions and labour. The first stream is research done on professionals – this research considers how the emotional labour

¹¹⁹⁵ Robert Sutton, "Maintaining Norms About Expressed Emotions: The Case of Bill Collectors" (1991) 36:2 *Administrative Science Quarterly* 245 at 255 ["Expressed Emotions"].

of professionals differs from the emotional labour of non-professional employees. The second stream is research carried out on people working with debtors, such as debt collectors, bailiffs and American consumer bankruptcy lawyers. In the final section, I synthesize the research in each of these streams to identify determinants of emotional labour in the bankruptcy system.

In Chapter 7, I draw on my interviews with bankruptcy trustees to identify the feeling rules, which shape their work. I then consider what emotional labour trustees carry out to comply with these rules and how that labour might shape the judgments that bankruptcy trustees make about the deservingness of debtors.

6.5. THE AFFECTIVE-COGNITIVE INTERFACE

When an individual engages in deep acting to cultivate or suppress emotions in compliance with a feeling rule, he or she may adopt one of three strategies: cognitive, bodily or expressive deep acting.¹¹⁹⁶ When one engages in cognitive deep acting, one tries to change how one feels in a situation by changing how one thinks about the situation. I propose that the beliefs a trustee espouses in an effort to comply with the feeling rules of their work may shape how they judge debtors, and that the emotions they succeed in cultivating may orient their judgments in predictable directions.

The analysis that follows draws on the work of Aristotle and scholars working in the Aristotelian tradition, such as Martha Nussbaum and Stephen Leighton. The work of these thinkers is employed here to help illuminate the interaction between reasons and emotions, generally, and emotional labour and discretionary decision-making, specifically. My intention is not to argue in favour of an Aristotelian conception of emotions to the exclusion of other conceptions and my treatment of the subject is sufficiently ecumenical that I believe it should resonate with scholars who hold a diversity of theoretical commitments.

My claim that emotional labour is relevant for understanding discretionary decision-making presupposes a dynamic interface between beliefs and emotions. Emotions can be

¹¹⁹⁶ Hochschild, " Emotion Work, Feeling Rules and Social Structure", *supra* note 1163 at 562.

cultivated by changing one's beliefs about a situation. Emotions may also reinforce some ways of thinking. The intuition that beliefs and emotions are intimately connected has a long intellectual pedigree. In *Rhetoric*, Aristotle explored how an orator could sway the emotions of an audience by changing the audience's underlying beliefs and how these shifts in emotion might impact the audience's judgments. He tellingly defines emotions as "all those feelings that so change men as to affect their judgments and are also attended by pain or pleasure."¹¹⁹⁷

In the second book of *Rhetoric* Aristotle set about defining several emotions by outlining the beliefs associated with the emotions, the people towards which the emotions may be felt, and the types of situations in which a person may experience the emotion.¹¹⁹⁸ One goal of this exercise is to identify how a speaker can put his or her audience into a specific emotional frame of mind. For instance, after defining fear as "a pain or disturbance due to a mental picture of some destructive or painful evil in the future",¹¹⁹⁹ Aristotle recommends that when trying to inspire fear in an audience, "the orator must make them feel that they really are in danger of something, pointing out that it has happened to others who were stronger than they are, and is happening, or has happened, to people like themselves, at the hands of unexpected people, in an unexpected form, and at an unexpected time."¹²⁰⁰

Aristotle's conception of how an orator may foster a desired emotion in an audience by encouraging them to adopt certain beliefs bears a striking resemblance to Hochschild's conception of how a person may foster a desired emotion in him or herself by adopting a different cognitive frame. Aristotle's orator may inspire fear in his audience by pointing out that similarly situated people have fallen prey to calamity. Hochschild's flight attendant

¹¹⁹⁷ Aristotle, *Rhetoric*, translated by W Rhys Roberts (Mineola, NY: Dover Publications, 2004) at 60.

¹¹⁹⁸ John Cooper, "An Aristotelian Theory of the Emotions" in Amelie Oksenberg Rorty, ed, *Essays on Aristotle's Rhetoric* (Berkeley, CA: University of California Press, 1996) 238-257 at 243.

¹¹⁹⁹ Aristotle, *Rhetoric*, supra note 1197 at 69.

¹²⁰⁰ *Ibid* at 71.

might work to overcome a creeping sense of fear during a turbulent flight by reminding him or herself that similarly situated people regularly come through such experiences unscathed.

One can use thought exercises to shape one's emotions, but the affective cognitive interface works in the opposite direction, too. In *Rhetoric* Aristotle argued that being able to evoke emotions in an audience was an important persuasive tool because the emotions of an audience member may make them more or less receptive to the orator's message. Stephen Leighton has identified five ways in which Aristotle may be saying that emotions can shape one's beliefs.¹²⁰¹ First, in a moment of insincerity or self-deception, one may profess to hold judgments that achieve the instrumental motives of one's emotions. For instance, one could slander a person with whom one was angry and against whom one wanted to extract a measure of revenge.¹²⁰² Second, emotions may have judgments attached to them, which exclude other emotions and judgments. Leighton gives as an example that if one feels indignation towards someone, one thinks they have an undeserved benefit, and that precludes one from feeling pity, which requires one to believe the subject of the pity has suffered an undeserved misfortune.¹²⁰³ Third, one might be inclined to judge a person more or less favourably depending on what emotion one feels towards them.¹²⁰⁴ One judges those one loves more favourably, and more quickly makes negative judgments against those with whom one is angry.¹²⁰⁵ Fourth, emotions may impact how one perceives information, because emotions can cause one to develop expectations, and one may organize information to accord with those expectations.¹²⁰⁶ For example, if two people both hear a loud noise, a fearful person who is expecting "some destructive or painful evil in the future"¹²⁰⁷ may

¹²⁰¹ Stephen Leighton, "Aristotle & The Emotions" in Amelie Oksenberg Rorty, ed, *Essays on Aristotle's Rhetoric* (Berkeley, CA: University of California Press, 1996) 206-237.

¹²⁰² *Ibid* at 207.

¹²⁰³ *Ibid* at 209.

¹²⁰⁴ *Ibid* at 210-11.

¹²⁰⁵ *Ibid* at 210-11.

¹²⁰⁶ *Ibid* at 212-14.

¹²⁰⁷ Aristotle, *Rhetoric*, supra note 1197 at 69.

perceive the noise as a gunshot, whereas a more calm person may perceive it as a backfiring car.¹²⁰⁸ Finally, emotions may impact the extent to which one pays attention to an object – or person – on whom one is passing judgment. If the object or person evokes a pleasurable emotion, one will pay them greater attention, and one may try to avoid the object or person who evokes painful emotions.¹²⁰⁹ More attention does not always translate into better understanding, because one’s pleasurable emotions may cause one to favourably misperceive the facts; however "insofar as one feels pleasure or pain, one has a better or worse opportunity to understand."¹²¹⁰

This general account of the interface between emotions and cognition begins to reveal how emotions might shape the exercise of discretion by trustees in bankruptcy during the opposition to discharge process. In trying to evoke emotions that are consonant with the feeling rules, trustees may adopt cognitive frames that preclude holding other types of judgments. Trustees, who have cultivated a genuinely harmonious emotional response, may find that their emotional states shape the types of judgments that they make about a debtor. These impacts are structured by social norms, because the emotions that trustees endeavour to cultivate are dictated by feeling rules. To the extent that these feeling rules are constant across the profession, these impacts could result in a heightened level of consistency in how trustees exercise their discretion. In the final section of this chapter, I will synthesize some of the previous research carried out on the emotional labour of two types of workers, professionals and individuals who work in debt occupations. These previous studies highlight some of the determinants of a worker’s feeling rules. Trustees share many characteristics with both of these types of workers and their feeling rules are shaped by similar determinants. This review of previous studies helps to identify these determinants of

¹²⁰⁸ Leighton, *supra* note 1201 at 214.

¹²⁰⁹ *Ibid* at 216.

¹²¹⁰ *Ibid* at 217. According to this account, emotions appear to adversely impact rational decision-making. Rebutting this inference is both beyond the scope of this dissertation, and not strictly necessary for the analysis that follows, but at another point I hope to take up the defence of the position that emotions can both hinder and help rational decision-making.

a bankruptcy trustee's feeling rules and connects my findings in Chapter 7 to the larger body of work on emotional labour.

6.6. EMOTIONAL LABOUR OF PROFESSIONALS

Research on the emotional labour of professionals is relevant to understanding the emotional rules impacting the operation of the Canadian consumer bankruptcy system because trustees are undergoing a process of professionalization. They call themselves insolvency and restructuring professionals. They are quasi-self-regulated: CAIRP has taken over the training of trustees from the OSB, although it still does so under the supervision of the OSB.¹²¹¹ I expect that the emotional labour carried out by trustees will share many similarities with the emotional labour carried out by other professionals.

The emotional labour carried out by professionals differs in some important respects from the emotional labour carried out by other types of workers. Four themes emerge from the literature: professionals are expected to present dispassionately, they tend to frame their work in the context of promoting the greater good and this rhetoric can infuse their emotional labour, professionals have a greater degree of occupational autonomy, and the emotional labour of professionals is shaped by structural constraints, namely competition for work and volume of work.

These themes have been teased out in research on different types of professionals including doctors, lawyers and judges. I will summarize some of the key research projects carried out on the emotional labour of professionals, discuss the four themes that emerge from the research, and then consider the implications for the emotional work of bankruptcy trustees.

¹²¹¹ In 1997, the OSB and the CAIRP signed a Memorandum of Understanding to establish a National Insolvency Qualification Program. In 2009, this program was renamed the CIRP Qualification Program and CAIRP took over running the program with the OSB being involved only as a regulator. Canadian Association of Insolvency and Restructuring Professionals, "Becoming a Member: General" online: Canadian Association of Insolvency and Restructuring Professionals < <http://www.cairp.ca/membership/becoming-a-member/general/index.php> > [June 14, 2013].

6.6.1. HARRIS ON BARRISTERS

Harris undertook to study the emotional labour of barristers in the United Kingdom at a time when their profession was undergoing significant change. Lawyers in the United Kingdom traditionally qualify as either barristers or solicitors, with only the former being entitled to attend court. Solicitors have a more sustained relationship with a client and, when it becomes obvious that a matter is headed to court, will retain a barrister to represent the solicitor's client. Shortly before Harris began his study, the regulatory regime in the United Kingdom was changed to allow solicitors to make some appearances in court.¹²¹²

Harris used interviews, and both overt and covert observation to collect his data. His research considered the origins of emotional labour, its content and its consequences. With respect to the origins of emotional labour, Harris found that barristers were heavily influenced by occupational factors, including the relative financial instability of being essentially self-employed, changes to the regulatory structure that increased barrister's competition with other professionals for paying work, the expectations of clients and others who observed the barristers at work (e.g., the media), the process of occupational acculturation at bar school and during the barrister's pupillage and their own positive self image, which was frequently reinforced by other behaving towards the barristers with deference.¹²¹³

The content of the barrister's emotional work varied, but consisted primarily of surface acting with limited moments of deep acting. Barristers were very reticent to show genuine feeling, a phenomenon which is discussed in detail below.

Consistent with previous research, barristers experienced both positive and negative consequences as a result of engaging in emotional labour. The labour was exhausting, could be stressful and sometimes spilled over into the home lives of barristers. On the positive

¹²¹² Harris, *supra* note 1191 .

¹²¹³ *Ibid* at 564-66.

side, barristers viewed their ability to engage in surface acting as an important professional skill.¹²¹⁴

6.6.2. PIERCE AND LIVELY ON PARALEGALS

Jennifer Pierce and Kathryn Lively separately studied the emotional labour of paralegals. These studies are of interest when discussing the emotional labour of professionals for two reasons. First, so much of the emotional labour carried out by paralegals was done in the context of their relationship with lawyers and, as such, provides a different perspective on the emotional labour of lawyers as professionals. Second, paralegals are themselves a quasi-professional group and their experiences reflect the emotional labour of people working in occupations that are undergoing a process of professionalization.

Pierce engaged in embedded research: she worked as a paralegal for 6 months at a large private law firm and for 9 months at an in-house legal department of a private corporation, both located in the Bay Area of the United States.¹²¹⁵ Her research considered the gendered aspect of emotional labour from two angles: how largely female paralegals related to the largely male lawyers with whom they worked, and how the emotional expectations placed on male paralegals differed from those placed on their female colleagues. Female paralegals were expected to show deference to male lawyers, by remaining cheerful in the face of angry or aggressive treatment by the lawyers, and also to nurture or mother the lawyers.¹²¹⁶ Similar types of expectations were placed on male paralegals, but to a lesser degree: they were given more leeway in terms of responding to angry treatment from lawyers in kind and they were expected to be polite to the lawyers with whom they worked, but not actively nurturing.¹²¹⁷

Lively's research resulted in several publications, including a piece that compared the emotional labour of paralegals at consumer-oriented law firms with those at commercial-

¹²¹⁴ *Ibid* at 574-75.

¹²¹⁵ Pierce, *supra* note 1184 at 140.

¹²¹⁶ *Ibid* at 129.

¹²¹⁷ *Ibid* at 133-34.

oriented law firms.¹²¹⁸ She carried out interviews with 51 American paralegals, including 14 who worked at firms that specialized in consumer-oriented areas of law: consumer bankruptcy, family law, plaintiff medical malpractice, and plaintiff personal injury.¹²¹⁹ The clients serviced by these firms tended to be dealing with emotionally evocative life events: serious injury, divorce, or financial destitution. They were often ignorant about the law, uncomfortable interacting with attorneys and required significant handholding through the litigation process.¹²²⁰ Because each individual filing was not very lucrative, attorneys had to take on a large number of them to make a profit, and they could only do so by delegating the time-consuming work of emotional management to their paralegals.¹²²¹ As a result, paralegals at consumer firms carried out a significant amount of emotional labour in their interactions with clients; however, they carried out less emotional labour in their interactions with their attorney-employers, and tended to have more equitable relationships with their attorney-employers as compared to paralegals at commercial firms.¹²²²

6.6.3. RESEARCH ON JUDGES

Three projects have considered different aspects of the emotional labour of judges.

Sharyn Roach Anleu and Kathy Mack interviewed 40 magistrates working in Magistrates' courts in Australia. Australian Magistrates' courts are courts of first instance that hear the bulk of civil and criminal matters, and have high rates of self-represented litigants.¹²²³ Anleu and Mack found that magistrates engaged in emotional management, both to control their own feelings and to evoke certain feelings in the court users, who appeared before them.

¹²¹⁸ Kathryn Lively, "Client Contact and Emotional Labor: Upsetting the Balance and Evening the Field" (2002) 29:2 Work and Occupations 198.

¹²¹⁹ *Ibid* at 206.

¹²²⁰ *Ibid* at 207-14.

¹²²¹ *Ibid* at 215.

¹²²² *Ibid* at 217-19.

¹²²³ Anleu & Mack, *supra* note 1169 at 593-96.

The magistrates wanted the court users to come away from their experience in the court feeling as though they had been treated fairly, instead of feeling angry, contemptful or indignant.¹²²⁴ They developed strategies for diffusing emotionally tense situations, such as adjourning matters to allow for a cooling off period, and emphasizing the similarities between themselves and the court users; de-emphasizing hierarchy in the courtroom tended to lessen the intensity of court users' emotional reactions.¹²²⁵ Court users wanted to feel as though they had been heard and their stories had been considered, and magistrates attempted to give court users this experience by deeply engaging with them; however, this was difficult to do because the case load in Magistrates' court was very heavy, leaving little time for each individual litigant. Some magistrates became emotionally drained by engaging with the "passing parade of misery, day in, day out, and folly and stupidity and dishonesty and depravity..."¹²²⁶ The magistrates attempted to mute their own feelings of sympathy and disdain to the extent that they were inconsistent with the professional norms that required them to appear as neutral, impartial arbiters of the law.¹²²⁷

The magistrates in Anleu and Mack's study were not subject to direct supervision in the emotional labour that they carried out, nor were they explicitly advised of the emotions that they were expected to display in their face-to-face dealings with court users. The emotional rules were suggested by conventional beliefs about the role of the judicial officer as an impartial and dispassionate arbiter, and their professional ethics as distilled in guidelines.¹²²⁸ Deviance from the emotional rules of their work could result in critical commentary by the press or court users, or reversal by an appellate court.¹²²⁹

¹²²⁴ *Ibid* at 602-03, 610.

¹²²⁵ *Ibid* at 608.

¹²²⁶ *Ibid* at 613.

¹²²⁷ *Ibid* at 611.

¹²²⁸ *Ibid* at 601-02.

¹²²⁹ *Ibid* at 603.

Jennifer Scarduzio carried out interviews and participant observation of municipal judges in two courthouses in a large, unidentified American city. Municipal courts handle a diversity of cases including “traffic violations, misdemeanors, small-claims cases, pretrial hearings, domestic violence cases, assaults, and other civil and criminal misdemeanors.”¹²³⁰ Her research explored the concept of emotional deviance – when a person visibly departs from the emotional rules of one’s occupation. She identified two feeling rules governing the behavior of municipal court judges: neutrality and fairness, and observed many instances of the judges deviating from these rules, with their body language (e.g., eye rolling, rude hand gestures), use of humour and angry outbursts.¹²³¹ She hypothesized that judges can engage in these forms of deviance because they have high status and power in the courtroom, and their acts of deviance from the feeling rules reinforce their high status.¹²³²

Dave Cowan and Emma Hitchings used interviews and courtroom observation to study district judges presiding over applications for repossession of housing brought by social-housing landlords against tenants, who had fallen behind on their rent.¹²³³ Their research focused on how judges could manage large caseloads, when each decision was highly discretionary. The judges’ exercises of discretion were driven by their assessment of the worthiness of the landlord and tenant, respectively and they developed short cuts for assessing the worthiness of both parties.¹²³⁴ Judges viewed tenants more favourably if they showed up to court, evidenced a willingness to pay, were female, had children or suffered from a disability.¹²³⁵ Judges viewed landlords more favourably if they sought orders in line

¹²³⁰ Jennifer Scarduzio, "Maintaining Order Through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges" (2011) 25 *Management Community Quarterly* 283 at 290.

¹²³¹ *Ibid* at 293-94.

¹²³² *Ibid* at 287.

¹²³³ Dave Cowan & Emma Hitchings, "Pretty Boring Stuff: District Judges and Housing Possession Proceedings" (2007) 16 *Social & Legal Studies* 363.

¹²³⁴ *Ibid* at 371-75.

¹²³⁵ *Ibid* at 374-75.

with what the court usually granted.¹²³⁶ Landlords attended at court repeatedly, and would develop a positive or negative reputation with the judiciary.¹²³⁷

6.6.4. OTHER RESEARCH ON PROFESSIONALS

Allen Smith and Sherryl Kleinman studied how medical students maintain emotional distance while engaging in acts of physical intimacy with the living and the dead, which often evoked disgust, arousal or embarrassment. They carried out participant observations in medical school, including during the clinical component of the student's training, and a number of interviews with students and other individuals involved in the medical school.¹²³⁸ They found that students developed a variety of strategies for maintaining emotional distance, ranging from avoiding intimate contact to joking about their work demands.¹²³⁹

Niza Yanay and Golan Shahar studied how psychology students managed their emotions during a placement at an Israeli residential psychiatric facility. They discovered that the students could be roughly categorized into two groups: those who were striving to display professionally appropriate emotional states such as dispassion and empathy and those who allowed for greater spontaneity in their emotional displays, including displays of strong emotions such as hate, love and anger.¹²⁴⁰

6.6.5. THE EMOTIONAL LABOUR OF PROFESSIONALS: THEMES

Taken together, these studies provide rich descriptions of the experiences of professionals working in very different contexts, including courts, law offices, and medical facilities, on four different continents. Despite the breadth of experiences described, four

¹²³⁶ *Ibid* at 371.

¹²³⁷ *Ibid* at 371.

¹²³⁸ Allen Smith & Sherryl Kleinman, "Managing Emotions in Medical School: Student's Contact with the Living and the Dead" (1989) 52:1 *Social Psychology Quarterly* 56.

¹²³⁹ *Ibid* at 60-66. All six strategies identified by Smith and Kleinman are discussed in greater detail below, see FNs 1252-1253 and accompany text.

¹²⁴⁰ Niza Yanay & Golan Shahar, "Professional Feelings as Emotional Labor" (1998) 27 *J of Contemporary Ethnography* 346.

themes emerge about the emotional labour carried out by professionals. Professionals are expected to maintain an air of dispassion by avoiding displays of strong emotions, they view their work as contributing to the greater public good and these ideals can inform their emotional labour, they have significant autonomy in how they carry out their emotional labour, and structural factors – competition and workload – shape their emotional labour.

6.6.5.1. DISPASSION

Professionals are expected to be dispassionate, and strong displays of emotion are considered inappropriate and inconsistent with professional norms.¹²⁴¹ Reflecting the traditional division drawn between reason and emotion, a professional's dispassionate disposition is intended to convey his or her rational competence.¹²⁴² Strong or raw emotions are viewed as an obstacle to the rational thinking expected of professionals.¹²⁴³ Clients place more confidence in a dispassionate professional than an emotional one.¹²⁴⁴ By learning to display emotional detachment, professionals-in-training can begin to establish themselves as authoritative.¹²⁴⁵

The general rule that professionals are expected to act dispassionately surfaces in a number of the studies on the emotional labour of professionals.

Harris, in his study of English barristers, found that many of them used surface acting to achieve professional ends: to secure work from clients and solicitors, to facilitate negotiations with other counsel, to sway juries and judges. For instance, one barrister explained the importance of maintaining a veneer of friendliness with solicitors: “you’ve got to pretend to be interested in their squalid little lives – interested in their children, their petty

¹²⁴¹ Anleu & Mack, *supra* note 1169 at 599; George Cheney & Karen Ashcraft, "Considering 'The Professional' in Communication Studies: Implications for Theory and Research Within and Beyond the Boundaries of Organizational Communication" (2007) 17 *Communication Theory* 146 at 161-62.

¹²⁴² Harris, *supra* note 1191 at 571.

¹²⁴³ Yanay & Shahr, *supra* note 1240 at 356.

¹²⁴⁴ Anleu & Mack, *supra* note 1169 at 599.

¹²⁴⁵ Wharton, *supra* note 1189 at 153, citing Smith & Kleinman, *supra* note 1238 at 56-57.

squabbles, their workload, their new house.”¹²⁴⁶ In contrast with the prevalence of manufactured emotional displays, the barristers tried to avoid expressing genuine emotions. They repeatedly espoused the idea that genuine emotions were inconsistent with being a professional. Strong emotions were seen as impairing the rational competence at the centre of the barrister’s skill set.¹²⁴⁷ The barristers distinguished themselves, favourably, from solicitors, on the basis of their superior ability to maintain this distance.¹²⁴⁸ Harris also found some suggestion that the emotional distance maintained by barristers allowed them to carry out work that could otherwise be the source of significant stress, or sadness, such as child protection hearings.¹²⁴⁹

Anleu and Mack, in their study of magistrates in Australia, found that the magistrates worked to mute their strong emotional reactions to litigants – of both sympathy and disdain – to comply with the public’s expectation that a neutral decision-maker should be dispassionate.¹²⁵⁰ Similarly, Scarduzio identified neutrality as one of the feeling rules governing municipal judges.¹²⁵¹ An emotional display by a judge may raise concerns that his or her reason has been impaired, but also that he or she is biased.

Smith and Kleinman found that medical students learned to use a variety of tools to maintain professional neutrality despite the demands of their work, which often required intimate physical contact with live patients and cadavers. These instances of contact could induce either desire or disgust. Students worked to suppress these emotions. They depersonalized people into a series of sub-human components – such as biological systems or body parts – or into an analytic problem that needed to be solved. They avoided uncomfortable emotions by focusing on the positive emotions associated with contact

¹²⁴⁶ Harris, *supra* note 1191 at 567.

¹²⁴⁷ *Ibid* at 571.

¹²⁴⁸ *Ibid* at 571.

¹²⁴⁹ *Ibid* at 572.

¹²⁵⁰ Anleu & Mack, *supra* note 1169 at 611.

¹²⁵¹ Scarduzio, *supra* note 1230 at 293-94.

including excitement about hands-on learning, pride in doing medical work and gratification in problem-solving. Another avoidance technique was empathizing with the patient, allowing the patient's emotions to take precedence over the student's emotions. Alternatively, they might project their negative feelings onto their client or justify the negative feelings by manufacturing or exaggerating the blameworthy attributes of the client. They also used humour to relieve tension and maintain "hierarchical distance" from the patients.¹²⁵² Finally, they avoided contact that evoked uncomfortable feelings, by not carrying out particularly intimate exams (e.g., genital, rectal) or covering up body parts that made them feel uncomfortable.¹²⁵³

Yanay and Shahar found that those psychology students who were committed to maintaining an objective, empathetic stance would create emotional distance by approaching the patients as a "problem" as opposed to a person with a narrative history.¹²⁵⁴ Infuriating behaviour would be recast as evidence of psychopathology, allowing the psychology students to transform feelings of anger into feelings of pity.¹²⁵⁵

Taken together, these studies suggest that professionals engage in self and other-focused emotional labour to comply with a feeling rule that requires dispassion. A professional's other-focused emotional labour is directed at those people with whom the professional interacts and aims to make them feel confident in the professional's rational capacity. Where the professional takes on a role as a neutral arbiter, this other-focused labour has an additional aim – to dispel any fears or suspicion that the arbiter is biased in favour of one party. A professional's self-focused work is aimed at muting strong emotions. The research suggests that many professionals have internalized a feeling rule that strong emotional displays are inappropriate because they may impact a professional's rational competence.

¹²⁵² Smith & Kleinman, *supra* note 1238 at 60-67.

¹²⁵³ *Ibid* at 67.

¹²⁵⁴ Yanay & Shahar, *supra* note 1240 at 371.

¹²⁵⁵ Yanay & Shahar, *supra* note 1240 at 346-47, 357.

6.6.5.2. GREATER GOOD

Professionals view themselves as serving a greater good, such as justice, divinity or human understanding, in addition to the demands of their clients.¹²⁵⁶ Professional work is framed in the context of serving a larger goal, and this larger goal may be a potent tool for carrying out the cognitive emotional work necessary to cultivate or suppress feelings.

A judge's work can be understood as serving a number of "greater goods", including justice and truth. Anleu and Mack's study of magistrates revealed that the magistrates were very concerned with the impressions that court users would form after their experience with the judicial system. They wanted litigants to feel as though justice had been done, and this meant giving them the opportunity to tell their story and feel as though the magistrate gave it serious consideration.¹²⁵⁷ Anleu and Mack suggest that affective, empathetic engagement with the individual is an important part of this listening process. The magistrates also wanted to maintain the broader public's confidence in the justice system, and this required that they suppress emotions – especially strong emotional displays – that were inconsistent with the magistrate's role as impartial, rational arbiter.¹²⁵⁸ Because their emotional labour was directed towards this larger goal, magistrates' emotional labour was not aimed at a specific individual, but a diffuse audience.¹²⁵⁹

The medical students studied by Kleinman and Smith would sometimes drown out uncomfortable or inappropriate feelings by focusing on the positive emotions associated with learning or behaving like a professional.¹²⁶⁰ In doing so, they could frame their work as part of the larger medical project of alleviating human suffering through healing.

¹²⁵⁶Harris, *supra* note 1191 at 555; Cheney & Ashcraft, *supra* note 1241 at 151; Scott Cummings & Rebecca Sandefur, "Beyond the Numbers: What we know - and should know - about American Pro Bono" (2013) 7 Harv L & Pol'y Rev 83 at 86.

¹²⁵⁷ Anleu & Mack, *supra* note 1169 at 606, 610.

¹²⁵⁸ *Ibid* at 601-02.

¹²⁵⁹ *Ibid* at 595.

¹²⁶⁰ Smith & Kleinman, *supra* note 1238 at 62-63.

A similar type of cognitive emotional work, evidenced by professionals and non-professional workers alike, reframes unpleasant tasks as in the best interest of the client. Sutton found that bill collectors would suppress feelings of sympathy when pressing a debtor to pay by telling themselves that if they were able to get the debtor to repay the debt (by conveying irritation and disapproval), it would be to the debtor's benefit. A supervisor at the debt collection agency suggested that the proper way to think about the situation was as follows: "I'm helping this person to save their credit rating. If they don't pay me, they may never be able to buy a car or a house."¹²⁶¹ The judges studied by Cowan and Hitchings would sometimes adopt "strong language" to explain to the tenant the importance of staying up-to-date on their rental payments. They justified this strong language on the basis that it was for the tenant's "own good" to understand the importance of paying rent to avoid eviction.¹²⁶²

A worker's beliefs about what course of action is best for a specific client or some larger constituency can provide a potent tool for cognitive deep acting. This approach to emotional work is not the exclusive purview of professionals, but their work tends to be cast as advancing a greater good, which may facilitate this form of cognitive deep acting.

6.6.5.3. OCCUPATIONAL AUTONOMY

The prototypical professional is an autonomous, self-regulated actor, unlike front-line staff, who are often deeply enmeshed in hierarchical bureaucracies.¹²⁶³ As a result, prototypical professionals cannot have their feeling rules dictated to them and enforced by a superior in the same way as front-line staff in a hierarchical bureaucratic setting.¹²⁶⁴ Many professionals operate in organizations – including in firms of similar professionals, in in-house departments of large corporations, or as part of government bureaucracies. These professionals may be subject to control by superiors; however, they still tend to be accorded a greater degree of autonomy. Because of the complexity inherent in much of the work

¹²⁶¹ Sutton, "Expressed Emotions", *supra* note 1195 at 261.

¹²⁶² Cowan & Hitchings, *supra* note 1233 at 376.

¹²⁶³ Harris, *supra* note 1191 at 554-55.

¹²⁶⁴ Hochschild, *The Managed Heart*, *supra* note 1164 at 153.

done by professionals, superiors will have more difficulty – without a significant investment of time and effort – supervising the actual content of the work or developing and enforcing feeling rules. Moreover, direct control of the type used in other settings may be less effective with professionals – it may “stifle creativity, undermine initiative, evacuate meaning or chill enthusiasm.”¹²⁶⁵

In the absence of direct supervision, the feeling rules of professionals are shaped by more diffuse forces, including ethical codes of practice, unwritten professional norms and public expectations. As part of their training Harris’s barristers were given “explicit, detailed oral and written instructions of professional expectations” in bar school and then apprenticed to a mentor, who educated them on the unwritten rules of practice.¹²⁶⁶ Anleu and Mack’s magistrates were informed in their work by the Australian Institute of Judicial Administration’s *Guide to Judicial Conduct*, which set out the key components of judicial conduct - impartiality, independence and integrity, and personal behavior – and the goals towards which judges should strive: “to uphold public confidence in the administration of justice; to enhance public respect for the institution of the judiciary; and to protect the reputation of individual judicial officers and of the judiciary.”¹²⁶⁷ When members of the public are aware of the content of the ethical codes of practice, such as the Hippocratic oath’s prohibition on doing harm, it can also shape their expectations around how a professional should be behaving.¹²⁶⁸ Professionals’ emotional work may be guided by an awareness of these expectations, and a desire to comply with them.

The degree of autonomy accorded to professionals alters, but does not sever the connection between a workplace’s feeling rules and its instrumental aims. In a hierarchical work place, employers may promote feeling rules that advance the employer’s instrumental

¹²⁶⁵ Gideon Kunda & John Van Maanen, "Changing Scripts at Work: Managers and Professionals" (1999) 561 *Annals of the American Academy of Political and Social Science* 64, at 72.

¹²⁶⁶ Harris, *supra* note 1191 at 565.

¹²⁶⁷ Anleu & Mack, *supra* note 1169 at 602.

¹²⁶⁸ Harris, *supra* note 1191 at 554.

aims. Flight attendants are instructed to be friendly and sympathetic because clients feel happier when served by a friendly and sympathetic flight attendant, and happy customers are more likely to be repeat customers or to recommend the airline to a friend. A professional with more autonomy may set out to identify the instrumental aims he or she wishes to achieve, what feeling rules best promote those aims and what emotional labour is required to comply with those feeling rules, but I suspect that this manner of strategizing is rare. First, because emotions are commonly seen as antithetical to a professional's rational competence, professionals may be reticent to acknowledge – much less reflect on – the emotional dynamics of their work. Second professionals view their work as advancing bigger public goods. To the extent that the professional's instrumental aims are self-serving, such as increasing his or her profit, the individual may be reticent to acknowledge, much less strategize, about how his or her behaviour could better advance his or her self interest. On the other hand, a professional's aims may be tied to a public good, such as the magistrates studied by Anleu and Mack, who wanted court users to feel as though justice had been done. Ethical codes of conduct may reinforce this public-mindedness by identifying what aims are legitimate, and which ones are not. Professional norms may be more ambiguous, with some reinforcing public-minded aims, and some legitimizing self-interested ones. For most professionals, I expect that much of their emotional labour is carried out unreflectively, in response to a general sense of what they “should” feel, without tying that sense of obligation to either a self-serving or publicly-minded aim.

Non-professionals who strayed from an organization's feeling rules risked being sanctioned by their superiors – with punishments ranging from a gentle reprimand to termination of one's employment. Professionals are unlikely to be subject to the same degree of supervision by superiors, but they can still be subject to serious consequences if they depart from the governing feeling rules. Australian magistrates who deviated from the feeling rules were potentially subject to negative media reporting, being overturned on appeal, and being reprimanded by appellate judges.¹²⁶⁹ English barristers who deviated from the feeling rules risked not attracting or retaining clients – a possibility that carried serious

¹²⁶⁹ Anleu & Mack, *supra* note 1169 at 603.

financial consequences.¹²⁷⁰ Depending on how seriously a professional deviates from the feeling rules, he or she could conceivably also be subject to discipline by a regulating body, such as a bar association or council of judges.

6.6.5.4. STRUCTURAL FACTORS

A final theme emerging from the literature is that the emotional labour of professionals is shaped significantly by structural factors, including competition for business and volume of work.

Harris' study of the emotional labour of barristers took place shortly after the longstanding rules giving barristers a monopoly over court appearances were relaxed: solicitors could appear on some matters and were doing so at rates which undercut the barrister's fees. Harris found evidence of barristers using emotional labour instrumentally to secure clients and to differentiate themselves from solicitors in this environment of heightened competition.¹²⁷¹ Of note, one of the ways that barristers distinguished themselves from solicitors was by being less emotional. One barrister summed it up colourfully, "We can't go running around after clients, holding their hands and fetching them cups of tea; that's what solicitors are for!"¹²⁷²

Work volume repeatedly arose as a factor impacting emotional labour. Large caseloads hampered Anleu and Mack's magistrates from engaging affectively with individual litigants.¹²⁷³ Scarduzio's judges experienced frustration and anger towards time-consuming litigants, because they had a large volume of other cases that they needed to get through.¹²⁷⁴ Cowan and Hitchings judge's relied on a mix of rough rules of thumb and their intuitive assessment of a renter's worthiness to quickly dispatch a large number of cases.¹²⁷⁵

¹²⁷⁰ Harris, *supra* note 1191 at 564, 566.

¹²⁷¹ *Ibid* at 564, 571.

¹²⁷² *Ibid* at 571.

¹²⁷³ Anleu & Mack, *supra* note 1169 at 610.

¹²⁷⁴ Scarduzio, *supra* note 1230 at 307.

¹²⁷⁵ Cowan & Hitchings, *supra* note 1233 at 375.

Additionally, they might defer to the assessments of worthiness made by trusted others, such as landlords who regularly appeared in court.¹²⁷⁶ Lawyers in Lively's study managed large caseloads by delegating time-consuming emotional work to paralegals. The paralegals either felt frustrated when a client took up more than his or her allotted amount of time, or like they were being impeded from engaging fully with the client by time pressures.¹²⁷⁷

6.6.6. APPLICATION TO TRUSTEES

As emerging professionals, trustees share many similarities with the professionals described above when it comes to the feeling rules stipulating dispassion, the framing of their work in the context of the greater good, the autonomy, the workload and the competition for business.

Remaining dispassionate was important for professionals because it reinforced their rational competence. There was an additional pressure to be dispassionate on professionals, like judges, who are expected to be neutral arbiters. Many view a display of strong emotions as antithetical to being an impartial decision-maker. In Anleu and Mack's study, the judge's feeling rule was reinforced by their professional code of ethics. Like judges, trustees are expected to remain neutral as between a debtor and his or her creditors. This duty is reflected in the trustee's Code of Ethics, which exhorts them to "be honest and impartial."¹²⁷⁸ A significant difference between judges and trustees is that the public is less familiar with the role of trustees. Public expectations about how judges should approach their role reinforced the feeling rule requiring dispassion, conversely, my interviewees reported they had to be very clear with debtors that they were not the debtor's advocate and that creditors, too, seem confused about the role played by trustees. I will outline in the next chapter that even absent a clear public understanding of their ethical obligations, trustees feel subject to a strong feeling rule requiring dispassion.

¹²⁷⁶ *Ibid* at 376.

¹²⁷⁷ Lively, "Upsetting the Balance", *supra* note 1218 at 212.

¹²⁷⁸ *BLA*, *supra* note 11, s 39.

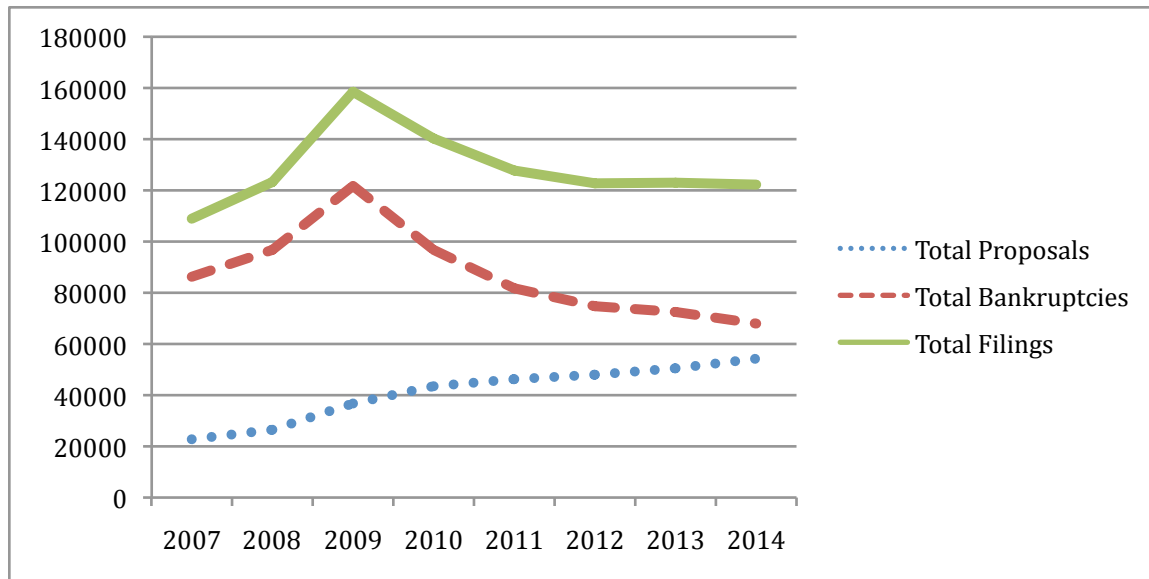
Professional's work can contribute to a greater public good – healing, justice, learning – and this aspect of their work can be used as a potent cognitive frame. As outlined in Chapter 3, personal bankruptcy is regularly justified in terms of its ability to foster economic growth by rehabilitating and reintegrating financially destitute individuals. Trustees place particular emphasis on the rehabilitative aims of bankruptcy and it operates as a cognitive frame that evokes strong feelings of hopefulness. It is unclear whether this hopefulness results more from a trustee's belief that bankruptcy benefits discrete individual's or the community as a whole, and it is possible that trustees do not need to distinguish between these two aims when thinking about their work

Like other professionals, trustees have a significant amount of autonomy over how they perform their emotional labour. They may work entirely alone, in an office where they are the only trustee, or in an office where there are several trustees, but they are each responsible for their own caseload. The feeling rules with which bankruptcy trustees must comply are not dictated, nor enforced by an employer. Despite this autonomy, they are still subject to censure for emotional deviance. A judicial officer could reprimand them or reduce their fees if they thought a trustee was deviating too far from the feeling rules. A significant deviation might attract a disciplinary response from the OSB. Like Harris' barristers, a trustee's failure to carry out emotional labour may result in the trustee getting less business.

Competition for work is a reality for bankruptcy trustees. The overall number of bankruptcy filings decreased each year between 2009 and 2012, leveling out in 2013 (see Figure 6.1). While the total number of filings is still high from a historical perspective, a number of trustees with whom I spoke intimated that competition amongst trustees for files had become fiercer. There is also increasing competition from other debt industry players including credit counsellors and debt poolers.¹²⁷⁹ Harris' barristers engaged in surface acting to secure work referrals from solicitors. In a bankruptcy, the decision of with whom to file rests with the debtor, and bankruptcy trustees use emotional labour to secure business from debtors.

¹²⁷⁹ Stephanie Ben-Ishai & Saul Schwartz, "Credit Counselling in Canada: An Empirical Examination" (2013) 29:1 Cnd J of L & Socy' 1.

Figure 6.1 Insolvency Filings in Canada (Consumer + Business), 2007-2014



The workload of trustees varies. My interviewees estimated starting between one and sixty files each month (see Table 6.2). Unlike judges, who are assigned a docket of cases to hear, trustees have more control over the size of their workload. Consumer trustees are similarly situated to the consumer law offices studied by Lively, in that any one file tends not to be very lucrative, so there is an incentive to take on a large number of files. Those trustees, who took on fewer files, tended to be quite critical of those who took on more. Common reproaches were that large volume filers gave insufficient attention to each individual bankrupt and delegated too much work (including, one might presume, emotional labour) to their support staff. Perhaps because they are aware of their critics, I did not hear large volume filers complaining about the pressures of a large workload.

Table 6.2 Breakdown of Interviewees by File Load

Number of New Bankruptcy Files Started Per Month	Number	Percentage
10 or less files	13	31%
11-20 files	18	43%
21-30 files	6	14%
31-40 files	2	5%
41-50 files	1	2%
51 or more files	2	5%
Total	42	100%

6.7. THE EMOTIONAL LABOUR OF DEBT OCCUPATIONS

In the previous section, I considered the research done on the emotional labour of professionals. In the following section, I turn to consider research that has been carried out on the emotional labour of people working in the debt industry, including debt collection, debt enforcement, and bankruptcy. This research suggests a notable degree of similarity in the emotional demands facing and emotional management techniques adopted by people whose jobs require them to interact with debtors. Debtors will often evoke considerable compassion or pity. Employees may find they need to distance themselves from this claim to compassion to carry out their work. Bankruptcy trustees are subject to comparable emotional demands as other individuals working in debt related industries; they interact with debtors and make their discretionary decisions in the discharge process in the context of these interactions.

In the following section, I outline previous research carried out on the emotional labour of people working in the debt industry and then consider the demands they face and techniques they adopt in greater detail. It bears noting that some of the researchers set out below, including Sutton and Hochschild, explicitly set about to research the emotional labour carried out by debt collectors. For other researchers, like Rock, Bass, and Braucher,

their insights into the emotional labour of bailiffs, debt collectors, and consumer bankruptcy lawyers emerged from more general studies of these occupations.

6.7.1. ROCK ON BAILIFFS

Paul Rock carried out interviews and participant observation of bailiffs and other parties involved in debt collection in the United Kingdom in the 1960s, prior to the abolition of debtor's prison. At the time he was carrying out the study, bailiffs were entrusted with tracking down recalcitrant debtors and taking them to debtors' prison. The bailiffs would adopt a sympathetic attitude towards the debtors, because such attitudes were more likely to elicit the debtor's cooperation.¹²⁸⁰ Some bailiffs made clear that this sympathetic attitude amounted to a form of surface acting – and did not reflect the bailiff's genuine feelings. Rock recounts one situation where a bailiff was comforting an upset debtor but, "ostentatiously winked at me whilst he dried the execution debtor's tears."¹²⁸¹ Rock concluded that bailiffs adopted a sympathetic posture, but worked to maintain internal emotional distance from the debtor's against whom they had to enforce debts, because the enforcement procedure was painful for the debtor.¹²⁸² Presumably, it would be painful for a bailiff to empathize too deeply with the debtor and may hamper the bailiff's ability to carry through with his work.

One way that bailiffs were able to maintain this emotional distance was by interpreting non-responsiveness of a debtor to debt collection efforts as evidence of deviance. The further an individual proceeded through the debt collection process without making attempts to pay the amounts owed, the more likely he was a bad debtor than a sad one.¹²⁸³ Rock found that bailiffs placed debtors into three categories: "the professional is an elusive, predatory person who has no wish to retain any links with the creditor; the feckless

¹²⁸⁰ Paul Rock, *Making People Pay* (London: Routledge & Kegan Paul Ltd., 1973) at 201, 240.

¹²⁸¹ *Ibid* at 201.

¹²⁸² *Ibid* at 201.

¹²⁸³ *Ibid* at 168.

debtor is too disorganized and irresponsible to make moral decisions; and the unfortunate is a co-operative, guilt ridden individual who will pay whatever he can afford."¹²⁸⁴

6.7.2. HOCHSCHILD ON DEBT COLLECTORS

As part of her larger project on the emotional work carried out by flight attendants at Delta Airlines, Hochschild interviewed a number of debt collectors working for the airline. She found that the emotional labour expected of debt collectors differed significantly from the emotional labour expected of flight attendants: flight attendants were expected to display emotions such as sympathy, patience, and friendliness and elicit trust and enjoyment in their passengers whereas bill collectors were expected to display aggression, and mistrust and elicit fear in the debtors.¹²⁸⁵

Hochschild's observations of Delta's debt collectors differ slightly from Rock's observations of bailiffs. The debt collectors were more prone to adopt an aggressive or indignant tone with recalcitrant debtors, rather than the sympathetic tone adopted by the bailiffs. The debt collectors did not "dry the tears" of upset debtors, instead they would purposefully deny the debtor's the comfort of a sympathetic ear by ignoring the debtors' attempts to justify non-payment.¹²⁸⁶ Although Hochschild's debt collectors adopted a different emotional posture than the bailiffs, the debt collectors also seemed to employ strategies to emotionally distance themselves from the individuals against whom they were required enforce debts. They adopted a version of the "professional debtor" narrative, dismissing all the debtors they were enforcing against as loafers and cheats.¹²⁸⁷

6.7.3. BASS ON DEBT COLLECTORS

Bass carried out a study of debt collectors working at a collection agency. He collected information by working as a debt collector at the agency, interviewing 50 of the debtors the agency contacted, reviewing documentary material such as the training manuals

¹²⁸⁴ *Ibid* at 272.

¹²⁸⁵ Hochschild, *Managed Heart*, *supra* note 1164 at 146-47.

¹²⁸⁶ *Ibid* at 145.

¹²⁸⁷ *Ibid* at 143.

for the debt collectors, and interviews with other people involved in the process, including credit managers, debt counsellors, lawyers and bankers.¹²⁸⁸

The focus of Bass' study was how debt collectors classify the debtors from whom they are trying to collect into different types. He found that the collectors were using a typology similar to the one employed by the bailiffs in Rock's study, with three types of debtors, the "unfortunates", the "irresponsible or indifferent" and the evasive "deadbeats."¹²⁸⁹

Collectors used their various enforcement tools to gather information about the debtor and classify the debtor into one of these categories, and then their future dealings with the debtor would be shaped by their stereotyped expectations about and attitudes towards that type of debtor.¹²⁹⁰ For instance, debtors who responded promptly and readily volunteered information to a collector were more likely to be typed as unfortunates, than debtors who were non-responsive or difficult to locate.¹²⁹¹ Where debtors continued to behave in ways that conformed to the collector's stereotyped expectations, this confirmed the initial classification, whereas a departure from expectations may require the collector to reclassify the debtor.¹²⁹² The debtor, who readily volunteered financial information and negotiated a repayment plan but then repeatedly failed to make payments, would be reclassified from being an unfortunate to being irresponsible and indifferent, or possibly a deadbeat.¹²⁹³ As more information was gathered and the collector had more opportunity to

¹²⁸⁸ Jay Bass, "Dunners and Defaulters: Collectors Work as a Context for Naming" (1983) 12:1 *Urban Life* 49 at 52.

¹²⁸⁹ *Ibid* at 50.

¹²⁹⁰ *Ibid* at 51.

¹²⁹¹ *Ibid* at 65.

¹²⁹² *Ibid* at 58, 66.

¹²⁹³ *Ibid* at 68.

interact with the debtor, the image of the debtor matured.¹²⁹⁴ The collector's reliance on stereotypes allowed for a large number of debtors to be processed quickly.¹²⁹⁵

Bass found that collectors approached debtors with a sense of skepticism – assuming that harsh legal enforcement measures would be required to extract payment, unless the debtor established that he or she should be granted an exception.¹²⁹⁶ This initial attitude would be varied depending on how the debtor was typed. Each of the categories of debtor used by the collectors was instilled with evaluations, either positive or negative about the debtor, and these evaluations affected the collector's attitude towards the debtor. Positive identification of a debtor as an unfortunate resulted in the collector adopting a less harsh, even gracious manner. Negative identification "invite[d] attitudes and actions towards the person as the perpetrator of a moral wrong... the defaulter is regarded and accorded treatment assumedly appropriate for a dishonest, deceitful person, one who cannot be trusted or believed."¹²⁹⁷

6.7.4. SUTTON ON DEBT COLLECTORS

Robert Sutton studied a debt collection agency, in which he interviewed and observed collectors, and even worked a number of shifts as a collector calling recalcitrant debtors. Sutton was particularly interested in how the agency reinforced its feeling rules. He teased out a number of feeling rules – or organizational norms – all of which were rationalized as advancing the agency's collection aims. The agency wanted its employees to comply, at least on a surface level with these norms, but it fostered deep acting by its employees on the basis that it is easier to comply with organizational norms when one genuinely feels the emotion.¹²⁹⁸

¹²⁹⁴ *Ibid* at 66.

¹²⁹⁵ *Ibid* at 51.

¹²⁹⁶ *Ibid* at 62, 69.

¹²⁹⁷ *Ibid* at 70.

¹²⁹⁸ Sutton, "Expressed Emotions" *supra* note 1195 at 245-46.

Sutton identified one general organization norm, and three additional contingent norms that may apply depending on how the debtor responded when called by the collector. Generally, collectors were expected to display mild irritation and disapproval towards debtors, to convey a sense of urgency to the debtor and motivate him or her to repay the outstanding debt.¹²⁹⁹ This norm was maintained when a debtor's response was sad or friendly. In the former case, the collector wanted to motivate the lethargic, depressive debtor to take action.¹³⁰⁰ In the latter case, the collector wanted to convey the seriousness of non-payment to the debtor.¹³⁰¹ When a debtor responded to the collector's call with extreme anxiety, the collector was expected to shift emotional gears and act warmly towards the debtor so that he or she could calm down enough to process information about how to pay the debt.¹³⁰² When a debtor responded to a call with indifference, the collector would amplify his or her irritation, in the hopes that a debtor who did not care about the outstanding debt might still pay it so as to avoid further unpleasant calls from the collection agency.¹³⁰³ Collectors who encountered angry debtors were expected to convey a sense of calm, so as to deescalate the situation and refocus the debtor on the debt as opposed to the debt collector.¹³⁰⁴

It was easier for debt collectors to comply with some organizational norms than others. The emotions that collectors were expected to display with respect to extremely anxious and indifferent debtors were relatively easy for collectors to maintain, because they closely aligned with the actual emotions elicited by such debtors: most collectors felt genuine sympathy towards extremely anxious debtors and were infuriated by indifferent ones.¹³⁰⁵

¹²⁹⁹ *Ibid* at 250, 257.

¹³⁰⁰ *Ibid* at 260.

¹³⁰¹ *Ibid* at 259.

¹³⁰² *Ibid* at 257.

¹³⁰³ *Ibid* at 258.

¹³⁰⁴ *Ibid* at 261.

¹³⁰⁵ *Ibid* at 257-58.

The emotions that collectors were expected to display with respect to sad, friendly and angry debtors were more difficult to maintain, because they differed from the actual emotions elicited by such debtors: sad and friendly debtors elicited a neutral or sympathetic response, whereas angry debtors elicited reciprocal anger.¹³⁰⁶ In these latter three situations, their supervisors and senior co-workers encouraged the collectors to adopt new ways of thinking about the debtor that would help the collector to cultivate a genuine emotional response that aligned with the organizational norm. When dealing with sad debtors, collectors could focus on how they were helping the debtor to maintain his or her credit rating by extracting payment towards the overdue debt. Collectors were encouraged to maintain emotional distance from sad, friendly and angry debtors.¹³⁰⁷ One collector advised, “don’t think of her as a person, think of her as a bill you need to collect.”¹³⁰⁸ In situations where they felt angry, collectors used humour to defuse their heated emotional responses and engaged in displaced acts of aggression, such as making rude gestures towards the phone while maintaining a calm demeanour on the phone.¹³⁰⁹

6.7.5. BRAUCHER ON CONSUMER BANKRUPTCY LAWYERS

Jean Braucher studied a different group of debt professionals: American consumer bankruptcy lawyers. In Canada, it is somewhat unusual for individual bankrupts to be represented by lawyers; their primary contact is with the trustee in bankruptcy. A debtor might hire a lawyer if it becomes necessary to go to court to fight over an issue such as the amount of surplus income owing, or the debtor’s entitlement to a discharge. In the United States, most individuals who file for bankruptcy are represented by a lawyer. The American consumer bankruptcy lawyer carries out many of the tasks that, in Canada, are carried out by the trustee including helping the individual to choose from among the different debt relief options and assisting him or her with filling out the paperwork necessary to commence a bankruptcy. Braucher interviewed consumer bankruptcy lawyers operating in San Antonio

¹³⁰⁶ *Ibid* at 251.

¹³⁰⁷ *Ibid* at 260-63.

¹³⁰⁸ *Ibid* at 260.

¹³⁰⁹ *Ibid* at 263-64.

and Austin, Texas and Dayton and Cincinnati, Ohio. She was interested in learning more about how lawyers consider their own social and financial interests and the financial and social interests of their clients when counselling them on their legal rights; however, her research turned up some interesting insights into the emotional labour of consumer bankruptcy lawyers.¹³¹⁰

Consumer bankruptcy lawyers have a different relationship to debtors than either bailiffs or debt collectors. Bailiffs are imposing unpleasant sanctions on debtors – seizing their property or taking them to prison. Debt collectors are trying to extract payment. Both are taking actions that are adverse to the debtor. Conversely, consumer bankruptcy lawyers are attempting to help debtors access relief from their obligations: their interests are not adverse to, but rather aligned with the debtor's. They did not need to quiet their feelings of compassion to carry out work that caused additional hardship to debtors, but instead consumer bankruptcy lawyers struggled with the continual requirement to sympathize with the dire circumstances of their clients: "Even sensitive lawyers find it hard to be empathetic to the steady stream of distressed debtors who come through the door."¹³¹¹

In her study of consumer-oriented paralegals, discussed above, Lively interviewed paralegals employed at a consumer bankruptcy law firm. They echoed Braucher's findings regarding the emotional difficulty of dealing with debtors who were experiencing what one paralegal described as "unrelenting sadness."¹³¹² Some of the paralegals found their interactions with debtors to be emotionally disturbing, while others found them irritating because they were very time-consuming.¹³¹³ One paralegal expressed a preference for files

¹³¹⁰ Jean Braucher, "Lawyers and Consumer Bankruptcy: One Code, Many Cultures" (1993) 67 *Am Bankr L J* 501.

¹³¹¹ *Ibid* at 541.

¹³¹² Lively, "Upsetting the Balance", *supra* note 1218 at 209.

¹³¹³ *Ibid* at 212.

where they acted for the creditor, because these were less emotionally demanding than debtor-side files.¹³¹⁴

6.7.6. THE EMOTIONAL LABOUR IN DEBT OCCUPATIONS: THEMES

Workers in these different debt occupations face two constant challenges. First, the debtors with whom they worked often evoke compassion, and the workers need carry out self-focused emotional labour to be able to do their jobs. Second, they need to get the debtors to cooperate with them to complete their work and this requires other-focused emotional labour. I consider each of these challenges in turn.

6.7.6.1. QUIETING COMPASSION

Debtors will evoke compassion because they are mired in difficult situations. They are usually suffering from financial difficulties, but may also be suffering from a myriad of other tragedies, large and small. The challenge posed by the compassion-inducing debtor depends on a worker's position relative to the debtor. A worker's job may involve aggravating a debtor's situation, by aggressively pursuing repayment of a debt. Feeling compassion for the debtor can impede a worker who needs to take steps that are adverse to the debtor's interest. Conversely, workers who are seeking to help a debtor find the constant claims on their compassion to be exhausting.

For those workers who are in a position that is adversarial to a compassion-inducing debtor, they may be able to quiet their feelings of compassion by adopting a cognitive frame that places blame on the debtor. The debt collectors studied by Hochschild characterized all the debtors from whom they were trying to collect as loafers and cheats. The debt collectors studied by Bass, and the bailiffs studied by Rock adopted a more nuanced approach, a typology with three types of debtors: (i) the professional or deadbeat debtor, (ii) the feckless or indifferent and irresponsible debtor, and (iii) the unfortunate debtor. An individual's non-compliance with the debt collector or bailiff would result in a debtor being moved into one of the more deviant categories. There is some wisdom in equating non-compliance with deviance. Rock notes that as debt collection efforts proceed without cooperation from the

¹³¹⁴ *Ibid* at 209.

debtor, “rational excuses for inertia become progressively exhausted.”¹³¹⁵ However, non-responsiveness is not a perfectly valid measure of intent: a debtor may be passive for reasons other than an intention to cheat his or her creditors. By way of example, Rock recounted the story of a man who received a demand letter for payment on a bicycle that he had not purchased. In his own mind, he was clearly under no obligation to pay and he did nothing, resulting in him being typed as a professional debtor and being subjected to increasingly onerous enforcement measures.¹³¹⁶

Non-responsiveness may not be a completely accurate measure of deviance, but in many cases it could be. It is also an emotionally convenient measure for those who need to carry out onerous enforcement proceedings against debtors. These proceedings are more likely to be called for in cases of debtors who have repeatedly failed to respond to less drastic collection efforts. Enforcing against a debtor typed as an “elusive predatory person” is going to be much easier, from an emotional vantage point, because their deviant behavior makes them less sympathetic. The systems of categorization enable workers to put emotional distance between themselves and the debtors, by typing debtors as blameworthy.

Workers in debt occupations who are working to advance the debtor’s interest, such as the consumer bankruptcy lawyers studied by Braucher, have a different problem. Sympathizing with all their clientele can be emotionally exhausting because they are constantly sharing in their client’s painful emotions. They may seek to quiet their feelings of compassion and maintain emotional distance from the debtor to avoid burnout. It is not entirely clear how the lawyers maintain this distance, but presumably they are not reframing the debtors as blameworthy, because it might be difficult to remain motivated about one’s work if one perceives oneself as primarily advancing the interests of rogues.

6.7.6.2. INDUCING COMPLIANCE

A second theme that emerges from the research on workers in debt occupations is that the debtor’s cooperation may be important for the worker achieving success in his or

¹³¹⁵ Rock, *supra* note 1280 at 167.

¹³¹⁶ *Ibid.*

her job. The debt collector is trying to convince the debtor to pay off the debt. The bailiff is trying to convince the debtor to come along to debtors' prison peacefully. Often, workers would elicit cooperation by behaving aggressively towards the debtor, but this was not the only tactic used. Sutton's debt collectors had a range of approaches depending on how a debtor presented including warmth towards anxious debtors and a calm demeanour when the debtor was angry. Rock's bailiffs found that debtors were more cooperative when the bailiffs approach them with sympathy.

6.7.7. APPLICATION TO TRUSTEES

Like other individuals in debt occupations, trustees must carry out self- and other-focused emotional work. They carry out self-focused work to quiet feelings of compassion which might otherwise hamper their ability to do their job. Unlike debt collectors and bailiffs, who take steps adverse to a debtor's interest, or a consumer bankruptcy lawyer, who advocates for the debtor, a trustee's position relative to the debtor is complex: a trustee both works to advance the debtor's interest, and takes steps on behalf of creditors, which are adverse to the debtor's interest. They need to quiet their feelings of compassion to avoid emotional burnout, but also to enable them to take steps that are adverse to the debtor's interest. In the next chapter, I will outline how trustees maintain emotional distance from the debtors with whom they work.

Like debt collectors or bailiffs, trustees depend upon debtor compliance to achieve good outcomes at work and use other-focused emotional labour to achieve these outcomes. For trustees, a good work outcome might mean getting a debtor discharged and giving him or her a fresh start, or getting a file to the point where the trustee can get paid and then close the file. These outcomes are connected. A trustee can get paid and close a file without the debtor being discharged, but this process is delayed whenever a debtor's discharge is held up. When debtors are forthcoming at the outset of a file, the trustee can craft solutions to problems that might otherwise derail the debtor from getting debt relief. For instance, where a debtor made a modest preferential payment to a family member prior to bankruptcy, the trustee may disclose it to the creditors and have the debtor pay back an equivalent amount prior to his or her discharge. If the preferential payment is only discovered later, it may result in the debtor's discharge being opposed. When debtors comply with their duties throughout bankruptcy, it allows the files to proceed smoothly and be resolved quickly. Non-compliance

leads to problems. Where a debtor either fails to submit proof of its income or does not make surplus income payments to the trustee, the trustee will generally be required to oppose the discharge. As I outline in the next chapter, trustees rely primarily on being compassionate to elicit the debtor's cooperation, but in some situations, they will draw on more aggressive emotions.

6.8. CONCLUDING THOUGHTS

My larger claim in Chapters 6 and 7 is that the exercises of discretion by bankruptcy trustees are shaped by the emotional demands of their work environment. To better understand these emotional demands, I have introduced the concepts of emotional work, emotional labour, and feeling rules. These concepts indicate that the trustees' emotional reactions are not merely individualized, automatic responses, but structured according to a larger normative framework, and subject to being reshaped through an individual's efforts. This discussion has also pointed to the interplay between beliefs and emotions. A dissonant emotional reaction may cause a person to change their cognitive appraisal of a situation or a person may work to change how they feel about a situation by adopting a different cognitive frame. In the next chapter, I tease out how emotional rules may shape a trustee's exercise of discretion.

Before moving on to the discussion of the emotional labour of trustees, I want to make two related points. First, it can be threatening to a professional to point out that emotional labour is part of their work because emotions are perceived as derogating from one's ability to act rationally, and rational competence is central to what many professionals do. Answering the question of whether or not emotions corrupt reason, as is commonly thought, or enhance it is beyond the scope of this dissertation. Instead, I would note as my second point, that emotional labour is ubiquitous. The sociological research reviewed in this chapter reveals that airlines attendants carry out emotional labour, as do debt collectors, paralegals, bailiffs, lawyers, doctors and judges. I would suggest that it is unrealistic to pretend that individuals are able to turn their emotions off when they arrive at the office, and act solely on the basis of reasons. As I map the emotional terrain of a bankruptcy trustee's work, I want to make it clear that my analysis is not intended to diminish the rational competence of trustees nor to suggest that they are aberrantly emotional. Whether

or not emotions corrupt or enhance reasons, they are present in every workplace, and one can better understand the workplace practices if one broadens one's lens to include these emotions.

7. THE EMOTIONAL LABOUR OF BANKRUPTCY TRUSTEES

7.1. INTRODUCTION

The legislation governing trustees accords them significant discretion to lodge an opposition and thereby trigger a court hearing on whether or not an individual should receive a discharge. The case law identifies the types of arguments a judicial officer might entertain when assessing the deservingness of a debtor, but does little to circumscribe a trustee's discretion. Despite this wide grant of discretion, trustees lodge the vast majority of their oppositions in response to a relatively narrow set of grounds, those related to a debtor's non-compliance during bankruptcy. Oppositions based on a debtor's pre-bankruptcy misconduct are rare.

A close study of the role of the trustee in bankruptcy suggests some constraints, primarily financial, which may explain the relative prominence of compliance-based oppositions and absence of pre-bankruptcy conduct-based ones. Compliance-based grounds are easy, and inexpensive to identify. Conduct-based grounds are more difficult, and often expensive to identify. Most personal bankruptcy files are of such low value that there are insufficient funds to carry out investigations into the debtor's pre-bankruptcy conduct. Moreover, there is often no financial incentive for a trustee to undertake such an investigation, because the trustee's remuneration is tied to the value of the debtor's estate and not the amount of time spent on a file.¹³¹⁷ In addition to these financial realities, a close study of the role of the trustee revealed factors, which promote consistency amongst individuals and across time – the use of standardized forms and checklists, and the thick professional networks in which most trustees operate.

In this chapter, I suggest an additional way of understanding the pattern of trustees' oppositions, by considering the emotional terrain of their work. My findings in this chapter mirror my findings from the study of the role of trustees in Chapter 4. Trustees are subject to emotional constraints that limit the ways in which they exercise their discretion. The

¹³¹⁷ In an ordinary administration, the trustee does charge by the hour, but the total bill is usually capped at 7% of the estates receipts.

emotional constraints may promote consistency in the exercise of discretion across time and amongst individual trustees.

In the last chapter, I explored how individuals working in a number of different occupations carry out emotional labour to cultivate emotions that comply with the governing feeling rules. Sometimes this labour is other-focused, such as when a debt collector works to suppress his or her anger so as to calm down an irate debtor. Sometimes this labour is self-focused, such as when a debt collector works to suppress his or her sympathy for a debtor, so that her or she can use aggressive collection tactics against the debtor. This emotional labour can include purposefully reframing how a person thinks about a situation to evoke desired emotions, or to suppress inappropriate ones. Because of the intimate connection between emotions and beliefs, an individual engaged in discretionary decision-making may be influenced in his or her judgments by the emotional labour that he or she performs.

Trustees carry out emotional labour in response to specific, consistent demands in their work place. The demands shift over the course of the bankruptcy file, and this chapter considers the demands at two stages: (i) the initial meeting, and (ii) the period between when an assignment is filed and when a trustee must decide whether or not to lodge an opposition. At each of these stages, I tease out the feeling rules that stipulate the “appropriate” emotional responses to the demands, and the techniques, including cognitive frames, that trustees adopt to cultivate “appropriate” emotional responses. I then explore how the mandated emotional states, and emotional labour techniques may shape a trustee’s exercise of discretion in the opposition to discharge process. This analysis is broken down according to four themes, which emerged from my interviews: the initial importance of empathy and compassion; the centrality of hopefulness, the prominence of frustration when the bankruptcy process is derailed, and finally, professionalism as a constraining factor on the appropriateness of some emotions.

Throughout this chapter, I will continue to build on the discussion from the last chapter on the links between emotions and beliefs. Beliefs shape emotions. Both Hochschild and Aristotle have traced how one may try to evoke an emotion (in oneself or one’s audience) by using a cognitive frame. Trustees may adopt cognitive frames in an effort to evoke or suppress emotions. Likewise, emotions shape beliefs. Stephen Leighton listed

five ways that emotions can shape one's beliefs: (i) one may disingenuously adopt beliefs that accord with the instrumental aims of one's emotions, (ii) the judgments attached to some emotions may preclude one from experiencing other emotions, (iii) one judges those one feels positively towards more favourably, and those one feels negatively towards less favourably, (iv) emotions may lead one to develop expectations and one organizes information to accord with those expectations, and (v) one pays more attention to a person who evokes positive emotions than one who evokes negative emotions.¹³¹⁸ I will offer some insights into how the interplay between emotions and beliefs in the context of a trustee's emotional labour may shape how they exercise their discretion in the opposition to discharge process.

7.2. THE INITIAL MEETING

I examine the trustee's emotional labour at two stages in the bankruptcy process. The first stage I consider is the initial meeting, when a trustee carries out an assessment of a debtor and helps the debtor to fill out the paperwork necessary to make an assignment. As I outlined in Chapter 4, the practice with respect to initial meetings varies from trustee to trustee. Most will split the initial meeting up over two – or more – encounters to give the debtor time to reflect on the decision to file for bankruptcy. Some have an estate administrator carry out part of the initial meeting, while others will do the entire meeting themselves. Regardless of the approach, trustees carrying out initial meetings share three instrumental aims that shape the feeling rules governing their interactions with the debtor at the outset of a file. In this section, I will identify those instrumental aims and the feeling rules that advance them.

At the initial meeting, the trustee wants to capture the debtor's business, elicit any relevant information about the debtor's finances and to set a tone that will encourage compliance throughout the file. These are the goals towards which a trustee's other-focused emotional labour is geared during the initial meeting. A debtor's emotions can hamper a trustee's ability to achieve these goals. Most debtors do not want to be visiting a bankruptcy

¹³¹⁸ Leighton, *supra* note 1201 at 207-14.

trustee:¹³¹⁹ “for a lot of people, getting through the front door is a major hurdle.”¹³²⁰ They are stressed, overwhelmed, even “frightened to death.”¹³²¹ To achieve these goals, trustees must calm debtors down and give them some relief from their painful emotions.

Being able to make the debtor feel at ease is an important skill for attracting business, because one of the grounds upon which trustees may legitimately try to differentiate themselves is their attitude towards the debtor: “how we handle the file should be the same everywhere, but the experience someone has with a trustee is not the same everywhere... you might, from a marketing standpoint, just be easier to talk to, more accessible, easier to deal with.”¹³²² Being able to make a debtor feel at ease may also help with the administration of a file. A debtor, who feels at ease, may be more willing to share the unflattering details of his or her financial life. A debtor, who feels a positive connection with the trustee, may be more likely to complete the bankruptcy process without incident.

Trustees had different techniques for putting debtors at ease. A number indicated they might joke a bit with the debtor, “to bring a little bit of laughter and little bit of fun into their life.”¹³²³ Some eschewed formal dress wear, such as suits, in favour of work clothes that conveyed a more informal, friendly atmosphere.¹³²⁴ A number felt it was important to let the debtor know that they had time to make a decision about how to address their over-indebtedness: “And I’ll say look, relax, we’re not going to do anything today, we’re just going to have a chit chat.”¹³²⁵

¹³¹⁹ I16, I23, I26, I29, I31, I34.

¹³²⁰ I27, see also I1, I8.

¹³²¹ I23, see also I3, I4, I5, I20, I25, I32, I33.

¹³²² I23, see also I5, I12, I14, I22. I39 indicated that he was not empathetic and “so sometimes, that also doesn’t help me in getting more debtors.”

¹³²³ I16, see also I4, I13, I21, I24, I25, I30.

¹³²⁴ I25, I42.

¹³²⁵ I24, see also I3, I20, I25, I28, I38.

There is no one-size-fits-all approach to initial interviews. Some interviewees indicated they would adjust their approach depending on what they thought the debtor wanted or needed: “one approach with one person may not work with another person, so you just gotta know the person to the extent you can.”¹³²⁶ Trustees themselves might have different sensibilities.¹³²⁷ But they all consistently face the same hurdle – how to make debtors feel comfortable notwithstanding the debtor’s feelings of stress, shame and sorrow. One way to achieve this goal is for the trustee to empathize with the debtor. A number of interviewees indicated that it was important to be empathetic. Several trustees offered this insight unprompted.¹³²⁸ I also asked each interviewee how important a component of their job it was to empathize with debtors and many indicated that it was an important component, though with some reservations.

The reservations expressed by the trustees, that there were limits on the degree to which they should empathize with a debtor, points towards a second important insight. In addition to carrying out other-focused labour to calm and comfort the debtor, trustees must manage their own emotions. They cannot allow their feelings of empathy to hamper them from carrying out tasks which are adverse to a debtor’s interest, or to unduly favour a debtor, as compared to other debtors, or as compared to the creditors of the estate. Empathizing with debtors who are in distress can also be a painful and draining experience. Trustees must find a way to manage these claims on their emotional resources or they risk burn out.

In the next section, I examine the empathetic emotional labour carried out by bankruptcy trustees. I start with an exploration of what it means to empathize, followed by reflections on why listening is important to how trustees engage in other-focused emotional labour to empathize and finish by canvassing the reasons trustees offered about why they must engage in self-focused labour to avoid a surfeit of empathy.

¹³²⁶ I2, see also I4, I5, I32, I37.

¹³²⁷ I5, I19, I41, I43.

¹³²⁸ I7, I10, I26, I27, I28.

Empathy is related to another emotion, compassion. These two concepts are regularly used interchangeably in colloquial conversation, but it will advance my analysis to distinguish between them. Empathy refers to when one enters into the emotional experience of another person.¹³²⁹ The other person could be experiencing a range of emotions, from joy to grief, or anger to love. Compassion refers to when one enters into the experiences of another's sorrow or grief.¹³³⁰ In other words, as I am using them here, compassion is a subset of empathy. After a more general discussion of how trustees approach the emotional labour of being empathetic, I will consider the emotional labour they carry out with respect to compassion. I will start with an exploration of what it means to feel compassion, canvass some of the techniques trustees use when engaged in other-focused work to be more compassionate, consider why trustees might need to limit the extent to which they feel compassion, and describe how they carry out self-focused emotional labour to place distance between themselves and the claims made on their compassion. I finish my discussion of empathy and compassion by offering some insights into how a trustee's labour with respect to these two emotions might shape his or her decisions about whether or not to file an opposition to discharge.

The last emotion I consider at the initial meeting stage is hope. Trustees find solace from the emotional demands of their work by focusing on the potential for a positive outcome. Sometimes they must engage in self-focused emotional labour to maintain this sense of hopefulness. They might also engage in other-focused emotional labour to invite a debtor to share in their hopeful outlook. After completing my discussion of empathy and compassion, I will turn to consider the role of hope in the emotional labour of trustees.

7.2.1. EMPATHY

When a person empathizes with another, the person experiences the other person's emotions. This exercise has both a cognitive and an affective component. Psychologists June Tangney and Ronda Dearing have identified three fundamental aspects of empathy:

¹³²⁹ June Tangney & Ronda Dearing, *Shame and Guilt* (New York: The Guilford Press, 2002), 80.

¹³³⁰ My distinction tracks the distinction drawn by Adam Smith between pity and compassion, on the one hand, and sympathy on the other, see Smith, *supra* note 917 at 5.

"(1) The cognitive ability to take another's perspective, (2) The cognitive ability to accurately recognize and discriminate another person's affective experience, and (3) The affective ability to personally experience a range of emotions."¹³³¹ Imagine that a close friend is angry at her in-laws. To empathize, Tangney and Dearing indicate one must do three things: (i) imagine oneself in the friend's situation, (ii) ascertain that her emotional response is anger, and (iii) share in that anger.

Empathizing with another person can be hard work, because one must glean enough information to understand the other person's situation, properly identify the other person's emotional response and then enter into that emotional response.¹³³² The work of empathy is especially difficult when the other person's emotional response does not accord with how one imagines one might respond in a similar situation. After making an initial appraisal of the situation, one may be tempted to dismiss the other person's initial response as irrational or inappropriate.¹³³³ In the example of the friend who is angry at her in-laws, after hearing her recount the perceived slights, one may arrive at the conclusion that one would not feel anger in response to such slights and therefore label the friend's emotional response as unwarranted. The affective element of empathy pushes the cognitive element beyond a perfunctory appraisal based on one's imagined experience of another's reality. If one takes the friend's emotional response seriously, one may probe for further facts that would explain her anger. Or one may ask the friend about her interpretations of the facts as given, to see if one can better understand why she is angry. Because emotions can reflect a person's values, one may ultimately reach the conclusion that the friend's emotional response proceeds from a set of normative commitments that one does not share. For instance, imagine it became evident that the real reason for the friend's anger stemmed from her own embarrassment about being seen in public with her in-laws, because their mannerisms, speech and clothes

¹³³¹ Tangney & Dearing, *supra* note 1329 at 80.

¹³³² Empathy can go astray in a number of ways, including when one misinterprets another person's feelings or projects one's own feelings onto another person, see Lynne Henderson, "Legality and Empathy" (1987) 85 Mich L Rev 1574 at 1580, 1651.

¹³³³ Nel Noddings would describe empathy that is purely cognitive as rational empathy, see Nel Noddings, *Caring: A Feminine Approach to Ethics & Moral Education* (Berkeley, CA: University of California Press, 1984) at 30.

suggest membership in a lower socio-economic class than the class to which one's friend belongs (or aspires to belong). The friend's emotional response may reveal itself to be inconsistent with one's own aspirational values, but the empathetic exercise will have deepened one's understanding of one's friend, and ultimately oneself.

Empathizing can be hard emotional labour and when one person undertakes to empathize with another it reveals a level of regard for the person being empathized with. The empathizer conveys that the other person is worth the effort involved in ascertaining the person's situation and the affective effort involved in identifying and entering into his or her emotional response. Furthermore, during the act of empathizing, one person can acknowledge that the other person's emotional response was reasonable by conveying that were one faced with the same circumstances, one would respond with the same emotions. This acknowledgement can validate that person's experience.

By empathizing with a debtor, a trustee can convey regard to the debtor. A trustee may spontaneously empathize with a debtor, but there also appears to be a feeling rule that empathizing is desirable because the debtor may respond positively. In this sense, empathizing is a form of other-focused emotional labour. The debtor may be more eager to file an assignment with or more willing to reveal shame-inducing financial particulars to a trustee who demonstrates regard for the debtor. This regard may also be the foundation upon which a good working relationship is established for the remainder of the bankruptcy period. I lack the evidence to claim here that this is how debtors actually respond to empathetic trustees, but rather I am only asserting that these intuitions inform how many trustees approach their work.

In a work environment, when a person is subject to a feeling rule that compels the person to demonstrate empathy as a form of other-focused labour, listening becomes important. Listening is key to actually empathizing with another person because it allows the listener to collect the information necessary to imagine what it would feel like to be in the speaker's position. Even when a person is not making the effort to empathize, listening can amount to a convincing form of surface acting. A person trying to appear empathetic may give the other person time to speak, nod one's head at appropriate intervals and engage in other superficial acts that suggests one understands the speaker's situation and shares in his

or her feelings.

A number of studies synthesized in Chapter 6 identified listening or the intentional lack thereof, as important forms of emotional labour. Anleu and Mack, in their study of Australian magistrates, found that the magistrates were very concerned with doing their work in a way that would leave court users feeling as though they had been fairly treated. One way to cultivate this response from court users was to give them the opportunity to tell their stories and convey that the story had been listened to.¹³³⁴ The debt collectors observed by Hochschild would refuse to listen to a debtor's story about why he or she could not pay, or make it clear that they did not believe the story, as a way of "reducing the debtor's moral standing."¹³³⁵ The dignity-denying message of a failure to empathize is amplified when a person in a position of power makes a decision with serious consequences for another person without fully engaging with the factual and affective dimensions of the other person's experience. In Scarduzio's study of municipal judges, she recounted an instance where a judge had refused to hear the prepared statement of a criminally accused, who was appearing before him on an arraignment. By avoiding eye contact and gesturing with his hand for the defendant to stop speaking, the judge conveyed to the defendant that "his story was not important enough to be heard" – an act which Scarduzio interpreted as a violation of the norm of fairness.¹³³⁶

Several trustees indicated that allowing the debtor to tell his or her story was an important component of an initial meeting: "you just have to let people get it out, and just talk about what's bothering them, even if it's not related to what's going on."¹³³⁷ One interviewee indicated that before she looked at any of the debtor's documents, she would say: "tell me your story. Give me a flavour of who you are and what's going on."¹³³⁸ One

¹³³⁴ Anleu & Mack, *supra* note 1169 at 610.

¹³³⁵ Hochschild, *The Managed Heart*, *supra* note 1164 at 145.

¹³³⁶ Scarduzio, "*supra* note 1230 at 296-97.

¹³³⁷ I4.

¹³³⁸ I29. See also I27: "I try to have empathy for them, for my clients, and say look, what brings you here today?" See also I7: "I try to be respectful and empathetic to their situation... So I try to just look at it that way. What's your situation and how did you get

trustee's office was located near a senior's residence. She reported that she regularly had elderly women arrive for initial meetings and she would let them sit and drink tea for hours and eventually, when they were ready, tell their stories to an estate administrator.¹³³⁹ Another trustee hinted at the patience sometimes required for a trustee to be an engaged listener: "you have to be careful. If somebody says, I'm sure you've heard this before, my stock answer is yes, but every story's different, too. But it's not."¹³⁴⁰ Having the debtor tell his or her story also allows a trustee to gather information and identify contradictions or omissions that might hamper the smooth operation of the bankruptcy. One trustee advised that it is "important to listen to hear if the story makes sense."¹³⁴¹

Encouraging story telling has a drawback: it can be a very time consuming process. Anleu and Mack noted that the magistrates struggled to find time to empathize with the litigants who appeared before them. Given the large case loads that they were expected to process, they could only engage in brief interactions with each litigant.¹³⁴² Lively's consumer-oriented paralegals felt a similar pressure, and attempted to curb the emotionality of their clients to keep meetings short and productivity up.¹³⁴³ The case load pressure on Scarduzio's judges led them to react with anger, frustration and impatience to time-consuming litigants, emotional states which are antithetical to empathy.¹³⁴⁴ People empathize best when they have the time to engage with another's human story: when time is short, it may be difficult to patiently engage with the person's narrative.

here?" See also I34: "And I always say, I want to know how you got here and listen to them. So I will always listen to the story."

¹³³⁹ I33.

¹³⁴⁰ I34. See also I24: "I've heard it all before. I'm not saying that to be rude."

¹³⁴¹ I31, see also I32.

¹³⁴² Anleu & Mack, *supra* note 1169 at 610.

¹³⁴³ Lively, "Upsetting the Balance", *supra* note 1218 at 211.

¹³⁴⁴ Scarduzio, *supra* note 1230 at 307.

Trustees face time constraints, too. Time trustees spend with debtors is time not spent on other aspects of running or growing their businesses. Moreover, when given the opportunity to tell his or her story, a debtor may provide irrelevant details or just “too much information.”¹³⁴⁵ One interviewee indicated that it was important to keep the debtor focused on the pertinent information because “we don’t want to be spending a huge amount of time talking about stuff that isn’t really relevant to what we’re dealing with.”¹³⁴⁶ Another very experienced trustee took pride in his ability to do speedy, focused interviews: “I’ll do interviews twice as fast as all the staff. And I can normally shut these people up and keep moving, and still have them relaxed and joking.”¹³⁴⁷

Trustees engage in other-focused emotional labour to empathize with debtors, but at the same time they engage in self-focused work to ensure that they do not empathize too much. A remarkably prevalent theme in my interviews was the opinion that there were limits on the degree to which a trustee should empathize with debtors.¹³⁴⁸ Interviewees thought it was important to keep one’s empathy “at a reasonable standard,”¹³⁴⁹ or to avoid “get[ting] too involved with [the debtor’s] story.”¹³⁵⁰ The interviewees identified the dangers of too much empathy as including that it can hamper a trustee’s ability to administer the act in a way that imposes hardship on the debtor, or it may lead a trustee to unduly favour a debtor as compared to other debtors, or as compared to the estate’s creditors.

Even though many trustees feel empathy for debtors, a number of the interviewees indicated that they cannot allow their feelings to “override [their] ability to administer the estate.”¹³⁵¹ Trustees may need to push the debtor to make a very difficult decision – such as

¹³⁴⁵ I10, see also I18, I34.

¹³⁴⁶ I18.

¹³⁴⁷ I24.

¹³⁴⁸ I3, I4, I11, I12, I18, I21, I24, N1, I41, I43.

¹³⁴⁹ I26.

¹³⁵⁰ I18.

¹³⁵¹ I25.

“telling somebody they can’t afford their house any longer.”¹³⁵² Trustees cannot be “enablers,”¹³⁵³ they need to be able to “tell [the debtors] what has to happen and what they have to do.”¹³⁵⁴ They may also have to take steps which are unpopular with the debtor, such as requiring surplus income payments or seizing an after-acquired inheritance. A trustee “need[s] to be able to be firm when it comes to enforcing the rules.”¹³⁵⁵ A few trustees felt that it was also important to convey this message to the debtors: “I always tend to want to be like a friend to people, but you do have to keep a bit of a line there, so that if situations do come up they can still respect that you have other obligations besides just advising them and being in their corner.”¹³⁵⁶

A second danger of being too empathetic is that a trustee might develop a bias, that translates into unduly favourable treatment of the debtor. A debtor may be treated favourably as compared to other debtors. One trustee recounted an experience he had, where two debtors had not made their required payments. One was a “great guy” and one was “very difficult.” He was planning to oppose the latter’s discharge until he “just happened to be doing both [section 170] reports at the same time and they’re virtually identical. And [he] thought, you know what? I’m not being even handed here.”¹³⁵⁷

Too much empathy for a debtor may also result in a trustee unduly favouring the debtor as compared to the creditors of an estate. Richard Posner asserts that empathy can systematically bias a decision-maker to favour those actors, to whom the decision-maker has greater exposure.¹³⁵⁸ Posner argues judges may be tempted to give undue salience to the

¹³⁵² I3, see also I8, I20.

¹³⁵³ I41.

¹³⁵⁴ I10.

¹³⁵⁵ I26, see also I25.

¹³⁵⁶ I4, see also I12, I19.

¹³⁵⁷ I3.

¹³⁵⁸ Richard Posner, "Emotion versus Emotionalism in Law" in Susan A. Bandes, ed, *The Passions of Law* (New York: New York University Press, 1999) 309-329 at 311.

emotions evoked by those individuals who appear in court. He cautions judges need to remain empathetic to parties who are not present in the courtroom, such as the victim of a murderer in a criminal trial, or future tenants of an apartment when deciding a landlord-tenant dispute that may impose increased costs on the landlord.¹³⁵⁹ Posner's concern about judges being too willing to empathize with those individuals who appear in the court, at the risk of harming large groups of people who are not represented, accords with "the identifiable victim effect". As Cass Sunstein describes it, the identifiable victim effect refers to the observation that "people will devote substantial resources to save an identifiable victim, and they will make large efforts to assist such a victim. By contrast, 'statistical victims' or large groups of nameless people, at serious risk from some harm, often occasion little attention or concern."¹³⁶⁰

In the bankruptcy system, trustees are usually given greater exposure to debtors than creditors, and my interviewees reported working to avoid unduly favouring the debtor's interests over the creditors. One interviewee surmised: "you can't be too emotionally involved, because... you end up taking their side and not being able to give an objective report. Because, as you said, you're also working for the creditors."¹³⁶¹ One interviewee suggested that to "be successful" as a trustee, one needed to feel empathy for both the debtor and the creditors.¹³⁶² But fostering empathy for creditors can be difficult. Echoing Posner and Sunstein, one interviewee offered that "you don't see the human side of the creditor very often, it's normally the bank. And you have to be neutral, but you also have these people crying in your office that you've helped navigate, and you know their life

¹³⁵⁹ Posner, *supra* note 1358.

¹³⁶⁰ Cass Sunstein, "Some Effects of Moral Indignation on Law" 33 Vermont L Rev 405 at 432, citing Lisa Heinzerling, "The Rights of Statistical People" (2000) 24 Harv Envtl L Rev 189; Paul Slovic, "If I look at the Mass I will Never Act: Psychic Numbing and Genocide" (2007) 2 Judgment & Decision Making 79; Karen Jenni & George Loewenstein, "Explaining the Identifiable Victim Effect" (1997) 14 J Risk & Uncertainty 235.

¹³⁶¹ I6.

¹³⁶² I17.

story.”¹³⁶³ Large, impersonal institutions are less likely to induce feelings of sympathy than down on their luck debtors. Of course, fostering empathy can be difficult when creditors are individuals, too. Some individual creditors are unsympathetic, for example one trustee described the challenges of dealing with a “vindictive” creditor who “would rather crush the bankrupt than me realize on assets.”¹³⁶⁴ Considering their exposure to the debtor and the comparative absence of most creditors from the process, trustees describe carrying out emotional labour so as not to develop an empathetic connection with the debtor, that biases them against the creditors.

7.2.2. COMPASSION

Empathy can entail sharing in a diversity of emotions experienced by another person such as joy, anger, or fear. The reality for trustees is that they are consistently sharing in a much narrower range of emotions, all of them painful. By the time they meet with a trustee, debtors often present as being in distress. Financial failure can be a deeply painful event in an individual’s life. Bankruptcy marks an admission of that failure. My interviewees reported that debtors would be plagued by painful feelings such as shame, sorrow and grief.¹³⁶⁵ One trustee colourfully rendered the situation: “the people who come in here, they’re just feeling like failures and they’re feeling like they’ve screwed up their whole life. And I will try to pick them up. I’ve told some people, you now have to stop whipping yourself... you didn’t do this on purpose. Stop whipping yourself.”¹³⁶⁶ These feelings of shame may be exacerbated by the debt collection efforts of creditors prior to bankruptcy. As discussed in Chapter 6, debt collectors adopt aggressive, dehumanizing approaches to encourage repayment. One trustee contrasted his approach to that of a debt collector: “a lot of times, when they’ve been through the collection agencies, people say, I thought you were going to yell at me. And I’ll

¹³⁶³ I9.

¹³⁶⁴ I13. I7 described the challenges of remaining neutral when a debtor’s ex-boyfriend was making a number of allegations about the debtor, which the trustee thought were unfounded.

¹³⁶⁵ I4, I11.

¹³⁶⁶ I13.

always say, no, that was the last guy.”¹³⁶⁷ Trustees seek to empathize with debtors at the outset of a file. Because debtors are experiencing sorrow and grief, a trustee who seeks to empathize with them will be called on to feel compassion.

Compassion is a subset of empathy, it refers to when one person shares in another’s painful emotions. In *Rhetoric*, Aristotle defines compassion as “a feeling of pain caused by the sight of some evil, destructive or painful, which befalls one who does not deserve it, and which we might expect to befall ourselves or some friends of ours.”¹³⁶⁸ Annalise Acorn identifies three underlying beliefs that comprise Aristotle’s definition of compassion: (i) a belief that a person is experiencing serious suffering, (ii) a belief that a person did not cause his or her own suffering, and (iii) a belief that the person experiencing the compassion is similarly vulnerable.¹³⁶⁹ Martha Nussbaum would add a fourth factor to this list – to feel compassion one must make a eudaimonistic judgment that the person who is suffering is important to the person experiencing the compassion.¹³⁷⁰

Studying compassion as a subset of the empathetic emotional labour carried out by trustees provides two insights. First, I can identify an additional technique used by trustees in their emotional labour. It is difficult to feel compassion for an individual when one blames that individual for his or her suffering. My interviewees identified how they frame the debtor’s situation to minimize or obscure the debtor’s culpability. These frames convey to debtor’s that they are not being judged and help trustees foster compassionate feelings towards the debtors. Second, I can identify an additional goal of the emotional labour of trustees. While there is a feeling rule identifying compassion as an appropriate emotion for a trustee to feel at an initial meeting, trustees may spontaneously respond with compassion to many of the debtors they meet. Repeatedly sharing another’s painful feelings can result in

¹³⁶⁷ I16.

¹³⁶⁸ Aristotle, *Rhetoric*, supra note 1197 at 77.

¹³⁶⁹ Annalise Acorn, *Compulsory Compassion* (Vancouver, BC: UBC Press, 2004).

¹³⁷⁰ Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton, NJ: Princeton University Press, 2004).

burn out. As part of their self-focused emotional labour, trustees must find a way to manage the continuous claims on their compassionate resources.

The prominence of compassion in the trustee's emotional repertoire is suggested by the importance the interviewees placed on being non-judgmental.¹³⁷¹ Being judgmental means ascribing blame to an individual and such a perception is inconsistent with the second constitutive belief of compassion: one struggles to feel compassion towards those individuals who have caused their own suffering. Blame and compassion are uneasy companions, because when one sees a person as being culpable for his or her own misfortune, that misfortune is no longer undeserved. The question of culpability is complex, and can depend on how one frames a scenario. Imagine a pedestrian is visiting Amsterdam – a city with an expansive network of specially designated bike lanes. The pedestrian is unfamiliar with the city's bike lane system and steps into a bike lane thinking it is a pedestrian sidewalk. The pedestrian is struck by a cyclist and seriously injured. One's emotional response may depend on how one frames the situation. If one faults the pedestrian for not becoming better acquainted with Amsterdam's traffic rules before visiting, one may feel little compassion for his or her suffering. Conversely, if one focuses on the fact that the pedestrian was a bewildered foreigner trying to navigate an unfamiliar city, one may feel a greater degree of compassion for the pedestrian.

In my interviews with trustees, they identified a number of frames that they offer to debtors that minimize the debtor's culpability. One indicated he would remind the debtor of the larger social context of his or her financial difficulties: "the biggest thing I emphasize with is I tell people, sort of macro economics, the numbers that we see, and I say, the creditor's still making all this profit. To be really honest, nobody cares, but you care."¹³⁷² Similarly, another trustee minimized the seriousness of debt as compared to other obligations in a person's life: "I remind the person that all we're talking about is debt. It's not one of the most important things from this point forward. You've got a family. You've got a

¹³⁷¹ I3, I4, I9, I11, I19, I23, I28, I29, I31, I33, I40, I43.

¹³⁷² I16.

job you've got to perform well at."¹³⁷³ A third described how she would normalize the debtor's situation by letting them know that they were in no way aberrant: "a lot of times people will say, is this the worst case that you've ever seen? And I'll say no, I've seen people with a lot more debt. Not to worry. And people will say, what if I need family support to pay? I say that's completely fine, I see lots of people with that."¹³⁷⁴ A few trustees indicated they would emphasize that bankruptcy was a legal process available to all people who became overindebted.¹³⁷⁵ These frames may help debtors to manage their own feelings of shame and guilt, but they also convey to the debtor that the trustee is not judging them.

Conveying a non-judgmental stance to debtors can be complicated by the fact that sometimes trustees feel moved to judge debtors. With many debtors, trustees could point to factors that had contributed to the debtor's financial difficulty that were beyond the debtor's control, but other debtors may have contributed to their financial failure: "some people have done really stupid things."¹³⁷⁶ When faced with such individuals, trustees may find themselves experiencing the blaming emotions. The trustees I interviewed revealed a number of different cognitive frames – ways of thinking about their situation – that enabled them to suppress blaming emotions. Some trustees excused the debtor's behavior as an incidence of human fallibility, to which anyone is susceptible: "when you look at it, you're like – how could you – why did you do that? But we all do stupid things and that's okay."¹³⁷⁷ Others viewed debtors with an element of pity, as hapless individuals, who lacked the financial literacy skills necessary to avoid failure: "very often there's financial mismanagement, but they don't know any better... there should be something in the high school curriculum that prepares people for this, because they have no concept."¹³⁷⁸ A third

¹³⁷³ I28.

¹³⁷⁴ I9.

¹³⁷⁵ I19, I31, I38.

¹³⁷⁶ I29. Interviewees who would remind themselves of contributing factors that were beyond the debtor's control include I10, I11, I16, I26, I32, I43.

¹³⁷⁷ I29.

¹³⁷⁸ I22. See also I4: "And now [having worked as a trustee] some things seem so obvious and common sense to me, but to somebody who had no knowledge of financial planning

approach was to focus on the extent to which the debtors had already suffered as a result of their overindebtedness. One trustee surmised: “yeah, there’s things that they could have done to prevent it, but they made a mistake... they’ve already had however many sleepless nights and they don’t need my judgment on top of it.”¹³⁷⁹ Trustees might forestall judgment by reminding themselves that they do not know the whole story: “we can’t judge them, we don’t know the circumstances in their life.”¹³⁸⁰ A final approach was for a trustee to change focus from judging past behavior to helping the debtor move forward constructively: “we try to establish that we’re going to deal with the problem as it is. I’m not overly concerned with who is at fault for getting into this situation.”¹³⁸¹

At this point, a careful reader might point out that these cognitive frames do not appear to be wholly consonant with the third belief, which Nussbaum and Acorn agree makes up Aristotle’s definition of compassion, that the person feeling the compassion must believe that they are vulnerable to similar misfortune. Some of the cognitive frames used by trustees reflect this belief. As one quipped: “there but for the grace of God go I.”¹³⁸² On the other hand, it can be inferred from my discussions with some trustees that they did not see themselves as being vulnerable to the financial failures that befell debtors. These trustees viewed debtors as hapless victims of their own ignorance. The trustee could see how the debtor has brought about his or her financial failure, but was of the opinion that the debtor should not be held responsible because he or she lacked information and skills. There are a couple of ways in which this manner of belief may still be consistent with feeling

and really the repercussions that come from their actions, it’s hard to judge them on the decisions that they’ve made for that reason.” See also I43: “And I’ve learned over the years that there are a lot of financially illiterate people, that just don’t understand credit and how to use it. What the result of using it can be and how bad it can be and all the rest of this stuff.”

¹³⁷⁹ I9. See also I7: “But for most people they beat themselves up enough. I don’t need to do it for them.”

¹³⁸⁰ I33, see also I11: “For the most part, no, I try not to judge them. I haven’t walked in their shoes.”

¹³⁸¹ I28, see also NL2.

¹³⁸² I29, see also I19 & I42, who made similar comments.

compassion towards the debtor. The trustee may recognize that, prior to his or her professional training, he or she was similarly uneducated. For instance, one offered this insight while describing how she finds it difficult not to be judgmental about a debtor's pre-bankruptcy conduct: "It can be really difficult. But I guess you're not in someone else's mind, what may have made sense to them at the time. I guess it's hard to separate what I would have thought was reasonable before doing this and now after doing this for so long." Trustees might also feel compassion for debtors because, though they view themselves as insulated from such misfortunes, they see their loved ones as being similarly vulnerable. Aristotle's definition contemplates that the suffering that stimulates compassion must be one "which we might expect to befall ourselves *or some friends of ours*"¹³⁸³ (emphasis added). One trustee described how when she spoke with debtors about their situations: "like you can see that happening with your sister –in-law or your clerical person, you see that dynamic in their life."¹³⁸⁴

Trustees may sometimes need to work to feel compassion for a debtor, but often debtors will spontaneously evoke compassion because they are in dire circumstances. The prior research on emotional labour of professionals, and people working in the debt industry suggests that people in such situations may struggle with the constant demands made on their sympathy. Anleu & Mack reported that Magistrates found the "passing parade of misery, day in and day out" emotionally draining.¹³⁸⁵ Braucher found bankruptcy lawyers struggling with similar feelings of emotional exhaustion, as did Lively, when she interviewed paralegals working with consumer bankrupts.¹³⁸⁶ Trustees identified similar challenges in their work and reported engaging in self-focused emotional labour to manage the demands on their compassion.

I asked trustees about whether or not they found the emotional demands made on them by the unending stream of debtors' sad stories draining. As discussed above, a number

¹³⁸³ Aristotle, *Rhetoric*, *supra* note *supra* note 1197 at 77.

¹³⁸⁴ I42.

¹³⁸⁵ Anleu & Mack, *supra* note 1169 at 613.

¹³⁸⁶ Braucher, *supra* note 1310 at 541; Lively, "Upsetting the Balance", *supra* note 1218 at 209.

of them took steps to limit the extent to which they emphasized with debtors because they believed that a surfeit of empathy could hinder their work. They also acknowledged that empathizing repeatedly would extract a high personal toll. One trustee suggested that a person could not do the job for very long if he or she empathized too deeply with the debtors, because “you will drive yourself crazy.”¹³⁸⁷ A trustee needs to be able to “leave it behind you... when the door closes.”¹³⁸⁸ One interviewee reported that her colleague had recently retired from the field and thought the reason was that her colleague “was taking all these sad stories and she would worry about these people day in and day out. It was affecting her sleep because she would work until 3 in the morning.”¹³⁸⁹ Empathizing with another’s painful feelings can lead one to become personally invested in a file, or attached to a debtor. This attachment can make it particularly difficult if a debtor turns against a trustee – alleging wrongdoing by the trustee, or contesting the trustee’s decisions. One interviewee cautioned: “if you get too empathetic, then you kind of get sucked into all the drama and you get taken advantage of.”¹³⁹⁰ Another offered: “the reason we can’t empathize completely is that there’s... the wounded animal theory – it’s great that I’m helping you now, but as soon as things don’t go the way they plan or anticipate, they come back and say, you didn’t tell me this.”¹³⁹¹

I asked interviewees about how they managed to maintain distance from the emotional demands of their work. A number of different themes emerged. Some had techniques at work. Conversations with other members of the insolvency community were important. The trustees might debrief after an emotionally demanding experience, or check

¹³⁸⁷ I11.

¹³⁸⁸ I11, see also I13.

¹³⁸⁹ I12. See also I11: “Yeah, I got into this when I was really young and I’m sure the first five years, I would go home and not sleep at night and how is this family going to feed their children?”

¹³⁹⁰ I21.

¹³⁹¹ I12.

in to make sure that they were not becoming too personally involved in a file.¹³⁹² One trustee worked at an office that was arranged so that a different person handled each stage of a bankruptcy file to prevent any one employee from getting too deeply attached to or invested in one file.¹³⁹³ Another indicated that she liked to switch back and forth between emotionally demanding meetings with debtors and “lots of just monotonous paperwork.”¹³⁹⁴ For some trustees, they liked to put distance between themselves and their work with a commute: a long drive, a bike ride, or a trip on public transit.¹³⁹⁵ Some took steps to limit their connectivity to work when not at the office. One indicated he would read but not respond to emails when at home.¹³⁹⁶ Another did not give out his personal email address or phone number.¹³⁹⁷ Hobbies outside of work also helped trustees manage the emotional demands of their job. Interviewees mentioned gardening, martial arts, reading, and spending time with their dogs.¹³⁹⁸

In addition to these techniques of emotional management, many trustees remained optimistic about their work by focusing on the ways in which they could effectuate meaningful positive change in the debtor’s life. In the next section, I discuss the importance of hope in a trustee’s work.

Before turning to the role of hope in the work of trustees, I will end my discussion of empathy and compassion by considering how the types of emotional labour identified in this section could shape the types of discretionary decisions that trustees make about

¹³⁹² I6, I10, I20, I42, see also trustees venting about their frustration to colleagues, *supra* note 1459, and trustees checking in with colleagues to ensure they are not taking things too personally, *supra* note 1483.

¹³⁹³ I12.

¹³⁹⁴ I4. See also I41, who reported that early in her career she had limited herself to 3 meetings a day with debtors because she found them so emotionally draining.

¹³⁹⁵ I3, I5.

¹³⁹⁶ I3.

¹³⁹⁷ I16.

¹³⁹⁸ I16, I20, I34.

whether or not to oppose a debtor's discharge. The most evident impact may result from the frames that trustees adopt to help them remain non-judgmental. Leighton suggests that one way that emotions can shape cognition is that there are judgments attached to emotions and those judgments may exclude other emotions or judgments. He gives as an example indignation and compassion. When a person feels indignation towards another, the person may think that the other deserves to suffer. This belief excludes the beliefs necessary to feel compassion, namely that suffering is undeserved.¹³⁹⁹ Conversely, at an initial meeting, trustees adopt cognitive frames to engender compassion for the debtors. To do so they adopt cognitive frames that minimize or obscure the debtor's culpability. These frames may make it more difficult for trustees to adopt blaming emotions, such as indignation, and to hold the judgment that debtors deserve harsh treatment, at least as relates to pre-bankruptcy conduct disclosed at that initial meeting.

Empathizing with debtors – or engaging in surface acting to suggest one is empathizing with debtors – may also impact a trustee's exercise of discretion. Trustees who take the time and make the effort to enter into the emotional experience of the debtor may develop a better understanding of the debtor's situation. Empathizing requires one to learn enough about another's situation that one can imagine how one would feel in that situation, ascertain the other person's emotional response and then share in it. When the other person's emotional response differs from how one imagines one might feel in a similar situation, this dissonance may spur one to make further investigations to ensure one understands the parameters of the situation in which the other person finds him or herself. Even where trustees only engage in listening as a form of surface acting to convey to a debtor that he or she is being empathized with, careful listening may help a trustee uncover important information relevant to the question of whether or not a discharge should be lodged. When they engage in listening as part of their emotional labour, trustees may end up making better informed decisions about whether or not to oppose a debtor's discharge.

The trustees I interviewed expressed concern that empathizing too much with the debtor could bias them to unduly favour the debtor. This concern connects to a bigger

¹³⁹⁹ Leighton, *supra* note 1201 at 209.

theme that emerged from my interviews, namely that trustees feel subject to a feeling rule that they should not experience or express strong emotions. They perceive strong displays of emotion as antithetical to their role as professionals, and neutral arbiters. I will take this topic up in greater detail in the final section of this chapter.

7.2.3. HELPING & HOPING

Trustees work with individuals who are facing difficult life circumstances and experiencing painful emotions. Based on my reviews of previous studies of individuals who work with debtors, I expected to find trustees struggling with the overwhelming sadness of the people they work with. Instead, in my interviews I was struck by how optimistic and upbeat the trustees were. Trustees are in a position to offer substantial assistance to debtors and they derive a significant amount of satisfaction from providing this assistance. When trustees speak about their job, they convey a sense of hopefulness. This hopefulness is possible because trustees frame their work in terms of the desired end goal, a brighter financial future in which the debtors have not only shed their existing debt, but also addressed underlying causes of their difficulties and developed the skills that will better enable them to navigate future financial challenges. This goal provides a potent cognitive frame for trustees to carry out self-focused emotional work to maintain a sense of hopefulness, which motivates them to do their job. They also carry out other-focused emotional labour when they invite debtors to feel hopeful by sharing their optimism with the debtors. In this section I start by explaining what it means to hope, I canvass evidence of the centrality of hope to the work of trustees, I consider how trustees engage in emotional labour to evoke hope in debtors and themselves, and I conclude the section by considering the impact of this hopeful emotional labour on a trustee's decision about whether or not to lodge a discharge.

Kathryn Abrams and Hilda Keren considered hope in the context of law and identified 5 key elements of the emotion: (i) hope is an emotion that is oriented towards a goal, (ii) the goal is good, (iii) the goal is in the future, (iv) achieving the goal is neither a foregone conclusion, nor an impossibility, and (v) achieving the goals will require the exertion of human agency, it is not merely a matter of passive optimism that things will turn

out in the desired fashion.¹⁴⁰⁰ A bankruptcy trustee's hope is oriented towards the debtor's brighter financial future. It is neither a foregone conclusion nor an impossibility that debtors will achieve it. To get a discharge requires an exertion of effort by debtors; preparing and submitting monthly income and expense reports, reducing their spending so that they can make the surplus income payments and attending the counselling sessions.

The goal towards which a trustee's hope is oriented can be conceived of broadly or narrowly. As I discussed in Chapter 6, research on other professionals suggests that they view their work as advancing larger goals, such as justice, divinity or human understanding. They can use these goals as powerful frames when engaging in deep acting to evoke a desired emotional response. Judges, who feel frustrated or impatient with litigants may be able to quell their feelings of frustration or impatience by reminding themselves that they can help maintain public confidence in the justice system by giving each litigant the opportunity to tell his or her story. Alternatively, workers in both professional and other roles might be able to carry out work that causes them to experience painful emotions by focusing on how the work benefits the individual with whom they are dealing. Bill collectors might adopt aggressive tactics with sad debtors and remind themselves that by extracting payment from the debtors, they are helping them to save their credit rating.

Trustees can frame their work both in terms of benefits to individual and the public. Bankruptcy benefits the individual, who is rehabilitated through the release of debt, the acquisition of new financial skills, and relief from negative emotions associated with indebtedness. The rehabilitation of debtors may also benefit the broader public by providing debtors with an incentive to engage in productive labour, consumption or entrepreneurial risk taking. It is towards these ends that a trustee is working – their hopeful orientation may result from their awareness that they are serving the greater good and also benefiting specific individuals. When faced with overwhelmingly sad stories or hard tasks, such as seizing inheritances from recently deceased relatives, the trustees may be able to find solace in their hopeful orientation towards the rehabilitative potential of bankruptcy law.

¹⁴⁰⁰ Kathryn Abrams & Hila Keren, "Law in the Cultivation of Hope" (2007) 95 Cal L Rev 319 at 325.

The trustees I interviewed reported taking comfort and satisfaction in knowing that a debtor's situation will be improved by bankruptcy: "I've always just had a pretty good sense that at the end, the majority of people, we're helping them, and providing them with the ability to move forward and have a fresh start and I think that's a really great thing."¹⁴⁰¹ This knowledge helped trustees to remain positive: "I have people say to me, how can you do your job, it's like a parade of misery. And I said, I help people."¹⁴⁰² Two interviewees indicated that they had initially found their jobs emotionally draining, but no longer did because they had seen "so many stories" where the debtor's life was "so much better" after going through bankruptcy.¹⁴⁰³ One interviewee described the ability to help people as "the best part" of her job.¹⁴⁰⁴ Three interviews expressed something akin to, "that's why I love my job... I love my job because people's lives will be better. I make money, but I will make their life better with my job."¹⁴⁰⁵

The trustees identified different moments in the bankruptcy process when they felt satisfaction in the knowledge that they had helped a debtor. For some trustees, they perceived that the act of making an assignment into bankruptcy provided debtors with immediate relief: "When I'll see someone, do the assessment and I can see that, having finished the process, and talked to me, and now the papers are signed and they're getting ready to leave. The stress just leaves them. You can see that already you're making a difference."¹⁴⁰⁶ Teaching debtors budgeting skills could also be a source of satisfaction: "I

¹⁴⁰¹ I4. I15 offered: "At the end of the day the benefit is that you're going to get them through the process, and they'll be getting a fresh start. It all comes back to the same thing, is to enable someone to get a fresh start at the end of the day." See also I3, I5, I13, I14, I21, I32, I37.

¹⁴⁰² I29, see also I24, I32 *infra* note 1494.

¹⁴⁰³ I18. See also I9: "I think when it first started it took much more of a toll. But you know there's so many times where you get the big thank you at the end."

¹⁴⁰⁴ I26.

¹⁴⁰⁵ I13. See also I8: "I love helping people." I41: "I love what I do, I hope the people I help, I love that there is an opportunity and way to escape, we all need that."

¹⁴⁰⁶ I26. I13 observed: "It's interesting to watch somebody sitting there who can hardly talk when they walk in, because they're so tense, and when they walk out they're loose and

think we are helping people... I always tell them, budgeting isn't going to make you rich, but it gives you some peace of mind and you can pay everything and you can go to sleep at night not worrying what's coming in the mail tomorrow."¹⁴⁰⁷ Some trustees indicated they helped debtors by getting them released from their debts: "Even if [the bankruptcy] results in a conditional order, that is a big order because of other issues, I've still helped them. I've still helped them because they're getting rid of all the debt."¹⁴⁰⁸ These different ways of helping are not mutually exclusive, and some trustees acknowledged that they might help debtors in a number of ways: "I say I can get you down to zero [debt], but I also say that after 2 or 3 weeks they've had this tremendous weight lifted off."¹⁴⁰⁹

Nurturing their own feelings of hope provides trustees with a source of meaning and a buffer from the emotional demands of their jobs, it is also an important element in the other-focused emotional labour of cultivating hope in the debtor. Debtors, when they arrive on a trustee's doorstep, are some combination of stressed, overwhelmed, ashamed and sorrowful. If a trustee can help the debtor to replace these painful emotions with hope, the debtor may be motivated to carry out the work necessary to complete the bankruptcy process. Abrams and Keren have identified some of the steps a person must take if he or she wishes to cultivate hope in another. These include having a strong sense of hope oneself, communicating to the other person that his or her world could be different, recognizing the other person as having agency, engaging the other person in activities that nurture their agency, providing support as the person engages in these activities and fostering solidarity to help "break through the isolation that is typical of circumstances of despair."¹⁴¹⁰ An

laughing and you've helped them." See also I5, I25, I29. I31 thought that it depended on the debtor: "some people will say when they sign the documents, there's a sense of relief, they're happy. And other people, three or four months later, they say when am I going to start to feel better?"

¹⁴⁰⁷ I16.

¹⁴⁰⁸ I3.

¹⁴⁰⁹ I8.

¹⁴¹⁰ Abrams & Keren, *supra* note 1400 at 353. The steps a person must take to inculcate hope in another are described 345-353.

important purpose of the initial meeting is to inform debtors that they can move towards a better financial place, and illuminate the path forward. The bankruptcy process, and especially the duties which debtors are required to fulfill, becomes part of the process by which trustees help nurture a sense of agency in debtors, so that they can move towards a brighter future. Throughout, having a strong sense of hope oneself can assist trustees in the project of nurturing hope in the debtor.

Remaining hopeful is not always easy for trustees. Debtors may have a myriad of problems – marriage breakdown, job loss, illness - and a trustee only has the tools to help address the over indebtedness. My interviewees reveal that trustees can maintain a sense of hope by focusing on the problems they can assist with: “whatever badness they have to deal with, they’re going to have to deal with that regardless... but we can help them with their financial situation, we can take that one stress off them... so I don’t feel badly when they come here. I feel like we’re helping them.”¹⁴¹¹ Once debt-related stress is removed from an individual’s life, the individual may be better positioned to address the other problems they were facing.¹⁴¹² Conversely, an individual, who does not get relief from his or her debt-related stress, may find his or her other problems exacerbated: “I’m of the belief that if debtors are sincere in trying to remedy their situation and they don’t have any method by which to do that, the worry and anxiety about that will eventually make them ill. And that takes a bad situation to a worse situation.”¹⁴¹³ One trustee felt that it was important to “compartmentalize it, because you can’t do your job properly if you’re concerned about their marriage break up or mother dying or whatever else is going on in their life.”¹⁴¹⁴ A few

¹⁴¹¹ I40. I12 indicated that she would remind herself, “There’s only so much I can do for them as part of the *Bankruptcy and Insolvency Act*.” See also I9, I28.

¹⁴¹² I17.

¹⁴¹³ I37. I28 would tell debtors: “The alternative is you do something to get rid of the debt or you do something worse, and there’s no need to do something worse.” I38 offered: “I say firstly this is only money, but the stress from all the money worries takes its toll. And so I have a theory that bankruptcy saves on health care.”

¹⁴¹⁴ I27.

trustees indicated that they would give debtors referrals to other people or agencies that might be able to help address their other problems.¹⁴¹⁵

When trustees feel hope, it may shift their focus away from a debtor's pre-bankruptcy misconduct and result in fewer oppositions being lodged on such grounds. In the section on compassion, I set out how some trustees would work to remain non-judgmental by orienting themselves towards the task of rehabilitating the debtor and away from the debtor's previous misconduct. Hope reinforces such an orientation because it orients an individual towards a positive future goal. This orientation accords with one of the links between cognition and emotion suggested by Leighton's reading of *Rhetoric*. He suggested that one pays more attention to those people who evoke pleasurable emotions and less to those who evoke painful ones. I push this insight a bit further and suggest that trustees might pay more attention to those aspects of a person's situation that evoke pleasurable emotions. Trustees derive significant satisfaction from being able to help debtors and one might expect them to pay more attention to those problems with which they can assist. They cannot change the debtor's past behavior, but they can help the debtor undergo a process of rehabilitation consisting of both the discharge of debts and the acquisition of new skills. When debtors evidence a willingness to exert themselves towards this goal, the trustee is likely to experience the satisfaction of seeing his or her goal for the debtor achieved. When the trustees' initial hopefulness is dashed by the debtor's inaction or lack of cooperation, trustees can respond with frustration. I now turn to this emotional dynamic of the trustee's work, which arises primarily during the administration of the file.

7.3. ONGOING COMPLIANCE DURING ADMINISTRATION

Once they have secured a debtor's file and elicited the information necessary to complete the commencing documents, a trustee's goal shifts to encouraging the debtor to comply with his or her duties. Much of the groundwork for encouraging compliance is set at the initial meeting, where trustees reason with the debtor, and carry out other-focused emotional labour to build a relationship with the debtor that facilitates compliance.

¹⁴¹⁵ I9, I41.

The trustees I interviewed relayed some of the ways that they could encourage a debtor's compliance by reasoning with the debtor. A trustee might try to provide the debtor with a clear picture of his or her duties and an understanding of what will occur if he or she fails to fulfill them. A number indicated that they try to convey to the debtor "there are rules, and if you try to follow the rules, it goes very easy. And if you don't follow the rules, it may not be quite so easy."¹⁴¹⁶ One trustee opined that if you explain "the process and the concept and the reason behind the legislation, [the debtors] understand it better, they accept it better."¹⁴¹⁷ Trustees might also emphasize that it is in the debtor's "best interest to get through the bankruptcy as quickly as possible."¹⁴¹⁸ A few trustees indicated that they would point out that the duties were not very onerous: "you're going to invest maybe maximum ten hours over a nine-month period, perhaps. It's not a big investment in time to go through it."¹⁴¹⁹ Others would remind the debtor of the significant benefit they were receiving from the bankruptcy process – this tactic was mentioned in the context of debtors, who quibble with their obligation to pay surplus income. One trustee recounted a conversation in which he told a debtor, "okay, you realize that if you pay what I'm asking for here, you'll have paid about 10 percent of your debt... Is that harsh? That slowed her down a little bit. Okay, I guess that's not so harsh."¹⁴²⁰

In addition to reasoning with a debtor, trustees might carry out other-focused emotional labour to encourage compliance. Many trustees indicated that the rapport they establish with the debtor may encourage compliance. A few interviewees reported that they thought bankruptcies went more smoothly when they had managed to develop a connection

¹⁴¹⁶ I8. See also I27.

¹⁴¹⁷ I10. See also I28: "I think it works better if you can explain to somebody, here's how the rule helps. Or here's how this situation can be resolved and how it's going to benefit a person in the end."

¹⁴¹⁸ I2.

¹⁴¹⁹ I2. See also I27: "Because I've told them up front, look, here's what you have to do, there not a lot that you have to do."

¹⁴²⁰ I13. See also I32: "If you were out in 9 months you might pay \$1850. If you're out in 21 months, let's say you pay \$3,000. What's \$3,000 to clear \$50,000 of debts?"

with the debtor, or established a level of trust.¹⁴²¹ A debtor with whom a trustee has established a connection may place greater value on maintaining the trustee's esteem by complying with the trustee's instructions. A debtor who feels comfortable with a trustee may also be more willing to contact the trustee to address any problems that arise during the file. One trustee mused: "I find generally when people disappear and don't complete their obligations, a lot of it is they have questions and are afraid to call and ask or don't want to seem stupid. Or have fallen behind and think that we're mad at them."¹⁴²² A few interviewees suggested that debtors were so discouraged and downtrodden that they needed positive reinforcement before they would be able to carry out their duties. As discussed earlier, one way to foster a connection with a debtor is for a trustee to empathize with the debtor and express compassion for the debtor's suffering. With respect to the downtrodden debtor, one interviewee offered: "I try to be warm and empathetic and make them feel good about themselves, because they're not going to turn around and get that fresh start if they don't."¹⁴²³

After the initial meeting, if the debtor complies with his or her duties, there will usually be little further interaction between the trustee and the debtor. In some offices, the trustee may provide counselling to the debtor or assist the debtor with fulfilling his or her duties, for example, by helping the debtor fill out income and expense reports. In many offices, these types of interactions are delegated to support staff. Trustees tend to have more interactions with debtors when they fail to comply with their duties.

When debtors fail to comply with their duties, trustees may experience a range of emotions, prominent amongst these is frustration. A trustee's frustration may be channeled into other-focused emotional labour, to encourage the debtor's compliance. But in the same way that trustees indicated there were limits on the extent to which they should empathize with a debtor, my interviewees identified limits on the extent to which they should feel

¹⁴²¹ **Personal Connection:** I10, I36, I42. **Trust:** I41.

¹⁴²² I4.

¹⁴²³ I22. See also I2: "Some people respond, may need, shall we say, stroking of their ego to try and get them to understand, to do these things and get through it and they're on their way."

frustration. They engaged in self-focused emotional labour to suppress or hide their feelings of frustration. In the following section, I will examine what triggers the feelings of frustration, how those feelings are channeled to encourage compliance, and how trustees manage their feelings to avoid inappropriately forceful displays. I conclude the section by considering how the feelings of frustration may impact a trustee's exercise of discretion in the opposition to discharge process.

7.3.1. FRUSTRATION

Frustration is not an emotion that Aristotle addresses in *Rhetoric*; he considers two potentially related emotions, indignation and anger.

Indignation is “pain at unmerited good fortune.”¹⁴²⁴ The trustee might be indignant at the possibility that the debtor would try to take advantage of the benefits of a bankruptcy – the stay and the discharge – without carrying out the concomitant obligations.

Anger is “an impulse accompanied by pain, to a conspicuous revenge for a conspicuous slight directed without justification towards what concerns oneself or towards what concerns one's friends.”¹⁴²⁵ Aristotle defines slighting as “the actively entertained opinion of something as obviously of no importance.”¹⁴²⁶ A trustee may perceive the debtor's non-compliance as a personal slight, because the debtor's unwillingness to comply with the trustee's instructions can be perceived as conveying a lack of respect for the trustee.

A trustee may also respond with anger when his or her goal – to rehabilitate the debtor – is thwarted. Trustees are positioned to provide significant help to over-indebted individuals by giving them access to the stay, the discharge and the opportunity to learn better financial habits. They take a great deal of solace in their ability to help – knowing that a debtor's situation will improve because of bankruptcy – buoys many trustees even as they interact with a long parade of people in difficult circumstances.¹⁴²⁷ They may also focus on

¹⁴²⁴ Aristotle, *Rhetoric*, supra note 1197 at 79.

¹⁴²⁵ Aristotle, *Rhetoric*, supra note 1197 at 60.

¹⁴²⁶ Aristotle, *Rhetoric*, supra note 1197 at 61.

¹⁴²⁷ See FNs 1401-1405.

improving the debtor's circumstances going forward as a way of suppressing blaming emotions elicited by the debtor's pre-bankruptcy conduct.¹⁴²⁸ Aristotle contemplates that frustration of one's aims can induce anger. When he discusses the frames of mind, in which one feels anger, he observes: "the frame of mind is that one in which any pain is being felt. In that condition man is always aiming at something, whether, then, another man opposes him either directly in any way, as by preventing him from drinking when he is thirsty, or indirectly, the act appears to him just the same; whether some one works against him, or fails to work with him, or otherwise vexes him while he is in this mood, he is equally angry in all these cases."¹⁴²⁹ This species of frustration is reflected in the Oxford English dictionary, which offers one definition of frustration as "to render vain; to balk; disappoint (a hope, expectation, etc); to baffle, defeat, foil (a design, purpose etc)."¹⁴³⁰ In the trustee's situation it is his or her aim for the debtor that is being thwarted by the debtor's non-compliance. Feelings of frustration at a goal not met, can transform into feelings of anger towards an individual.

All three of these emotions – indignation, anger at a personal slight, and anger at the thwarting of the trustee's aims - are evident when trustees talk about the things that trigger their frustration.

A trustee's frustration sounds most akin to indignation when a debtor's behavior is characterized as negatively impacting a debtor's deservingness of a discharge. For instance, some trustees expressed frustration with the simple act of non-compliance, because the debtor's duties in bankruptcy are quite straightforward.¹⁴³¹ In the trustees' view, it does not take much work to get a discharge and those debtors who are unwilling to carry out the minimal amount of work required do not deserve the benefit of the bankruptcy system. Debtors also raised the ire of trustees when they tried to game the system, such as the debtor who says, "tell me how I can get out of this in 9 months and not pay any surplus and I'm

¹⁴²⁸ See FN 1381.

¹⁴²⁹ Aristotle, *Rhetoric*, supra note 1197 at 62.

¹⁴³⁰ *The Oxford English Dictionary*, online ed, *subverbo* "frustrate."

¹⁴³¹ I27.

just going to not work for the next 9 months.”¹⁴³² These debtors tend to convey a sense of entitlement. Instead of expressing gratitude at the availability of debt relief, they are eager to minimize their contributions: “they have the attitude that they don’t want to pay their creditors a penny more because they’ve already been paying them too much over the years.”¹⁴³³ They might also be incredulous about the cuts to spending that they are being required to make to meet the surplus income payments: “I can’t live on less, well, you’re going to have to.”¹⁴³⁴ Trustees describe these debtors as callous, uncaring or simply out-of-touch with reality.¹⁴³⁵

A trustee’s frustration sounds most akin to the first type of anger, when a debtor’s behavior is characterized as showing a lack of regard for the trustee. Several trustees expressed frustration with debtors who fail to take responsibility for how they contributed to their financial difficulties and instead, “are blaming everybody else for what’s gone on.”¹⁴³⁶ Such debtors may blame the trustee for the operation of the bankruptcy system – and trustees indicated that they found it frustrating when they were wrongly accused of misconduct or otherwise blamed: “you’re so sick of every mistake is our mistake, it’s never them.”¹⁴³⁷ For instance, one trustee had a debtor who was very angry that his bankruptcy had been extended from 9 to 21 months once he took a second job that put his income over the surplus income threshold. The trustee was of the opinion that “the debtor knew the rules when [he] signed. [He] knew the rules when [he] decided to take the second job. It is what it is.”¹⁴³⁸ Another was dealing with an angry debtor, whose house was being foreclosed on. The debtor had not disclosed the mortgage and seemed unaware that he had even granted it.

¹⁴³² I4.

¹⁴³³ I9. See also I22: “Now that I’m going bankruptcy, why should I have to pay all this money?”

¹⁴³⁴ I8. See also I22.

¹⁴³⁵ **callous:** I27, **uncaring:** I13, **out of touch with reality:** I8.

¹⁴³⁶ I9, See also I4, I7, I16,

¹⁴³⁷ I24, see also I3, I4, I7, I19, I22, I42.

¹⁴³⁸ I7.

The trustee explained to the debtor, “at the end of the day, you’re an adult, and you signed the documents, and if you granted them a mortgage, you should know that.”¹⁴³⁹

A trustee’s frustration sounds most akin to the second type of anger, when a debtor’s behavior is characterized as creating an obstacle to the smooth operation of the bankruptcy system. Trustees feel frustrated when a debtor’s uncooperativeness impedes the trustee’s ability to help solve the debtor’s financial problems, for instance when a debtor failed to disclose important information at the initial meeting that might have led the trustee to recommend a different course of action.¹⁴⁴⁰ Trustees reported feeling frustrated when they perceive that a debtor is not taking the necessary steps to “move on to a better life.”¹⁴⁴¹ Trustees connected the debtor’s rehabilitation to the debtor’s willingness to take responsibility for their situation because “when they’re not taking responsibility for how they got themselves into that situation... they’re not going to learn, they’re not going to rehabilitate, and they’re going to be right back here within 10 years.”¹⁴⁴²

A trustee’s frustration may be channeled into other-focused emotional labour. When a debtor does not respond to gentle encouragement, trustees may try to evoke compliance by conveying their frustration to the debtor. One trustee indicated that “at that point, I say okay, I’ve explained what I can. I have to proceed with it. So I’m not trying to get buy in from the person anymore.”¹⁴⁴³ Some trustees indicated that they needed to “read the riot act” to a debtor.¹⁴⁴⁴ Others described it as being the bitch.¹⁴⁴⁵ Some debtors “need a slap.”¹⁴⁴⁶

¹⁴³⁹ I22.

¹⁴⁴⁰ I32.

¹⁴⁴¹ I32.

¹⁴⁴² I7. See also I42.

¹⁴⁴³ I28.

¹⁴⁴⁴ I2, I27.

¹⁴⁴⁵ I7, I41.

¹⁴⁴⁶ I33.

One trustee indicated he would “take a harder line on it,” “push back and say, look this must get done.”¹⁴⁴⁷ The debtor may come to view the trustee as “the big bad wolf.”¹⁴⁴⁸

Although conveying one’s frustration to a debtor is one technique that trustee’s use to encourage compliance, the interviewees repeatedly indicated that they needed to limit the extent to which they displayed this frustration. One indicated, “I have to keep my cool when I phone. I wouldn’t be able to yell at them the way I yell at my husband, for example.”¹⁴⁴⁹ One offered: “And if I’m angry with someone, I usually want them to know it. If I’m not happy about something, that doesn’t mean that I’m going to start to act out and hit things.”¹⁴⁵⁰ Another reported that “I may be frustrated and angry and not take it out on [the debtors] if that makes sense... for the most part I would sort of relieve my frustration after having hung up the phone or after leaving a meeting as opposed to taking it out on them.”¹⁴⁵¹ Similarly, one reported, “I never get angry with [the debtors]. Well, I get angry with them, but they never know it.”¹⁴⁵² A fourth quipped that, “I do exercise impulse control. I don’t shout at people.”¹⁴⁵³ Trustees seem to be subject to a feeling rule which allows for some mediated displays of frustration, but labels strong displays as inappropriate.

Trustees must engage in self-focused emotional labour to remain calm when dealing with frustrating debtors; they identified different techniques for suppressing strong displays of frustration. When a situation became heated, several reported that they would try to suppress their anger and maintain a calm demeanour, because it helps calm down the debtor: “whatever energy you project you’re going to get back. So you talk louder, they’re going to

¹⁴⁴⁷ I25.

¹⁴⁴⁸ I26. See also I9: “They typically tend to see you as the big bad trustee at that point in time.”

¹⁴⁴⁹ I5.

¹⁴⁵⁰ I6.

¹⁴⁵¹ I26.

¹⁴⁵² I13.

¹⁴⁵³ I37.

get louder and eventually everyone's just screaming."¹⁴⁵⁴ They might take some time: leaving a meeting, ending a phone call and indicating they would call the debtor back later or putting an email to the side for a moment.¹⁴⁵⁵ They might ask another trustee or staff person to deal with the debtor.¹⁴⁵⁶ They might also have to calm down staff, who are dealing with an angry debtor.¹⁴⁵⁷ Where the debtor is exceptionally frustrating, the individuals in the firm may take turns dealing with him or her.¹⁴⁵⁸ Several indicated they will vent about their frustration afterwards to co-workers or other insolvency insiders, such as friends at other firms.¹⁴⁵⁹ One indicated that she would, "stop and think and say, what's really going on here? What's the real reason behind this as far as me being frustrated?"¹⁴⁶⁰

One cognitive frame that trustees might adopt to suppress their feelings of frustration is to emphasize the extent to which a debtor's fate in bankruptcy is within his or her own control. One indicated that if a debtor was non-compliant, his response would be: "You didn't do your duties, you left me in a box, I don't have a choice here. Don't make it your problem, it's their problem."¹⁴⁶¹ Along a similar line, another offered: "I make the point

¹⁴⁵⁴ I4. I13 indicated that he would "refuse to rise to any bait when I'm dealing with the debtor." I20 reported that, "In those kinds of situations, you just have to step back and say, okay, I'm not going to get into a verbal sparring match." I24 advised that he needs to "swallow [his] tongue."

¹⁴⁵⁵ I2 indicated that he would "set the matter aside and go on to something else, and then come back to it and look at it, perhaps with a fresh set of eyes, perspective." I12 will call the debtor back later, when calmer. In an extreme case, I14 asked a debtor to leave a meeting. I40 reported leaving emails for later, and sometimes leaving a meeting room to calm down. I41 reported: "There's days when I'm not picking up that call. I don't have it in me."

¹⁴⁵⁶ I3, I7, I8. An estate administrator may bring a trustee in to deal with difficult debtors, I14, I18.

¹⁴⁵⁷ I16.

¹⁴⁵⁸ I3 reported the members in his office playing rock, paper, scissors to determine whose turn it was to deal with a difficult debtor.

¹⁴⁵⁹ I4, I9, I26, I41, I42.

¹⁴⁶⁰ I11.

¹⁴⁶¹ I3.

that here's the issue, and here's why it's not going the way it's supposed to go, because you haven't done what you're supposed to do."¹⁴⁶² One reported that he did not get angry with debtors because: "If I'm on good ground, then what choice do I have? I just have to let them know that this is what you gotta do. Do it or don't do it. I can't lose too much sleep over what you do or don't do."¹⁴⁶³ This cognitive frame allows a trustee to pull back from his or her investment in a file. The debtor's rehabilitation is no longer something towards which the trustee is working, but is entirely the debtor's concern. A debtor's non-compliance does not thwart the trustee's aim, because the trustee has disavowed that aim. Instead, the debtor's non-compliance is reframed as a form of self-sabotage.

Another technique trustees use to reduce their frustration is to defer resolution of a disagreement to the judicial officer: "And that's where it comes down to, okay. You have your opinion and I have mine. We'll agree to disagree and let the court decide."¹⁴⁶⁴ Another reported: "I'm really not going to get too riled because ultimately the law's the law and if you don't like it, there's the door and I'll see you in court and we'll let them decide."¹⁴⁶⁵ A trustee who feels that his or her authority is being challenged by the debtor's non-compliance may be looking to the judicial officer for vindication. The anticipation of being vindicated in court may help to quell a trustee's feelings of anger at being slighted.

In this frustrated state, trustees are more likely to characterize the debtors as undeserving of a discharge. In his list of the ways emotions may shape cognition, Leighton suggests that one may judge people with whom one is angry less favourably. Frustration is related to anger and, and trustees may be oriented by their feelings of frustration towards making negative judgments about the non-compliant debtor. Moreover, Leighton notes that one avoids paying attention to people who elicit painful emotions. Frustrated trustees might

¹⁴⁶² I27.

¹⁴⁶³ I23.

¹⁴⁶⁴ I20. See also I7: "I'm also a big proponent of once it goes before the court, it's their decision. And I'm going to honour that. And I'm just going to say my piece. Try to keep it as professional as possible and let them have their say." See also I9: "I can just tell the court what the facts are, and what my recommendation is based on the facts."

¹⁴⁶⁵ I22.

be disinclined to spend time uncovering alternative explanations for a debtor's non-compliance. For instance, one trustee allowed that sometimes relevant exculpatory information did not make it to the trustee in time to avoid an opposition: "so all of a sudden you're standing there in court saying they still owe us \$600 and the person walks in and says well I've had three heart attacks and two different cancers, and of course the trustee will just say, with all that we'll just forget it."¹⁴⁶⁶

A trustee with a non-compliant debtor finds him or herself in a situation, which is akin to the bailiffs and debt collectors, whom Paul Rock and Jay Bass studied. Those workers would try to assess the relative blameworthiness of a debtor, often in the absence of any information other than the debtor's non-responsiveness to collection measures. Bailiffs and debt collectors equated continuing non-responsiveness with increasingly severe judgments of blameworthiness. The frustration evoked by the non-compliant debtor may fuel this manner of thinking. Absent some exculpatory explanation for the non-compliance, the fault seems to rest with the non-compliant debtor.

If frustration does lead trustees to view debtors more culpably, then the prevalence of frustration as an emotional response to a debtor's non-compliance may help explain why trustees oppose on the basis of non-compliance with relative frequency. According to this train of thought, trustees view non-compliant debtors as being more culpable, more culpable debtors are less deserving of a discharge, and so trustees are more likely to lodge an opposition on the basis of non-compliance. At the same time, trustees reported working to suppress their frustration. In the next section I will consider how a trustee's efforts to avoid strong emotions, including frustration and empathy, may shape their discretionary decision-making in the opposition to discharge process.

7.3.2. PROFESSIONALISM

Trustees work to empathize with debtors, but explain that they cannot empathize too much. They allow themselves to convey frustration to debtors, but explain that they cannot show too much frustration. They are under significant pressure to maintain an aura of professionalism and some emotions are identified as inconsistent with that goal. In this

¹⁴⁶⁶ I38.

final section of the chapter, I analyze the emotional labour of professionalism in greater detail. I present the traditional account of professionalism as the absence of emotion and draw on the philosopher Peter Strawson to present an alternative account of what emotions might be appropriate for professionals to feel. I canvass evidence that the Strawsonian account applies to bankruptcy trustees and then consider what insights a Strawsonian account might provide into how trustees exercise their discretion in the opposition to discharge process.

Trustees indicated that there were limits on the extent to which they should entertain empathetic or frustrated feelings, and these limits were often connected to the idea of being a professional: trustees evoked their role as professionals and officers of the court as bulwarks against inappropriately forceful feelings. After explaining why she would not yell at debtors, one observed: “This is a professional office and I’m a professional, so I have to do it that way.”¹⁴⁶⁷ After discussing the danger of too much empathy, one trustee surmised, “there has to be a certain distance to keep it professional.”¹⁴⁶⁸ One felt it was important to communicate to the debtor that when he took actions adverse to the debtor’s interest it was not because he was being “mean spirited” or “punitive,” but because he had an obligation to do so as a professional and an officer of the court.¹⁴⁶⁹ Another interviewee reported that she wanted to empathize with the debtors, “but you have to also come across as independent and an officer of the court.”¹⁴⁷⁰ One explained how she used her role as officer of the court to constrain her sympathetic impulses: “There’s a handful of files that I’m concerned about and it is overwhelming. But at the end of the day, there’s only so much I can do for them as part of the *Bankruptcy and Insolvency Act*. And you know if I crossed over the other line, like

¹⁴⁶⁷ I5. See also I6: “You have to be professional about it, but you’re human.” I19 recounted an experience with a difficult debtor, “Now, I kept it professional, but I certainly can’t say that I didn’t raise my voice at him.”

¹⁴⁶⁸ I21.

¹⁴⁶⁹ I19.

¹⁴⁷⁰ I12, see also I1, I2, I4. I5 tried to establish a trusting relationship with debtors, but noted that “I still have to keep everything to a professional level.” Trustees also reminded themselves that they were officers of the court when trying to navigate the competing interests of debtors and trustees, see I2, I7, I41.

helping them with groceries – you know, I can provide resources, I think I wouldn't appear as an officer of the court and that's really important to me."¹⁴⁷¹

The emotions of professionals are subject to important constraints. In Chapter 6, I summarized findings from a number of studies on emotional labour that professionals feel pressure to appear dispassionate. Professionalism is often equated with an absence of emotion, because there is a prominent belief that too much emotion may impair one's ability to be rational. According to this view, professionals suppress strong feelings as a form of self-focused emotional labour because they want to make good decisions, but also as a form of other-focused emotional labour, because they are viewed as more competent when they mute strong displays of emotion.

I want to offer a slightly different understanding of the feeling rules that govern professionals: being professional may not mean working to feel less emotion, but instead working to feel certain types of emotion. The interviewees repeatedly indicated that it was important not to take things personally. There are emotions that one experiences when one is personally involved in a situation and these differ from the emotions that one experiences when one eschews personal involvement. The feeling rules that govern professionals may specify that their emotional register should only include the latter. Working to comply with this feeling rule may be an important type of self-focused emotional labour that provides trustees with a refuge from the emotional demands of their work.

In his 1962 piece "Freedom and Resentment", Peter Strawson distinguished between impersonal and personal emotions, or what he called objective and reactive attitudes.¹⁴⁷² One feels reactive emotions towards a person when one sees them as a full member of one's community. One has expectations about the regard the other person should show one, should show other community members, and what regard one should show the other person. One assesses the regard people show for one another and oneself based on the people's actions. Depending on how closely the degree of regard demonstrated by people's

¹⁴⁷¹ I12.

¹⁴⁷² Peter Strawson, "Freedom and Resentment" in *Studies in the Philosophy of Thought and Action* (Oxford: Oxford University Press, 1968) 71-96.

actions aligns with one's expectations, one may feel a number of reactive emotions such as gratitude, indignation, resentment or compunction. For example, imagine a person on a public bus observes as a young rider fails to offer up his or her seat when an elderly rider boards. The person may perceive that the young rider's behaviour betrays an inappropriate lack of regard for the older rider, and consequently feel indignant towards the young rider. The elderly person may feel an additional element of personal slight, and consequently feel a mix of indignation and resentment. The young rider may be aware that his actions betray an inappropriate lack of regard for the elderly rider and feel a mix of guilt or compunction. These are all examples of reactive emotions.

One feels objective emotions when one takes a step back from full engagement with another person, because one views that person as "warped, deranged, or prone to compulsive behavior or peculiarly unfortunate in his formative circumstances."¹⁴⁷³ One no longer sees the person as a member of the same community, with reciprocal expectations of regard. Instead "to adopt the objective attitude to another human being is to see him, perhaps as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained..."¹⁴⁷⁴ When a person moves from being fully engaged with another to viewing the other as the subject of policy, treatment or study, the person's expectations of the other change. The person makes fewer demands of the other, so there are fewer opportunities to feel the reactive emotions. Instead the person feels emotions that lack that reciprocity, "repulsion or fear... pity or even love, though not all kinds of love"¹⁴⁷⁵.

Imagine the bus scenario again. If a young rider failed to give her seat up to an elderly rider, but the young rider was only a child, the observer might not feel indignation and the elderly rider might not feel resentment. The observer and the elderly rider will understand that the child is still undergoing a process of moral development, which includes

¹⁴⁷³ *Ibid* at 79.

¹⁴⁷⁴ *Ibid* at 79.

¹⁴⁷⁵ *Ibid* at 79.

learning what level of regard is due in the situation and how to show it. The observer or the elderly rider might take it upon him or herself to aid in the child's moral development by explaining to the child that usually able-bodied bus passengers are expected to give up their seats for less mobile ones, but the person would do so without the sting of indignation or resentment.

Professional neutrality might mean limiting oneself to feeling Strawson's objective emotions. The professional can feel and express the detached emotions of a person engaging in policy development, research or treatment of another, but should not "take things personally" as he or she might when adopting a reactive stance. For instance, a doctor might care deeply about her patient and seek to do her best to heal the patient, but with no expectation of regard from the patient. Arlie Hochschild conceived of emotional interchange as a form of debts and credits.¹⁴⁷⁶ When a person assumes the role of a professional, she removes herself from this system of exchange, and to the extent she manages to maintain a purely objective stance, she neither feels an obligation to repay the emotional debts of others, nor does she demand repayment for her own emotional labour.

It became evident during my interviews that trustees place importance on not taking their work too personally. This theme emerged in a variety of contexts. One interviewee cautioned against empathizing too much with a debtor, because "it's hard not to cross over and start taking it personally."¹⁴⁷⁷ Another reported that he did not find constantly dealing with debtors, who might be in sad situations, difficult, because "it's not my fault, it has nothing to be with me personally."¹⁴⁷⁸ One reported that it was important for her to "not be emotionally and personally invested in [her work] to the extent that now I'm going to go home and kick my cat or something like that."¹⁴⁷⁹ Two mentioned that they do not take the debtor's non-compliance personally.¹⁴⁸⁰ Two interviewees indicated they would try to train

¹⁴⁷⁶ Hochschild, *The Managed Heart*, *supra* note 1164 at 77-81.

¹⁴⁷⁷ I18.

¹⁴⁷⁸ I14.

¹⁴⁷⁹ I41.

¹⁴⁸⁰ I4, I29

their staff not to take matters personally.¹⁴⁸¹ One admitted that he did not always manage to remain disengaged: “By the time I’m opposing someone’s discharge we’ve already had a number of conversations about what’s not going right, and I try not to let them get under my skin, but occasionally they do.”¹⁴⁸² One interviewee used regular meetings with her colleagues to discuss “troublesome files” and get feedback on whether she was “going off on a tangent, and getting all emotional and personal and taking something personally, or whether there’s really something relevant here.”¹⁴⁸³ A few interviewees made remarks suggesting that one’s satisfaction at work may be tied to one’s ability to not take matters personally. One interviewee offered that: “I think it’s a very tough industry, if you took it personally, you couldn’t do it.”¹⁴⁸⁴ Another offered: “I love what I do. I don’t take any of it personally.”¹⁴⁸⁵

If trustees adopt an objective stance, does that mean they view debtors as “warped, deranged, prone to compulsive behavior or peculiarly unfortunate in their formative circumstances?”¹⁴⁸⁶ Not necessarily. Some interviewees held the view that debtors struggled with compulsive behaviors, including spending and gambling. Another prevalent view was that many debtors had not acquired important financial literacy skills. Trustees viewed both of these shortcomings as subjects to be treated in bankruptcy. But Strawson points out that some people will adopt an objective stance even where they do not view another as deficient or underdeveloped, “as a refuge, say, from the strains of involvement.”¹⁴⁸⁷ People subject to

¹⁴⁸¹ I14, I16.

¹⁴⁸² I25.

¹⁴⁸³ I41. See also I12: “When I feel I’m getting too attached, I kind of step back and get another trustee’s take on it.”

¹⁴⁸⁴ I16. See also I14: “You can’t survive in this business if you take any of the stuff that goes on personally, because you’re the bad guy in the bankrupt’s eyes and that’s pretty much universal.”

¹⁴⁸⁵ I33.

¹⁴⁸⁶ *Supra* note 1472 at 79.

¹⁴⁸⁷ *Ibid* at 80.

repeated acts of disregard by other bus riders may find that they are less resentful and indignant when they stop viewing other bus riders as members of the same moral community, and instead view them as interesting subjects in an ethnographic study of politeness on public transit.

The literature on emotional labour reveals some instances of professionals adopting an objective attitude as refuge from the emotional demands of their work. The psychology students studied by Yanay and Shahar and the medical students studied by Smith and Kleinman maintained emotional distance from patients by recasting them as problems that required solving as opposed to full humans.¹⁴⁸⁸ For the psychology students, who were required to deal with very difficult behaviors, this frame allowed them to reframe a patient's infuriating conduct as a symptom that required treatment, and thereby transform their feelings of anger into feelings of pity.¹⁴⁸⁹ Harris also noted that maintaining emotional distance enabled barristers to carry out emotional work, such as child protection hearings.¹⁴⁹⁰ For trustees, adopting an objective stance may afford them a refuge from the painfulness of repeatedly empathizing with the sad stories of debtors. Adopting an objective stance may also allow trustees to recast a debtor's non-compliance from being callous slights, to symptoms of an unsuccessful course of treatment. Adopting an objective stance may be an important tool for self-focused emotional labour.

That trustees adopt an objective stance is suggested by some of the metaphors that they used to describe their work - as parenting and health care. These are both situations in which one person aims to train or cure another. These metaphors may also operate as cognitive frames, which trustees can adopt to evoke objective emotions and suppress reactive ones.

Medical metaphors loomed large in my interviews. Trustees compared debtors' financial problems to illness: "personal bankruptcy is sort of like an intensive care ward in a

¹⁴⁸⁸ Smith and Kleinman, *supra* note 1238 at 60; Yanay and Shahar, *supra* note 1240 at 371.

¹⁴⁸⁹ Yanay and Shahar, *ibid* at 346-47, 357.

¹⁴⁹⁰ Harris, *supra* note 1191 at 572.

hospital. People come to you with a variety of injuries, some self-inflicted, some not.”¹⁴⁹¹ Trustees extended this metaphor, comparing themselves to doctors. One noted that trustees undergo a significant period of training, like doctors: “If you look at the training that, for example, I went through. I got a BCom, that’s 5 years. I got a CA that took 3 years. So now we’re at 8 post graduate. 3 years to get the trustees license, now we’re at 11. I’m a doctor of insolvency when you get right down to it, so I consider myself a financial doctor. And you just deal with it, and you try to be as professional as you can.”¹⁴⁹² One pointed out that both doctors and trustees are focused on healing: “I don’t dwell on the problems, and I guess it’s a doctor with someone with a broken bone in great pain. That’s the worst time of their physical life at that point. And he’s helping them get back on track. And I’m doing the same.”¹⁴⁹³ As discussed above, trustees find solace in their ability to help debtors – and this was sometimes framed in terms of a medical metaphor. For instance, once trustee quipped: “Everybody says to me, my god your job must be so depressing. It’s the exact opposite. I have a cure for cancer. These people come in and they have cancer and in 9 months I can have them cured.”¹⁴⁹⁴

Trustees might also compare debtors to errant children, and cast themselves into a metaphorical parent role. Trustees might be particularly apt to adopt this metaphor when they are older than the debtor with whom they are working. One interviewee shared an anecdote about cautioning a young male debtor about the financial perils of working in the oil sands, he observed that he was “almost like a father figure” to the debtor.¹⁴⁹⁵ Another recounted a story about a young debtor, who wanted to make an assignment into bankruptcy despite having relatively little debt, “I give them the mother finger, do you really want to do

¹⁴⁹¹ I37. Trustees also intuited that debt problems may lead to health problems.

¹⁴⁹² I8.

¹⁴⁹³ I32.

¹⁴⁹⁴ I24. See also I32: “People that I meet of course say, oh the bankruptcy trustee, you’re like the undertaker, I say I don’t know, I’m like the recovery surgeon getting them going again, I turn them around.”

¹⁴⁹⁵ I32.

this, to make sure.”¹⁴⁹⁶ Others likened their work with debtors, regardless of a debtor’s age, to parenting – teaching loomed large in these uses of the metaphor. One offered: “It’s like they’re your kids. You gotta teach them. And some don’t want to learn. And if somebody doesn’t want to learn, you can’t teach them anything. So there are successes, there are failures.”¹⁴⁹⁷ Another shared: “It’s kind of like, your mommy never told you this. You need someone to tell you this. No. You can’t have that. And I loved raising my children and I’m an empty nester now, and its like I don’t have to be an empty nester, I have all these little birds coming in.”¹⁴⁹⁸

If professionals are expected to maintain an objective stance in their emotions, this could provide an important insight into the ways in which they try to direct their experiences of empathy and frustration. Trustees work to experience emotions in a manner that advances the treatment of the debtor and the policy goals of the bankruptcy system. They empathize with and feel compassion for the debtor to the extent that this emotional work advances the treatment of the debtor by providing him or her with the support and connection necessary to take control of his or her financial situation, but not to the extent that the debtor is coddled. Trustees empathize and feel compassion without an expectation of reciprocal positive emotional work by the debtor. An expression of gratitude from the debtor is welcomed but never assumed. By quieting their expectations for reciprocal regard from the debtor, trustees maintain emotional distance, which protects them from painful feelings if the debtor turns against them. The trustee’s frustration, when the treatment of a debtor goes awry, is an appropriate objective emotion, as is conveying that emotion to the debtor, if doing so advances the treatment of the debtor. Frustration may be inappropriate if it hampers the debtor’s progress through bankruptcy or when it stems from the trustee’s perception that a debtor’s non-compliance displays a lack of regard for the trustees. A trustee’s expectation of regard is inconsistent with maintaining an objective stance.

¹⁴⁹⁶ I29.

¹⁴⁹⁷ I13.

¹⁴⁹⁸ I41.

When trustees successfully maintain an objective stance, this might narrow the criteria against which they evaluate the deservingness of a debtor. A person, who has adopted the reactive stance to another, views the other as a full member of the community and subject to all the community's norms governing behavior. A person, who has adopted the objective stance towards another, excuses the other from compliance with all of the community's norms, especially those that stipulate how a person conveys appropriate levels of regard to others. Instead, the other person's behavior is judged in light of the desired treatment or policy outcome. A doctor treating a patient for a heart condition may look favourably on the patient's decision to take up jogging, because it advances the course of treatment, and may judge as blameworthy the patient's decision to eat red meat every night, because it exacerbates the heart condition. The doctor may be simply unconcerned with the patient's promiscuous sex life, which otherwise might violate his community's norms, because it does not impact the course of treatment.

There is evidence to suggest that trustees have narrowed the moral criteria they use to judge a debtor's behavior to include only criteria that relates to the debtor's rehabilitation. Trustees could use their wide discretion in the opposition to discharge process to penalize a wide variety of behaviors that they perceive to be blameworthy, but they do not. For many trustees, pre-bankruptcy misconduct, such as profligate spending or non-payment of taxes, is only of concern if the debtor imperils his or her discharge by continuing to engage in the behavior after making an assignment into bankruptcy. Post-assignment misconduct may attract an opposition because it suggests that the debtor's "course of treatment" remains incomplete. Non-compliance during bankruptcy is more likely to attract an opposition. In the absence of an exculpatory reason, such as advanced age or disability, non-completion of duties is viewed as hampering the debtor's rehabilitation. For some trustees, compliance is important because they take the perspective that the completion of duties helps debtors develop better financial habits and advance their rehabilitation through learning. Other trustees are of the view that some of the duties are pointless (e.g., counselling) or unfairly burdensome (e.g., surplus income payments), but that a debtor's completion of them is still fundamental to the debtor's economic rehabilitation, because the trustee may be required to lodge an opposition if the duty has not been completed.

7.4. CONCLUDING THOUGHTS

Trustees are carrying out emotional labour, both directed towards the debtors with whom they work and towards themselves. They want debtors to feel calm, empathized with, not judged and connected enough to the trustee that they carry out their duties. In cases of non-compliance, trustees may place pressure on debtors to fulfill their duties by adopting an aggressive stance designed to make the debtor feel anxious. With regard to themselves, trustees want to engender some empathy for the debtors, but not too much. Trustees suppress strong feelings of frustration. Trustees also derive significant satisfaction – and find solace from the sad stories they encounter – from the knowledge that they are able to provide debtors with a significant and concrete form of help, namely debt relief. Throughout they aspire to remain professional and avoid taking any aspect of their work too personally.

The ways in which trustees exercise their discretion during the opposition to discharge process may be shaped by the emotional labour they carry out. They work to adopt a compassionate stance at the initial stages of a bankruptcy file and, to do so, they adopt cognitive frames, which minimize the culpability of the debtor's pre-bankruptcy conduct. Their work is animated by a sense of hopefulness and they experience frustration when debtors comport themselves in ways that belie their hopefulness. Non-compliance during bankruptcy can thwart the smooth administration of a file, resulting in a trustee becoming frustrated and judging the debtor more harshly. They work to maintain an air of professionalism. Traditionally, professional dispassion has been understood as a muting of all emotion, but I suggest instead that it might mean adopting an objective – as contrasted with a reactive – stance. A trustee, who has adopted an objective stance, may assess the deservingness of a debtor according to a more narrow set of criteria than one who adopted a reactive stance. These emotional dynamics help explain why non-compliance during bankruptcy is much more likely to attract the trustee's censure than pre-bankruptcy misconduct.

This emotional explanation of how trustees exercise their discretion in the opposition to discharge process supplements the financial explanation that emerged in Chapter 4, and remedies some of its shortcomings. Unlike the financial explanation, the emotional one provides an account of why trustees might not file an opposition, even when

faced with evidence of pre-bankruptcy conduct, which has been characterized in the case law as culpable. This dynamic was evident in Chapter 5, where trustees consistently adopted a more sympathetic view of debtors who had engaged in misconduct than was prescribed in the case law. The emotional explanation also provides an account of why trustees might lodge oppositions on non-compliance grounds, even if the cost of an opposition outweighs any realistic assessment of a potential benefit.

How important is the emotional explanation relative to the financial one? My research suggests that the relative importance of these factors depends on the type of decision being made. With respect to pre-bankruptcy misconduct, the financial realities constrain trustees from discovering pre-bankruptcy misconduct, whereas the emotional dynamics lead them to characterize disclosed misconduct as less blameworthy. I lack the data to identify how frequently a debtor's pre-bankruptcy misconduct goes undiscovered, nor can I identify how frequently a debtor's pre-bankruptcy conduct is characterized as insufficiently blameworthy to merit an opposition. With respect to non-compliance during bankruptcy, both the financial and the emotional factors lead trustees to lodge oppositions. My data does not enable me to quantify the relative importance of each type of factor to the trustee's ultimate decision to oppose for non-compliance; that is not the project I have undertaken here. A project that sought to tease apart their relative importance would need to adopt a different model of inquiry. There are some promising examples of this manner of research on the discretionary decision-making process of American bankruptcy judges.¹⁴⁹⁹ I would caution that in undertaking such a project, one would need to remain mindful that the two types of factors are not entirely distinct. Financial factors, such as competition for business, can shape the feeling rules of a workplace. Any attempt to test the relative importance of the two types of factors would need to account for the blurry border between the two categories.

I have framed my investigation into the opposition to discharge process in the larger context of the rule of law and how it needs to balance the goals of predictability and consistency with flexibility. An examination of the emotional dynamics of the work of a

¹⁴⁹⁹ Jennifer Robbenolt & Robert Lawless, "Bankrupt Apologies" (2013) 10:4 J of Empirical Studies 771; Jeffrey J Rachlinski et al "Inside the Bankruptcy Judge's Mind" (2006) 86 BU L Rev 1227

bankruptcy trustee speaks to these larger themes. My research suggests that trustees across Canada are subject to a consistent and predictable set of demands, which shape the feelings rules governing the emotional labour they carry out. The emotional terrain of bankruptcy law, along with its financial realities, promotes consistency and predictability across the system, in ways that are not revealed when a person consults only traditional sources of the law, such as the *BLA* and the written decisions of judicial officers. By paying close attention to the emotions and practices of actors involved in the Canadian personal bankruptcy system, one can better understand its operation.

8. SO WHAT? STEPS FOR REFORM AND RESEARCH

8.1. INTRODUCTION

The opposition to discharge process bestows a very large amount of discretion on trustees to penalize a raft of different types of misconduct, both prior to and during bankruptcy. The legislative provisions and case law both suggest that the mechanism may be primarily used to penalize pre-bankruptcy misconduct, but this does not reflect the reality on the ground. A substantial majority of oppositions result from the non-compliance by debtors with their duties during the bankruptcy process, and oppositions based on pre-bankruptcy misconduct are relatively rare.

One possible explanation for this pattern of oppositions is financial. Trustees lack the financial resources on most files to investigate pre-bankruptcy misconduct. Creditors, who may be well positioned to provide information about the debtor's pre-bankruptcy misconduct, are largely disengaged from the bankruptcy process. The OSB seems reluctant to become involved in rigorously investigating pre-bankruptcy misconduct, possibly due to a lack of funds. Consequently, a debtor's pre-bankruptcy conduct may go undiscovered. Furthermore, the method by which trustees are remunerated provides little incentive to carry out such investigations. But my research suggests that financial considerations, the lack of resources or incentives, may not entirely explain how the opposition to discharge process functions. I asked each of my interviewees how they would handle three different debtor types, all of whom have been characterized in the case law as having engaged in pre-bankruptcy misconduct. As compared to the written decisions from discharge hearings, the trustees expressed more sympathetic views of such debtors and, additionally, indicated with remarkable consistency that it was not their role to raise such issues. Even when there is no question about what types of pre-bankruptcy conduct have occurred, trustees appear reluctant to characterize it as blameworthy or take steps to penalize it. A further shortcoming of the financial explanation is that trustees regularly oppose on the basis of a debtor's non-compliance during bankruptcy, despite the extra costs of doing so and the uncertainty of further recovery.

An alternative or additional explanation for why trustees are reluctant to penalize pre-bankruptcy misconduct and focus, instead, on non-compliance during bankruptcy can be formulated by looking at the emotional labour they perform. Initially, they try to empathize with debtors and adopt cognitive frames that evoke compassionate feelings, but also minimize the culpability of the debtor or otherwise forestall negative judgments about the debtor. When carrying out this emotional labour, a trustee may be less prepared to characterize debtor's pre-bankruptcy conduct as blameworthy. Additionally, trustees are hopefully-oriented towards a future goal, the financial rehabilitation of the debtor. The criteria by which trustees evaluate the deservingness of a debtor are intimately linked to this goal. Pre-bankruptcy misconduct is not a significant concern for trustees unless it threatens to impede this rehabilitative goal, for example, when it continues after the assignment. Conversely, trustees experience significant frustration in response to non-compliance by a debtor with his or her duties during bankruptcy, because this non-compliance may signal that the debtor is not learning better financial habits, and can derail the debtor's fresh-start. In this frustrated state, trustees may more readily label non-compliance as censure-worthy, and their pattern of oppositions are consistent with such a dynamic.

These findings have implications for both the rule of law and the policing of abuse in the bankruptcy system. I finish this dissertation by discussing some of these implications. First, I set out how the opposition to discharge system could be restructured to ensure that the system identifies and addresses a debtor's pre-bankruptcy misconduct. I suggest that as part of this structural overhaul, the grounds of opposition set out in the *BLA* need to be updated, the oversight of potential opponents should be enhanced, and potential opponents should be provided with clearer guidelines around when to exercise their discretion. Second, I outline two further changes to the opposition to discharge system that my interviewees repeatedly urged on me: reducing the number of matters that require court appearances, and getting rid of surplus income mediation. Third, I argue that individuals, who work in the bankruptcy system and the researchers who study it, would do well to recognize the significance of emotional labour to the operation of the system. Acknowledging the centrality of emotional labour may have implications for how trustees are trained and how their work lives are organized. It also opens doors for promising further research that may allow researchers to deepen their understanding of how the bankruptcy system operates, and

develop policy prescriptions that account for the complex experiences of the people who populate the bankruptcy system.

8.2. PREDICTABILITY, CONSISTENCY, BIAS & FLEXIBILITY: STRIKING THE RIGHT BALANCE IN THE OPPOSITION TO DISCHARGE PROCESS

My concern when I first began to study the opposition to discharge process was that potential opponents were given too much latitude to make their own determinations about what constitutes deservingness. An administrative system that incorporates a wide element of discretion allows for flexible decision-making that is calibrated to an individual's circumstances, but it lacks predictability, consistency and risks being biased by irrelevant considerations. When exercising their discretion, I worried that implicit biases may shape the potential opponent's decision-making process. For instance, previous law and society research suggested that in such discretionary regimes, lower class individuals were often viewed less favourably and subject to worse outcomes.

My research suggests that in the opposition to discharge process, trustees have significantly narrowed the scope of their discretion, choosing not to exercise their power to oppose in a wide range of circumstances where they could. Through their practice, they have re-introduced a large element of consistency and predictability into the personal bankruptcy system. For most debtors, as long as they fulfill their duties in bankruptcy, they will receive an automatic discharge. I cannot rule out that implicit biases may continue to play a role in how trustees decide when to oppose a discharge. Some voiced a willingness to overlook instances of non-compliance, and the decision to do so could be shaped by irrelevant considerations. However, the space in which such biased decision-making can occur has been significantly narrowed, because trustees generally limit themselves to oppositions based on non-compliance.

The trustees' focus on non-compliances raises the concern that debtors, who have engaged in serious pre-assignment misconduct, may be able to access the bankruptcy discharge. One way that the government could respond to this concern would be to acknowledge that abuses of the system may occur, but to refrain from taking any further steps to police the abuse on the logic that the policing costs exceed the benefits of eradicating abuse. While this stance holds significant appeal for me personally, I worry about

its feasibility. The bankruptcy system inspires considerable public anxiety about perceived abuses, not unlike the anxiety inspired by welfare programs. This anxiety has been marshaled in support of legislative amendments, which restrict access to the discharge. In the lead up to the adoption of the *Bankruptcy Abuse Prevention and Consumer Protection Act*, Americans were told that each household was incurring an annual bankruptcy tax of \$400, the calculated pass-along costs resulting from abuse of the bankruptcy system.¹⁵⁰⁰ Before Canada's legislation was amended to make it more difficult to discharge student loans, stories circulated about the newly graduated professional – a doctor or a lawyer – who avoided repaying publicly-funded student loans by making an assignment into bankruptcy prior to embarking on a well paid career.¹⁵⁰¹ I worry that, unless there is an effective mechanism for policing abuse in the bankruptcy system, public anxiety may be fanned and harnessed to support legislative amendments that restrict the availability of debt relief to the truly honest, unfortunate debtor.

In the following three sections I set out how I think the opposition to discharge process could be changed to ensure that it responds adequately to both pre-bankruptcy misconduct and non-compliance during bankruptcy. In preparing my recommendations, I have noted a number of problems with the current system. Trustees are disinclined to oppose pre-bankruptcy misconduct. Some of the grounds contained in section 173 are outdated or inexplicably inconsistent with other provisions of the *BLA*. Providing a list of grounds upon which oppositions can be lodged risks being both under- and over-inclusive. My recommendations respond to each of these problems, and I then turn to consider the political process by which such changes might be implemented.

8.2.1. NEW RESPONSIBILITIES FOR THE OSB

I recommend that the OSB be tasked with policing pre-bankruptcy misconduct, because OSB analysts do not appear to be subject to the same pressures that hamper a trustee's ability to identify and investigate misconduct, and to characterize it as blameworthy.

¹⁵⁰⁰ See the discussion in Chapter 3, Section 3.2.4.1.

¹⁵⁰¹ Saul Schwartz, "The Dark Side of Student Loans" (1999) 37 *Osgoode Hall L J* 307 at 331.

Trustees face both financial and emotional constraints, which limit their ability to police pre-bankruptcy misconduct. One can imagine changes to the system that might remove these constraints. The remuneration formulas for trustees could be amended to reward them for investigating misconduct. But such a change could create other problematic incentives, encouraging trustees to pursue frivolous investigations of debtors with valuable bankruptcy estates. In other circumstances, such a change would do little to alter the status quo. Many estates are of such low value, that the only way to provide trustees with extra funds would be through an injection of funds from an outside source. It might be more difficult to shift the feeling rules, which disincline bankruptcy trustees from opposing on the basis of pre-bankruptcy misconduct. For instance, consider the feeling rule that stipulates a trustee should be compassionate when first meeting with a debtor. Competition for a debtor's business was one factor that placed pressure on trustees to appear compassionate. Canada could adopt a system, where debtors were assigned to trustees on a rotational basis.¹⁵⁰² This may reduce the competitive pressure, but trustees do not only compete with each other. They also compete with an array of credit counsellors. Greater regulation of these other entities might be necessary to reduce the pressure on trustees to attract business by appearing compassionate. These innovations – adoption of a rotational system and greater regulation of other debt industry professionals – might still not be enough to shift the feeling rules. Other instrumental goals advanced by a compassionate stance – eliciting information and encouraging compliance – are central to the work of the trustee and it is difficult to imagine how to shift these determinants of the feelings rules.

Even if it was possible to shift the feeling rules, to which trustees are subject, with the aim of motivating them to pursue abusive debtors more aggressively, I am not convinced that the costs of doing so would outweigh the benefits. The emotional states fostered by the feeling rules serve important ends.

¹⁵⁰² In the public consultations carried out with insolvency practitioners about the commercial insolvency system in 2011, one participant suggested that monitors in *Companies Creditors' Arrangement Proceedings* might be appointed by the Court from a pre-approved list, see Janis Sarra, *Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System* (July 2012) online: Insolvency Institute of Canada https://www.insolvency.ca/en/iicresources/resources/Examining_the_Insolvency_Toolkit_Dr._J._Sarra_2012.pdf [July 7, 2015].

A trustee, who fosters compassion for a debtor, may be less inclined to characterize a debtor's pre-bankruptcy conduct as culpable. At the same time, by taking the time to listen to a debtor's story, the trustee conveys respect for the debtor. This may be an important dignity imbuing moment for a person, who has been robbed of his or her self-worth in the lead up to his or her financial failure. Additionally, to feel compassion, one must empathize with the debtor. To empathize – or even just to appear as though one is empathizing – one must listen to the debtor. While listening, the trustees may collect important information that enhances the trustee's ability to administer the files such as admissions about pre-bankruptcy misconduct, considerations that bear on a bankrupt's decision between a proposal and bankruptcy, or other obstacles that may be addressed prospectively.

The hopeful orientation towards the financial rehabilitation of the debtor may direct the trustee's attention away from pre-bankruptcy misconduct, but it also provides trustees with satisfaction from what could otherwise be a very emotionally painful job. When they are able to convey this hopefulness to the debtor, trustees relieve the debtor of some of the emotional strain of over-indebtedness, and may motivate the debtor to make efforts him or herself towards rehabilitation.

By adopting an objective attitude, trustees may narrow the types of emotions they allow themselves to feel and the criteria upon which they judge the culpability of a debtor. If one wants them to respond with indignation to a wider range of violations of a community's economic norms, trustees might need to adopt a reactive attitude towards debtors, meaning they would need to see bankrupts as full members of a community, subject to a web of expectations about the level of regard they should show other community members. But if they adopt a reactive attitude, there is a risk that trustees may make judgments on the basis of personal reactive attitudes. Personal reactive attitudes “rest on and reflect an expectation of and demand for the manifestation of a certain degree of goodwill or regard on the part of other human beings towards ourselves.”¹⁵⁰³ If a trustee lodged an opposition because he felt that a debtor was not sufficiently respectful of him, he would be acting on the basis of personal reactive attitudes. Encouraging such types of judgments is undesirable because it

¹⁵⁰³ Strawson, *supra* note 1472 at 85.

would increase the element of arbitrariness and inconsistency in the bankruptcy system. Debtors would be judged, not only by the degree to which they comply with the community's economic norms, but also a trustee's personal views of the level of regard he or she is owed by the debtor. I worry that it is perhaps unrealistic to ask trustees to adopt a reactive attitude towards debtors, to the extent that they see them as fully engaged members of a community and expect them to comply with a wide range of rules about what level of regard they should show others, but not to develop any expectations about what level of regard a debtor should show the trustee.

Instead of taking steps to encourage trustees to take a more active role in policing pre-bankruptcy misconduct, I recommend that the OSB be tasked with the responsibility for investigating and pursuing such misconduct. From an emotional standpoint, the OSB appears well positioned to take on such a role. Trustees meet with debtors when they are in very difficult circumstances and compassion is often a natural response. Even in those situations when compassion is not a natural response, trustees work to feel it so as to attract business, evoke more information from a debtor, and build a relationship with the debtor that encourages compliance throughout the bankruptcy process. OSB analysts are removed from the emotional demands and business considerations, which result in trustees experiencing – or working to experience - compassion, and adopting the concomitant belief that the debtor's bad fortune is undeserved. The trustee can continue providing individual debtors with a dignity-imbuing empathetic experience and OSB analysts can ensure that pre-bankruptcy misconduct is identified and penalized. In Chapter 4, I suggested that one way to fund such an expanded role by the OSB would be to tax creditors on the value of consumer loans in default each year. The OSB's role could be expanded without such a revenue generator; however, finding operational funding may be an obstacle. Since 1997, the OSB has been operated as a special agency of the Federal Government with the expectation that it will be self-funding.¹⁵⁰⁴

I recommend that the provisions dealing with oppositions to discharge be redrafted to clearly indicate which actor has responsibility for which grounds, so as to avoid actors

¹⁵⁰⁴ Iain Ramsay, "Interest Groups", *supra* note 427 at 393.

identifying grounds for opposition, but declining to lodge an opposition because they believe it is someone else's responsibility to do so. Responsibility for opposing on grounds related to pre-bankruptcy misconduct will be assigned to the OSB. Such grounds would include giving preferences, undertaking frivolous and vexatious litigation, or engaging in rash and hazardous speculation. Trustees will be assigned responsibility for grounds related to non-compliance, such as failure to pay surplus income and non-completion of duties.

It may be desirable to continue to allow creditors to lodge oppositions on any of the enumerated grounds, so that motivated creditors have a mechanism for holding debtors to account when trustees or the OSB are reluctant to act. The difficulty will be in providing the creditor with opportunities for involvement, while at the same time not creating a structure, which encourages OSB analysts and trustees to shirk their responsibility for policing their respective areas of pre-bankruptcy misconduct or non-compliance. One possibility might be to adopt language akin to section 38 of the *BLA*. Section 38 allows a creditor to apply to court for an order to take a proceeding that is available to the trustee, if the trustee "refuses or neglects" to take the proceeding. Creditors use section 38 orders to pursue impeachment proceedings, or causes of action that have vested in the trustee. The revised opposition to discharge process could provide that where the OSB or trustee has refused or neglected to lodge an opposition, the creditor can. Unlike section 38, the creditor would not be required to get a court order prior to lodging an opposition: the judicial officer will rule on the merit of the opposition at the discharge hearing. Such language would make it clear that the creditor's responsibility is secondary to that of the trustee or OSB analyst.

8.2.2. UPDATING THE GROUNDS FOR DISCHARGE

Before the OSB is tasked with taking on new responsibilities, a larger conversation needs to occur regarding what constitutes pre-bankruptcy misconduct. Trustees have circumscribed the grounds upon which they choose to exercise their discretion, but if taking on a bigger role in policing the bankruptcy system, the OSB may not place the same limits on its discretion. Currently, the grounds upon which an opposition may be lodged include both the enumerated grounds in section 173 and any other ground, which a potential opponent believes may disentitle a debtor from receiving an absolute discharge. I recommend that the enumerated grounds be reviewed, updated and restructured, and that the potential opponents' residual discretion be made subject to greater oversight, and

structured by providing a list of principles to guide its exercise. I take up each of these recommendations in turn.

Section 173 needs to be reviewed and updated, removing imprecise or outdated grounds and adding new ones that capture new forms of misconduct. The need for such revisions was highlighted in a recent discussion paper, circulated as part of Industry Canada's statutorily mandated review of insolvency legislation.¹⁵⁰⁵ A handful of the individuals and organizations, who participated in the formal consultation process, opined on how section 173 should be altered.¹⁵⁰⁶ In its Final Report, synthesizing the feedback it received, Industry Canada did not identify section 173 as a topic upon which there was any consensus for reform.¹⁵⁰⁷ Notwithstanding the lack of consensus, the feedback provided to Industry Canada does highlight some provisions in section 173, which could be updated.

Some grounds are problematically vague, such as having less than 50 cents of assets for every dollar of unsecured debt as a result of circumstances for which the bankrupt can justly be held responsible.¹⁵⁰⁸ Jean Daniel Breton, a bankruptcy trustee operating in Quebec, noted that there is no guidance in this section about how to calculate if the 50% threshold has been reached. Breton opined that if one takes a debtor's "total assets less secured claims, divided by unsecured liabilities" it is rare that the value of a debtor's assets will exceed 50% of the value of the debtor's unsecured liabilities.¹⁵⁰⁹ Likewise, Iain Ramsay notes that the section no longer "fit[s] the contemporary reality of the great majority of consumer debtors, who have no assets."¹⁵¹⁰ Both of these respondents are making the point that this

¹⁵⁰⁵ Canada, Industry Canada, *Statutory Review of the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act*, *supra* note 95 at 33.

¹⁵⁰⁶ Five of 68 respondents to the invitation for submissions discussed amending section 173.

¹⁵⁰⁷ Canada, Industry Canada, *Fresh Start: A Review of Canada's Insolvency Law*, *supra* note 451 at 16.

¹⁵⁰⁸ *BLA*, *supra* note 11, s 173(1)(a).

¹⁵⁰⁹ Submission of Jean-Daniel Breton to Industry Canada (July 14, 2014) at 48.

¹⁵¹⁰ Submission of Iain Ramsay to Industry Canada (July 15, 2014) at 5.

ground applies to nearly every personal bankruptcy.¹⁵¹¹ My research shows that this ground was raised in 12.01% of all oppositions. This suggests it is not raised in many cases where it could be, but is raised with relative frequency as compared to every other enumerated ground, with the exceptions of non-payment of surplus income and non-completion of duties. This ground gives potential opponents a *carte blanche* to lodge oppositions, which they are able to do in any event because of their residual discretion to oppose, but it adds little by way of guidance regarding when an opposition is warranted. It should be removed.

Some grounds of opposition may need to be removed because they no longer adequately reflect Canadian society's values. For instance, an opposition can be lodged where gambling contributed to a debtor's financial difficulties.¹⁵¹² Medical practitioners now recognize problem gambling as a form of addiction.¹⁵¹³ Canadian law protects individuals from being discriminated against on the basis of mental disabilities, including addictions, yet listing gambling as a ground upon which a debtor's discharge may be opposed could result in an individual being penalized for having an addiction.¹⁵¹⁴ In its submission to Industry Canada, CAIRP flagged that it would be helpful if the legislation provided "clear direction on dealing with gambling, where a bankrupt suffers more from a gambling addiction, rather than dishonesty."¹⁵¹⁵ On a related note, Rumanek and Company Ltd, a firm of bankruptcy trustees operating in Ontario, suggested that the list of factors in section 173 should be expanded to include substance abuse. The justification offered was that otherwise an individual struggling with addictive behaviors may be automatically discharged from bankruptcy twice before seeing a judicial officer, and a judicial officer could require that the

¹⁵¹¹ Iain Ramsay makes the same point in "Individual Bankruptcy", *supra* note 2 at 69.

¹⁵¹² *BLA*, *supra* note 11, s 173(1)(e).

¹⁵¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (2013), s. 312.31; Garry Smith & Rob Simpson, "Gambling Addiction Defence on Trial: Expert Witness Perspectives" (2014) 3 *Int'l J of Crim & Sociology* 318 at 321-22.

¹⁵¹⁴ E.g., *Canadian Human Rights Act*, RSC 1985, c H-6, s 5-14; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 3-9.

¹⁵¹⁵ Submission of the Canadian Association of Insolvency and Restructuring Professionals to Industry Canada (July 15, 2014) at 51.

individual take steps to address his or her addiction.¹⁵¹⁶ Ensuring that an individual receives treatment for an underlying addiction is a legitimate goal of the bankruptcy system, but the opposition to discharge process may not be the best place for an intervention to occur. Adding substance abuse to the list of grounds in section 173 does not guarantee that a potential opponent will lodge an opposition and thereby trigger a hearing before a judicial officer. Moreover judicial officers have no special expertise that qualifies them to address addiction issues. I suggest that, instead of including addictive behaviors in the list of grounds disqualifying bankrupts to a discharge, an innovative approach needs to be developed to ensure that bankrupts are receiving appropriate treatment to address underlying addictions.

Some grounds in section 173 seem incongruous with other parts of the legislative scheme. Since 2009, second-time bankrupts receive an automatic discharge unless someone opposes, and yet, being a second-time bankrupt is – without more – a reason to have one’s discharge opposed. In its submission to Industry Canada, CAIRP urged that previous bankruptcies should continue to be included as a ground under section 173, notwithstanding the extension of automatic discharges to second-time bankrupts.¹⁵¹⁷ CAIRP did not explain why it took this position. I would urge amendments to section 173 that distinguish between second-time filers and third (or more) time filers. The 2009 amendments indicate a shifting conceptualization of who constitutes an honest unfortunate debtor: the second-time bankrupt now qualifies. A second-time bankrupt may engage in other behaviors, which disqualify him or her from a discharge. The opposition to discharge scheme should enable opponents to attack such behaviors directly, rather than circuitously by raising an individual’s previous filing. On the other hand, previous bankruptcy filings may still merit inclusion as a ground under section 173 where the debtor is a third (or more) time filer. Third (or more) time filers must apply for a discharge, and will appear before a judicial officer in any event. Including two or more previous bankruptcies as a ground under section 173 restricts judicial officers from granting an absolute discharge at the hearing. A final multiple filing scenario that bears consideration is an individual, who has repeatedly made use of the proposal

¹⁵¹⁶ Submission of Rumanek and Company Ltd to Industry Canada (July 14, 2014) at 4.

¹⁵¹⁷ Submission of the Canadian Association of Insolvency and Restructuring Professionals to Industry Canada, *supra* note 1515 at 52.

processes under the *BLA*, but is only making a first or second assignment into bankruptcy. Legislators have expressed a clear preference for proposals on the basis that individuals should pay back a portion of their debts, if they are able.¹⁵¹⁸ At the same time, individuals can be released from significant amounts of debt in a proposal. If repeated use of proposals is considered blameworthy, the grounds in section 173 may need to be drafted to reflect such a judgment.

Another ground in section 173, which seems incongruous with other parts of the legislative scheme is the provision that an individual's discharge can be opposed on the basis of a preference given in the three months prior to bankruptcy. A debtor prefers a creditor when the debtor gives the creditor something of value, which puts the creditor in a better position than it would be under the rules of distribution in bankruptcy. Another creditor or the trustee can impeach a preference. Under the impeachment provisions, a preference between the bankrupt and an arm's length creditor is void if it occurs in the three months prior to bankruptcy.¹⁵¹⁹ The look-back period is longer when the bankrupt and the creditor are not operating at arm's length; a preference is void if it occurs in the 12 months prior to bankruptcy.¹⁵²⁰ I see no justifiable reason why the giving of a preference to a non-arm's length party during this longer period should not be a ground in section 173. Moreover, I see no justifiable reason to include preferences as a ground for opposition, but not transfers at undervalue. A transfer at undervalue is another impeachable transaction, when a debtor disposes of property or provides services and receives no consideration, or consideration that is conspicuously less than the fair-market-value of the property or services.¹⁵²¹ Section 173 should be harmonized with the impeachment provisions of the *BLA*.

¹⁵¹⁸ See the discussion in Chapter 3.

¹⁵¹⁹ *BLA*, *supra* note 11, s 95(1)(a).

¹⁵²⁰ *Ibid*, s 95(1)(b).

¹⁵²¹ *Ibid*, s 2 "transfer at undervalue", s 95.

8.2.3. ADDRESSING OVER & UNDER-INCLUSIVENESS

Providing a legislative list of enumerated grounds in which a potential opponent is required to lodge an opposition creates greater predictability and consistency in a system, but the drawback to such an approach is that the list may be both over- and under-inclusive. In some situations, lodging an opposition on the enumerated grounds might work an injustice, by limiting a deserving individual's ability to access a discharge. Alternatively, the grounds may not capture all the types of misconduct that a debtor could engage in, and an undeserving debtor may receive a discharge without triggering an opposition. The current system includes mechanisms to address the problems of over- and under-inclusiveness. These mechanisms expand the scope of a potential opponent's discretion and should be restructured to better promote consistent, predictable and unbiased decision-making.

8.2.3.1. OPTIONAL USE OF THE ENUMERATED GROUNDS & THE NEED FOR OVERSIGHT

The opposition to discharge system avoids the problem of over-inclusiveness by making oppositions optional. Section 172 sets out that when a section 173 fact is proven, the judicial officer is restricted from making an absolute discharge, but it does not mandate that an opposition be lodged when an opponent suspects a section 173 fact might exist. The grounds in section 173 are “facts for which discharge *may* be refused, suspended or granted conditionally.”¹⁵²² If a potential opponent can simply opt to disregard the existence of an enumerated ground, this permissible structure undermines the predictability and consistency provided by bright-line rules.

A trustee's decision not to oppose is subject to some degree of oversight. Trustees are required to prepare a section 170 report detailing the causes of bankruptcy, the debtor's conduct before and after bankruptcy, the degree of the debtor's compliance with his or her duties, and “any other fact, matter or circumstance” that would justify the court in refusing an unconditional order of discharge.”¹⁵²³ The section 170 report informs creditors, and the OSB of instances where a trustee has identified a section 173 fact, but opted not to oppose. However, this oversight mechanism has a limitation. A section 170 report is not required in

¹⁵²² *Ibid*, s 173(1).

¹⁵²³ *Ibid*, s 170.

every bankruptcy, and there could be cases where a trustee has identified a section 173 fact, but is not required to prepare a section 170 report.¹⁵²⁴ Under my proposed system, trustees would be tasked with policing non-compliance during bankruptcy, and I would recommend that they be required to prepare a section 170 report in any file where there has been non-compliance. They would be required to detail the non-compliance and explain why they have, or have not, opted to lodge an opposition. This report would then be circulated to the debtor, creditors, and the OSB. The creditors could lodge an opposition, if they thought one was warranted.

The OSB's decision to oppose, or not, is not currently subject to scrutiny. If the OSB is delegated primary responsibility for identifying and pursuing pre-bankruptcy misconduct, I recommend that they be made subject to a similar oversight mechanism as trustees. The OSB could be mandated to prepare a report, like a section 170 report, when they identified one of the enumerated grounds. This report would then be circulated to the debtor, the trustee and the creditors. The creditors could lodge an opposition, if they thought one was warranted.

8.2.3.2. PURPOSIVELY STRUCTURING RESIDUAL DISCRETION

Providing a legislative list of enumerated grounds on which a potential opponent can lodge an opposition may also be under-inclusive. It is difficult to identify all the different types of misconduct in which individuals may engage. Moreover, specific rules may encourage gamesmanship by unscrupulous debtors. If a debtor's discharge can be opposed on the basis of preferences made in the three months before bankruptcy, an unscrupulous debtor may wait three months and one day from the time a preference was made before filing an assignment. Under the current system, the enumerated grounds are not an exhaustive list and parties can lodge oppositions on other grounds, but they are given little direction as to what additional types of grounds might be appropriate ones upon which to lodge an opposition. This wide grant of discretion is problematic, because it undermines

¹⁵²⁴ A section 170 report only needs to be prepared when a bankrupt has surplus income, the bankrupt's discharge has been opposed, the bankrupt has previously been bankrupt or a court hearing of the discharge is required, *General Rules*, *supra* note 77, R 121.1.

predictability and consistency in the system, and provides more room for biased decision-making.

Attempting to resolve the tension between predictability and consistency, on the one hand, and flexibility on the other is not a futile exercise, and revised legislation could strike a better balance between these divergent aims. Len Rotman gestures towards a solution. Rotman shares Lon Fuller's view – outlined in Chapter 1 - that laws must provide “a readily ascertainable basis for its standards of behavior.”¹⁵²⁵ Rotman suggests that this goal needs to be balanced with the retention of “sufficient flexibility to respond to new and unique circumstances.”¹⁵²⁶ Too much discretion and laws lack predictability and consistency; too little discretion and rules risk being applied in a technically correct way that subverts their larger purpose. Rotman sees a solution to this quandary in the equitable jurisdiction of the court, which allows a court to depart from the strict application of the legal rules to ensure a more just outcome. Rotman is adamant that equitable jurisdiction should not be used as a judicial *carte blanche* for unprincipled decision-making, but that the court should only exercise its equitable discretion in a way that accords with the spirit of the law.¹⁵²⁷ When equitable jurisdiction is exercised in accordance with the spirit – or purpose – of a law, it becomes easier for individuals to predict outcomes. The purposive approach should translate into greater consistency in the decisions made, and help actors identify what considerations are relevant.

Rotman argued that equitable jurisdiction could inject needed flexibility into the law, but the opposition to discharge process already contains a significant measure of flexibility. Rotman's analysis is useful because it suggests how a potential opponent's discretion can be exercised more consistently and predictably – by tying its exercise to the “spirit of the law.” In Chapter 3, I examined how judicial officers apply the rationales of bankruptcy when deciding applications for discharge. I argued that the multiple rationales offered for the

¹⁵²⁵ Leonard Rotman, "Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91 Boston U L Rev 921 at 946.

¹⁵²⁶ *Ibid* at 946.

¹⁵²⁷ *Ibid* at 948.

discharge might support divergent outcomes, but I discouraged any attempt to rank the rationales. Elevating one rationale over others may be analytically advantageous, because it becomes easier to identify the appropriate outcome. One need only ask, “which outcome best advances the pre-eminent rationale?” Despite being analytically useful, elevating one rationale to a pre-eminent position may be both politically infeasible, and risks undermining support for the bankruptcy system.

Fortunately, I think there is a middle ground available between the current situation, where potential opponents and judicial officers can draw from a long, shifting menu of rationales to formulate their decision, and adopting a rigidly prioritized list of rationales. The legislation could set out a short list of considerations to help potential opponents decide whether or not they should lodge an opposition. Such an approach is already being used with respect to personal income tax debtors. In deciding what type of discharge a personal income tax debtor should receive, a judicial officer is directed to consider: (i) the individual’s circumstances at the time the tax debt was incurred, (ii) the efforts the individual made to pay the tax debt, (iii) whether the individual paid off other debts while failing to pay the tax debt, and (iv) the individual’s financial prospects for the future.¹⁵²⁸ I recommend that section 173 be amended to identify a list of considerations that should guide an opponent’s decision about whether or not to lodge an opposition on grounds other than the enumerated ones. Judicial officers could also be instructed to consider these factors at the resulting discharge hearing. I would suggest that this list of factors may include the following items:

1. How genuinely the debtor needed the debt relief available in bankruptcy.
2. How much effort the debtor has expended towards improving his or her financial situation.
3. How significantly the debtor’s conduct has impacted the creditors’ recovery from the estate.
4. Whether the debtor’s conduct impairs the equitable and efficient administration of the bankruptcy system.

¹⁵²⁸ *BLA*, *supra* note 11, s 172.1(4).

5. Whether the debtor's conduct impairs the public's perception that the bankruptcy system is being administered equitably and efficiently.

8.2.4. THE REFORM PROCESS

The legislative branch may be best suited to oversee a reform of the opposition to discharge process. The reform will require hearing from a number of stakeholders in the bankruptcy system, who may have different views about what types of conduct should be sanctioned. The legislative branch is well-structured to solicit this input and reconcile the competing views. The Senate's Standing Committee on Banking and Trade may be one venue, where such a review could occur. It has a track record in the area; it previously considered discharges in its 2003 Report *Debtors and Creditors Sharing the Burden*, though only to the extent of whether or not second-time bankrupts should receive automatic discharges.¹⁵²⁹ The pace of business in the Senate also tends to be slower and thus may be better suited, than the House of Commons, to a careful review of a technical statute.

When this consultation takes place, the facilitating body should endeavour to canvass a variety of opinions. Getting input from current or future bankrupts will be particularly challenging. Former bankrupts may be unwilling to identify themselves as such, or be involved in the process, because of the continuing stigma associated with bankruptcy. Members of the Canadian public tend not to view themselves as future bankrupts, because they underestimate the risks in their financial lives.¹⁵³⁰ They enjoy the patina of control over their financial futures, until it is eroded by the reality of their lived experiences. Bankruptcy law is also perceived as a dry, technical area of law. Members of the public have difficulty understanding it, much less confidently opining on it, with prescriptions for change. In a 2003 article, Iain Ramsay highlighted how personal debtors are a very diffuse and fragmented group that have little power in the political process as compared to trustees and

¹⁵²⁹ Senate, Standing Committee on Banking and Trade, *Debtors and Creditors Sharing the Burden*, (November 2003), 57-59 (Chair: Richard H Kroft). Online: Parliament of Canada <http://www.parl.gc.ca/Content/SEN/Committee/372/bank/rep/bankruptcy-e.pdf> [June 19, 2015].

¹⁵³⁰ Kilborn, *supra* note 259 at 18-19; Saul Schwartz, "Personal Bankruptcy Law: A Behavioural Perspective" in Johanna Niemi-Kiesilainen et al, eds, *Consumer Bankruptcy in Global Perspective* (Portland, OR: Hart Publishing, 2003), at 71.

creditors, who are concentrated and organized in their lobbying efforts. Consequently, “the terms on which bankruptcy will be available to consumers will be primarily a side effect of the interests of other players in consumer bankruptcy policy-making and their perceptions of the needs of consumer debtors.”¹⁵³¹ The facilitating body has a formidable challenge of finding a way to engage this diffuse, disengaged group.

Under my proposed system, responsibility for policing debtors would be divided between two groups of actors, with trustees retaining primary responsibility for policing a debtor’s compliance during bankruptcy and the OSB policing the debtor’s pre-bankruptcy conduct. A list of identified grounds, upon which a discharge might be opposed, would be retained, but the list in section 173 would be revised and updated. The list would be divided between those grounds for which trustees have primary responsibility and those for which the OSB has primary responsibility. Trustees and the OSB would retain the discretion not to oppose where a ground existed, but would be required to notify the other potential opponents of a decision to forego an opposition. The OSB and trustees would retain the discretion to oppose a discharge in situations other than those listed, but the legislation would enumerate a list of principles to guide the exercise of discretion.

8.3. WHAT TRUSTEES WOULD CHANGE

I am not the only person with prescriptions for how the bankruptcy system could be improved. I ended each interview by inviting the participant to offer his or her suggestions for how the bankruptcy system could be improved. Two topics consistently emerged from these discussions. First, trustees had suggestions for reducing the number of required court appearances. Second, trustees expressed frustration with the surplus income mediation process.

8.3.1. REDUCING COURT APPEARANCES

The opposition to discharge process requires trustees to bring their oppositions before a judicial officer for further consideration. This process provides an important check on a trustee’s activities, but it may not be necessary in all circumstances. The trustees I

¹⁵³¹ Iain Ramsay, “Interest Groups”, *supra* note *supra* note 427 at 385.

interviewed suggested that the discharge process could be streamlined if some matters were dealt with solely by the trustee, or by way of a desk order. A desk order is granted by the court based on paperwork filed by the affected parties, without any party being required to appear in court. Any changes that reduce the number of a trustee's court appearances must ensure that other parties – creditors, debtors and the OSB – have the opportunity to be involved, if they so desire, and that trustees are still subject to an adequate level of supervision. Court supervision of trustees may be particularly important in cases where the trustee's and debtor's interests directly conflict, such as when a trustee applies for a conditional order to enforce an agreement for payment of the trustee's fees.¹⁵³² For some debtor types, such as third-time bankrupts, it might also be desirable to require them to appear before the court so as to drive home the seriousness of the matter.

One suggestion was that in instances of non-compliance, a trustee should be able to propose how a debtor's discharge would be affected, i.e., suspended, conditioned or refused. Notice of the trustee's proposed order would be provided to the creditors, the OSB and the debtor. The proposed order would then become binding, unless someone filed an objection. If someone filed an objection, it would trigger a court hearing.¹⁵³³ Similar procedures are employed elsewhere under the *BLA*. For instance, a court is deemed to approve a consumer proposal, without any court hearing, unless an interested party asks that the court review the proposal. The interested party must make such a request within 15 days from when the consumer proposal is approved or deemed approved by the creditors.¹⁵³⁴ Adopting such an approach in the opposition to discharge process would reduce the workload placed on the court, but would allow parties to trigger court review of a trustee's proposed discharge order where they think it is unfair.

A second suggestion, supported by a number of trustees, is that greater use of desk orders would streamline the opposition to discharge process.¹⁵³⁵ Interviewees identified

¹⁵³² This point was raised by I24.

¹⁵³³ I25.

¹⁵³⁴ *BLA*, *supra* note 11, s 66.22.

¹⁵³⁵ I4, I6, I7, I1, I22, I24, I34, I36.

applications for adjournment and orders to which the debtor consented, such as when a debtor asks for more time to pay a trustee's fees, as appropriate matters to be dealt with by desk order.¹⁵³⁶ Some felt that orders sought in response to simple instances of non-compliance, such as failure to attend counselling or failure to submit income and expense sheets, should also be dealt with by way of a desk order.¹⁵³⁷ There would need to be a mechanism built into the desk order process by which creditors, the OSB or the debtor receive notice of the proposal to proceed by way of a desk order and could trigger a court hearing, if they felt one was necessary. Desk orders are already used heavily in Saskatchewan and I received positive feedback about this process from the trustee I interviewed there.

8.3.2. MEDIATION

When the only reasons for opposing a debtor's discharge is that the debtor has failed to make surplus income payments or the debtor could have made a proposal, but chose bankruptcy instead, the trustee must attend mediation with the debtor to attempt to settle the matter without appearing in court.¹⁵³⁸ If the mediation is unsuccessful, the parties will attend at an application for discharge hearing. Non-payment of surplus income was one ground for opposition in 19.92% (n=141) of my smaller sample (total n=708), and was the only ground for opposition in 10.31% (n=73) of those cases. This suggests that a significant number of oppositions are being diverted into the mediation process.

With a few exceptions, the feedback I received about the mediation process was negative.¹⁵³⁹ Interviewees felt that mediation was "useless" or an "unnecessary step".¹⁵⁴⁰ It

¹⁵³⁶ **Adjournments:** I4, I7. **Consent Orders:** I6, I22, I36.

¹⁵³⁷ I16, I22 distinguished between serious and minor forms of non-compliance, arguing that the former should go before the court but the latter should be handled by desk order: "Even if it's simple non-compliance, hasn't filed income and expense, all those sorts of things, those should go before [the court], but some of these ones, were someone's on disability and they didn't give us the last couple income and expense and they still owe us four hundred dollars, the really minor ones should be able to go as a desk matter." I24 thought trustees should just be able to deal with compliance issues, without going to court.

¹⁵³⁸ *BLA*, *supra* note 11, s 170.1.

¹⁵³⁹ I32 and I34 thought the mediation process worked well.

took significantly longer to resolve surplus income matters in mediation than in court: “you spend 90 minutes or 2 hours doing something that could be decided in court in 90 seconds.”¹⁵⁴¹ Trustees felt that the mediator just reiterated the discussions they had had with the debtor prior to the mediation.¹⁵⁴² Often matters were not resolved in mediation, and a court hearing was still necessary.¹⁵⁴³ The mediation is confidential, and so trustees are restricted in their ability to justify the outcome to creditors afterwards.¹⁵⁴⁴ One trustee reported that she had heard that other trustees “will just find another reason to oppose, just to get it to court and avoid the mediation all together.”¹⁵⁴⁵ It is not only trustees, who take issue with mediation. In its submission to Industry Canada, the Canadian Bar Association, an advocacy group representing lawyers, questioned the continued inclusion of a mandatory mediation requirement.¹⁵⁴⁶

Some mediations address payment terms, i.e., the period of time the debtor is given to pay the surplus income. For instance, a first-time bankrupt with surplus income is normally required to pay surplus income for 21 months. If all surplus income is paid by the end of 21 months, the debtor receives an automatic discharge. Sometimes debtors require more time to pay off their surplus income amount. The interviewees suggested that they should be able to extend the period for payment – and the date of the debtor’s discharge – without going to mediation or court.¹⁵⁴⁷ Some thought that this power should be limited;

¹⁵⁴⁰ “Useless” I3, I30; “Unnecessary step” I15; see also I43.

¹⁵⁴¹ I6, see also I12, who described it as “very time consuming” and I30, who described mediation as a “waste of time.”

¹⁵⁴² I4, I26.

¹⁵⁴³ I26.

¹⁵⁴⁴ I6.

¹⁵⁴⁵ I4.

¹⁵⁴⁶ Submission of the Bankruptcy, Insolvency and Restructuring Law Section, and Canadian Corporate Counsel Association of the Canadian Bar Association to Industry Canada (July 2014) at 36.

¹⁵⁴⁷ I3, I13, I14, I43.

trustees should be allowed to extend the time for payment up to a set maximum, 6 or 12 months, but if they required a further extension they would need to apply to court.¹⁵⁴⁸ Alternatively, the period of time might be extended by way of a consensual agreement between the debtor and the trustee.¹⁵⁴⁹

Other mediations address the amount of surplus income owing.¹⁵⁵⁰ Debtors may think that the income guidelines are too low, or do not allow them to deduct some non-discretionary expenses.¹⁵⁵¹ Undoubtedly, there will be exceptional circumstances where the OSB's Guidelines work an injustice on a debtor and there should be some flexibility to depart from them when calculating a debtor's surplus income obligations. Some of the interviewees I spoke with felt that some manner of oversight was necessary to ensure that trustees were not entering into collusive agreements with debtors.¹⁵⁵² This manner of oversight is particularly important when trustees seek to vary the amount owing. Otherwise, trustees could use their ability to adjust the amount of surplus income due from an individual to attract business, thereby undermining consistency in the system, and reducing recovery for the creditors. On files where parties are contesting the amount of surplus income owing, I would recommend that the contest be resolved by a third party. If the mediation system cannot be fixed to address the above-noted concerns, then judicial officers should be tasked with resolving disputes over quantum.

¹⁵⁴⁸ I3 (12 months), I43 (6 months).

¹⁵⁴⁹ I13.

¹⁵⁵⁰ Note that some interviewees doubted that mediators had the authority to adjust the amount, whereas others used mediation to adjust the amount owing in exceptional circumstances. I15 doubted the mediator has the authority to vary the amounts. I4 thought only the court should vary the amount. I9, I26 and I32 reported using mediation to vary the amount. I3 thought that mediation should only be used when there is a dispute over the quantum.

¹⁵⁵¹ For instance, I25 pointed out that the guidelines make no provision for the additional costs incurred by migrant workers who maintain two households, one for their family in their home community and one for themselves in the community where they work.

¹⁵⁵² I6, I32.

8.4. EMOTIONAL LABOUR

My dissertation helps illuminate some of the ways in which the bankruptcy system could be improved, it also advances the claim that emotional labour is an important component of a trustee's work. There are a number of implications flowing from this claim and I will conclude my dissertation by considering the implications for bankruptcy trustees and researchers. I start by reiterating that I do not see the centrality of emotions in the work of trustees as unique. Sociologists have identified a wide variety of employees who engage in emotional labour – it is a ubiquitous component of the workplace. There are both benefits and drawback to engaging in emotional labour and I will outline some of these. I consider what changes might enable trustees to perform emotional labour better. Then I switch my focus to researchers. I argue that they can gain valuable insights into the operation of the bankruptcy system by studying its emotional terrain. I highlight some promising avenues for further research. I offer some reflections on how research on emotional labour may supplement financial accounts of bankruptcy and result in policy prescriptions that better reflect the complex experiences of actors in the system.

Emotion and reason are frequently set up in opposition to one another, with emotion being devalued. According to this line of thought, emotions corrupt rational decision-making. Considering that emotions are characterized so negatively, it should come as no surprise that many individuals feel uncomfortable acknowledging the prominence of emotions in their own work. This discomfort appears to be especially acute when an individual's rational capacity is viewed as important to his or her work. In Chapter 6, I presented research that indicates professionals work hard to avoid experiencing genuine or fervent emotions. The trustees I interviewed acknowledged that their work does have an emotional component, but also repeatedly voiced the belief that their emotions needed to be constrained. My impression was that most seemed more comfortable talking about how they manage the emotions of the debtors with whom they deal, than how they manage their own emotions, but as I argued in Chapter 7, their work requires them to engage in both self- and other-focused emotional labour. I hope that one outcome of this dissertation project is that trustees involved in the bankruptcy system feel empowered to acknowledge, reflect on and start discussing the emotional components of their work.

By highlighting the role of emotional labour in a bankruptcy trustee's work, I aim to create greater space for trustees to reflect on their own emotional labour practices. They might see commonalities between the experiences relayed here, and their own practices. Recognizing such commonalities may help reinforce for trustees that emotional labour is not a wholly personal experience, varying from individual to individual. Rather, it is a constant in the work of bankruptcy trustees, structured by social norms and financial pressures. It is an important part of what they do and merits discussion as much as other aspects of their work, such as the accounting principles, the law and the office management techniques.

Emotional labour has benefits and drawbacks. Arlie Hochschild concluded that carrying out emotional labour had a number of negative impacts on airline attendants, including burnout, feelings of inauthenticity, and cynicism.¹⁵⁵³ Subsequent research has been more mixed in its findings. Employees, who engage in significant levels of surface acting, report high degrees of burnout, including emotional exhaustion, depressions, anxiety and job dissatisfaction.¹⁵⁵⁴ But performing emotional labour has also been tied to increased job satisfaction and feelings of competence.¹⁵⁵⁵ These differences may be explained with reference to the emotional demands of a given workplace – workers required to suppress anger seem particularly prone to burnout.¹⁵⁵⁶ Having autonomy over how one performs emotional labour may result in higher levels of job satisfaction.¹⁵⁵⁷ There may also be a

¹⁵⁵³ Hochschild, *The Managed Heart*, *supra* note 1164 at 132-136; see also Lively, "Emotions in the Workplace" *supra* note 1178 at 571.

¹⁵⁵⁴ Steven Kiely & Peter Savastos, "Emotional Labour; A Significant Interpersonal Stressor" (April 2008) InPsych: Australian Psychological Society, at n.p. online: Australian Psychological Society <https://www.psychology.org.au/publications/inpsych/highlights2008/#apr08> [June 19, 2015]; Wharton, *supra* note 1189 at 159.

¹⁵⁵⁵ Wharton, *ibid* at 154. Harris, *supra* note 1191 at 557-58. Harris reported that some British barristers viewed their ability to perform emotional labour as an important part of their professional skill set at 574.

¹⁵⁵⁶ Lively, "Emotions in the Workplace", *supra* note 1178 at 579.

¹⁵⁵⁷ Anleu & Mack, *supra* note 1169 at 599.

difference between surface acting and deep acting, the latter is not correlated with burnout.¹⁵⁵⁸

My research suggests that bankruptcy trustees may derive job satisfaction and feelings of competence from performing emotional labour. The feeling rules that govern a trustee's work advance a number of instrumental ends, such as attracting business and encouraging debtor compliance. Successful performance of emotional labour may allow trustees to achieve better work outcomes. The feeling rules reinforce the meaning which trustees attach to their work. Trustees are hopeful that their work will result in the betterment of a debtor's life. The feeling rules provide protection from emotional burnout, by maintaining a level of distance between the trustee and the debtor. These are positive ends and where a trustee can carry out the emotional labour more adeptly, he or she may benefit.

Can trustees be empowered to perform emotional labour better? And if so, how? One way of empowering trustees may be through education. Already there appears to be a move towards training trustees and their support staff to deal with the emotional demands of their jobs. One interviewee mentioned that during the insolvency counsellors training program, she learned how to deal with angry debtors: "you learn to keep a calm demeanour, because it helps to keep them calm."¹⁵⁵⁹ Another interviewee indicated that his firm had developed a course to instruct estate administrators on how to adopt an empathetic approach to debtors. The course covered such subjects as identifying the debtor's personality type and asking emotionally evocative questions.¹⁵⁶⁰

Deep acting seems to be more closely associated with good work outcomes than surface acting. Trustees may benefit from training that develops deep acting skills. Other professions have already explored how to teach deep acting skills. Trustees should be cautious about uncritically adopting pedagogical innovations from other disciplines, but

¹⁵⁵⁸ Wharton, *supra* note 1189 at 159-60.

¹⁵⁵⁹ I4.

¹⁵⁶⁰ I15. Though not explicitly mentioned, the firm seemed to be using William Moulton Marston's DISC personality types in their training materials.

there are also valuable lessons to be gained from examining their efforts.¹⁵⁶¹ For instance, role-play may be used to introduce and practice cognitive reframing techniques.¹⁵⁶² Having educators and mentors model emotional labour could also be an important part of the educative process.¹⁵⁶³ One challenge I foresee is that any attempt to provide instruction on emotional labour risks being disregarded as flippant or non-serious. Organizations like CAIRP and its provincial counterparts could play an important role by developing intellectually rigorous content that allows bankruptcy trustees to engage with topic of emotional labour.

Arlie Hochschild gestures towards a second challenge. She worried that when employers (or in the case of professionals, their governing bodies) instruct employees on how to carry out emotional labour, the skills can be devalued, because individuals are restricted to implementing standard operating procedures instead of developing their own responses to the emotional demands of the workplace.¹⁵⁶⁴ She gave the example of flight attendants being assigned emotional labour tasks, such as being urged to hand out magazines *with a sincere smile*.¹⁵⁶⁵ The type of deskilling that worried Arlie Hochschild in the context of flight attendants may be less of a concern when the workers are professionals, because they have a greater degree of autonomy and it would be harder to prescribe emotional labour tasks that cover the variety of situations they will encounter. If training on emotional labour is incorporated into the professional development of bankruptcy trustees, the training materials should not set out guidelines on how to perform emotional work, but rather should focus on acknowledging that it is an important part of the trustee's tool set, and provide them with the opportunities to practice it.

¹⁵⁶¹ Dawn Freshwater & Theodore Stickley, "The heart of the art: emotional intelligence in nurse education" (2004) 11:2 Nursing Inquiry 91 at 95.

¹⁵⁶² Kiely & Savastos, *supra* note 1554.

¹⁵⁶³ Freshwater & Stickley, *supra* note 1561, at 94.

¹⁵⁶⁴ Hochschild, *The Managed Heart*, *supra* note 1164 at 118-20.

¹⁵⁶⁵ *Ibid* at 118-20.

Trustees might also be empowered to perform emotional labour better by rearranging their work practices. Social interaction with supportive colleagues, regularly scheduled breaks from emotionally demanding tasks, and time away from work provide trustees with space to recover their personal resources, which have been depleted by the effort of carrying out emotional labour.¹⁵⁶⁶ My research suggests that some trustees already incorporate these practices into their work. My interviewees responded to emotionally demanding situations by venting to, or debriefing with colleagues or friends.¹⁵⁶⁷ One trustee reported scheduling her day so that she alternated between potentially emotionally-demanding work, such as contact with debtors, and “lots of just monotonous paperwork.”¹⁵⁶⁸ Many talked about the importance of getting away from work, either by disconnecting electronically from the office, or spending their leisure time on hobbies.¹⁵⁶⁹ Social interaction, scheduled breaks and time away from the office may seem peripheral to the actual work of a bankruptcy trustee, but this assessment shifts if one acknowledges the centrality of emotional labour to a trustee’s work; it becomes evident that these practices are important for ensuring that bankruptcy trustees are able to perform their emotional labour.

In this dissertation I trace how emotions shape the implementation of bankruptcy’s ‘law-on-the-books’. By incorporating emotions as a subject of study, researchers can develop a more richly textured understanding of what is occurring in the bankruptcy system. My research for this dissertation starts this project of illustrating the emotional framework of the personal bankruptcy system, but it points to many areas for further research.

Researchers may develop a deeper understanding of the bankruptcy system by investigating other aspects of the emotional labour of bankruptcy trustees. Do the feeling rules differ in consumer proposals or on commercial files? How have the feeling rules been impacted by the growth of a competing debt counselling industry? Does the emotional labour carried out by trustees differ according to their gender, seniority, geographic location,

¹⁵⁶⁶ Kiely & Savastos, *supra* note 1554.

¹⁵⁶⁷ **Vent:** I4, I9, I26, I41, I42. **Debrief:** I6, I10, I20, I42.

¹⁵⁶⁸ I4.

¹⁵⁶⁹ **Disconnecting:** I3, I16. **Hobbies:** I16, I20, I34.

professional background or firm size? Previous work has examined the emotional interplay between paralegals and lawyers, and an avenue for further research would be to compare the findings from this work with the emotional interplay between estate administrators and bankruptcy trustees.

My research has focused on the emotional labour of bankruptcy trustees, but the emotional labour of other actors – OSB analysts, creditors and judicial officers - may provide revealing insights into the operation of the bankruptcy system. I have predicted that OSB analysts come to the bankruptcy system with a different set of feeling rules, seeing as they are divorced from an intimate relationship with debtors, and focused on policing misconduct by debtors and trustees. This intuition should be confirmed. Institutional creditors tend to be disengaged from the personal bankruptcy system, and their emotional involvement in the process may be more muted as a result. Conversely, my interviewees indicated that individual creditors are very involved in the bankruptcy system, emotionally and otherwise. Between the extremes of the disengaged institutional creditors and the angry personal creditors, there lies a group of medium-sized creditors, such as credit unions and local suppliers, whose involvement in the bankruptcy system defies explanation along solely financial grounds. Studying how emotions shape the relative involvement of creditors might allow one to develop a system that is more responsive to each creditor's needs. As compared to the potential opponents, judicial officers occupy a different position in the bankruptcy system: they are passive arbiters of disputes. One might expect them to feel subject to an even stronger feeling rule requiring neutrality – and objective emotions – than the potential opponents. It could be revealing to study how their emotional labour differs from other actors in the bankruptcy system, and also from judicial officers presiding in other areas of the justice system.

A final, and I suspect very rich, topic for further study is the emotional work of debtors. The common wisdom is that debtors used to be subject to a feeling rule that they should feel significant shame or guilt when forced to declare bankruptcy, but that the erosion of this feeling rule has contributed to rising bankruptcy rates. Some work has tried to

uncover how shame may informally restrict access to bankruptcy.¹⁵⁷⁰ Janis Sarra's study of consumer proposals suggested that the relative growth in consumer proposal filings may be driven, in part, by the debtor's perception that proposals carry less stigma than bankruptcies.¹⁵⁷¹ Presumably there are other feeling rules that impact a debtor's experience of bankruptcy, and a trustee's approach to a file may shape the feeling rules to which a debtor is subject. It could be interesting to study if and how trustees convey their sense of hopefulness to debtors. By studying the emotional work that debtors carry out when deciding to seek debt relief, choosing between the different options for relief, completing their duties and re-establishing themselves after receiving a discharge, one might develop insights into how to make bankruptcy more accessible to needy debtors and more effective at providing a fresh start.

Studying the emotional terrain of bankruptcy law offers researchers new insights, it might also help policy makers develop better laws than a purely economic analysis of bankruptcy law. Central in economic theory is the concept of *homo economicus*, a human who acts rationally to maximize his or her self-interest. Economic theory proposes that when each individual acts to maximize his or her own interest, the market coordinates these activities in a way that benefits the whole community. In her book, *Cultivating Conscience*, the business law scholar Lynn Stout provides a critique of *homo economicus*, by highlighting the ways in which the model fails to account for so much of pro-social behavior. She suggests that instead of being ruthless self-maximizers, humans move back and forth between pro-social and selfish behaviors, with a person being more likely to engage in pro-social behavior (i) when directed to do so by an authoritative figure, (ii) when one believes that others are engaging in pro-social behavior, and (iii) when the costs to oneself are low, or the benefits to the person helped are high.¹⁵⁷² She suggests that the emphasis on *homo economicus* in research undermines these cues for pro-sociality, because respected experts (i) tell people they should act as rational self-maximizers, (ii) report that others are acting as rational self-maximizers,

¹⁵⁷⁰ See e.g., Sousa, *supra* note 3; Barry Scholnick, "Stigma, Public Disclosure & Bankruptcy" (Ottawa, Office of the Superintendent of Bankruptcy, 2011).

¹⁵⁷¹ Janis Sarra, "Economic Rehabilitation," *supra* note 15 at 448.

¹⁵⁷² Lynn Stout, *Cultivating Conscience* (Princeton, NJ: Princeton University Press, 2011) at 99.

and (iii) argue that one benefits others by pursuing one's self interest.¹⁵⁷³ Additionally, Stout cautions that the policies resulting from the economic worldview try to change the financial incentives in a system to foster more pro-social behavior, but these changed incentives sometimes have serious, unintended consequences and may crowd out pro-social motivations.¹⁵⁷⁴ For instance, in a famous study of daycares in Israel, the introduction of fines, intended to reduce the number of late pick-ups by parents, had the opposite effect, resulting in an increasing number of parents picking up their children late.¹⁵⁷⁵ Parents of school-aged children are discouraged from providing financial incentives for good grades, because such incentives may crowd out other motivations for scholastic achievement: curiosity, a love of learning, the satisfaction derived from hard work.

A solely economic account of the bankruptcy system risks resulting in unsatisfactory policy outcomes, that have unintended consequences and crowd out the pro-social motivations of the actors in the system. It strips trustees of their complexity, colouring them as single-mindedly money focused, to be manipulated with promises of financial carrots, and threats of beatings with financial sticks. The fee structure in bankruptcy needs to provide trustees with sufficient funds to carry out their work, but a system of remuneration that uses financial incentives to reward trustees for investigating misconduct may have the unintended consequence of promoting spurious investigations. Providing trustees with financial rewards for bringing oppositions could promote frivolous oppositions and crowd out other motivations – the feelings of hope and frustration – that lead trustees to take an active role in policing debtor compliance. Researchers who incorporate emotional dynamics into their study of bankruptcy law can paint a more nuanced picture of the operation of the system, and develop policy prescriptions that better reflect the complexity of experiences of those people involved in its implementation.

¹⁵⁷³ *Ibid* at 247-49.

¹⁵⁷⁴ *Ibid* at 251.

¹⁵⁷⁵ Uri Gneezy & Aldo Rustichini, "A Fine is a Price" (2000) 24 *J of Legal Studies* 1.

8.5. CONCLUDING THOUGHTS

When I embarked on this dissertation project, I expected to uncover a problematic level of inconsistency and unpredictability in how trustees exercise their discretion to oppose. Instead, I uncovered an entirely different story. Trustees consistently and predictably decline to lodge oppositions on the basis of a debtor's pre-bankruptcy conduct, because they are not aware of it, they do not view it as sanctionable or they have another method for responding to it outside of the opposition to discharge system. Instead, they limit themselves to opposing on the basis of a debtor's non-compliance during bankruptcy. I have attributed this consistency in practice to the financial constraints and emotional norms facing Canadian personal bankruptcy trustees, but I have identified other factors that promote consistency across the profession including standardized checklists and forms, and networks of professional ties.

The most rewarding aspect of writing this dissertation was hearing from 43 individuals about their first-hand experiences in Canada's personal bankruptcy system. By sharing their insights with me, they helped me to develop a richer understanding of how the bankruptcy system operates, and I am extraordinarily grateful for their contributions of time and wisdom. During my interviews, I was struck by how committed they are to the project of debtor rehabilitation. I hope that the recommendations set forth in this dissertation result in changes to the bankruptcy system that help trustees to more effectively advance this goal, and ultimately, to ensure that Canadians suffering from severe financial hardship continue to have access to a legal process that provides them with meaningful debt relief.

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APPENDIX

A. METHODOLOGY

A.1 INTRODUCTION

In the introduction to their book, *Conducting Law and Society Research*, Simon Halliday and Patrick Schmidt bemoaned the lack of detailed discussions around methodology in socio-legal research projects. They suggested that the field would benefit from more researchers providing information about how they had carried out their projects and indicated that an appendix might be a good place to locate such a discussion.¹⁵⁷⁶ By putting the methodological discussion in the appendix, a researcher can make an additional level of detail available to interested readers. This appendix is intended to respond to Halliday and Schmidt's call.

In this dissertation, I wanted to explore how actors exercise their discretion in the opposition to discharge process. I initially wanted to examine and compare the exercise of discretion by all three types of potential opponents: trustees, creditors and OSB analysts as well as judicial officers. As the research progressed, my lens narrowed to focus on bankruptcy trustees. Unlike the other two potential opponents, they are very active in the opposition to discharge process. Unlike judicial officers, they are an understudied group.

To better understand the role played by trustees in the personal bankruptcy system, I triangulated three types of data: written decisions from judicial officers, quantitative data collected by the OSB and qualitative interviews with bankruptcy trustees. Each of these types of data gave me a different perspective on the opposition to discharge process. In their written decisions, judicial officers resolved hard cases with reference to the rationales of the bankruptcy system. These decisions inform how trustees exercise their discretion. Trustees study these decisions as part of their continuing education and will consult them when they encounter a difficult question in their own practice. The OSB data allowed me to identify the frequency with which oppositions are being filed, who is filing them and the grounds upon which they are being filed. The interviews with trustees allowed me to better

¹⁵⁷⁶ Simon Halliday & Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (New York: Cambridge University Press, 2009).

understand their practices with respect to oppositions, how they interpret and apply the rationales articulated in the case law and other considerations, which shape their exercise of discretion. Data collected in one stage of the research could sometimes be cross referenced against data collected in another stage. For instance, trustees reported that creditors and OSB analysts infrequently opposed discharges. This statement found further support in my analysis of quantitative data. Of the 7,082 files in which an opposition was filed in 2012, creditors only lodged oppositions in 11.40% of files, OSB analysts in a mere 1.00%, whereas trustees were involved in 94.25% of all oppositions.

A.2 THE DECISION REVIEW

A.2.1 GOALS

The written decisions of judicial officers were of interest in helping me to understand how trustees exercise their discretion, because the decisions articulate and apply the policy rationales that govern the bankruptcy system. They identify – though not always consistently – what types of behaviors or character traits disentitle a debtor from receiving an absolute discharge and what types of behaviors and character traits should not operate as obstacles to debt relief. Trustees are regularly exposed to the written decisions of judicial officers through their continuing legal education practices. Though they might not always agree with the judicial officer’s disposition of a given matter, judicial officers pass judgment on whether a trustee’s opposition should result in a debtor receiving less than an absolute discharge. Consequently, trustees take account of the judicial officers’ positions when deciding whether or not to lodge an opposition. The written decisions also helped me to identify debtor types that commonly appear in the case law. I subsequently used these debtor types to draw out trustees during the interview process to better understand how they make the decision of whether or not to lodge an opposition.

A.2.2 THE SAMPLE

I reviewed a decade of written decisions from application to discharge hearings, covering the period from 2003 to 2013. This sample allowed me to assess how discharge applications have been decided in the recent past.

I identified the cases using the keycite function on Westlaw/Carswell's website. The keycite function can be applied to written decisions and legislative provisions and it provides users with a list of cases and secondary material that reference the item in question. When the keycite function is applied to a legislative provision that has a number of subsections, like section 173 of the *BLA*, it will first provide a list of materials that cite the section generally and will then provide lists of materials that cite each of the subsections. There can be significant overlap between these lists.

I used the keycite function to identify all the reported decisions in the Westlaw database that have cited sections 172 and 173 of the *BLA*. Section 172 sets out the court's power to grant, condition, suspend or refuse a discharge at an application for discharge hearing. Section 173 sets out specific grounds upon which a potential opponent can oppose a discharge. Applying Westlaw's keycite function to section 172 and 173 revealed a large number of cases: 536 citing section 172, and 1406 citing section 173.¹⁵⁷⁷ These search results overstate the number of written decisions from discharge application hearings available in the Westlaw database. There is a significant degree of overlap between the cases citing section 172 and those citing section 173, moreover, there is a considerable amount of repetition of cases in both lists because they include lists of cases for each separate subsection.

I reconciled the lists of cases provided by keyciting the two sections, and removed duplicates. As I read through the decisions, I was able to remove more cases from my initial sample, because it became evident that they were not from application to discharge hearings. At final count, I had 282 written decisions in my sample.

My sample included written reasons from application for discharge hearings. Most of these hearings were triggered by oppositions, absent an opposition the debtor would have received an automatic discharge. Some of the hearings were required because the bankrupt did not qualify for an automatic discharge, i.e., because the bankrupt had filed for bankruptcy at least twice before or fit the definition of "personal income tax debtor." An

¹⁵⁷⁷ These numbers are based on a keycite search performed February 27, 2013. These numbers do not include the secondary sources that cite sections 172 and 173. I carried out a second search in 2014 to ensure that I had captures all the decisions made in 2013.

opposition might be filed in these cases too, even when a hearing is already necessary. It was not always possible to discern from the reasons whether the hearing was triggered by an opposition, mandated by the legislation, or mandated by the legislation, but also the subject of an opposition. In three of the 282 cases I was unable to identify an opponent. In 32 of the cases the trustee alone was involved, potentially as an opponent. Some of these 35 written decisions may have resulted from applications where no one opposed. In the remaining decisions, the opponent included creditors and/or the OSB, and I can conclude with a high degree of confidence that oppositions had been filed in these 247 cases, because otherwise one would not expect creditors or the OSB to be involved.

A.2.3 CODING

As I read through each case, I coded it using qualitative coding software. Some of my codes related to the factual aspects of the case, such as the stated cause of the bankruptcy or the outcome of the case. I used other codes to identify different types of arguments used by the judicial officers. For instance, I had codes for each of the rationales for bankruptcy that I had identified from reading academic literature on bankruptcy. I also collected a standardized set of data on each case – the sheet I used to collect this data is schedule 1 to this appendix.

A.2.4 SHORTCOMINGS IN THE DATA

The written decisions potentially give a skewed perspective on how the opposition to discharge system operates, because decisions are only issued in a very small number of cases, and these tend to be files where the debtor engaged in pre-bankruptcy misconduct, or where the creditor lodged an opposition. I kept track, for each written decision, of the category of opponent lodging an opposition and the grounds upon which the opposition was lodged. In the tables below, I provide a comparison of the written decisions with the data set from the OSB, broken down along these grounds. Just reading the written decisions would lead a person to significantly overestimate the frequency with which creditors oppose discharges and the proportion of oppositions lodged in response to pre-bankruptcy misconduct.

Table A.1 Comparison of Written Decisions and OSB Data Set by Opponent Type

Type of Opponent	File Where An Opponent in Written Decisions (%)	Files Where An Opponent in OSB Data Set (%)
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Trustee	53.02	94.27
Creditor	80.43	11.38
OSB	13.17	1.00
No Information	N/A	0.34

Table A.2 Comparison of Written Decisions and OSB Data Set by Grounds for Opposition

Ground of Opposition	Files Where Ground Raised in Written Decisions (%)	Files Where Ground Raised in OSB Data Set (%)
Section 173(1)(A)	49.29%	12.01%
Section 173(1)(B)	11.70%	0.14%
Section 173(1)(C)	14.54%	0.85%
Section 173(1)(D)	21.63%	2.26%
Section 173(1)(E) - Any	33.33%	1.69%
Rash & Hazardous Speculation	4.26%	0.00%
Unduly Extravagant Living	11.35%	0.14%
Gambling	12.41%	0.56%
Culpable Neglect of Business	3.90%	0.14%
Section 173(1)(F)	10.28%	0.42%
Section 173(1)(G)	2.84%	0.00%
Section 173(1)(H)	6.38%	0.00%

Ground of Opposition	Files Where Ground Raised in Written Decisions (%)	Files Where Ground Raised in OSB Data Set (%)
Section 173(1)(I)	1.06%	0.14%
Section 173(1)(J)	20.92%	1.27%
Section 173(1)(K)	13.83%	0.71%
Section 173(1)(L)	8.51%	0.28%
Section 173(1)(M)	9.57%	19.92%
Section 173(1)(N)	11.35%	0.28%
Section 173(1)(O)	34.40%	75.99%
Other Grounds	6.03%	6.21%
No Info	8.87%	6.50%

A.3 OSB QUALITATIVE DATA

A.3.1 GOALS

By analyzing the data collected by the OSB on oppositions to discharge, I was able to examine how oppositions operate on a system-wide basis. I was able to compare the frequency with which oppositions were filed by different opponents. Using a smaller subset of the data, I was able to identify the grounds upon which oppositions are being lodged and the outcomes of the oppositions. This data also allowed me to double-check the trends identified by interviewees against a larger data set.

A.3.2 SAMPLE

Working with an analyst at the OSB, I was able to compile a data set containing information on all the oppositions to discharge filed in 2012. I chose the year 2012 because I wanted recent data, but the oppositions needed to have been filed far enough in the past that

most would have been resolved – either withdrawn or taken to a hearing – by the time the data set was finalized in early 2014.

To identify the variables I wanted to include in the sample, I reviewed the standard forms submitted by a trustee in a bankruptcy and identified the types of information that I thought would be useful to my analysis. There were some types of information that were not included in any of the standard forms, such as the outcome of the opposition. The analyst, with whom I worked, was able to extract this data from the OSB's files.

A.3.3 DATA CLEANING & CODING

The information provided by the analyst at the OSB needed to be cleaned up and coded before it could be analyzed. For instance, there might be multiple entries for the same bankruptcy file, where both the trustee and a creditor opposed the bankrupt's discharge or where the trustee's opposition had been recorded more than once. There was no mechanical method for identifying these duplicates, locating and removing them was done manually. Many of the entries in the data sheet were provided as blocks of text that did not lend themselves to quantitative analysis. I went through the data set and coded these. For instance, I coded all the creditor oppositions as oppositions by public creditors (such as CRA or the National Student Loans Centre), private creditors (such as banks, or individuals), or where it was impossible to determine who the creditor was on the basis of the information provided, "unknown creditor."

The data set was quite large ($n=7082$), so for variable where coding was required for each file, I extracted a smaller, random sample of files to code and analyze. This smaller sample was 10% of the full sample ($n=708$), and allows for a confidence level of 95%, with a confidence interval of 3.5%. This smaller sample was used to analyze the grounds for opposition and the outcomes.

A.3.4 SHORTCOMINGS WITH THE DATA

The quantitative data collected by the OSB suffers from two shortcomings. First, there were many blank entries where information had not been provided to the OSB. I have coded where information is missing and included these values in my analysis. For instance, I used the code "no information" when it was impossible to determine the grounds upon

which the debtor’s discharge had been opposed. I used the code “unknown creditor” when it was impossible to determine the opposing creditor’s identity. By making these numbers available, I hope to convey to readers the extent to which my analysis is hampered by missing data.

I also have reason to suspect that the data set from the OSB might be incomplete. As part of my analysis, I compared how many oppositions were being filed according to the province in which the debtor lived. The results are set out in the table below.

Table A.3 Breakdown of Oppositions in OSB Data Set by Debtor’s Province

Province	Number of Oppositions	Percentage of Total Oppositions
Alberta	302	4.26%
British Columbia	22	0.31%
Manitoba	9	0.13%
New Brunswick	739	10.43%
Newfoundland	565	7.98%
Nova Scotia	571	8.06%
Ontario	719	10.15%
Prince Edward Island	120	1.69%
Quebec	3999	56.47%
Saskatchewan	34	0.48%
NWT, Nunavut, Yukon	2	0.02%
TOTAL	7082	100.00%

I expected to see provincial variations in the number of oppositions, with fewer oppositions being lodged in provinces where the courts will not allow a solely fee-based opposition, namely British Columbia and Manitoba. Even allowing for these differences, the level of variation between provinces in the OSB’s data leads me to suspect that the data set may not include all of the oppositions filed in 2012, with some provinces being

systematically underrepresented in the data. It is possible that practices established in some provinces for filing paper work in conjunction with an opposition to discharge are such that it is more difficult to identify these files in the OSB's database. Notwithstanding the potential incompleteness of my data set, I have an added measure of confidence in the conclusions I draw from the data because they accord with the observations offered by my interviewees.

A.4 QUALITATIVE INTERVIEWS

A.4.1 GOALS

The qualitative interviews gave me the opportunity to explore how trustees make the decision to oppose discharges, including the impact of procedure on their decisions, their interpretation and application of the rationales for bankruptcy, the feeling rules that govern their work and the emotional labour they carry out to comply with those feeling rules. I opted to focus on trustees, because they lodge a significant majority of all oppositions.

A.4.2 SAMPLE

In assembling my sample, I wanted to draw participants from a wide variety of geographic locations and practice contexts, because previous research suggested that the practice of bankruptcy law varies along these two vectors. I began by identifying locations where I would carry out my interviews. All travel was self-funded, and that limited how many locations I could visit; however, I was able to carry out interviews while travelling for other purposes during the year. I carried out 41 interviews in 13 communities in 8 provinces. To avoid inadvertently identifying some of my interviewees, who practice in smaller communities, I have not listed the communities I visited; however, I can provide the following break down by province.

Table A.4 Breakdown of Interviews by Province

Province	Number of Interviews	Percentage of Interviews
Alberta	8	19.51%
British Columbia	6	14.63%
Manitoba	6	14.63%
New Brunswick	3	7.32%
Newfoundland & Labrador	3	7.32%
Nova Scotia	4	9.76%
Ontario	10	24.39%
Saskatchewan	1	2.44%
Total	41	100.00%

Once I identified the communities I expected to visit, I accessed the OSB’s online registry to identify all the registered trustees operating in a given community. I put this list into an excel spreadsheet, assigned each entry a random number and then sorted them according to the randomly assigned number.¹⁵⁷⁸ I worked down the list, contacting trustees until I had set up the desired number of interviews in each community.

Because I wanted my sample to include trustees working in a variety of different practice contexts, I did not interview more than one trustee working in the same office. I did interview trustees working at different offices of the same multi-office firm. I asked each interviewee about how many other trustees he or she worked with in his or her office and how many support staff her or she had assisting with insolvency matters. The results are described below.

¹⁵⁷⁸ I used the function =RAND() to assign random numbers to each entry.

Table A.5 Interviewees Broken Down by Office Size (Number of Trustees)

Size of Office (Trustees)	Number of Interviewees	Percentage of Interviewees
1 trustee	15	36.59%
2-5 trustees	23	56.10%
6 or more trustees	3	7.32%
Total	41	100.00%

Table A.6 Interviewees Broken Down by Office Size (Number of Support Staff)

Size of Office (Support Staff)	Number of Interviewees	Percentage of Interviewees
No support Staff	3	7.32%
1-5 Support Staff	13	31.71%
6-10 Support Staff	13	31.71%
11-20 Support Staff	7	17.07%
More than 20 Support Staff	5	12.20%
Total	41	100.00%

My interview sample included 43 individuals. Forty of the interviewees were bankruptcy trustees, three were estate administrators. In one office, I had a trustee refer my request for an interview to the estate administrator, who had primary responsibility for the consumer bankruptcy files in that office. In two interviews, the trustee requested to have their estate administrators sit in on the interview, in which cases I interviewed two people at once.

Insolvent corporations are unlikely to file for bankruptcy, they are more likely to attempt restructuring under one of the other insolvency regimes, or the owners may just walk away from a business without undergoing formal bankruptcy proceedings. Even when

it does file for bankruptcy, a corporation does not get a discharge.¹⁵⁷⁹ Trustees, who practice primarily corporate insolvency, will have less experience with the opposition to discharge process. In my initial letter to trustees, I indicated that I would not seek to interview them if they had spent more than 50% of their time working on corporate insolvency files. For those trustees, whom I did interview, I asked them to set out how their file load broke down between corporate and personal files. Amongst their personal files, I asked them to further break down their file load between bankruptcies and proposals. The results are summarized below.

Table A.7 Breakdown of Practice – Personal vs. Corporate Bankruptcy

Percentage of Practice Devoted to Personal Bankruptcy	Number of Interviewees	Percentage of Interviewees
100% personal	18	54.55%
90-99% personal	13	39.39%
80-89% personal	2	6.06%
Less than 80%	0	0.00%
Total	33¹⁵⁸⁰	100.00%

¹⁵⁷⁹ *BLA*, *supra* note 11, s 169(4). Corporations can apply for a discharge if they satisfy all claims in full, but in essence this means they never obtain a discharge.

¹⁵⁸⁰ Not all interviewees were able to provide this breakdown.

Table A.8 Breakdown of Personal Practice – Bankruptcy vs. Proposals

Percentage of Personal Files that are Bankruptcies	Number of Interviewees	Percentage of Interviewees
85% or more bankruptcy	3	8.82%
60-84% bankruptcy	10	29.41%
40-59% bankruptcy	14	41.18%
15-39% bankruptcy	4	11.76%
Less than 15% bankruptcy	3	8.82%
Total	34¹⁵⁸¹	100.00%

I am aware of no research in Canada investigating how the experience or approach of trustees varies based upon their gender. On the other hand, gender has been an important subject of study in the research on emotional labour. Gender diversity was not something for which I intentionally selected. I ended up with a sample that comprised 29 (67.4%) men and 14 (32.6%) women.

One theme that emerged from my interviews was that the approaches of trustees may differ depending on their seniority, with more senior trustees identified as being more creative in their interpretation and application of the law, as compared to their “by-the-book” junior colleagues. Additionally, some interviewees observed that senior trustees tended to adopt more pro-debtor approaches. Seniority was not something for which I intentionally selected, but I asked each interviewee how long they had been working in the insolvency field and when they received their trustee’s license. The results are captured in the tables below.

¹⁵⁸¹ Not all interviewees were able to provide this breakdown.

Table A.9 Length of Career as a Licensed Trustee

Time as a Licensed Trustee	Number of Interviewees	Percentage of Interviewees
5 years or less as a trustee	4	10.00%
6-15 years experience as a trustee	12	30.00%
16-30 years experience as a trustee	19	47.50%
More than 30 years experience as a trustee	5	12.50%
Total	40	100.00%

Table A.10 Length of Career in the Insolvency Industry

Time in the Insolvency Industry	Number of Interviewees	Percentage of Interviewees
5 years or less experience in insolvency	0	0.00%
6-15 years experience in insolvency	7	18.92%
16-30 years experience in insolvency	19	51.35%
More than 30 years experience in insolvency	11	29.73%
Total	37	100.00%

Table A.11 Difference Between Time in the Insolvency Industry and Time as a Trustee

Difference between time in the insolvency industry and time as a licensed trustee	Number of Interviewees	Percentage of Interviewees
5 years or less difference	14	41.18%
6-10 years difference	10	29.41%
More than 10 years difference	10	29.41%
Total	34	100.00%

A.4.3 THE INTERVIEWS

Thirty-six interviews were done in-person at the interviewee’s office. Some interviewees met with me in their private office, others met with me in their boardroom. Five interviews were done by telephone. I told the interviewees that I expected the interview would take about an hour. The actual interviews ranged in length from 39 minutes to 2 hours and 53 minutes.

I had each interviewee sign a consent form, which had been approved by the University of British Columbia’s Research Ethic Board. I sent each interviewee a copy of the form prior to the interview. At the outset of each interview, I asked each interviewee if they had any questions about the form and asked them to sign it, if they had not done so already.

The interviews were structured according to a standard script. I asked interviewees questions about (i) their background and practice context, (ii) their processes for identifying files where grounds exist for lodging an opposition and for deciding whether or not to actually lodge an opposition, (iii) their impressions of the discharge process, (iv) specific debtor types and whether or not they would oppose them, and (v) the emotional demand of their role. I advised each interviewee that we were not tied to a script and could discuss other aspects of the opposition to discharge process that they felt were important. I ended each interview by asking the interviewee if they had any recommendations for improving the opposition to discharge process.

A.4.4 TRANSCRIBING, CODING & ANALYZING

I recorded the interviews using a digital audio recorder. Once the interview was done, I transcribed it. I did not anticipate how much time it would take to transcribe interviews. I became speedier the more interviews I transcribed, but it was initially taking me 6 hours to transcribe each hour of interview.

Once the interviews were transcribed, I coded them. Some of my codes were quite narrow. For instance, every time an interviewee mentioned an emotion, I coded it separately (e.g., “anger”, “fear”). Other codes were broader. For instance, every time an interviewee discussed a bankrupt with tax debts, that would be coded as “tax debtor”.

After coding all the interviews, I started to compare what interviewees had said about different topics. For instance, I read through all the sections coded “tax debtor.” By comparing the responses given by all my interviewees on this subject, I was able to identify themes around how the interviewees conceived of tax debtors. Some of these themes had become evident while carrying out the interviews, transcribing and coding them, but others emerged for the first time once I was able to compare and contrast discrete responses of different interviewees.

A.4.5 SHORTCOMINGS IN THE DATA

A.4.5.1 RESPONSE RATE & SELECTION BIAS

My response rate was 46.59%. This rate was affected by the large number of trustees I contacted in the first community where I carried out interviews. Many of these trustees responded that they only practiced commercial and not personal bankruptcy law. In subsequent communities, I researched each trustee before inviting them to participate and did not contact those, whom I could identify as primarily practicing commercial law, e.g., based on their profile on their firm’s webpage. My response rates in other communities improved. My response rates, by community, are set out below.

Table A.12 Response Rate by Community

Community	Number of Interviews	Number of Trustees Contacted	Response Rate
Community 1	5	25	20.00%
Community 2	1	1	100.00%
Community 3	4	5	80.00%
Community 4	2	2	100.00%
Community 5	4	7	57.14%
Community 6	6	10	60.00%
Community 7	2	5	40.00%
Community 8	3	3	100.00%
Community 9	4	9	44.44%
Community 10	3	4	75.00%
Community 11	5	10	50.00%
Community 12	1	4	25.00%
Community 13	1	3	33.33%
Total	41	88	46.59%

Anytime that participants are voluntarily choosing to participate (or not) in a research project, there is a risk of selection bias. It is possible that the group of bankruptcy trustees, who chose not to be interviewed, adopt consistently different perspectives or approaches, than those trustees, who willingly participated in my interviews.

A.4.5.2 FRENCH CANADA NOT REPRESENTED

My interviewees did not include any trustees working in Québec. Though I speak some French, I had concerns that my ability to interview trustees in Québec would be hampered by my (lack of) proficiency in the French language. The language difficulties might be exacerbated by the fact that Québec uses a civil code legal system, and much of the legal terminology is unfamiliar to me. Additionally, none of the 282 written decisions that I reviewed were issued by Québécois courts. To the extent my findings rely on my interviews

and my review of decisions, they may not accurately reflect the experiences of trustees in French Canada.

A.4.5.3 UNRELIABLE NARRATOR

When carrying out interviews, a researcher cannot accept the interviewee's answers at face value. As Jean Braucher noted with respect to her interviews with consumer bankruptcy lawyers in Texas and Ohio, the interviewees "may sometimes have picked what they have said in order to be entertaining or to make themselves look good. Even with the best of intentions, subjects self-reports will not provide a perfectly accurate picture of what they in fact do."¹⁵⁸² Reflecting on this methodological obstacle, Braucher suggested that the researcher "listen to what the lawyers say about what they do more as evidence of their attitudes rather than as mirrors of their actual behavior."¹⁵⁸³ Kristin Luker describes this process as uncovering the mental maps of the interview subject, whereby the researcher develops a deeper understanding of how the subject views and understands the world around them.¹⁵⁸⁴

Even if a researcher accepts that the interviewee can only speak to his or her attitudes or understanding as opposed to his or her actual behaviors or motivations, there are steps the researcher can take to elicit less distorted answers. A researcher can frame questions to normalize stigmatized behaviors, for instance I asked "how often have you used oppositions to discharge to elicit payment of your fees from a debtor," instead of asking, "do you use oppositions to discharge to elicit payment of your fees from a debtor."¹⁵⁸⁵ Braucher suggested that the researcher should address the risk of an unreliable narrator by looking for patterns that emerge from several interviews, but it strikes me that these patterns may just

¹⁵⁸² Braucher, *supra* note 1310 at 513.

¹⁵⁸³ *Ibid* at 514.

¹⁵⁸⁴ Kristin Luker, *Salsa Dancing Into the Social Sciences* (Cambridge, MA: Harvard University Press, 2010) at 167.

¹⁵⁸⁵ Bruce Berg, *Qualitative Research Methods for the Social Sciences*, 3d, (Needham Heights, MA: Allyn & Bacon, 1998) at 69.

reflect repeated exaggerations or distortions.¹⁵⁸⁶ I tried to address the issue of the interview subject as unreliable narrator by asking three types of questions, including questions on their procedures, questions about the debtor types and questions about their impressions of the opposition to discharge process. I was able to check their answers to these questions against each other and look for discrepancies.

A.5 TIMING

I carried out the decision review first, reading and analyzing the bulk of written decisions in September through December of 2013. During this time, I completed and submitted my Research Ethics Board application for my interviews with bankruptcy trustees. Approval was granted January 30, 2014. I began contacting and interviewing trustees shortly thereafter. I conducted my last set of interviews in November 2014. While carrying out my interviews, I was transcribing and coding recordings of the interviews. Getting quantitative data from the OSB was a very long process. I first contacted the OSB in the autumn of 2012. I received a final data set in February 2014. Most of the coding and analysis of the quantitative data took place between November 2014 and March 2015.

¹⁵⁸⁶ Braucher, *supra* note 1310 at 513.

Schedule 1 – Decision Review Information Sheet

Case Name: _____ Province: _____

DBs Name: _____ Joint? Joint DBs Name _____

Court: _____ Venue: _____ Judge: _____

Date of Bkrptcy: _____ Date Heard: _____ Date Decided: _____

Debtor :Age _____ Married: _____ # Previous bkrptcies _____

Income: _____ Education: _____

Homeowner: _____ Occupation: _____

Cause of Bankruptcy: _____

Liabilities: Total _____ SC _____ PR _____ UN _____
 _____ Assets _____

Bankruptcy: Business Consumer Summary High Income Tax
 Surplus Income Yes No Amount/month _____

Opponent: _____ Trustee Public CR
 Private CR OSB Other Amount _____

Grounds: (a) (e) spec (e)other (i) (m)
 (b) (e) extrav (f) (j) (n)
 (c) (e) gambl (g) (k) {o}
 (d) (e) busi (h) (l)
 Other _____ Not specified

Outcome: Absolute Refused _____
 Conditional _____
 Suspended _____
 Conditional & Suspended _____

Appealed to a higher ct Yes No Appealed from a lower ct Yes No
 Renewed Application Yes No Represented Counsel Agent No