Bankruptcy Administration in the United States and Canada

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This Article compares bankruptcy administration in the United States and Canada and considers the recommendations of the United States Bankruptcy Commission concerning bankruptcy administration.

I have always admired the knowledge that Stefan Riesenfeld has of the legal systems of so many countries and the use he makes of it. He has never been one to fall into the easy error of believing that the problems of his own country are unique. He is constantly aware that other countries have similar problems and that the solution to a problem propounded by the legal system of his own country is not necessarily the best or the "natural" one.

My introduction to Professor Riesenfeld and the commencement of my continuing indebtedness to his scholarship began with my reading of his Article comparing the bankruptcy acts of Italy and the United States.¹ It is a particular pleasure for me to be asked to write a somewhat similar Article as part of the California Law Review's tribute to him.

The most far-reaching recommendation of the United States Bankruptcy Commission is that the United States Bankruptcy Administration be created as a nationwide establishment located in the executive branch of the federal government and operated through regional and local offices.² The agency would be authorized to handle almost all matters that do not involve litigation. The effect of this recommendation, if implemented, would be to provide a system of official administration that would in part parallel and in part replace the present system of private administration. At the same time, one of the distinguishing features of the present Bankruptcy Act, court control of bankruptcy administration, would be substantially assimilated into a system of offi-

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cial control. The resulting administrative structure would be similar, in a number of ways, to the Canadian system.

The similarities invite a full comparison between the recommendations of the United States Bankruptcy Commission and the Canadian system. However, neither the recommendations nor the current Canadian law were cast in a mold; they both involve the evolution of ideas developed to meet changing needs. Using an historical method, this Article will examine the recommendations of the United States Bankruptcy Commission from two perspectives. First, it will demonstrate how the recommendations derive from the American experience with bankruptcy. Second, it will show how the Canadian system developed and how the recommendations of the Commission compare with the current Canadian resolutions to the problems of bankruptcy administration.

I

BANKRUPTCY ADMINISTRATION IN THE UNITED STATES

The first Bankruptcy Act of the United States was enacted in 1800 during the administration of President John Adams. It incorporated the main features of the English and Pennsylvania legislation of the time, most notably, complete creditor control of the bankrupt's estate. The Act provided for the appointment of up to three commissioners who were good and substantial citizens and who were residents of the district in which the debtor resided. The commissioners were required to hear the evidence against the debtor and, if insolvency was proven to their satisfaction, they could declare him bankrupt. Upon a declaration of bankruptcy the commissioners were required to take possession of the debtor's property and to call a meeting of the creditors, who would choose an assignee or assignees of the debtor's estate and effects. When the assignees were elected, the commissioners assigned the assets of the bankrupt to them. In the words of the statute, "the assignees shall be vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue."

The Act of 1800 was enacted as a temporary measure, to be effective for five years. It proved unsatisfactory primarily because of the difficulty litigants had in travelling to the often remote and unpopular

4. Id. § 2, 2 Stat. 21.
5. Id. § 3, 2 Stat. 22.
6. Id. § 5, 2 Stat. 23.
7. Id. § 6, 2 Stat. 23.
8. Id.
9. Id. § 44, 2 Stat. 33.
federal courts. With the return of prosperity, Congress repealed the Act in 1803, two years before it was due to expire.

Before a second bankruptcy act was passed in the United States, the Bankruptcy Act of 1831 was enacted in England. It introduced for the first time in that country a system of official bankruptcy administration. A class of officials known as official assignees was established and attached to the London Bankruptcy Court. For all practical purposes the official assignees controlled the administration of estates in bankruptcy. In 1840, after the system of official administration had been in existence for nine years, a royal commission was appointed to consider the subject of bankruptcy. This commission recommended the extension of “official assigneeism” to the country generally, and official assignees were thereafter attached to the county courts.

The second bankruptcy act of the United States was enacted in 1841. It did not adopt a system of official control of administration, as England had done in its 1831 act, but chose instead a system of court control. The new act made no provision for creditors’ meetings. The assignee who administered the estate was appointed and removed by the court. Moreover, all conveyances of the debtor’s property held by the assignee had to be approved by the court. The court itself was responsible for collecting the assets of the bankrupt and distributing them to creditors.

The Act of 1841 was largely a result of the rash of financial failures in 1837 and, like the Act of 1880, was short-lived. It was repealed in 1843. Its chief contribution to the present bankruptcy legislation is the system of court administration that it introduced and that, ironically, was the basis for much of its unpopularity. The creditor class found the administration of debtors’ estates to be very expensive. They also objected to the fact that the administration was entirely in the hands of the courts and court-appointed assignees, with no control given to creditors.

Following the Civil War and the severe inflation which accompanied it, the financial difficulties of debtors led to the enactment of the Bankruptcy Act of 1867. The Act anticipated the English Bankruptcy Act of 1869 in returning to the creditors the right to choose their own

10. See C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY 19 (1935).
11. Act to Establish a Court in Bankruptcy, 1 & 2 Will. 4, c. 56 (1831).
15. Id. § 10, 5 Stat. 447.
16. C. WARREN, supra note 10, at 82.
However, this did not directly translate into control of estate administration. While the assignee or trustee was chosen by the creditors, their choice was subject to the approval of a judge. If the assignee failed to qualify or the office became vacant, the judge might ignore the creditors and fill the vacancy. The judge could also "for any cause needful or expedient" either appoint additional assignees or order a new election. A novel feature of the 1867 Act was the appointment of one or more registers in bankruptcy for each congressional district. The duties of the register were "to assist the judge of the district court in the performance of his duties under this Act."

From the outset, the 1867 Act met general dissatisfaction. The dissatisfaction focused partly on abuses by the courts and registers. Some courts, for example, used the right to appoint assignees in addition to the assignee or assignees appointed by the creditors by doing so in every case without regard to need. Also, the registers in bankruptcy were too numerous and not effectively supervised. The courts often undercut the authority of both the registers and the creditors. There was no effective supervision of the system to protect creditors and to secure honest dealing on the part of the persons employed in the administration of an estate. In addition, costs of administration increasingly absorbed the assets of bankrupts' estates. The fees of the registers and assignees, combined with the waste, fraud and generally defective machinery of the Act, resulted in average dividends of 10 per cent or less.

Like its predecessors, the Act of 1867 was short-lived. It was repealed in 1878. However, the Act is of historical importance in that it was the first bankruptcy bill enacted as a permanent piece of legislation, concerned with both the interests of the nation and the interests of individual creditors.

Almost immediately after the Act of 1867 was repealed, several commercial organizations began agitation to have a new bill enacted. In response, the Senate in 1880 appointed a committee to study the subject of bankruptcy. The committee report, released in 1882, contained a simple bill which was later introduced in the Senate by Senator John J.

21. Id.
22. Id. § 3, 14 Stat. 518.
24. For many of the individuals employed, their "prickings of the stomach far exceeded the prickings of conscience. . . ." 7 Amer. L. Rev. 641, 647 (1873), cited in C. Warren, supra note 10, at 113.
25. See C. Warren, supra note 10, at 118.
27. Id. at 109.
The bill, known as the Equity Bill, made no provision for creditor control. Proceedings were to have been commenced by a debtor making an assignment for the benefit of his creditors under state laws. The debtor did this by filing the assignment in the federal district court. Once the proceedings were filed, the court, sitting in equity, would have marshaled the assets of the debtor. If no fraud were shown, the debtor would have received a discharge. The district court would have been free to develop such rules as it considered appropriate.29

A second bill proposing a new bankruptcy law was introduced in opposition to the Equity Bill.30 It was drafted by Judge John Lowell, a United States District Judge of Boston, at the request of the Boston Merchants Association. The bill was based upon the insolvency law of Massachusetts. Creditors would have been given the right to appoint a committee to advise and supervise the trustee. Under the supervision of this creditors' committee, the trustee would have had a free hand in the administration of bankrupts' estates.31

An important feature of the Lowell Bill was the requirement that judges in each circuit appoint a supervisor in bankruptcy. The supervisor's duties would have been to advise the trustees in administrative matters, to review bankruptcy proceedings, and to report to the courts any misconduct on the part of trustees. The bill also would have required the supervisor to make a quarterly report to the circuit judges concerning the entire field of bankruptcy administration.32 The system of official supervision of bankruptcy administration, as provided in the Lowell Bill, anticipated the English Act of 188333 as well as later Canadian legislation.34 However, the bill encountered considerable opposition in Congress. To circumvent this opposition, commercial interests had a new bill drafted by Jay L. Torrey, a young St. Louis lawyer.35

The Torrey Bill followed the substance of the Lowell Bill but omitted the provisions for a supervisor in bankruptcy and creditors'

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28. Id. at 128.

Although the Equity Bill was rejected, it had an important effect in that it introduced for the first time in the history of bankruptcy legislation the concept of balance sheet insolvency. Insolvency was defined as an insufficiency of assets at a fair valuation to meet the debtor's liabilities. Levi & Moore, supra note 23, at 36.

30. C. Warren, supra note 10, at 129. But see Levi & Moore, supra note 23, at 35. There seems to be some conflict as to which bill was introduced first and which was a substitute.
32. Id.
33. Bankruptcy Act, 46 & 47 Vict., c. 52 (1883).
34. Levi & Moore, supra note 23, at 35.
35. C. Warren, supra note 10, at 134; Levi & Moore, supra note 23, at 36.
committees. While the creditors were given an unfettered right to elect the trustee, thereby leaving them some control over administration, other interests were also protected. The bill provided that the trustee should collect, liquidate and distribute the estate under the direction of the court. In order to protect the public interest, the United States Attorney could be directed by the court, on application by a creditor, to attend the first meeting of creditors and to publicly examine the bankrupt. The United States Attorney could also be required to attend the hearing on the discharge of the bankrupt and to oppose discharge unless satisfied by the examination of the bankrupt that there were no grounds for so doing. In every case, the court was also required to publicly examine the bankrupt.36

Congress finally chose the Torrey Bill over the Lowell and Equity Bills as the vehicle for a new bankruptcy act. However, the Torrey Bill was modified extensively by several House judiciary committees37 before it was enacted by Congress in 1898.38 The underlying theory of the administrative structure as enacted was that of creditor control. Presumably, creditor control would be so effective that a centralized administrative machinery would not be necessary. However, as the law developed, creditor control was attenuated and courts assumed greater responsibility.

Under the 1898 Act the creditors were given "an unrestricted right to appoint their own trustee."39 Initially, the court had no right to interfere with an appointment. This was changed by the Supreme Court in 1933. Through the exercise of its authority to prescribe all necessary rules, forms and orders for carrying the provisions of the Act into force and effect, it adopted a General Order40 which provided that the appointment of trustees should be subject to the approval of the court.41 In 1938, the Act was amended to incorporate the provisions of the Supreme Court's order.42 In addition, the 1938 Act gave the Supreme Court the right to appoint a trustee when the trustee appointed by the creditors failed to qualify according to the standards specified in the Act. Previously it was the creditors who would have appointed another trustee.

These examples illustrate a general trend. Since the enactment of the 1898 Act, there has been a progressive deterioration in the authority

37. Id. at 37.
40. Amendments and Additions to the General Orders in Bankruptcy and Additions to the Official Forms, 288 U.S. 621, 624 (1933).
41. 2A W. Collier, Bankruptcy ¶ 44.01[2] (14th ed. 1974).
of the creditors and trustees, accompanied by an increase in the administrative functions and responsibility of the court and in the authority of lawyers. This development has not been without problems. To a degree, the courts have had to assume duties that they are not competent to perform and that they should not be expected to discharge.\textsuperscript{43}

As a result of alleged inefficiencies in administration and the occasional abuses, there has been much legislative tinkering with bankruptcy law since 1898 and also many public and private studies. The first major study of the bankruptcy system, released in 1931, was an inquiry into the administration of bankrupts’ estates by the United States District Court for the Southern District of New York. The report of this study, named after William J. Donovan, the counsel for certain petitioners, made a number of recommendations designed to separate judicial from administrative functions and to correct the inefficiency and abuses resulting from the failure of the theory of unlimited creditor control. The most important recommendation was that the President appoint a permanent Federal Bankruptcy Commissioner. According to the recommendation, this officer, a member of the executive branch, would license and supervise trustees, investigate complaints against unlicensed trustees, make rules for the administration of bankrupts’ estates, and generally supervise the administrative process, thereby relieving the courts of major administrative duties.\textsuperscript{44}

Under the Donovan Report, creditors were to be encouraged to elect a supervising committee of inspectors, with no more than five members, “with whose written consent, or that of a majority, the Trustee would be permitted to act without court authority in the various matters now requiring such authority.”\textsuperscript{45} It was thought that this would provide for greater creditor participation and also relieve the courts of some supervisory work.

Judge Thomas D. Thacher, who presided over the investigation that led to the Donovan Report, later became the Solicitor General of the United States. In that capacity, he conducted a second study in which he examined the whole field of bankruptcy law and practice. The Thacher Report, completed in 1932, concluded that the administration of bankruptcy estates and, in particular, that of small estates could never be placed on an efficient and businesslike basis unless

1. Trusteeships are restricted to thoroughly experienced and reputable persons whose qualifications have been established by impartial inquiry;

\textsuperscript{43} W. Donovan, Administration of Bankrupt Estates 9 (1931) (House Judiciary Comm. Print, 71st Cong. 3d Sess.).
\textsuperscript{44} Id. at 26.
\textsuperscript{45} Id. at 31.
(2) The compensation of trustees is sufficiently increased to attract trustees of such a character into the liquidation field; and
(3) The legal formalities are, as far as possible, eliminated and business responsibility placed squarely upon the trustees.\footnote{46}

The Thacher Report recommended that ten full-time salaried administrators in bankruptcy be appointed. The duties of the administrators were to include the employment, under the civil service, of examiners, assignment of examiners to judicial districts, and the supervision of their work. The principal duty of the examiners was to examine the bankrupt at the first meeting of creditors and at other times upon the order of the court. Another important duty of the administrators was to investigate the qualifications of applicants for trustee positions and to recommend to the courts the number of trustees to be appointed to each judicial district.

President Hoover took up the cause of the improvement of bankruptcy administration in his message to Congress in 1932. In his message, Hoover pointed out that the confusion of judicial and business functions led to delay. He also pointed out the need for overall supervision of bankruptcy administration. As a solution, he stated his support for a system of official supervision of bankruptcy administration and for a permanent staff of competent personnel whose job it would be to carry out the liquidation of estates.\footnote{47} Other studies, such as that of the Sabath Committee in 1936, also recommended a system of official administration.\footnote{48}

The Attorney General's Committee on Bankruptcy Administration in 1940 suggested a slightly different approach. It recommended that a bankruptcy division should be created in the Administrative Office of the United States.\footnote{49} The Committee felt that this would obviate the

\footnote{46. S. Doc. No. 65, 72d Cong., 1st Sess. 38 (1932).}
\footnote{47. The choice of the liquidating personnel should be limited to competent individuals or organizations after careful consideration by the courts of their qualifications and ability to maintain an efficient and permanent staff for the conduct of the business. Compensation for such services should be upon a scale that will attract trained business organizations. Competent officials should be continuously charged with the observance of the administration of the law and charged with the duty to suggest to the courts and to Congress methods for its improvement. The present statute is susceptible of improvement to eliminate delay in its cumbersome process much of which results from a confusion of judicial and business functions. Herbert Hoover, Message to the Senate and House of Representatives, February 29, 1932, in S. Doc. No. 65, 72d Cong., 1st Sess. XII (1932).}
\footnote{48. Hearings on H. R. 10634 Before the Special Subcomm. on Bankruptcy of the House Comm. on the Judiciary 74th Cong. (1936), appended to Hearings on H. R. 9 and H. R. 6963 Before the House Comm. on the Judiciary, 75th Cong., 1st Sess., ser. 10 at p. 67 (1937).}
\footnote{49. Report of the Attorney General's Committee on Bankruptcy Administration 117 (1940).}
necessity for a new agency. The following year, the Judicial Conference approved of the establishment of the Bankruptcy Division in the Administrative Office. This office has continued in existence up to the present time. However, it neither directs nor controls administration: it provides only central administrative services and some coordination of the courts, concentrating mainly on financial, statistical, and managerial functions. Thus, it does not address the recognized necessity of having some overall supervision and direction of the bankruptcy administration system. More importantly, it does not treat the problems stemming from the combination of administrative and judicial functions in the courts. In recent years, criticism has been directed as much against this combination as against the lack of a coordinated national system.

In 1970, the National Bankruptcy Conference went on record as approving the establishment of a special court of bankruptcy whose jurisdiction would be limited to juridical business. Two years later a committee of the Conference reported:

The present system has too much of a potential for bias. Parties adverse to a receiver, trustee or other representative of the estate have reason to fear that trial before a referee may be less fair than one before another judge who does not have the added statutory responsibility for looking out for the estate's best interest. Again, his non-judicial duties often result in a referee's receiving information in a non-adversary proceeding that later becomes relevant in a litigious context . . . . The opportunity for unfair prejudice could be significantly reduced if the judicial officer's duties were limited to deciding disputes.

Initially, some judges were reticent to accept the separation of administrative and judicial functions. However, the principle has now been accepted by the National Conference of Bankruptcy Judges.

A report of the Brookings Institute in 1971 found that, in most cases, the bankruptcy system is not a genuine judicial enterprise but is rather a large scale example of routine administrative machinery. As such, the report found it appallingly archaic and inefficient, a system characterized by loose supervision, infrequent field examinations, little concern for the qualifications of personnel, outdated procedures, high costs, and unwarranted delays. The report argued that these shortcomings are a natural result of using a judicial system to try to solve

31. NATIONAL BANKRUPTCY CONFERENCE, REPORT OF COMMITTEE ON ESTABLISHMENT OF A SEPARATE COURT OF BANKRUPTCY (1971).
32. Id. at 4.
problems that have little or no adversary interest and are by nature administrative.\(^5^4\)

Responding to this situation, the Brookings report suggested that the major need of the system was for a "speedy, discriminating, understanding processing of about two hundred thousand small, largely uncontested cases each year," which it regarded to be an essentially administrative rather than judicial function and which it suggested should be performed by a staff selected on a merit basis and aided by the most modern records management and data processing methods.\(^5^6\) To this end, the report recommended the establishment of a bankruptcy agency within the executive branch of government, which would be entrusted with the work presently done by the bankruptcy courts together with the work done by trustees, receivers, appraisers, accountants, auctioneers, and other auxiliary personnel.\(^5^6\)

In 1971, the Commission on the Bankruptcy Laws of the United States began to study the Bankruptcy Act. Among the matters requiring consideration by the Commission were such basic issues as the extent of the public interest in the financial failure and the rehabilitation of debtors, who should supervise, control and direct the bankruptcy system and whether the courts should continue to exercise administrative functions that were often incompatible with their judicial functions. In addition, there was a need to carefully examine the whole concept of no asset bankruptcies and wage earners plans from an administrative point of view.

The recommendations of the Commission with respect to administration were not unexpected. Indeed, they had a certain inevitability about them. Most of the conditions that prompted the recommendations had existed for some time, and the substance of many of the recommendations can be traced to the Lowell Bill or earlier sources.

The recommendation that the administrative and judicial functions of bankruptcy judges should be separated was widely expected. The more difficult decision of the Commission involved the question of who should be responsible for the administrative functions presently exercised by the courts. Realistically, new responsibilities could not be given

\(^5^4\) Brookings Report, \textit{supra} note 50, at 197-98. See also note 56 infra.

\(^5^5\) Brookings Report, \textit{supra} note 50, at 200.

\(^5^6\) \textit{Id.} at 197-99. This recommendation could have been prompted in part by the observation of Chief Justice Warren in his address to the National Conference of Referees in Bankruptcy in 1962. The Chief Justice warned that Congress could repeal the federal bankruptcy law, as it had done three times in the past, or place bankruptcy in the executive branch, if it was decided that the bankruptcy courts were too slow or expensive. He added: "Already there are those who point out that the Executive Branch through its custodian administers alien property in its possession for a fraction of the twenty-five per cent of bankruptcy estates." Warren, \textit{Address at Annual Dinner of National Association of Referees in Bankruptcy, October 23, 1962}, in \textit{37 Ref. J. 3} (1963).
to creditors who, for the most part, do not use the limited authority they now possess. Similarly, it would be difficult, and indeed unrealistic to recommend that greater responsibilities be given to private trustees. For too long, they have been forced into a relatively minor if not subservient role within the system. It would seem to be too late to attempt to establish a system of licensed trustees, as recommended by the Donovan and Thacher Reports and by President Hoover, to whom greater administrative responsibilities could now be given. These were undoubtedly among the considerations that led the Commission to the conclusion that the only practical solution was to recommend that the administrative functions be exercised by an administrative agency to be created for this purpose. This in turn led to another difficult decision, i.e., whether such an agency should be a part of the executive or the judicial branch of government.

Under present conditions, there is no persuasive reason why a newly-established agency could not perform these functions effectively within the judicial branch. As a matter of internal organization, it should be a simple matter for the judges to be restricted to judicial functions while the agency carries out administrative functions. No substantial conflict of roles would arise simply because the administrative and judicial functions of the bankruptcy process were both housed in the judicial branch.

However, the recommendations of the Commission, taken in their entirety, envisage and would have the effect of creating a bankruptcy system that is not based upon court control, the system established by existing law. The proposed system is one of combined court and official control. This gives the executive and judicial branches at least an equal claim to the agency. If the slate is wiped clean, there seem to be good reasons for preferring the executive branch. In fact, the Bankruptcy Commission did place the agency in the executive. 57 It was the Commission's view that bankruptcy problems, particularly in the area of consumer bankruptcies, were largely administrative in nature. Certainly, it can be argued that the processing of noncontested, no-asset cases is as much an administrative as a judicial function. Indeed, such cases, in their widest social context, are primarily a welfare-oriented means of rehabilitating the large and increasing number of citizens who would otherwise be unable to surmount their financial difficulties. There is a similarity between these bankruptcies and the social security and workers' compensation programs, which are ordinarily administered by agencies and not by the courts. By analogy, the agencies administering

bankruptcy law should clearly be marked as administrative rather than judicial bodies by placing them in the executive branch.

Another consideration for attaching the agency to the executive branch is the need for a much closer degree of supervision of the entire bankruptcy system than now exists or is presently proposed. With the present and expected volume of bankruptcies, there is likely to be a sufficient number of situations involving the appearance of fraud or abuse of the system so as to require formal investigatory procedures. These situations must be detected and dealt with if the system as a whole is to retain public confidence.

Experience has shown that bankruptcy and related areas are not, as a rule, well investigated by regular police agencies. Investigations in such areas are time consuming and require special expertise. It is usually accepted that these investigations are best undertaken by special teams of experienced investigators who are associated with the agency which regulates the specialized area. A police function of this nature would be incompatible with the regular functions of the judicial branch. The judges who have the ultimate authority for the administration of the judicial branch are not institutionally accustomed to policing programs, especially where these programs have a major nonjuridical element. In any event, it is inherently objectionable to have judicial and police functions combined in the same branch. The executive branch is traditionally more experienced in investigatory work and the police function in general. For this reason alone, the agency should be attached to the executive branch. Also it would be easier for an agency to evolve in response to changing circumstances if it were located in the executive branch rather than in the judiciary. Agency reorganizations in the executive branch are more common and more easily accepted than modifications in judicial institutions.

The Commission was specifically directed "to recommend changes in the Act which would reflect and adequately meet the demands of present technical, financial and commercial activities."\footnote{58} The recommendations made, particularly as they relate to administration, reflect the changing nature of the bankruptcy system and the demands made upon it. The recommendations are well conceived and deserve serious and impartial consideration.

II

BANKRUPTCY ADMINISTRATION IN CANADA

Prior to confederation in Canada in 1867, all provinces had bankruptcy or insolvency legislation. The first federal bankruptcy act, inap-
propriately called The Insolvent Act of 1869, amended and consolidated the prior provincial legislation, taking its basic form from The Insolvent Act of 1864, which was the insolvency law of the former Province of Canada. This federal law was passed as a temporary measure, to be effective for four years.

The Insolvent Act of 1869 continued the use of a system of administration through official assignees first introduced in England by the Bankruptcy Act of 1831 and later introduced into pre-confederation provincial legislation. This was in spite of the fact that the system had gradually fallen into disfavor in England. An English report in 1861 had generally condemned the system of official assignees, and an act had been passed that year which drastically limited the duties of official assignees. In 1864, a celebrated committee in England advised that the position of official assignee should be totally abolished. This was in fact done in 1869 by an act enacted less than two months after the enactment of the Canadian Insolvent Act of 1869. The Canadian Act did not take these events into consideration, possibly because it was designed to be a temporary measure.

Perhaps the most significant aspect of the Insolvent Act of 1869 was that it provided a large measure of creditor control. Under the terms of the Act, the assignee of the estate was required to wind up the affairs of the insolvent under the guidance and direction of the creditors. He was obliged to discuss with the creditors his proposal for liquidation of the estate and to ask for their suggestions. Also, he could not proceed with liquidation until the creditors had approved the method proposed. As a means of further protection the creditors could appoint one or more inspectors, either from their own number or otherwise, to supervise and direct the assignee in the performance of his duties under the Act. In addition, only the creditors could remove the assignee. These provisions, and the general concern for creditor control, were to be influential in all subsequent Canadian bankruptcy legislation.

While creditors had a major role, their control was not plenary. The responsibility for the appointment of official assignees was delegated to local Boards of Trade. These boards were required to appoint the assignees for the county in which they were located and any adjacent

59. An Act respecting Insolvency, 32 & 33 Vict., c. 16 (1869) (Can.) (hereinafter referred to in the text as the Insolvent Act of 1869).
60. An Act respecting Insolvency, 27 & 28 Vict., c. 17 (1864) (Prov. of Can.).
61. 1 & 2 Will., c. 56.
64. 277 PARL. DEB., H.C. (3d ser.) 825 (1883).
65. The Bankruptcy Act, 1869, 32 & 33 Vict., c. 71.
66. An Act respecting Insolvency, 32 & 33 Vict., c. 16 (1869) (Can.).
county in which there was no active Board of Trade. Where there was no board or if the local board failed to appoint an official assignee, the court was required to make the appointment.\(^{67}\)

One interesting aspect of the 1869 Act was its division of responsibilities, particularly as this affected the role of the assignee. The Act provided that the assignee had certain judicial duties in addition to his administrative responsibilities. In any dispute concerning a claim or dividend, or the ranking or privilege of a claim, the assignee had the authority to hear and examine the parties and their witnesses under oath and to make an award, which could then be appealed to the court.\(^ {68}\)

The 1869 Act was twice extended to keep it in force beyond its original four year term.\(^ {69}\) However, in 1875 a new Insolvent Act was finally enacted.\(^ {70}\) The principal features of the 1875 Act were the abolition of voluntary assignments, the appointment of assignees by the government, the removal of judicial functions from assignees, and the reaffirmation of creditor control.

Two reasons were advanced for the appointment of assignees by the government. First, with government appointment, the assignees would be accountable to the government in case of malversation. Second, it was argued that government appointment would lead to greater control over assignees than had previously been the case. As a means of carrying out this second goal, the new law provided that assignees were required to give security not only for the due performance of their duties, but also for the benefit of creditors.\(^ {71}\)

The elimination of assignees' judicial functions occurred because of the failure of the earlier law. It had been found in practice that the assignee often did not independently adjudicate claims according to his own knowledge of the law or his own judgement. Instead, the lawyer that he retained, who might also be representing some of the creditors, generally made the decisions. In addition, the assignee himself often acted as the agent of some of the creditors and adjudicated claims in which he had an interest.

A principal object of the 1875 Act was to give creditors greater control over the administration of bankrupts' estates. Pursuant to this objective, the powers of inspectors were augmented. In all matters of importance, the law provided that nothing could be done by the assign-
ees without the approval of the inspectors. The new law also provided for tighter control over the funds of the estate while in the hands of the assignees.

A serious depression, which resulted in many commercial failures, took place in Canada from 1874 to 1878. This caused much public resentment, particularly in the rural areas of the country, where farmers found that they had no remedy against the eastern farm implement dealers who did not deliver paid-for equipment and then received a discharge of their debts. This resentment led to the Insolvency Acts Repeal Act in 1880.72

It was soon found that there was no convenient way to wind up insolvent companies without legislation such as the Insolvency Acts, and Boards of Trade in several of the large cities passed resolutions requesting new legislation. As a result, the Insolvent Banks, Insurance Companies and Trading Corporations Act, later to be known as the Winding-Up Act, was enacted in 1882.73

The Winding-Up Act provided for a system of court controlled administration not dissimilar to the administrative scheme under the United States Bankruptcy Act of 1898,74 whereby the court appointed a liquidator upon notice to the creditors, contributors and shareholders.75 Upon appointment, the liquidator was required to perform such duties in winding up the business of an insolvent company as were imposed by the court or the Act.76 At each step in the liquidation process, the liquidator was obliged to obtain the approval of the court.77

Apart from the Winding-Up Act, no federal bankruptcy or insolvency legislation relating to individuals was enacted in Canada during the thirty-nine year period from 1880 to 1919. The only relief available to insolvent individuals during this period was provided by provincial insolvency statutes. All of the common law provinces had assignment acts, and in Quebec similar relief was available under the Code of Civil Procedure.78 Under the provincial assignment acts, an insolvent debtor made an assignment of his property to an authorized trustee appointed by the provincial government. The authorized trustee liquidated the property of the insolvent under the supervision of creditors who acted in the role of "inspectors." It was a system of creditor control. No applications by the trustee to the court were necessary during the course of the

72. 43 Vict., c. 1 (1880) (Can.).
76. Id. § 33.
77. Id. § 35.
78. CODE OF CIV. PRO. OF LOWER CANADA, art. 763-80 (1867).
liquidation. The trustee was required, however, to obtain the consent of the inspectors at each step.79

From the point of view of both the creditor and the debtor, the provincial legislation had serious limitations. From the creditors' side, there was no provision permitting a creditor to force a debtor to make an assignment. As for the debtor, arrangements were not permitted, and the debtor could not receive a release or discharge of his debts. Considerable agitation in the commercial community consequently developed in support of a national bankruptcy act. Pressure for a new law also arose from commercial interests outside of Canada that found it difficult to do business in a country without uniform insolvency legislation.80

While there was general agreement as to the need for a new law, interested groups disagreed over the form of the new legislation. At one stage, a committee of the Canadian Bar Association was appointed to draft a bill. This disturbed some businessmen as well as the authorized trustees licensed by the provinces.81 They feared that an act drafted by lawyers would provide for some form of court-controlled administration as found in the Winding-Up Act. As an alternative, the businessmen sought to maintain the existing system of creditor control whereby estates were liquidated by the authorized trustees under the supervision of inspectors. One of the largest firms of trustees took the initiative in retaining H.P. Grundy, K.C., a prominent Winnipeg lawyer, to draft a bill based upon creditor control that would retain the essential features of the provincial assignment acts.82

Mr. Grundy's experience under the Winding-Up Act, in addition to some knowledge of the United States' Bankruptcy Act of 1898, led him to the conclusion that a system of court control was slow and expensive. Accordingly, he provided for a bare minimum of court involvement in his draft bill. The principal sources for the bill were the English Bankruptcy Act of 1883,83 the earlier Insolvent Acts of 1869 and 1875,84 and the provincial assignment acts. This draft, with some modifications, ultimately became the Canadian Bankruptcy Act of 1919.85

80. 3 Parl. Deb., H.C. 3065 (1932) (Can.).
81. Trustee organizations were incorporated throughout Canada for the exclusive purpose of carrying out liquidations, primarily under the provincial legislation but also under the federal Winding-Up Act. These organizations acquired much experience and developed staffs skilled in liquidation. The trustee business became a well recognized and accepted occupation in Canadian commercial life and one that provided a high income for the services rendered.
83. 46 & 47 Vict., c. 52.
84. An Act respecting Insolvency, 32 & 33 Vict., c. 16 (1869) (Can.), An Act respecting Insolvency, 38 Vict., c. 16 (1875) (Can.).
85. 9 & 10 Geo. 5, c. 36 (1919) (Can.).
Under the 1919 Act, estates were to be liquidated by “authorized trustees” who were appointed by the government much in the same manner as the official assignees were appointed under the 1875 Insolvent Act and the provincial assignment acts. The system was supervised by the creditors who were required to appoint at least one, but not more than five, inspectors.\textsuperscript{86} These inspectors had a major role in the liquidation, for at each stage of the administration, the trustee was required to obtain their written permission in order to proceed.\textsuperscript{87} Within the scope of this control, the trustee carried out the liquidation and distribution of the estate. Proof of claims were filed with the trustee who could either accept or disallow them. A disallowance was final and conclusive unless the claimant promptly appealed to the court.\textsuperscript{88} When the estate was completely administered, the trustee passed his accounts and was discharged by the court.\textsuperscript{89}

The only government control over the system lay in the appointment of trustees. It was expected that the government would appoint as trustees only the experienced organizations that had been authorized trustees under the provincial assignment acts, or firms with similar qualifications, including adequate facilities and skilled personnel. However, much of the business under the 1919 Act did not go to those organizations. Unfortunately, the trustee business attracted undesirable persons who were unqualified and inexperienced, and who received their appointment through political patronage. When work was scarce, many trustees openly solicited business. This often led to collusive and inefficient administration of estates.\textsuperscript{90}

In an attempt to remedy the abuses surrounding the appointment of trustees, the Act was amended in 1923.\textsuperscript{91} The government appointment of authorized trustees was abolished, and the English system of administration by trustees selected by the creditors was adopted as a replacement. For voluntary relief under the new law, the debtor assigned to the creditors instead of assigning to a trustee. He did this by offering the assignment to an Official Receiver, whose office was created by the 1923 amendment. Upon acceptance by the Official Receiver, the debtor’s property would come under the authority of the court.\textsuperscript{92} Immediately upon acceptance of the assignment, the Official Receiver would appoint a custodian from among “the most interested creditors, if ascertainable

\textsuperscript{86} Id. § 43.
\textsuperscript{87} Id. § 20.
\textsuperscript{88} Id. § 53.
\textsuperscript{89} Id. § 41.
\textsuperscript{90} 156 Parl. Deb., H.C. 1490-1528 (1923) (Can.).
\textsuperscript{91} The Bankruptcy Act Amendment Act, 1923, 13 & 14 Geo. 5, c. 31 (Can.).
\textsuperscript{92} Id. § 11(2).
at the time of assignment." The custodian would call a first meeting of creditors, whereupon the creditors would select a trustee to administer the debtor's estate and inspectors to supervise the trustee.

The system of involuntary proceedings was also changed. Under the system prior to 1923, if the debtor had committed an "act of bankruptcy"—broadly, an act to defeat his creditors— a creditor could present to the court a bankruptcy petition. If statutory requirements were met and if the court was satisfied that an act of bankruptcy had been committed, it would adjudge the debtor a bankrupt and issue a "receiving order" for the protection of the estate. Under this order, either the trustee named in the bankruptcy petition or some other authorized trustee would be vested with the debtor's property.

Under the 1923 Act, when the court issued the receiving order, the debtor's property was "deemed to be in the custody of the court." The property was then administered by a custodian until the first meeting of creditors. The custodian, appointed by the court at the time the receiving order was handed down, was to be "a qualified person having regard, as far as the court deems just, to the wishes of the creditors." Just as with an assignment, the custodian would call a first meeting of the creditors, who in turn would elect a trustee and inspectors. The trustee, under the supervision of the inspectors, would administer the estate.

The creation of the two offices of custodian and Official Receiver was a principal feature of the 1923 Act. The office of the Official Receiver has continued in existence up to the present, but the office of the custodian was abolished in 1949. There were problems associated with that office almost from the time that it was created. First, the act was somewhat confusing regarding who would be appointed custodians. In involuntary proceedings, the court was required to appoint as custodian "a qualified person having regard, as far as the court deems just, to the wishes of the creditors." In voluntary proceedings, the Official

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93. Id. § 11(3).
94. See Bankruptcy Act of 1919, 9 & 10 Geo. 5, c. 36, § 3 (Can.).
95. Id. § 4(1).
96. Id. § 4(5).
97. Id. § 6(2).
98. Id. § 6(3).
99. The Bankruptcy Act Amendment Act, 1923, 13 & 14 Geo. 5, c. 31, § 6(3) (Can.).
100. Id. § 4(2).
101. Id.
102. Id. § 26(2) (Can.); Bankruptcy Act of 1919, 9 & 10 Geo. 5, c. 36, § 42(1), (2) (Can.).
103. The Bankruptcy Act Amendment Act, 1923, 13 & 14 Geo. 5, c. 31, § 4(2) (Can.).
Receiver was required to appoint a custodian whom he shall, "as far as possible, select from the most interested creditors, if ascertainable at the time of the assignment."104

Second, and more importantly, creditors refused to accept appointments as custodians. Few of them had the time or the experience to perform efficiently the duties required of a custodian. In practice, the creditors invariably nominated one of the trustee organizations which had developed under the former provincial assignment acts to be custodian. These organizations had become so well established, and their efficiency and ability had become such a matter of general commercial knowledge, that creditors naturally turned to them when a debtor's estate was to be liquidated.

Finally, the office of custodian proved to be superfluous. The established trustee firms which took over the position of custodian eventually contributed to its abolishment. The principal function of the custodian was to take possession of the property of the debtor and to be responsible for its safekeeping until the first meeting of creditors. At that meeting, the creditors were required to choose a trustee to take over the estate. In practice this did not happen. Since the custodian was generally an established trustee firm or a member of such a firm, it was natural for the custodian to act also as trustee. Also, as a practical matter, it was difficult to appoint another as trustee. As a rule, the custodian appointed was the person or organization nominated by the largest creditor or creditors. Since the largest creditor or creditors were also involved in selecting the trustee, it was difficult for the other creditors to appoint another as trustee. As a result it soon developed that the custodian was invariably appointed the trustee. Following this development, the office of custodian served no useful purpose, and it was ultimately abolished by the Bankruptcy Act of 1949.105

The position of Official Receiver is not well-named, for the duties of this official are somewhat different from those usually associated with the position of receiver. In England, the Official Receiver is a true receiver. In the interval between the making of an interim order to protect the debtor's property and the final order declaring the debtor bankrupt, the official receiver controls the debtor's property. In Canada, the Official Receiver does not have this control. However, the other duties of the Canadian Official Receiver are generally those of his English counterpart. Those duties are to accept and file assignments (i.e., voluntary bankruptcies), to examine all debtors as to their conduct, the causes of their bankruptcy and the disposition of their proper-

104. Id. § 11(2).
105. 13 Geo. 6. c. 7 (Can.).
ty, to fix the amount of the bond to be filed by trustees in both voluntary and involuntary bankruptcies, and to preside over, or nominate someone else to preside over, the first meeting of creditors.

Official Receivers are appointed by the federal government, with one or more for each bankruptcy division in Canada. (Each province in Canada is a bankruptcy district. The larger provinces are divided into bankruptcy divisions.) Originally, Official Receivers were provincial civil servants who were often court officials in the provincial superior courts. They acted as Official Receivers on a part-time basis. At present, in Vancouver, Calgary, Edmonton, Winnipeg, Toronto, Ottawa, Hull, Montreal and Quebec City, where a larger volume of bankruptcies occurs, the Official Receivers are full-time federal civil servants.

The abolition in 1923 of the system of authorized trustees, making it possible for creditors to choose any person as trustee, proved ineffective in eliminating misconduct on the part of trustees. Complaints against trustees continued, and members of the public expressed a sense of frustration over the lack of a person to whom complaints could be made and from whom quick and effective remedial action could be expected. A number of organizations made studies and recommendations to improve the system. Among these was the Canadian Bar Association, which recommended that all trustees should be licensed by the government and that a Superintendent of Bankruptcy should be appointed to supervise and discipline trustees.106

In 1932 the Bankruptcy Act was amended107 to substantially incorporate the recommendations of the Canadian Bar Association.108 Under the 1932 Act, the Superintendent was given the duty of supervising the administration of all estates to which the Act applied. Specifically, he was required to supervise the activities of the trustees, make necessary investigations and recommend remedial action to the Minister of Finance, who was ultimately responsible for the administration of the Act. The Superintendent was also required to make such inspections of the administration of estates as he considered advisable. In addition, on the application for a discharge by the bankrupt or the trustee, he was to report to the court concerning the merits of the application. All complaints from creditors or other persons concerning the operation of the system had to be investigated by him and a report made to the responsible minister.109

106. 3 PARL. DEB., H.C. 3065 (1932) (Can.).
107. The Bankruptcy Act Amendment Act, 1932, 22 & 23 Geo. 5, c. 39 (Can.).
108. It is an interesting historical footnote that the Canadian legislation of 1932, which re-introduced licensed trustees and a Superintendent of Bankruptcy, was enacted in the same year that President Hoover advocated similar legislation in his message to Congress. The Hoover address is quoted at note 47 supra.
109. The Bankruptcy Act Amendment Act, 1932, 22 & 23 Geo. 5, c. 39, § 18 (Can.).
The licensing system authorized by the 1932 Act was under the authority of the Minister of Finance. However, it was actually the Superintendent who was responsible for the administration of the system. Applications for licenses had to be made to the Superintendent, who then made an investigation into the character, business experience and efficiency of the applicant. If the applicant measured up to the requisite standards, the license was issued by the Minister on the recommendation of the Superintendent.

Unfortunately, the licensing system did not work well in practice. The procedure for the licensing of trustees was not demanding and did not ensure that only those persons who were well qualified held licenses. The investigations made by the Superintendent's office were too often superficial. There was no system of unscheduled investigations of the books, accounts and records of trustees, and those investigations of records that were made were often performed by unqualified personnel. The major device for supervising trustees was the mandatory review of all applications of trustees for the passing of their accounts and their discharge. While useful, the main drawback to this was that the review was not made during the administration of an estate but after it had been completed. A weak and unaggressive system of supervision led not unnaturally to abuses and to trustees who did not have the competence and integrity essential to a trustee-oriented system of bankruptcy administration.

Abuses on the part of trustees first began to appear in the late 1950's. Many abusive practices were uncovered. Trustees split fees with the attorneys who directed the estates to them. Trustees contrived to have the attorney who had arranged for their appointment retained as the attorney for the estate and then did not question the fees later charged. They solicited estates and proxies. Unnecessary or useless audits of estates were performed by partners of the trustees who often grossly overcharged for these services. Also, trustees misled inspectors by withholding or obfuscating critical information. Not infrequently they knowingly hired incompetent and often dishonest persons to take inventories and used irregular procedures in accepting and opening tenders so as to give advantage to favored persons.\(^{110}\)

Apart from the abuses uncovered on the part of trustees, fraudulent bankruptcies became a serious problem, particularly in the Montreal area.\(^{111}\) To some extent this was made possible by the difficulty in investigating fraudulent bankruptcies and successfully prosecuting those

\(^{110}\) Interview with Roger Tassé, former Superintendent of Bankruptcy.  
\(^{111}\) 6 PARL. DEB., H.C. 6490-91 (1966) (Can.); 2 PARL. DEB., H.C. 1720-23 (1966) (Can.).
accused of offenses. Problems were compounded by the less than close co-operation of federal and provincial law enforcement agencies.

In reaction to the evidence of abuses, a number of changes were made in the operation of the Superintendent’s office to make it more efficient. This was in the late 1950’s and in the 1960’s. First of all, major changes were made in the licensing procedures. Arrangements were made with the Royal Canadian Mounted Police for a field investigation of all applicants for a trustee’s license. Qualifications were tightened; at a minimum an applicant was required to have extensive knowledge of business operations, a good knowledge of the Bankruptcy Act and related legislation, a good reputation, and financial independence.

Boards of Examiners, usually consisting of two or three members of the Superintendent’s staff and two private bankruptcy attorneys, were established to examine applicants for a trustee license. At present these boards usually meet twice a year in the principal regions of the country, where they give a viva voce examination approximately one hour in length to each applicant. These examinations are sufficiently rigorous that more than half of the applicants fail on their first appearance, although those who fail may try again. Consideration is presently being given to a proposal that would require trustees who have not administered many estates in recent years to appear before a Board of Examiners in order to requalify. Under the proposal, all trustees would ultimately be required to appear before a Board from time to time.

In order to deal with the apparent increase in bankruptcy fraud, the Bankruptcy Act was amended to give the Superintendent responsibility for investigating prebankruptcy frauds and other offenses connected with bankruptcies which might not otherwise be investigated. To meet these added responsibilities, the office of the Superintendent was reorganized. A number of full-time investigators and field auditors were added to the office. These staff people do regular, periodic audits of trustees, as well as unannounced audits. They also carry out routine investigations for chronic problems, such as solicitation of bankruptcies, and special investigations in response to complaints alleging criminal or

112. As of January 1, 1966, there were 528 licensed trustees for all of Canada. This fell to a low of 418 as of January 1, 1971, and since then the number has been very slowly increasing. Interview with Mr. Roger Tassé, former Superintendent of Bankruptcy.

113. The latest annual report of the Superintendent of Bankruptcy discloses that since 1967 when the current licensing policy was established 253 applicants for licenses were asked to appear before Boards of Examiners. Of this number a total of 122 were licensed. Report of the Superintendent of Bankruptcy for the Year Ended March 31, 1973.

114. An Act to Amend the Bankruptcy Act, 14 & 15 Eliz. 2, c. 32 (1966) (Can.).
administrative irregularities on the part of trustees or others. Regional offices of the Superintendent were established and are now located in thirteen cities across the country. These offices are responsible for the routine and systematic audits of trustees' books as well as the investigation of suspected irregularities or offenses by trustees or others connected with bankruptcies.

In 1966 the Minister of Justice appointed a committee to study the bankruptcy and insolvency legislation of Canada. The committee, which submitted its report in 1970, found that notwithstanding the elaborate provisions designed to ensure effective creditor control of bankruptcy administration in Canada, creditor control, as in many other countries, had failed. It was accordingly recommended that creditor control should no longer be relied upon as a cardinal principal upon which the administrative machinery of the bankruptcy system should be based. While the machinery should be such as to allow those creditors who have a genuine interest in the administration of estates to involve themselves, the committee recommended that the government assume greater responsibilities in order to fill the vacuum resulting from the failure of creditor control.115

Among the specific recommendations of the committee were:

1. as far as possible, all Official Receivers should be full-time employees of the public service;
2. the Official Receiver should be the trustee in every arrangement made by small debtors;
3. the Official Receiver should serve as the interim receiver in involuntary cases;
4. the Official Receiver should serve as the initial trustee in all cases and as permanent trustee if the creditors wish to retain him;
5. the Official Receiver should represent the public interest in all applications to the court regarding the status of a bankrupt;
6. the creditors should be permitted but not required to appoint inspectors;
7. the government should continue to license trustees, and there should be a right of appeal where a trustee's license is revoked, suspended or not renewed, but not where a license is refused; and
8. the Superintendent should be given the exclusive initial responsibility to audit and tax the statement of receipts and disbursements and the accounts of interim receivers, trustees, receivers, solicitors and accountants, with a right to appeal to the court.116

116. Id. at 152-62.
The recommendations were in part designed to relieve the courts from as many administrative and quasi-judicial responsibilities as possible and to prevent unnecessary duplication of work. If the recommendations are implemented, the court will no longer be involved in the taxation of accounts, the discharge of trustees or bankrupts or the administration of arrangements by small debtors, except on appeal.

The strongest opposition to the report came from the trustees, who objected to the role of public officials in the proposed system, especially their involvement in the administration of business bankruptcies. The opposition was based mainly upon the propositions that the functions of the trustee can best be performed by the private sector and that the implementation of the report would result in the virtual disappearance of the private trustee. The trustee organizations admitted that there were some unscrupulous and incompetent trustees but asserted that they could be eliminated and abuses prevented if the Superintendent were to appoint to every estate a monitor who could sit in on all meetings and have access to all records.117

In 1973, pending the introduction of a new bankruptcy bill which would give greater rights to Official Receivers to act in small estates without a trustee, the federal government incorporated the Federal Insolvency Trustee Agency (FITA). The FITA was then granted a trustee license. It now acts as the trustee for the small non-business debtors who cannot afford a trustee and who meet a means test, assisting them within the framework of the existing system.

On May 5, 1975, a new bankruptcy bill that closely followed the report of the study committee was introduced into the Canadian Parliament by the Minister of Consumer and Corporate Affairs.118 The principal variation between the bill and the report in respect of administrative matters was that the bill did not call for the Official Receiver to be the interim receiver or first trustee in every bankruptcy. After considering the comments on the report, the government concluded that the bill should assign the primary responsibility for the administration of commercial bankruptcies to licensed trustees. It was felt that they would better be able to react to emergencies and to make the quick decisions often required in the early stages of a bankruptcy.

Under the 1975 bill, the Official Receiver, re-named the Bankruptcy Administrator, would act as the trustee in all bankruptcy cases where

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117. Submission made on behalf of the Canadian Institute of Chartered Accountants and the Board of Trade of Metropolitan Toronto at a meeting held in Ottawa on March 22, 1971, with the Minister of Consumer and Corporate Affairs to hear submissions in respect of the Report of the Study Committee on Bankruptcy and Insolvency Legislation (1970).

118. Bill C-60, 30th Parli., 1st Sess. (1974-75) (Can.).
licensed trustees cannot be found to accept appointments or where there is a vacancy in the office.\textsuperscript{110} The Bankruptcy Administrator would also be responsible for administering the entire small debtor arrangement program. This includes preparing the proposed arrangement on behalf of the debtor, presiding at meetings of creditors, and acting as the trustee in every case. The courts would not have any role in the program other than to hear appeals from the administrator and to review applications from interested persons in a limited number of situations. A court could, for example, annul an arrangement if it constitutes a fraud with respect to particular creditors.

The 1975 bill proposes that, in the case of the bankruptcy of an individual, the debtor would automatically receive his discharge ninety days after the bankruptcy order is made unless the administrator had reason to believe that the debtor had substantially aggravated his insolvency or had engaged in misconduct. In such cases, the administrator could file a caveat within ninety days from the making of the bankruptcy order. When filed, this would prevent the debtor from being discharged for a period not exceeding five years. However, when a caveat was issued, the debtor would have a limited right of appeal to the courts.\textsuperscript{120}

Creditors would continue to have wide opportunities to control the administration of estates except where a small debtor is involved. In all other cases, creditors would be encouraged to establish boards of inspectors, although it would not be mandatory that they do so. Where a board was established, the 1975 bill provides that the trustee would be required to obtain the authorization of the inspectors at each stage in the liquidation of an estate.\textsuperscript{121} In order to make the boards more representative and to bring special expertise to a board in particular cases, certain creditors would be given special rights of representation. If the bankrupt is a bank, the federal Inspector General of Banks or his nominee would be a member of any board of inspectors established.\textsuperscript{122} Where the Crown, representing Canada or any province, was a creditor, the Superintendent could appoint an additional inspector nominated by the government concerned.\textsuperscript{123} In all cases, creditors would be given the right to cumulate their votes for the election of inspectors in order to prevent large creditors from controlling the election of the entire board.\textsuperscript{124} Where the creditors chose not to establish a board, the administrator could appoint one although he would not be required to do so.

\begin{itemize}
\item \textsuperscript{119} Id. § 25.
\item \textsuperscript{120} Id. § 204.
\item \textsuperscript{121} Id. § 189.
\item \textsuperscript{122} Id. § 292(10).
\item \textsuperscript{123} Id. § 292(8), (9).
\item \textsuperscript{124} Id. § 292(3), (4), (5), (6).
\end{itemize}
If no board had been appointed or a board was abolished by the creditors subsequent to its appointment, a trustee could by his own authority do any of the things that otherwise could be done only with the specific authorization of the inspectors.\footnote{125} This would also be the case where a board was appointed and the inspectors failed to attend meetings called by the trustee.\footnote{126}

The powers and functions of the Superintendent of Bankruptcy would continue substantially unchanged. However, his responsibilities in a number of areas would be increased. The bill provides that the Superintendent would have the authority to appoint a supervisor of the estate, who would exercise surveillance over the administration of the estate by the trustee. The supervisor would be able to do such things as make periodic checks upon the trustee or sit in on meetings of boards of creditors. While the Superintendent could appoint supervisors in all cases, appointment would not be mandatory. Presumably, he would make appointments only for larger estates or in special situations.

The Superintendent would also be given broad powers to decide issues concerning the licensing of trustees. At present, he merely makes recommendations to the Minister of Consumer and Corporate Affairs. The Superintendent would have a great deal of independence with the new decisionmaking power, for his decisions would be reviewable only by the federal court.

The Superintendent’s investigatory powers would also be increased. The present power of the Superintendent to investigate suspected offenses is limited to cases where a bankruptcy actually occurs. He is thus precluded from investigating offenses related to arrangements. The bill would authorize the Superintendent to investigate the affairs of a debtor where any proceeding has been taken under the new act.\footnote{127}

In addition, the bill gives the Superintendent important additional supervisory responsibilities. The Canadian courts have never had the responsibility for the wide range of administrative functions for which the courts in the United States are responsible. They have had, however, a number of quasi-administrative functions such as the taxation of accounts and the routine discharge of bankrupts. The bill would transfer these responsibilities to local Bankruptcy Administrators who would carry out their duties under the general supervision of the Superintendent.

If the bill is enacted, the Superintendent will be required to supervise the administration of the Act\footnote{128} as he does at present.\footnote{129} He will be

\footnotesize{125. Id. § 298(1)(b), (4)(a).}  
\footnotesize{126. Id. § 298(2).}  
\footnotesize{127. Id. §§ 53-54.}  
\footnotesize{128. Id. § 11(2).}  
\footnotesize{129. The Bankruptcy Act Amendment Act, 1932, 22 & 23 Geo. 5, § 18 (Can.).}
able to intervene in any matter or court proceeding as if he were a party thereto, and he will also be able to give general directions to administrators, interim receivers or trustees in the performance of their duties. Once a year he will be required to report to Parliament on the implementation of the Act.

Hearings on the bill have commenced, but it is too early to estimate when it might be enacted. It would be reasonable to expect that the bill will become law within the next year or so. However, it is likely that the system of administration and control under the final version of the act will not be greatly different from that which prevails under the present system, subject to some modification as a result of the legislative process.

CONCLUSION

The history of bankruptcy administration in both the United States and Canada evidences a search for answers to certain questions of underlying importance to an effective system. Whoever is chosen to administer the everyday details of the bankrupts' estates determines to some extent the degree of efficiency and expense of a bankruptcy system. The extent of control over those administrators and the character of the body exercising that control influence a system's performance and affect the balance between often conflicting public and private interests.

Under most systems, the creditors were originally responsible for the administration of an estate. At a later stage, creditors—either willingly or through legislation—delegated much of their authority either to a committee of creditors or to a trustee. In theory and sometimes in practice, the creditors controlled those who administered an estate on their behalf. However, in most countries, including the United States and Canada, creditor control has been progressively superseded by official or court control.

One of the major problems in the administration of bankruptcies has been that of cost. As bankruptcy legislation has been extended to protect individuals who were not in business and as credit has been increasingly made available, the amount of assets in bankruptcy estates available to pay the costs of administration has become progressively less. At the same time, administration costs have increased by reason of the increasing complexity of the legislation and rules of procedure promulgated to protect the public interest. As a consequence of these

130. Bill C-60, 30th Parl., 1st Sess. (1974-75) (Can.).
131. Id. § 13(j). The Bill also has a number of new provisions addressing certain conflicts of interest. Any person who may have a conflict of interest is disqualified from acting in the administration of an estate. Id. §§ 4, 28, 29, 30, 31, 36.
and other factors, most countries have been forced to reconsider the entire administrative organization of their bankruptcy system.

There are two broad purposes of bankruptcy which must be considered in dealing with the problem of costs. The first is to give relief to those with major financial problems. Where access to bankruptcy depends upon the payment of a sizeable filing fee or the availability of a certain minimum of assets to finance the administration of an estate, those who need the relief offered by bankruptcy may be in the anomalous position of being unable to afford it. The second relevant purpose is to examine the affairs of the debtor in order to prevent defraudment of creditors and to protect the public interest. This requires special investigatory procedures and appropriate sanctions.

Considering the purposes of the bankruptcy system, there are at least two methods of coping with situations in which assets are insufficient to finance the administration of an estate. Where there is little need for investigation, often the case in bankruptcies of small debtors, procedures may be simplified and made more summary. If a trustee is required to do less, the cost should be less. However, the procedures that are omitted for estates of one class of debtor may be desirable for the estates of other classes of debtors whether or not there are assets. Fraudulent debtors and creditors should not escape investigation simply because there are no assets in the estate. If the bankruptcy system is to be respected, those who have committed bankruptcy offenses and other offenses should be subject to investigation and the sanctions prescribed by law. In order to deal with these cases and other cases where prescribed procedures and administrative requirements are regarded to be essential to the public interest, an alternative system of public trustees or administrators is often created. Thus, the problem of costs leads away from creditor control and into publicly supported administration.

Related to the problem of costs is that of creditor apathy. Where the costs of administration were high in relation to the likely returns, creditors had little incentive to take over the task of administering a bankrupt's estate. But beyond this, creditors often lacked both time and expertise to do the job. As a result they were willing to leave the job to others, so long as their interests were protected.

Whether because of costs, creditor apathy, or other reasons, creditor control has virtually disappeared in the United States and all but disappeared in Canada.\textsuperscript{132} That some creditor control remains in Cana-

\textsuperscript{132} In both countries, actual estate administration by creditors has been replaced by a widespread belief in the myth of creditor control. The most ardent believers of creditor control are very often those who control the system in fact such as attorneys, receivers, liquidators and trustees. They apparently prefer the anonymity permitted in the exercise of their control behind the facade of apparent or fancied creditor control.
da, is largely because creditors in Canada have always enjoyed a greater
degree of control than that enjoyed by creditors in the United States.
Ostensibly, they still retain a great deal of power. The right to appoint
and replace the trustee and to elect a board of inspectors permits
creditors to exercise a significant degree of control over the administra-
tion of an estate. However, this is largely illusory. In a voluntary
bankruptcy, the trustee is usually the nominee of the debtor. In an
involuntary bankruptcy, the trustee is usually the trustee nominated by
the petitioner creditors. Where there is a board of inspectors, it seldom
exercises any substantial control over the trustee. In practice, the inspec-
tors look to the trustee—who is a professional—for guidance. As a rule,
and particularly where there are no assets in the estate, the inspectors are
happy to leave the entire administration to the trustee.

Creditor attitudes are reflected in the current Canadian bankruptcy
bill. In recognition of the wide-spread apathy of creditors, the bill
retains the mechanisms of creditor control, but provides that the rights
of creditors to control administration shall be permissive rather than
mandatory. Even in Canada, therefore, creditor control has lost its
earlier importance.

The need to protect the public interest is another factor that has
affected the evolution of administrative practices. In both the United
States and Canada, a public interest in the bankruptcy procedure was
asserted at an early stage in the development of the law. Procedures
were instituted to exercise a degree of control over the debtor, to detect
and punish fraud, and to supervise the mutual sacrifices that groups
within the community are required to make in the larger interests of the
general welfare when a bankruptcy occurs. In general, these procedures
recognize the necessity of retaining public confidence in the bankruptcy
system and, indirectly, in the credit system upon which the economy of
each country is based.

In the United States, the court asserts the public interest in the
bankruptcy process through its involvement in most proceedings. The
prominent role of the court and the comparatively minor role of the
trustee are two of the distinguishing features of bankruptcy administra-
tion in the United States. This no doubt reflects a greater willingness in
the United States to allow the courts to take an active rather than a
passive role in society. Beyond the courts, there are no mechanisms for
the supervision and direction of the entire system.

In Canada, the public interest in the bankruptcy system was origi-
nally asserted through the licensing of trustees. This initial involvement
developed through a slow and often hesitant process into a system of
official control. Experience indicated that it was not enough simply to
license trustees. Continuous supervision and the authority to set stand-
ards and in general to control the system were required in order to maintain high ethical and professional standards. The creation of the office of Superintendent of Bankruptcy in 1932 finally provided a central authority which could implement these elements of official control. Under the supervision of that office, a system of public administration grew up alongside the system of private administration. This provided services that the private sector was unable or unwilling to perform; it provided a means of supervising and directing the entire system in the interest of attaining uniform bankruptcy administration; and it also asserted the necessary public interest in the administration of bankruptcy.

The procedures for ultimate control of bankruptcy administration in the United States and Canada reflect the differences between the two forms of government. The parliamentary system of government in Canada, where there is no separation of powers in the organs of government, makes it easier to exercise official control over bankruptcy. The executive and legislature are intimately associated with each other, and the cabinet, in the interests of efficiency, has come to control all parliamentary business. In order to relieve the strain on the cabinet caused by the increase in its authority, many of its powers are delegated to individual ministers, deputy ministers, and departmental officers such as the Superintendent of Bankruptcy. Another way in which the responsibilities of Parliament are spread is through the delegation of authority to a variety of independent agencies, commissions and public corporations. As a consequence, there is not the same rigidity in the operation of government in Canada that there appears to be in the United States: the functions that have been assigned to the Superintendent of Bankruptcy could have been assigned to the cabinet, to a minister, or to an administrative agency such as has been proposed for the United States by the Bankruptcy Commission.

Because of the separation of powers between the legislative, executive and judicial branches in the United States, the use of an agency or bureau is often a practical necessity in American government, whereas it is only a matter of choice or convenience in Canada. An agency is particularly useful where it is necessary to combine the functions of two or more branches of government.

The bankruptcy administration proposed by the United States Bankruptcy Commission would, if enacted, provide a suitable agency to carry out the present administrative functions of the court. The agency would also be able to provide in a convenient manner additional administrative services that creditors and private trustees are unable or unwilling

133. This is discussed at text following note 117 supra.
ing to provide and that are not suitable for assignment to the courts, notwithstanding the quasi-judicial nature of some of those services. Most importantly, the agency would be able to provide a means for ensuring a necessary degree of control, supervision and direction of the entire system with the ability to expand when needed to take on new functions. While there is some controversy over the proper location of this agency, the functions that one would reasonably expect it to perform in the future are more compatible with the nature of the executive than the judicial branch of government. In fact, the proposal of the Bankruptcy Commission places it in the executive branch.

It is unlikely that the methods for administering bankruptcy or the methods of supervising and controlling administration will ever be, or should be identical in the United States and Canada. Each country has a different constitution and, to a degree, different social attitudes. These are likely to provide a different shape to both public and private institutions. In the past, the two countries have traveled different routes with respect to bankruptcy administration. However, if the proposals of the United States Bankruptcy Commission are adopted in whole or to any substantial degree, the systems of bankruptcy administration of the United States and Canada may become more similar to each other than they have been in the past.