

Insolvency

# BULLETIN

Issued by the Office of the Superintendent of Bankruptcy

1st trimester 1997

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Insolvency

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Industry Canada Industrie Canada

# INSOLVENCY BULLETIN

Issued by the  
Office of the Superintendent of Bankruptcy,  
Industry Canada.

The objective of the Insolvency Bulletin is to promote communication and strengthen ties between the Office of the Superintendent of Bankruptcy and insolvency professionals. The Insolvency Bulletin is a free publication which is published four times a year. The Bulletin is aimed particularly at trustees, jurists, registrars, accountants, credit managers and to those with a general interest in bankruptcy and insolvency.

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## In Brief

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Since the last publication of the Bulletin, Bill C-5 has moved a step further. On February 4, 1997, the Standing Senate Committee on Banking, Trade and Commerce filed its report. The report proposes certain amendments to the Bill, mainly with respect to the *Companies' Creditors Arrangement Act* (CCAA). The Senate recommended that the eligibility threshold for relief under the CCAA be lowered from ten to five million dollars of debt. In addition, with respect to the application for an extension of an initial stay of thirty days, the Senate recommended that the only criteria the court should take into account should be if the applicant has acted in good faith and with due diligence.

Parliamentary Procedure requires that the House of Commons approves by way of a motion, the amendments proposed by the Senate. At the writing of these lines, that motion had still not been made. As usual, we will keep you informed in our next Bulletin, as further developments are expected in the next few months.

On another matter, you may be interested to know that Monthly Bankruptcy Statistics are now available on the Internet in both official languages. These are statistics compiled since January 1992 on Consumer Bankruptcies, Business Bankruptcies, Proposals and Receiverships. The Internet address for the English site is as follows: <http://strategis.ic.gc.ca/osb>

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# News Release

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## Office of the Superintendent of Bankruptcy Becomes a Special Operating Agency

OTTAWA, February 17, 1997 — Industry Minister John Manley today announced the establishment of the Office of the Superintendent of Bankruptcy (OSB) as a provisional Special Operating Agency (SOA).

"Turning the Office of the Superintendent of Bankruptcy into a Special Operating Agency is a clear example of the government's commitment to provide efficient, modern and flexible public services — services that are responsive to the needs of clients and citizens," said Mr. Manley.

SOAs are a form of alternative service delivery, in which special authority and flexibility is granted to enable an organization to better meet its clients' needs. In exchange, the SOA commits itself to becoming more business-like, client-oriented and accountable for attaining measurable results.

The new SOA will continue to function within Industry Canada and will be headed by the Superintendent of Bankruptcy, who will also assume the role and title of Chief Executive Officer. To support the CEO, a Management Advisory Board consisting of clients, stakeholders

and business leaders will be created later this year. In addition, the OSB will be surveying its clients over the next few months on how best to measure its performance in terms of client service, efficiency and effectiveness. It will also be seeking client and stakeholder input on the directions the OSB should take to increase revenues as it moves to a cost-recovery operating system.

Greater detail on how this provisional SOA will operate can be found in the OSB's Framework Document, available soon on the Internet at <http://strategis.ic.gc.ca/>, or by calling (613) 941-1000.

For more information, please contact:

Marc Mayrand  
Acting Superintendent of Bankruptcy  
(613) 941-2691  
[mayrand.marc@ic.gc.ca](mailto:mayrand.marc@ic.gc.ca)

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## Re-engineering the Office of the Superintendent of Bankruptcy Background Information

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The Office of the Superintendent of Bankruptcy (OSB) is faced with supervising the administration of a record number of bankruptcy and insolvencies. Filing volumes increased 20% in 1995 over the previous year, and volumes reached approximately 100,000 filings in 1996 — another 20% increase. As well, clients are requesting improved services, more strategic information and access to electronic services.

To meet these challenges, the Office of the Superintendent of Bankruptcy is working to maintain a bankruptcy system worthy of investor, lender and client confidence well into the twenty-first century. This investment will comprehensively restructure the way the OSB does business, protect the integrity of the bankruptcy system, and improve and make sustainable the Office's delivery of services. Action is being taken in five general areas:

- The **Business Framework** of the Office of the Superintendent of Bankruptcy is being redesigned and strengthened, through OSB's transformation to a **Special Operating Agency (SOA)** of the federal government, and by putting the OSB's operations on a full cost-recovery basis.
- The **Legislative Framework** is being modernized and improved. *The Bankruptcy and Insolvency Act* is being revised (Bill C-5) to make it more responsive and relevant to the current business, social and economic demands of the marketplace. In doing so, it is continuing to support the principles of fairness, participation by all parties in the system, rehabilitation of debtors, and re-organization as an alternative to bankruptcy.
- A **private sector service provider(s)** is being sought by the OSB to develop a modern bankruptcy database system capable of electronic filing, and to perform many of the administrative and information-based services. This will enable the OSB to examine efficiencies which will benefit the OSB end-users, and to focus its remaining resources on ensuring compliance within the bankruptcy and insolvency system — its core business.

- **Business Process Re-engineering and Streamlining** will be changing the way the OSB does business, and enabling it to provide faster and cheaper service to clients and stakeholders, while still adding value. For example, the OSB will seek to streamline the consumer bankruptcy system as it relates to low income, low issue bankruptcies.
- The effectiveness of the OSB's **Enforcement and Compliance** activities will be enhanced as the OSB develops and adopts new compliance strategies. In addition, the OSB will continue to study and adopt new tools to identify and remedy potential non-compliance issues.

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### Why a Special Operating Agency?

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A Special Operating Agency is an alternative service delivery mechanism of the federal government. SOA status enables an organization to operate with increased freedom from normal government-wide rules, because of the unique nature of its mandate and operations. Although it is still responsible and accountable for achieving its statutory goals, an SOA operates under a tailor-made agreement with its parent department (in this case, Industry Canada). In effect, SOAs have the autonomy to conduct their business with some of the flexibility and efficiency of a private sector company. At present, perhaps the best known SOA in Canada is the Passport Office.

A lengthy strategic assessment and examination of processes and costs, begun in 1993, determined that SOA status could contribute to the OSB's ability to meet client needs and fulfill its legal mandate both in the present and in the future. At a time when limited resources are available, SOA status will also enable the OSB to act more like a business as it responds to pressures such as escalating volumes and changes in technology.

There are many benefits to Special Operating Agency status:

- The OSB will seek the authority and flexibility required to serve its clients in the most efficient way.

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With the freedom to adopt appropriate business practices of the private sector, procedures and expenses can be rationalized and reduced to ensure that those paying for the system obtain maximum value for their money. In addition, a Management Advisory Board, consisting of client and business leaders, will be formed to help guide the new SOA.

- SOA status will provide the foundation for the OSB to become self-financing. Full cost-recovery will mean the people who actually use or benefit from OSB services, rather than the Canadian taxpayer, will bear the burden. This approach is consistent with government policies and debt reduction efforts.
- SOA status will improve the OSB's ability to focus on its core activities, costs, revenues and results. It will also enhance the OSB's ability to find better ways to ensure compliance and access to the system, invest in technology, transfer non-core activities to the private sector, and streamline its processes.
- By giving the OSB the freedom to act more like a business, SOA status will foster the development of

a corporate culture with a strong, shared focus on client needs, and an approach that is innovative and entrepreneurial.

The specific details of how the OSB will function as a Special Operating Agency — its mission, mandate, objectives and strategic direction — are set out in a Framework Document. This document also describes the new relationship the OSB will have with Industry Canada, its future organizational and accountability structure, and the authorities and accountabilities that will be delegated to its Chief Executive Officer. The OSB's Framework Document is available on the Internet at <http://strategis.ic.gc.ca/> or by calling (613) 941-1000

For more information, please contact:

Marc Mayrand  
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(613) 941-2691  
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# Directive No. 7 — Inventory of Estate Assets

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You will recall that some time ago there was extensive discussion and consultation on the above subject matter.

You will therefore find attached a copy of the Directive entitled *Inventory of Estate Assets*, which replaces Directive No.31 *Taking Inventory of the Bankrupt's Property*.

The revision of this Directive involved extensive consultation involving discussion at numerous JCB meetings. The Directive was revised following its issuance in draft form to all stakeholders on May 22, 1995, to take into account comments received.

I would like to thank all those who have participated and conveyed their views to make the Directive as relevant as possible. We will collectively need to continue to monitor and assess the use and impact of this Directive to ensure that it is functional in the insolvency process.

There are a few differences between this Directive and the former draft upon which it is based. As a result of all the comments we received, it was decided to make the following changes:

1. Definitions were added to clarify certain items, particularly the term "inventory".
2. There is a new form, Appendix I, to be completed by the person conducting the inventory to certify the accuracy of the inventory lists.
3. The trustee is required to separate the inventory list of estate assets into three parts (where applicable), pursuant to paragraph 4. These different parts of the list indicate items which are to vest in the trustee, items which are clearly owned by a third party, and items where ownership is in dispute.
4. The trustee is now responsible for the provision of more details in the inventory. For example, at paragraph 5(b), the valuation of each estate asset is required.

Should you have any questions concerning the content and application of this Directive please contact your District Assistant Superintendent.

Marc Mayrand  
Acting Superintendent

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## Inventory of Estate Assets

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**Issued: February 3, 1997**

(Supersedes Directive No. 31 on the same topic.)

### Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"inventory" means a list of the property of the debtor made pursuant to the standards of this directive;

"trustee" includes a trustee as defined in section 2 of the Act, an interim receiver, and an administrator of consumer proposals as appointed in accordance with section 66.11 of the Act.

### Purpose

2. This Directive, issued pursuant to the authority of paragraphs 5(4)(b) and (c) of the Act, sets the standards for making an inventory.

### Background

3.(1) Subsection 16(3) of the Act states: "The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory...".

(2) The standards of this directive shall be complied with in all:

- (a) bankruptcies;
- (b) interim receiverships where required by the court to make an inventory; and
- (c) proposals where the trustee is in possession or control of assets conveyed to him/her by the debtor for purposes of either distribution or realization.

### Standards

4. The inventory shall be divided into three parts:

- (a) All items which vest in the trustee,
- (b) all items which belong to a third party, and
- (c) all items, where, in the opinion of the trustee, ownership is in dispute. This may include, but is not limited to, 30 day goods, section 81.1 claims, leased goods, and goods held on a consignment basis.

5. Furthermore, the inventory shall include:

- (a) an accounting of all the articles of property in the possession of the debtor, with sufficient information to identify each item;
- (b) a valuation of each item with a note explaining the means used to establish the value (however, where such a valuation is not included, by the person making the inventory, the trustee shall be responsible for ensuring that the valuation is completed immediately and added to the inventory after receiving the incomplete inventory);
- (c) the name(s) of the person(s) who conducted the inventory count and the trustee responsible for the inventory;
- (d) the date and time when the inventory was prepared;
- (e) the location(s) of the assets;
- (f) the details of damaged, deteriorated or perishable goods; and
- (g) a description of control procedure(s) employed to ensure that all assets are accounted for.

6. The person preparing the inventory shall initial or sign each inventory sheet. The same person shall also complete and attach the form in Appendix I.

7. The debtor, or an officer of the debtor corporation, shall be given a copy of the inventory sheets and shall complete the written statement in Appendix II. The completed statement shall be attached to the inventory list. In the absence of such a statement the trustee shall sign and attach a document providing reasons for its absence.

8. Where the trustee is relying on an inventory prepared by a third party, the trustee shall personally ensure that this Directive has been adhered to and shall sign Appendix I.

The Acting Superintendent of Bankruptcy  
Marc Mayrand

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## Appendix I

### Person Preparing the Inventory

I, \_\_\_\_\_ of the firm of (if applicable)  
\_\_\_\_\_ (address)  
\_\_\_\_\_ prepared the  
inventory (attached) of the debtor (corporation) named \_\_\_\_\_  
and state that to the best of my knowledge and belief this final inventory listing represents the quantities, descriptions  
with/without (strike out inapplicable wording) valuations, of all property, goods and assets of the debtor (corporation)  
at the following locations as at \_\_\_\_\_, 19 \_\_\_\_\_.

Locations: (list addresses or description of sites here)

\_\_\_\_\_  
Signature of person preparing the inventory

\_\_\_\_\_  
Signature of trustee

Date \_\_\_\_\_

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## Appendix II

### Debtor's Statement Re Inventory Listing

I, \_\_\_\_\_ of  
(address) \_\_\_\_\_  
\_\_\_\_\_ the debtor/bankrupt/officer or director of  
\_\_\_\_\_ the debtor corporation,  
state that to the best of my knowledge and belief this final inventory listing (attached) correctly represents  
the quantities, descriptions (and valuation, if applicable) of all estate property, goods and assets  
as at \_\_\_\_\_, 19 \_\_\_\_\_, except for the following items:

(Give details of deficiencies or incorrect items in the inventory listing, if applicable.)

\_\_\_\_\_  
Signature of Debtor/Bankrupt/Officer or Director of debtor corporation

Date \_\_\_\_\_

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# Order Suspending Trustee Licence — Gaétan Laflamme

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## Bankruptcy Act

In the Matter of Gaétan Laflamme, of the City of Outremont, Province of Quebec,  
Holder of a Trustee's Licence.

### Order Pertaining to the Trustee's Licence Issued Pursuant to the Bankruptcy Act Order

WHEREAS Gaétan Laflamme was granted a trustee's licence in 1977;

WHEREAS in February and March 1991, a general audit of the estates administered by the trustee since 1982 at the Montreal office of Peat Marwick Thorne Inc. was conducted;

WHEREAS, following this general audit, a special investigation was conducted to review the insolvency files administered by Mr. Gaétan Laflamme while he was a partner with Thorne Riddell Inc and Thorne Ernst & Whinney Inc, together with certain accounting procedures used by these corporate trustees;

WHEREAS the trustee has contravened section 26(1) of the Act;

WHEREAS Mr. Laflamme in certain estates used a general trust account instead of a separate trust account for each estate;

WHEREAS Gaétan Laflamme deposited certain moneys without justification in the general account of Thorne Ernst & Whinney after the estates in question had been closed, whereupon the said moneys should have reverted to either the beneficiaries or the Superintendent of Bankruptcy;

WHEREAS Mr. Laflamme failed to comply at all times with the Act, the Rules and the Directives and with the standards required of a trustee in the performance of his obligations and duties;

WHEREAS Mr. Laflamme voluntarily agreed as of January 15, 1992 not to file any bankruptcy files;

WHEREAS, in order to conclude the litigation arising from these circumstances, Mr. Laflamme and the Superintendent of Bankruptcy have agreed it would be desirable that the trustee shall continue not to file any estates in bankruptcy until August 1, 1997;

WHEREAS the aforementioned recommendation seems to me fair and reasonable and consistent with the public interest, and I find no reason to vary it in the light of all the circumstances;

#### FOR THESE REASONS:

I, Fred Kaufman, by virtue of the authority delegated to me by the Minister and the powers vested in me by the Act, do order the following:

Let the record show that Gaétan Laflamme, at the request of the Superintendent, has filed no estates in bankruptcy since January 15, 1992;

Pursuant to the recommendation made by the parties, the trustee's licence issued to Gaétan Laflamme be suspended until August 1, 1997, from which date forward all the rights and privileges conferred by such licence will be restored to him.

SIGNED AT TORONTO THIS eleventh day of December 1996.

By:

(Signed) Fred Kaufman

Fred Kaufman  
Minister's Delegate

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# Order Cancelling Trustee Licence — Louis Drolet and Groupe G. Tremblay, Syndics Inc.

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In the Matter of:

Louis Drolet, Trustee  
and  
Groupe G. Tremblay Syndics Inc., Corporate Trustee

WHEREAS Louis Drolet was granted a bankruptcy trustee licence with restrictions on February 6, 1989;

WHEREAS a disciplinary inquiry was ordered regarding the administration of insolvency files by Louis Drolet, trustee, and Groupe G. Tremblay, Syndics Inc.;

WHEREAS, on August 27, 1996, pursuant to the general delegation regarding the enforcement of paragraph 14.02(1) of the Bankruptcy and Insolvency Act (hereinafter the Act), the Deputy Superintendent (Policy, Programs and Standards) submitted a disciplinary report on the administration of Louis Drolet and Groupe G. Tremblay Syndics Inc., copy of which was given to the trustees and their attorney on August 29, 1996;

WHEREAS said report and its appendices indicate that:

- the trustees Louis Drolet and Groupe G. Tremblay, Syndics Inc. failed to comply with the Act and Directives;
- the trustees Louis Drolet and Groupe G. Tremblay, Syndics Inc. demonstrated carelessness and negligence;
- the acts carried on by the trustees Louis Drolet and Groupe G. Tremblay, Syndics Inc. and their administration are detrimental to the integrity of the bankruptcy system;

WHEREAS Louis Drolet had a prior disciplinary file;

WHEREAS Louis Drolet appeared at the continuation of the hearing, where he remitted his licence for reasons contained in a letter, dated February 18, 1997, and placed in evidence in this file;

WHEREAS the Deputy Superintendent (Policy, Programs and Standards) refuses to acknowledge the content of the said letter, particularly the grounds, circumstances and conclusions stated therein;

FOR THESE REASONS, I, Albert Malouf, lawyer, as the delegate of the Superintendent of Bankruptcy (section 14.01(2) of the Act), and by virtue of the powers vested in me by the Superintendent under section 14.01(1) of the Act:

Note the remittance of the licence by Louis Drolet and order the permanent cancellation of the said licence;

Note the cancellation of the licence of Groupe G. Tremblay, Syndics Inc. for failure to renew the said licence and order this cancellation to be permanent.

Signed in Quebec City, this eighteenth day of February, 1997.

(S) Albert Malouf  
Albert Malouf, QC

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# Reflections on the Origins of Business Bankruptcies

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by Benoit Mario Papillon<sup>1</sup>

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## Business Bankruptcies on the Increase

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Business bankruptcies are on the increase in Canada. Even after accounting for the fluctuations associated with business cycles (recession-recovery), statistics show an upward trend in business bankruptcies over the past several years.

There were just over 13,000 business bankruptcies in 1995, almost matching the recession high of 13,496 in 1991. This latter was itself more than 25% higher than the 10,675 reached in 1982 during the previous recession. At first glance, this is surprising given that the recession of the early 1990s is not considered to have been as severe as that of the 1980s. Comparison with previous decades reveals an upward trend which is even more marked.

From the sixties to the mid-seventies, the number of business bankruptcies reported annually averaged between 2,000 and 3,000. This was followed by a rapid increase, with the number of bankruptcies going from 3,136 in 1976 to the previously mentioned high of 10,765 in 1982. Levels have not since dropped to what they were in the past. The lowest figure reported since the recession of the early eighties was 8,031 (1988), which is two to three times higher than the levels of the sixties and seventies.

What are we to make of the increasing numbers of bankruptcies? Leaving aside the fact that bankruptcies are exceedingly painful for those directly involved, should we also see in them an indication of profound deterioration of the economy? Some use the animal kingdom analogy of natural selection to argue the inevitability of bankruptcies. International comparisons reveal the limits of such thinking, however, and demonstrate the need to go beyond traditional explanations. For example, the fact that business bankruptcies are concentrated among SMEs rather than large firms suggests that their levels may be linked to the structure of the economy and its evolution.

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## International Comparisons

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The rate of business bankruptcies varies considerably from one country to another. Recent data indicate that the number can be as low as 224 in the case of Hong Kong or as high as 50,000 plus in the case of the United States.<sup>2</sup> Given the difference in size between these two economies, however, such figures may overestimate the actual degree of variation. A simple method to correct for the effects of size is to calculate the rate of business bankruptcies per million of population. The following table provides the adjusted values for eight industrialized countries.

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1 Associate professor, Department of Management Sciences and Economics, University of Québec at Trois Rivières. For a more detailed discussion of certain themes addressed in the text, see Papillon, B.M. (1996b). Sections of this text were presented in Papillon, B.M. (1997). The author thanks the Office of the Superintendent of Bankruptcy, notably Henri Massue-Monat, and the staff of the Industry Canada library, Henry Watt in particular, for their assistance. The author is responsible for any errors of observation or interpretation which may be found in the text.

2 Hugh, C.M. *The 1995 Bankruptcy Yearbook and Almanac*, p. 415

Annual business bankruptcy rate per million of population in eight industrialized countries (1995 or most recent year available)	
Country	Rate
Hong Kong	39
Japan	115
Germany (West)	172
United States	213
United Kingdom	385
Canada	455
Denmark	684
France	1,230
Source: <i>The 1996 Bankruptcy Yearbook and Almanac</i>	

The table reveals significant variations among the sample countries. For example, the rate in the United States is almost twice as high as that of Japan, but six times lower than that of France. The Canadian rate is halfway between those of the United States and Denmark.

Given that the observations in the table are limited to one year — generally 1995 — it is conceivable that the year chosen may not be representative and may exaggerate the actual differences. For example, countries with high rates may be experiencing a recession, while those with lower rates could be in the midst of strong growth. A review of the data for several years refutes this notion, as the use of an average annual rate for the past ten years reveals similar variations. The

exceptions are Canada and France, which, having experienced an upward trend in their bankruptcy rates over the period in question, would have slightly lower averages than suggested by the table.

How do we account for such a diversity in national trends for business bankruptcies? The explanations for bankruptcy are the same everywhere: bad luck, bad management, or a combination of the two.<sup>3</sup> How then do we explain economies which are otherwise comparable<sup>4</sup> in terms of performance, as is the case for the United States and Japan, or France and Canada, having such different rates of business bankruptcies? Viewed from this angle, bad luck and bad management are basically release mechanisms. We must try to determine what is different in the national circumstances in which these release mechanisms combine to create the variations shown in the preceding table.

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### Evolution of the Industrial Structure

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The bankruptcy rates shown in the table are the result of the combined effects of two variables: **the rate of hundreds of businesses per million of population and the percentage of businesses declaring bankruptcy over the course of a year.**

Several elements contribute to determining the number of businesses which make up the economic activity of a country. These can be classified into three categories: 1) the level of entrepreneurship in the population; 2) the distribution of wealth, and more generally, access to resources for business purposes; and 3) the nature of business opportunities, including the sectors of activity or the industrial composition of a national economy. An economy specialized in heavy industrial sectors such as iron and steel, where there are significant economies of scale, would be less favourable to the existence of a large number of companies than would be an economy specialized in such sectors as clothing.

The determining effect of some of these elements, such as the industrial composition, can be traced back

3 See P.R. Wood, *Principles of International Insolvency*, pp. 33-34. Among the factors associated with bad management, the author mentions too much debt, inadequate financial structures..., while factors associated with bad luck include interest rate increases, currency devaluations, unforeseen recessions, natural disasters, etc.

4 It would be difficult to maintain that management skills and/or market fluctuations are so different among these economies as to explain the variations shown in the table.



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decades, and can therefore be considered historical factors. Others have a more immediate effect. Government policies and fiscal regimes aimed at encouraging the creation of new companies could be included among the elements associated with access to resources.

Between 1983 and 1993 the total number of businesses in Canada increased by about 25%. This can be attributed principally to small and medium-sized businesses, as the number of companies with 500 or more employees increased by only 3.9% during that time. Therefore, not only did the number of businesses increase, but the composition of the group as a whole changed, with SMEs making up a greater percentage.

As previously mentioned, business bankruptcies in Canada increased by more than 25% between 1982 and 1991. After adjusting for the fact that the last recession was not as deep as that of the early eighties, it is reasonable to suggest that the increase in business bankruptcies over that ten-year period was in the order of 30 to 40%. The observations in the previous paragraph suggest that the number of businesses per million of population would be responsible for more than half of this increase, while the remainder can be attributed to the percentage of businesses declaring bankruptcy over the course of a year.

The difference between the annual rate of business bankruptcies in Canada in the nineties and eighties is therefore partly the result of a greater number of companies in operation and partly the result of a greater overall probability of bankruptcy given the makeup of those companies. The differences among countries reported in the table could be broken down on the basis of similar considerations, that is, the percentage of SMEs versus large firms and the relative probability of bankruptcy for each group.

The differences among Canadian provinces can also be broken down in the same fashion. For example, since the early eighties, business bankruptcies in Québec have been 30 to 50% higher annually than in Ontario. As an annual rate per million of population, Québec's rate is almost twice as high as Ontario's,

which compares with the difference between the Canadian and American levels in the table above. The Québec government's efforts to promote the creation of new businesses have doubtless contributed to this phenomenon. This is because at the same time that they increase the number of businesses, they also raise the overall probability of bankruptcy by increasing in terms of percentage the class of business most prone to bankruptcy (SMEs). Such government policies, which multiplied nationwide over the course of the sixties and seventies, no doubt also played a role in the large increase in the Canadian business bankruptcy rate between the seventies and the eighties.<sup>5</sup>

Government policies alone do not account for the proliferation of SMEs. More and more, large companies rely on other companies by contracting out services or stages of production which once were handled internally. In other words, very large firms are vertically disintegrating and turning to other firms through market transactions. This is confirmed in part by the fact that it is the commercial services sector which has reported the greatest net increase in the number of companies in the last few years.<sup>6</sup>

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### **Losses Engendered by Bankruptcy and Risk Management**

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A company bankruptcy entails financial losses for the entrepreneur-owner, the employees and suppliers, and often for the creditor financial institutions and the government. A lower-end estimate of the total of these losses can be obtained from the value of the liabilities of bankrupt companies minus their recoverable assets. In Canada, this amounts to billions of dollars every year.<sup>7</sup>

The losses associated with bankruptcy are no more inevitable than is the annual rate of bankruptcy. In extreme cases of government intervention, bankruptcies can be reduced to zero, but this necessitates elaborate centralization which has been proven not to be profitable. One of the challenges facing the former

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5 See Chapter 3, "Business Assistance" in Economic Council of Canada (1982)

6 A global perspective on the phenomenon of emerging SMEs is presented in P.A. Julien and M. Marchesnay (1989).

7 This value is considered low because it does not include the losses of the company's residual creditors, that is, shareholders.

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planned economies of countries in the Eastern Bloc and elsewhere is putting bankruptcy procedures in place.<sup>8</sup> This calls for decentralizing decisions concerning the use of resources in a market context and sharing the risks associated with such decisions.

Canada's business bankruptcy regime is the product of bankruptcy legislation and other relevant laws<sup>9</sup>

is one of the crucibles where all legal materials combine ... human rights, property law, liabilities, contracts, privileges and mortgages, commercial law, judicial law, social law, administrative law (cited in L. Ganshof (1969), p.1), business practices, the financial system and government programs for access to credit, and the industrial structure. Taken together, they place Canada somewhere between the extreme "centralization" where the probability of bankruptcy is nonexistent, and the extreme "market" in which the firm has no justification.<sup>10</sup> Any modification of the bankruptcy regime through changes in one of its determining components can be interpreted as the search for a compromise between these two extremes.

By way of illustration, the national business bankruptcy regime constitutes one element in the system of controlling businesses in terms of their management of resources and risk. Other features of this control system include stock exchanges, boards of directors, credit assessment agencies, etc. The distribution of losses determined by a specific bankruptcy regime reveals the sharing of risk among those directly concerned by a company bankruptcy. A change in the bankruptcy regime can be interpreted as a quest for a more efficient system of controls.

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## Conclusion

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It is unlikely that the upward trend in the number of business bankruptcies reported annually in Canada over the course of the last decade is a reflection of a gradual deterioration of the economy. Viewed in the context of the evolution of the industrial sector, this trend can be largely explained by the increase in the number of businesses in operation and the higher proportion of companies which are more likely to declare bankruptcy, that is, SMEs.

Government programs which aim at increasing employment and regional development by creating new businesses no doubt constitute a determining factor, among others, in the evolution of the Canadian industrial sector. At first glance, this policy direction seems to be justified, given that net job creation in Canada over the last several years has been concentrated in SMEs. Economic growth which favours the creation of SMEs will by its very nature, however, increase the volume of financial losses associated with bankruptcies and result in more frequent losses and employment changes.

Companies are places of association and exchange among buyers and sellers, employees and employers, lenders and investors. Commercial insolvency threatens the existence of companies and renders financial and employment losses likely for those involved. The observations of R. Ithurbide are relevant to the application of bankruptcy regimes and to practitioners of insolvency:

Bankruptcy procedure should not be made to bear responsibility for a hopeless situation that it has been charged with resolving.<sup>11</sup>

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8 See for example the comments of A. Shleifer in Hirshleifer, J. et al (1994), and more recently, those of P. Kranz (1996) concerning Eastern Bloc countries, and the comments of D.G. Boshkoff and Y. Song (1987) regarding China.

9 These other laws are many if one believes J. Limpens, for whom bankruptcy: is one of the crucibles where all legal materials combine ... human rights, property law, liabilities, contracts privileges and mortgages, commercial law, judicial law, social law, administrative law, (cited in L. Ganshof (1969), p. 1).

10 Every firm plans and coordinates many activities which could be carried out as individual market transactions; resort to contracting out illustrates the role of the market as alternative to the firm. This concept of the firm as an alternative mode of resource allocation to the market can be traced to Ronald Coase (1937). For a more detailed discussion in the context of national bankruptcy regimes, see B.M. Papillon (1996b).

11 Ithurbide, R. *Histoire critique de la faillite*, p.29

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There is an important nuance here which suggests that we should not attempt to establish a direct link between specific elements of the procedure and the volume of financial or employment losses associated with bankruptcies. If these procedural elements increase the efficiency of the system to control companies in their risk management functions, it follows that there would be an increase in employment at the level of the entire economy without an accompanying reduction in the volume of financial or employment losses associated with bankruptcies. Bankruptcy procedures being one way, among others, to resolve the problem of financial losses, it is conceivable that a more efficient procedure (relative to the alternatives) would be associated with a higher number of bankruptcies.

Many people are concerned with business insolvency and bankruptcy: trustees, financial analysts, management consultants, official receivers, etc. What do all of these players have in common? In the current context of restructuring of the economy, the response can be a useful guide. In this regard, the foregoing only serves to lift a corner of the veil.

Many jobs are lost and financial losses incurred by companies without them going bankrupt. Another way of putting the same question is to ask what are the alternatives to commercial insolvency and to the services of insolvency specialists in the economy, and what are the advantages and disadvantages of each option.

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# Property Exempt from Attachment or Seizure\*

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## Rules respecting the exemption of property from attachment or seizure

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### General Comments

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In our December 1985 and September 1986 issues, we published a list of property exempt from seizure by virtue of provincial and federal legislation. In response to requests from some of our readers, this list has now been updated.

Almost all provincial and territorial jurisdictions, in their statutes, list specific property belonging to the execution debtor that is exempt from attachment or seizure. In some cases, these statutes also impose a maximum value on the exemption of such property. The following is a brief overview of the principal exemptions found in the various provinces' and territories' legislation, followed by a list of exemptions provided by federal legislation.

This document has been prepared to serve as a quick reference tool, and is thus limited to being a general summary of the various categories of property

which benefit from exemptions in each province and territory. Only the most commonly used property has been included, for example: personal property; home/homestead; other real estate; annuities; RRSP's. Readers are therefore advised to refer to the relevant acts and regulations for full details.

Despite our best efforts, we cannot fully guarantee the accuracy of this document. However, it may serve as a helpful guideline to direct readers to the pertinent statutes. It is strongly recommended that readers refer to the actual legislation, particularly in light of different conditions and procedures for execution that exist in each province and territory, and in order to verify exceptions to the rules which have been omitted from this document for the sake of brevity. We invite our readers to bring to our attention, in writing, any errors, omissions or inaccuracies. Comments will be published in a future edition of the Bulletin.

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## ALBERTA

**Exemptions Act**, R.S.A. 1980, c. E-15 - *Repealed and superseded by the **Civil Enforcement Act**, 1994, c. C-10.5, s.171: Effective December 31, 1995.*

*\*\*\* Section 88 of the Act provides for various property exemptions from writ proceedings, subject to maximum values prescribed by the regulations. The following subsections thus refer to the **Civil Enforcement Regulation (Alta. Reg. 276/95)**.*

### Personal property:

- Subsection 37(1) provides exemptions for household furnishings and appliances (not exceeding \$4,000), personal property used to earn income from an occupation (not exceeding \$10,000) or necessary for the proper and efficient conduct of farming operations, and a motor vehicle (not exceeding \$5,000).

### Home:

- Subsection 37(1) provides an exemption for a maximum of \$40,000 of the debtor's equity in a principal residence, including a residence that is a mobile home, provided that the residence is actually occupied by the execution debtor.

### Land:

- Subsection 88(f) of the Act provides an exemption, in the case of an enforcement debtor whose principal source of livelihood is farming, for 160 acres of land on which the principal residence is located, and which is part of the farm.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

## BRITISH COLUMBIA

**Court Order Enforcement Act**, R.S.B.C. 1979, c.75

*\*\*\* Part 3 of the Act does not apply to land registered under the **Homestead Act**.*

### Personal property:

- Section 65(1) provides a general exemption for the goods and chattels of the debtor, up to a value of \$2,000.

**Homestead Act**, R.S.B.C. 1979, c.173

### Homestead:

- Section 4 provides an exemption for up to \$2,500 of the value of the homestead, if the title is registered under the **Land Title Act** pursuant to Section 3.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.
- Under the **Law and Equity Act**, in the event of the annuitant's death, a benefit payable under an RRSP or a RRIF is exempt from seizure.

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## MANITOBA

*The Executions Act*, R.S.M. 1987, c.E160

### Personal property:

- Subsections 23(1) *a*) to *c*) and *f*) to *j*) provide exemptions for necessary furniture and household furnishings and appliances (not exceeding \$4,500), tools and implements used in the practice of a trade, occupation, profession or business (not exceeding \$7,500), and one motor vehicle required for the purposes of such employment (not exceeding \$3,000).
- Subsections 23(1) *d*) and *e*) provide specific exemptions for reasonably necessary farm machinery and equipment and one motor vehicle, in the case where the judgment debtor is a farmer.

### Annuities:

- Subsection 26(1) provides an exemption for an annuity under the *Government Annuities Act* (Canada).

### Mobile home:

- Section 36 provides that the mobile home ordinarily used by the judgment debtor as a permanent residence may not be sold until the expiration of one year from the date of seizure (no exemption).

*The Judgments Act*, C.C.S.M. 1987, c. J10

### House, buildings and lot:

- Subsections 13(1) *a*) and *b*) provide an exemption for a maximum of 160 acres of farm land upon which the judgement debtor or his family actually resides, or which he cultivates or uses for grazing or other purposes, as well as for the house, stables, barns and fences on this farm land.
- Subsections 13(1) *c*) and *d*) provide an exemption for the actual residence of a judgement debtor other than a farmer, up to a maximum value of \$2,500 if it is not held in joint tenancy or tenancy in common, or to a maximum of \$1,500 if it is held in joint tenancy or tenancy in common.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

## NEW BRUNSWICK

*Personal Property Security Act*, Chap. P-7.1

### Personal property:

- Subsections 58(3) *a*) to *h*) provide exemptions for furniture, household furnishings and appliances used by the debtor or a dependent (not exceeding \$5,000) and for one motor vehicle required in the course of the debtor's employment, trade, profession or occupation (not exceeding \$6,500).

*Memorials and Executions Act*, R.S.N.B. 1973, Chap. M-9

### Land:

- Section 11 expressly provides that the lands of a person may be seized, but may not be sold until after the seizure and sale of all personal estate.

### Personal property:

- Subsection 33(1) provides exemptions for various goods, chattels and effects of a judgement debtor, notably tools, agricultural implements or chattels, ordinarily used in the debtor's occupation (not exceeding \$200).

### Annuities:

- Subsection 33(2) provides an exemption for an annuity under the *Government Annuities Act* (Canada).

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

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## NEWFOUNDLAND

*The Judicature Act*, 1986, c. 42 - *Repealed and superseded by The Judicature Act Consolidation*, R.S.N., 1990, c. J-4

### Personal property:

- Subsections 140(1)(a) to (d) provide exemptions for furniture, household furnishings and appliances (not exceeding \$5,000), tools and implements used in the practice of a trade, occupation or profession (not exceeding \$10,000), and one motor vehicle required in the course of such employment (not exceeding \$5,000).
- Subsection 140(3) provides that the above-mentioned maximum exemption values may be changed by regulations made by the Lieutenant-Governor in Council (no regulation has been adopted to date).

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

## NORTHWEST TERRITORIES

*Exemptions Act*, R.S.N.W.T. 1988, c.E-9

### Personal property:

- Paragraph 2(1)(a) and subsection 2(2) provide an exemption for household furniture, utensils and equipment that are contained in and form part of the debtor's permanent home (not exceeding \$200).
- Paragraph 2(1)(d) provides an exemption for tools, implements and other chattels necessary to, and actually used by the debtor in his business, profession or calling (not exceeding \$600).

### House, buildings and lot:

- Paragraph 2(1)(e) provides an exemption for the house and buildings occupied by the debtor and the lot on which they are situated (not exceeding \$3,000).

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.



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## NOVA SCOTIA

*Judicature Act*, R.S.N.S. 1989, c.240

### Personal property:

- Subsections 45(1)(a) to (f) provide exemptions for household furnishings and furniture, as well as for farm equipment, tools, implements and chattels used in the debtor's chief occupation. Also exempt is one motor vehicle (not exceeding \$3,000).
- Subsection 45(3) provides that the Governor in Council may make regulations determining maximum aggregate values for chattels used in the debtor's chief occupation and for the motor vehicle required for this occupation (no regulation has been adopted to date).

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

## ONTARIO

*Execution Act*, R.S.O. 1980, c.146: *Repealed and superseded by Execution Act, R.S.O. 1990, c. E.24*

### Personal property:

- Subsections 2(1) to (3) provide exemptions for furniture, utensils and equipment contained in and forming part of the permanent home (not exceeding \$2,000), and for tools, instruments and other chattels used in the debtor's business, profession or calling (not exceeding \$2,000).
- Where the judgment debtor is a farmer, subsection 2(4) provides an exemption for tools and implements and other chattels used in the debtor's business not exceeding \$5,000 in value.

### Land:

- The Act does not provide an exemption for land or real estate, however section 13 states that, subject to the *Courts of Justice Act*, the seizure, sale or disposal of such property is subject to the same remedies, proceedings and process as is other personal property, and occurs in the same manner.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

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## PRINCE EDWARD ISLAND

*Judgment and Execution Act*, R.S.P.E.I. 1988, c. J-2; *An Act to Amend the Judgment and Execution Act*, S.P.E.I. 1990, c.25; *An Act to Amend the Judgment and Execution Act*, 1994, Cap. 30

### Personal property:

- Subsections 24(a) to (c) provide exemptions for furniture, utensils and equipment contained in and forming part of the permanent home (not exceeding \$2,000), tools, instruments and other chattels used in the debtor's business, trade or calling (not exceeding \$2,000), and any motor vehicle (not exceeding \$3,000).
- Where the judgment debtor is a farmer, subsection 24(d)(i) provides an exemption for agricultural machinery and equipment used in the farming operation not exceeding \$5,000 in value.

### Land:

- Section 26 specifically excludes any exemption for land and real estate of a debtor, but directs the execution to be made against the personal estate first.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.
- Under the *Designation of Beneficiaries under Benefit Plans Act*, a benefit payable under an RRSP or a RRIF is exempt from seizure if there is a designation in favour of a member of the direct family.

## QUEBEC

*Code of Civil Procedure*, R.S.Q., c. C-25

### Personal property:

- Subsection 552(1) provides an exemption for movable property used by the household, up to a market value of \$6,000.
- Subsection 552(3) provides an exemption for instruments of work needed for the personal exercise of the debtor's professional activity.

### Principal residence:

- Section 553.2 provides an exemption for the principal residence of the debtor, where the amount of the claim is less than \$10,000.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.
- Section 264 of the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 provides that RRSPs consisting of funds placed in a locked-in retirement account are exempt from seizure.

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## SASKATCHEWAN

### *The Exemptions Act*, R.S.S. 1978, c. E-14

*\*\*\* This act does not apply to farmers pursuant to section 1.2.*

#### **Personal property:**

- Subsections 2(1)(1) to 2(1)(9) provide exemptions for furniture and household furnishings and appliances (not exceeding \$4,500), as well as for tools, necessary implements, office furniture and equipment (not exceeding \$4,500) used in the execution debtor's business, trade, calling or profession. An exemption also exists for one motor vehicle necessary for the execution debtor's business, trade, calling or profession.

#### **House, buildings and lot:**

- Subsection 2(1)(10) provides an exemption for the homestead, up to a maximum of 160 acres.
- Subsection 2(1)(11) provides an exemption for the house and buildings occupied by the execution debtor, and the lots on which they are situated (not exceeding \$32,000).

#### **Mobile home:**

- Subsection 2(1)(12) provides an exemption for a trailer or portable shack occupied by the execution debtor as living quarters, if it is not in addition to the house and buildings specified in subsection 2(1)(11).

#### **Annuities:**

- Subsection 9(1) provides an exemption for an annuity under the **Government Annuities Act** (Canada) as well as any money payable or paid under a contract for an annuity.

### *The Saskatchewan Farm Security Act*, 1988-89, c. S-17.1

*\*\*\* This act applies to an execution debtor who is a farmer and continues to apply after his or her death if the property is in use and necessary for the maintenance and support of the surviving spouse and children (s. 71).*

#### **Personal property:**

- Subsections 66(a) to (g) provide exemptions for the following property of a farmer and his family: furniture and household furnishings and appliances (not exceeding \$10,000); farm machinery and equipment reasonably necessary for agricultural operations; tools, necessary implements, office furniture and equipment (not exceeding \$4,500) necessary for the farmer's business, trade, calling or profession, as well as one motor vehicle necessary for such activity.

#### **House, buildings and lot:**

- Subsection 66(h) provides an exemption not exceeding \$32,000 providing that the house and buildings are occupied by the execution debtor as his bona fide residence.
- Subsection 66(k) provides a total exemption for the homestead.

#### **Mobile home:**

- Subsection 66(l) provides an exemption for a trailer occupied by the farmer as living quarters, if it is not in addition to the house and buildings specified in subsection 66(h) or (k).

#### **RRSP:**

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

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## YUKON

**Exemptions Act**, R.S.Y. 1986, c. 59

### Personal property:

- Subsections 2(a) and (d) provide exemptions for tools and implements and other chattels necessary to and actually used in a business, profession or calling (not exceeding \$600), as well as for household furniture, utensils and equipment contained in and forming part of the permanent home.

### House, buildings and lot:

- Subsection 2(e) provides an exemption, not exceeding \$3,000, providing that the house and buildings are occupied by the execution debtor.

### RRSP:

- RRSPs associated with life insurance policies are exempt from seizure or attachment.

## FEDERAL EXEMPTIONS

1. **Canada Pension Plan**, R.S., 1985, c. C-8, s. 65(1.1): benefits are exempt from seizure and execution;
2. **Canadian Forces Superannuation Act**, R.S., 1985, c. C-17, s. 14(c) and s. 70(b): benefits are exempt from attachment, seizure and execution;
3. **Employment Insurance Act**, 1996, c. 23, s. 42(1): benefits are not capable of being assigned, charged, attached, anticipated or given as security;
4. **Government Annuities Act**, R.S.C. 1970, c. G-6: an annuity and moneys paid thereunder are exempt from insolvency laws;
5. **Indian Act**, R.S., 1985, c. I-5, s. 29: reserve lands are not subject to seizure under legal process. Also, real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour of any person other than an Indian or a band (s. 89(1));
6. **Old Age Security Act**, R.S., 1985, c. O-9, s. 36(1.1): benefits are exempt from seizure and execution;
7. **Pension Fund Societies Act**, R.S., 1985, c. P-8, s. 15: the interest of any member in the funds of the society is not transferable or assignable;
8. **War Veterans Allowance Act**, R.S., 1985, c. W-3, s. 17(1): no allowance is subject to assignment, alienation, or transfer by the recipient or to seizure in satisfaction of any claim against him.