

2015

# Reaffirmation of Debt in Consumer Bankruptcy in Canada

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## Recommended Citation

Ben-Ishai, Stephanie. "Reaffirmation of Debt in Consumer Bankruptcy in Canada" *Canadian Business Law Journal*. 56.2 (2015): 238.

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Stephanie Ben-Ishai \*

The legal treatment of reaffirmation of debt (or the reinstatement of a debt obligation) in the consumer bankruptcy context can be situated within a framework of, at times, competing interests: the debtor's right to a "fresh start" and the creditor's right to repayment. This article surveys applicable federal and provincial laws, as well as the law in the United States, in the context of the federal government's parliamentary committee review of Canadian bankruptcy and insolvency legislation (under way at the time of writing). Based on an analysis of the current and historical treatment of reaffirmation of debt in consumer bankruptcy in Canada and the United States, the article makes proposals for reform. Specifically, it is recommended that the secured party should be required to disclose any reaffirmation agreement to the bankruptcy trustee. One consequence of this reform would be to generate information in support of further empirical analysis on the frequency of reaffirmation agreements. It is also recommended that debtors should be required to positively elect to enter into reaffirmation agreements, that secured creditors should be given the mutually exclusive choice of repossession or assertion of a personal claim against the debtor, and that reaffirmation statistics should be examined in the next legislative review of Canadian bankruptcy and insolvency legislation.

## I. INTRODUCTION

A cornerstone of the Canadian consumer bankruptcy system is the individual's right to a "fresh start" provided by the bankruptcy discharge. [1](#) Under s. 178(2) of the Bankruptcy and Insolvency Act

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(the "BIA"), a discharged bankrupt is released from all liabilities with the exception of those outlined under s. 178(1). [2](#) However, creditors' interests are also a significant counterweight to the fresh start that bankruptcy offers, as consumer lending is integral to the Canadian economy. The reaffirmation of debt (or the reinstatement of a debt obligation) in the consumer bankruptcy context can be situated within this framework of, at times, competing interests.

A major issue regarding reaffirmation in the consumer bankruptcy context is the unavailability of Canadian statistics about the prevalence of these types of arrangements. [3](#) Anecdotal Canadian evidence suggests that bankrupts enter into reaffirmation agreements as a condition of obtaining new credit following a bankruptcy. [4](#) Presently, reaffirmation agreements are not regulated under the BIA. [5](#) Critics argue that reaffirmation agreements undermine the fresh start principle by reactivating pre-bankruptcy debts. [6](#) Conversely, because a debtor may have difficulty obtaining credit following a bankruptcy, reaffirmation of an agreement may be the sole means by which a bankrupt can obtain credit. [7](#) Further, a debtor may have a strong need or desire to retain a particular asset following bankruptcy due to the transaction and psychological costs associated with replacing an asset. In contrast, creditors may value an asset, especially used household goods, less than an outstanding loan.

The goals of this article are two-fold. First, the article is intended to provide a descriptive comparative overview in the context of the federal government's parliamentary committee review of the BIA (underway at the time of writing) by presenting the landscape in Canada, provinces across Canada and the United States. [8](#) Second, based on an analysis of the current and historical

treatment of reaffirmation of debt in consumer bankruptcy in Canada and the United States, the article makes proposals for reform.

The article proceeds as follows. Part II provides an overview of the definition of reaffirmation and its treatment in Canadian case law. It also provides a survey of the key reports and reform proposals to date on the treatment of reaffirmation. Both the Personal Insolvency Task Force Final Report [9](#) (the "PITF Report") and Industry Canada Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act [10](#) (the "Industry Canada Report") support reaffirmation only in certain circumstances, whereas the Report of the Standing Senate Committee on Banking, Trade and Commerce [11](#) recommended a prohibition on reaffirmation agreements. Part III considers provincial "seize or sue" legislation and the relationship to reaffirmation agreements in consumer bankruptcy and the role that such legislation plays in balancing debtor and creditor interests in the reaffirmation process. Part IV considers the treatment of reaffirmation agreements in the United States. Reaffirmation agreements in the United States must be entered into before discharge and filed alongside disclosure of current income and expenses. If the disclosure indicates that the debtor's income is insufficient to pay her debt, the court may decide not to approve the reaffirmation agreement on a presumption of undue hardship. Part V of the article concludes with proposals for reform. Overall, the proposals put forth in this article recommend disclosing reaffirmation agreements to the bankruptcy trustee with the secondary goal of supporting further empirical analysis on the frequency of reaffirmation agreements, requiring debtors to positively elect to enter into reaffirmation agreements, providing creditors with the mutually exclusive choice of repossession or assertion of a claim against the debtors, and reviewing reaffirmation statistics in the next round of BIA legislative review.

## II. REAFFIRMATION OF DEBTS IN CANADA

### 1. Definition of Reaffirmation

A debt reaffirmation occurs when a bankrupt revives or reaffirms personal responsibility for liabilities that have been or will be released upon discharge of the bankrupt. [12](#) Reaffirmation can occur through conduct or express agreement. [13](#) Reaffirmation by conduct occurs where the bankrupt continues to make payments to creditors even though the relevant debts have been discharged. [14](#) Reaffirmation by express agreement occurs when bankrupts enter into written agreements with creditors to repay debts even if the debts were released upon the bankruptcy discharge. [15](#) Written agreements will likely be enforceable where sufficient or new consideration is offered, such as the granting of new credit. [16](#)

With respect to secured creditors, if a debtor's default entitles the secured creditor to seize collateral that the debtor does not want to lose, the debtor may be prepared to agree to repay a debt that would otherwise be discharged in return for the creditor's agreement to refrain from exercising her rights of realization. The creditor's forbearance to exercise an existing legal right is consideration for the debtor's agreement to pay a sum of money. The amount of the debt and the terms may be different from the original agreement.

### 2. Treatment of Reaffirmation in Canadian Case Law

The leading reaffirmation case in Canada is *Seaboard Acceptance Corp. v. Moen* . [17](#) In this case, Seaboard Acceptance Corporation Ltd. ("Seaboard") entered into a standard form written contract with the defendant, Moen. Under the terms of the contract, Moen agreed to lease a motor vehicle for three years. The contract required the defendant to pay Seaboard a monthly rental fee for the use of the vehicle. The contract also contained a clause which provided that if the defendant became insolvent, Seaboard

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would repossess the vehicle. Moen took possession of the vehicle and subsequently made a voluntary assignment into bankruptcy but did not inform the trustee of the lease contract with Seaboard. Moen was awarded an absolute discharge from bankruptcy. Moen made the required monthly payments to Seaboard throughout the bankruptcy but defaulted on the lease contract after discharge. Following the default, the vehicle was returned. Seaboard calculated the amount outstanding under the contract and made a demand for the balance owing.

The court had to determine whether Seaboard was capable of collecting the amount owing or whether the amount was discharged in the bankruptcy. The British Columbia Court of Appeal upheld the trial judgment in favour of Seaboard. Justice Lambert, writing for the court, determined that the lease contract continued throughout bankruptcy and after the discharge from the bankruptcy; in essence, the lease was never terminated. [18](#) The fact that there might have been a claim provable in bankruptcy or that a claim provable in bankruptcy might have been made does not affect the fact that the contract itself continued. [19](#) The Court of Appeal maintained that this was not a novation, but a continuation of the contract. In effect, the contract was endorsed by the defendant's conduct after the discharge. [20](#)

A more recent pronouncement on reaffirmation in the Canadian context can be found in the British Columbia Supreme Court case, *Bridgewater Bank v. Simms* . [21](#) In this case, the defendants filed assignments into bankruptcy and, unlike the creditor in *Moen* , Bridgewater Bank filed proofs of claim as a secured creditor in the bankruptcy proceeding. [22](#) Throughout the bankruptcy, the Simms continued to maintain the mortgage with full payments. [23](#) As a result of these payments, the court held that where the debtor files an assignment in bankruptcy but thereafter maintains possession

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of the property and continues to fulfill the obligations due under the contract following the assignment in bankruptcy, the contract is affirmed, including the covenant to pay. [24](#) As part of his decision in *Simms* , Master Peter Keighley provided a detailed chronology of Canadian cases relating to reaffirmation, summarized in the following paragraph. [25](#)

Following *Moen* , in *Manulife Bank of Canada v. Planting* , Ontario courts held that where a secured creditor did not prove a claim in bankruptcy but the debtor continued to possess the security and make payments, the debtor would not be released from the debt. [26](#) Around the same time, an Alberta court found that in the context of a secured debt, where a debtor had maintained payments throughout bankruptcy, the contractual relationship was affirmed. [27](#) The judge made no distinction based on whether the debtor makes payments prior to, up to, or after the time of discharge. Similarly, the Nova Scotia Supreme Court dealt with a case where a borrower continued to maintain a mortgage throughout bankruptcy and discharge. [28](#) The borrower eventually defaulted and the lender foreclosed, but then sought a judgment for the residual deficiency. Based on *Moen* and *Manulife* , the court found that the debt was not released by the discharge. In a passage touching on policy considerations, Nathanson J. noted: [29](#)

It may be suggested that the Coleskis are worse off for having paid during the period of bankruptcy, but they are not. The effect of paying during the period of bankruptcy enabled them to continue to occupy the property and to delay the mortgagee from foreclosing at the time of bankruptcy, and resulted in the amount of the claim being reduced by the payments which were made during the period of bankruptcy.

After reviewing the treatment of reaffirmation agreements in Canada, three separate reports --- the Personal Insolvency Task Force Final Report, Report on the Standing Senate Committee on Banking, Trade, and Commerce, and Industry Canada Report on the Operation and Administration of the Bankruptcy and

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Insolvency Act and the Companies' Creditors Arrangement Act [30](#)--- proposed specific recommendations for reform.

### 3. Personal Insolvency Task Force Final Report

The Personal Insolvency Task Force (the "PITF") was established by the Office of the Superintendent of Bankruptcy (the "OSB") in October 2000 and included 23 consumer insolvency stakeholders such as creditors, trustees, debt counsellors, lawyers, and judges. [31](#) It was asked to review the consumer bankruptcy provisions of the BIA, explore alternative models of the consumer insolvency process, and develop recommendations for improvements to the process. [32](#)

The PITF does not recommend a blanket ban on reaffirmations. [33](#) Instead, it recommends that the BIA be amended to limit the availability of reaffirmation according to whether the debt is unsecured or secured. [34](#) Specifically, the PITF recommends that:

(1) "The *Moën* line of cases should be statutorily overruled so that reaffirmation cannot occur through the continuation of payments or through any other conduct." [35](#) The PITF believes that the *Moën* line of cases offends against the fresh start principle and is against the policy underlying s. 178 of the BIA. [36](#) The PITF maintained that bankrupts should make conscious and informed decisions before becoming personally liable for indebtedness that was released upon discharge from bankruptcy. [37](#)

(2) "Reaffirmation agreements respecting unsecured transactions should be prohibited in all circumstances." [38](#) The PITF believes that reaffirmation agreements respecting unsecured transactions offend against the fresh start principle, giving one creditor preference over other creditors. There is the danger that discussions between creditors and bankrupts about such

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reaffirmations may occur at a time when the bankrupts are vulnerable and might be susceptible to pressure. [39](#)

(3) "Reaffirmation agreements should be permitted in respect of secured transactions subject to a number of conditions." [40](#) This recommendation will allow bankrupts to retain assets covered by security agreements and avoid disruption in their lives. [41](#) There are 10 conditions attached to a reaffirmation in these circumstances, some examples of which are highlighted below:

(a) The assets covered by the security agreement must be in the possession of the bankrupt or a member of the bankrupt's immediate family; [42](#)

(b) There would be a limit on the amount which may be reaffirmed as specified by a sliding scale of the value of the secured asset; [43](#)

(c) The security must be valid as against the trustee in bankruptcy; [44](#)

- (d) The reaffirmation agreement must be in writing and entered into within nine months of the date of bankruptcy; [45](#)
- (e) The bankrupt would have a right to rescind a reaffirmation agreement within 90 days of the date on which it was signed; [46](#) and
- (f) The Official Receiver would have power to approve a reaffirmation agreement above the maximum limit or one that is signed more than nine months after the date of bankruptcy. [47](#)
- (4) It should be an offence under the BIA for creditors who know about the bankrupt's discharge to accept payment on account of any liability released upon the bankrupt's discharge from bankruptcy. [48](#) An exception to this rule would be made if:
  - (a) The payment was made under a permitted reaffirmation

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agreement; [49](#)

- (b) The payment is made under the terms of a security agreement entered into prior to the date of the bankruptcy. [50](#) This exemption allows discharged bankrupts to retain secured assets such as homes or cars simply by continuing to make their payments; [51](#)
- (c) The payment is voluntarily made by the discharged bankrupt to an individual related to the bankrupt. [52](#) This exemption recognizes that a discharged bankrupt may feel a moral obligation to repay family members despite the absence of a legal obligation; [53](#) or
- (d) The payment is first approved by the Official Receiver as being in the best interests of the bankrupt and not imposing undue hardship on the bankrupt. [54](#) This exception is designed to act as a fail-safe mechanism to allow the Official Receiver to approve particular payments rather than particular reaffirmation agreements. [55](#)

The recommendations outlined in the PITF Report have been criticized for their complexity and the lack of any empirical evidence of existing Canadian practices. [56](#) Notably, one member of the PITF strongly objected to criminalizing a creditor's receipt of payment of a discharged debt that did not qualify for an exception. [57](#) The member suggests that the PITF did not consider situations where it may be in the debtor's interest to make a voluntary payment as a condition of obtaining future service or preserving desired professional or social relationships. [58](#) Additionally, the member suggests that this recommendation criminalizes voluntary, ethically-based conduct between consenting adults, and it imposes an unrealistic standard on Canadians. [59](#) The member

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also criticizes the PITF for not exploring less intrusive methods prior to making this recommendation. [60](#)

#### 4. Report of the Standing Senate Committee on Banking, Trade and Commerce

After reviewing findings from the PITF and evidence from other witnesses both for and against reaffirmation agreements, the 2003 report issued by the Standing Senate Committee on Banking, Trade and Commerce (the "Senate Committee") recommended amending the BIA to prohibit reaffirmation by conduct or by express agreement. [61](#) The Senate Committee relied heavily on the notion that reaffirmation agreements are inconsistent with the fresh start principle, referred to as "a hallmark of insolvency law in Canada." [62](#) The Senate Committee determined that banning reaffirmation is consistent with the fresh start principle and a solution that supports the objectives of fairness and predictability by eliminating the opportunity for a debtor to selectively pay one or more, but not all, of their creditors. [63](#)

## 5. Industry Canada Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act

The consumer insolvency portion of the Industry Canada Report was the result of consultations with over 250 stakeholders, responses to discussion papers, and a review of a draft copy of the PITF Report. Stakeholders included small and large businesses, academics, lawyers, judges, financial institutions, the credit

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industry, labour, and various federal and provincial government agencies.

According to the Industry Canada Report, stakeholder consultations support the view that, except in a few specific circumstances, there should not be any legislative intervention to control reaffirmation agreements. [64](#) In fact, many stakeholders noted that efforts to pay debts that have been discharged should be encouraged. [65](#) Despite evidence of reaffirmation being fairly frequent in the United States, without any empirical evidence for Canadian markets, stakeholders questioned the frequency of reaffirmation in the consumer insolvency context. [66](#) The lack of evidence of a substantial problem of debtor abuse combined with the fact that many consider voluntary repayment to be a positive gesture led to minimal interest among the stakeholder group for intrusive action by the legislature. [67](#) The PITF recommendations received partial support from the Industry Canada Report but the stakeholders did not see the justification for distinguishing between secured and unsecured debt. [68](#) The Industry Canada Report also revealed there was very strong opposition to the PITF recommendation to criminalize inappropriate payments. [69](#) Finally, the stakeholders maintained that any intervention in this area should be focused on coercion by creditors and reaffirmation by conduct. [70](#)

### III. PROVINCIAL "SEIZE OR SUE" LEGISLATION

#### 1. Overview

Provincial "seize or sue" legislation provides, with some variation, a safeguard on reaffirmation agreements involving secured debt. In such provinces, where a debtor reaffirms a secured debt and the debtor later defaults after emerging from bankruptcy, the creditor may repossess the asset but may not assert a claim against the debtor for the deficiency. The fresh start problems associated with reaffirmation are thereby eliminated. Additionally, reaffirming such a debt allows the creditor to continue to collect the outstanding loan amount in most instances.

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Provincial "seize or sue" legislation applies to certain types of secured creditors inside and outside of bankruptcy and operates to give creditors the right to repossess secured consumer collateral and retain the proceeds on sale. [71](#) The secured creditor is not allowed to also collect a portion of the deficiency or its unsecured claim in addition to the asset value. In contrast, in provinces without "seize or sue" legislation, a secured creditor can allow a bankrupt to keep the collateral in a bankruptcy, reaffirm the debt and not lose the right to sue on the deficiency (on the basis that it was discharged in the bankruptcy) at a later point in time, post-bankruptcy, if the debtor defaults on the new agreement.

Specifically, in some Canadian provinces, the relevant legislation requires that creditors choose whether to sue or seize the collateral used to secure consumer loans. [72](#) In other provinces, such as Ontario, there is no restriction on deficiency claims. [73](#) Under a "seize or sue"

regime, the creditor must elect whether to pursue the amount owed through ordinary debt recovery proceedings or to repossess the secured property and sell it to satisfy the outstanding debt. [74](#) If the creditor elects to repossess the collateral, the whole debt is subsequently discharged and the creditor has no additional recourse for any other money owing on the debt after the collateral is sold. [75](#) In British Columbia, Yukon, and Northwest Territories, the "seize or sue" provision applies to security interests over consumer goods. In Alberta and Manitoba, the relevant "seize or sue" legislation applies only in the context of conditional or time-sale agreements. In Saskatchewan, the relevant legislation imposes a seize-only regime.

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Commentators have noted that "seize or sue" legislation provides an incentive for the creditor to engage in responsible lending by forcing creditors to consider the adequacy of security when entering into the loan agreement. [76](#) From a debtor's perspective, "seize or sue" legislation provides stronger consumer protection because it prevents a situation where the debtor no longer has access to the collateral (because it has been repossessed) and yet still owes money on the collateral.

## 2. Treatment of "Seize or Sue" Legislation in Provincial Case Law

The following discussion provides examples of the judicial treatment of "seize or sue" legislation in two provinces covered by the legislation: Alberta and British Columbia. This discussion is intended to serve as a sample, rather than an exhaustive review, of the provincial case law, which has been consistent both in its application of the "seize or sue" provisions and in its articulation of the underlying policy considerations.

In Alberta, as part of the decision in *Re Nielsen*, Registrar J.B. Hanebury provided a detailed history of the "seize or sue" provisions in that province. [77](#) Prior to 1942, Alberta legislation did not interfere with a creditor's right to recover any deficiency even after sale of the underlying collateral. However, the Conditional Sales Act [78](#) was amended that year to require an election by the creditor to choose between suing for the balance of the purchase price or repossession. This change resulted from a Depression-era sense of injustice.

Court decisions in the 1950s and 1960s reiterated the principle that the legislation provided a choice to a creditor; it could either: (i) seize the collateral; or (ii) bring an action for the purchase price. In the 1980s, the legislation was altered to apply only to consumer transactions. A change in the wording of the Act from "instead" to "elect" was held by the courts to be mere semantics. Indeed, despite the minor changes over the years: [79](#)

The goal and purpose of the provisions in issue is to ensure that debtors don't lose the goods they purchased and have a debt for the outstanding balance.

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Therefore, creditors, should they choose to seize, cannot recover anything further. That original purpose, found in the early versions of the legislation, does not appear to have changed over the intervening decades.

In a recent British Columbia commercial law case dealing with priorities between creditors, G.B. Butler J. provided the following overview of the seize or sue provision in s. 67 of the British Columbia Personal Property Security Act: [80](#) Subsections 67(1) and (2) of the PPSA set out the steps that a secured party may take if a debtor defaults under a security agreement that provides for an interest in consumer goods. Section 67(1) is known as the "seize or sue" provision. In brief, a secured party may take possession of the goods (subject, of course, to s. 58(3)), proceed with a "voluntary foreclosure", accept

surrender of the goods, or bring action to recover judgment subject to the terms of the agreement. If it does anything other than bring action, then the unperformed obligations under the security agreement are extinguished. [81](#)

#### IV. THE UNITED STATES

##### 1. Consumer Bankruptcy Legislation

In the United States, the Bankruptcy Reform Act of 1978 --- commonly referred to as the Bankruptcy Code --- is the uniform federal law that governs all bankruptcy cases. [82](#) The Bankruptcy Code is codified as title 11 of the United States Code, and has been amended several times since its enactment. The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), along with local rules of each bankruptcy court, govern the procedural aspects of the bankruptcy process. The Bankruptcy Code along with the Bankruptcy Rules (and local rules) provides a complete set of formal legal procedures for dealing with bankruptcy in an individual or corporate context. [83](#)

There are six basic types of bankruptcy cases provided for under the Bankruptcy Code. [84](#) Chapter 7, entitled "Liquidation", is the main source of legislative authority and guidance for consumer bankruptcies. Chapter 7 outlines a court-supervised procedure whereby the bankruptcy trustee gathers and sells the debtor's non-  
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exempt assets and uses the proceeds to pay the debtor's creditors in accordance with the creditor priority provisions of the Bankruptcy Code. [85](#) Under Chapter 7, if the debtor is an individual, he or she typically receives a discharge that releases him or her from personal liability for certain dischargeable debts. [86](#)

A discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action, including the filing of a lawsuit, designed to collect a discharged debt. [87](#) Discharges under Chapter 7 are only available to individual debtors, not to partnerships or corporations. [88](#) Similar to the Canadian bankruptcy regime, a primary purpose of bankruptcy is to discharge certain debts to give an honest individual debtor a "fresh start." Secured creditors, however, may retain some rights to seize property securing an underlying debt even after a discharge is granted. [89](#) If a debtor wishes to keep certain secured property, he or she may decide to "reaffirm" the debt by entering into a reaffirmation agreement with the secured creditor. [90](#)

If the debtor decides to reaffirm a debt, he or she must do so before the discharge is entered. [91](#) Under the Bankruptcy Code, the debtor must sign a written reaffirmation agreement containing a set of disclosures and file it with the court. [92](#) The disclosures must advise the debtor of the amount of the debt being reaffirmed, how it is calculated and, most importantly, that reaffirmation means that the debtor's personal liability for that debt will not be discharged in the bankruptcy. [93](#) The disclosures also require the debtor to sign and file a statement of his or her current income and expenses that shows the balance of income is sufficient to pay the reaffirmed debt. [94](#) If the balance is not enough to pay reaffirmed debt, there is a presumption of undue hardship, and the court may decide not to approve the reaffirmation agreement. [95](#) Unless the  
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debtor is represented by an attorney, the bankruptcy judge must approve the reaffirmation agreement. [96](#)

If the debtor is represented by an attorney in connection with the reaffirmation agreement, the attorney must certify in writing that he or she advised the debtor of the legal effect and consequences of the agreement, including a default thereunder. [97](#) The attorney must also certify that the debtor was fully informed and voluntarily made the agreement, and that reaffirmation of the debt will not create an undue hardship for the debtor or the debtor's dependents. [98](#) The Bankruptcy Code requires a reaffirmation hearing if the debtor has not been represented by an attorney during the negotiating of the agreement, or if the court disapproves the reaffirmation agreement. [99](#) The debtor may repay any debt voluntarily, however, whether or not a reaffirmation agreement exists. [100](#)

American judges, academics, and policymakers have noted that the current legislation has resulted in higher transaction costs and uncertainty about judicial approval. [101](#) Reaffirmation agreements may cost thousands of dollars. [102](#) Out-of-court bargains in the form of "rogue" or illegal reaffirmations continue to exist, despite a period during the 1990s when they resulted in numerous lawsuits and settlements. [103](#) Additionally, another form of out-of-court bargain --- forbearance agreements --- are in common use. [104](#)

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## 2. Reaffirmation Statistics

The American data on reaffirmation demonstrate that even with the possibility of out-of-court arrangements reaffirmation is occurring in a significant number of cases. According to the 2012 Report of Statistics (the most recent set of American data available at the time of writing), 238,926 reaffirmation agreements were reported as filed out of a total of 918,069 Chapter 7 consumer cases terminated during the year ending December 31, 2012. [105](#) Nationwide, 19% of Chapter 7 cases closed had at least one reaffirmation agreement filed. [106](#) In 11% of cases with reaffirmation agreements filed, one or more agreements were submitted without attorney certification. [107](#) Further, less than 1.5% of reaffirmation cases had at least one reaffirmation agreement approved by court order. [108](#)

The American Bankruptcy Institute ("ABI") reports that the highest percentage of reaffirmation agreements are entered into in states permitting repossession and/or foreclosure based on a default triggered by an ipso facto clause where no additional judicial action is required after default. [109](#) Relevant to the Canadian "seize or sue" analysis, this suggests that state law rights influence debtors' ultimate decisions to reaffirm debts. [110](#) Moreover, the American experience indicates that debtors' lawyers appear to play a significant role in debtors' decisions to enter into reaffirmation agreements. [111](#) As part of its report, the ABI reviewed 106 post-BAPCPA cases filed by five separate lawyers specializing in bankruptcy in the same geographic region. Results showed that reaffirmation agreements were filed in 50%, 40%, 32%, 20% and 0% of their respective cases. [112](#)

The ABI's analysis of 314 cases from various jurisdictions revealed that motor vehicles account for 78% of all reaffirmation

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agreements while mortgages account for 19%. [113](#) Personal property such as tools and furniture account for 2% of cases; none of the agreements in the sample covered unsecured debt. [114](#)

## 3. The Role of the Court in Reaffirmation Agreements

As summarized above, in the United States, reaffirmation agreements are subject to the review and approval of the bankruptcy court in two specific instances. First, if the balance of income

less the expenses does not leave the individual debtor with enough funds to complete the terms of the reaffirmation agreement, then there is a presumption of undue hardship and the agreement must be reviewed by the bankruptcy court. Second, if the debtor was not represented by an attorney in making a reaffirmation agreement, the bankruptcy court must hold a hearing to inform the debtor of his or her rights and the legal implications of reaffirming a debt.

In the case of undue hardship, judicial review of undue hardship is a "preventive measure against unwise reaffirmation of debts that may impair debtors' fresh start." [115](#) If the amount of the scheduled payments due on the reaffirmed debt exceeds the debtor's available income, the agreement is presumed to be an undue hardship on the debtor. [116](#) The debtor may rebut this presumption in a written statement, but if the debtor's explanation is not satisfactory, the court must hold a hearing after notice to the debtor and creditor. [117](#) If the debtor fails to rebut the presumption of undue hardship, the bankruptcy court "may" disapprove the reaffirmation agreement. According to the ABI Report, it is unclear whether the bankruptcy court has the power to disapprove a reaffirmation agreement if the presumption of undue hardship is rebutted, or where other factors indicate that the reaffirmation agreement is not in the debtor's best interest. [118](#)

If the debtor was not represented by an attorney in making the reaffirmation agreement, or if the attorney refuses to sign the necessary certification documents, § 524(c)(6) and (d) of the Bankruptcy Code require the court to conduct a hearing. [119](#) The  
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bankruptcy court may approve the reaffirmation agreement if reaffirming the debt does not impose an undue hardship on the debtor or a dependent of the debtor and if it is in the debtor's best interest. [120](#) As part of its duties, the court must inform the debtor at the hearing that the debtor is not required to sign the reaffirmation agreement. The court must also inform the debtor that the debt is not discharged and outline the legal consequences of a default under the agreement. [121](#)

## V. CONCLUSIONS AND RECOMMENDATIONS

The reviewed policies and proposed reforms present a wide range of options for dealing with reaffirmation agreements in consumer bankruptcy. Some stakeholders, such as the Canadian Bankers Association, oppose legislative action on the grounds that it would offend personal liberty. Others, such as Industry Canada and the Insolvency Institute of Canada, believe that while some level of intervention may be called for, doing so in the absence of statistics and a Canadian empirical record is inadvisable. At the other end of the spectrum, the Senate Committee would have instituted a complete ban on reaffirmations, in the name of the "fresh-start" principle. Similarly, the PITF Report would ban reaffirmation by conduct and reaffirmation of unsecured debts, while subjecting reaffirmation of secured debts to restrictions and regulations. Further, certain actions with respect to receiving repayment of discharged debt should, per the PITF Report, be criminalized.

In the first place, it is important to protect debtors' freedom of choice while recognizing the potential benefits of reaffirmation agreements. Yet, many provinces have already regulated this sphere of choice and enacted "seize or sue" provisions, and Canadian courts have long applied such legislation consistently with its objectives. Further, the American data indicates that reaffirmation agreements are a common phenomenon in the consumer bankruptcy cases and the American experience demonstrates the potential for abuse of debtors in this context.

The recommendations that follow recognize the importance of gathering a statistical record to guide any major policy changes in this area. In the absence of such data today, bold legislative actions such as a complete ban on reaffirmation agreements or criminalizing

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non-compliance may be overbearing. This article proposes a middle ground --- one that ensures a level of consumer protection in all provinces while also protecting debtors' rights to make individual decisions. In this light, the following amendments to the BIA are proposed.

The first recommendation is that a creditor must disclose a reaffirmation agreement to the debtor's bankruptcy trustee, and these statistics must be reported to the OSB. Unreported reaffirmation agreements or reaffirmation by conduct will not be enforceable. This recommendation is based on the need for detailed Canadian statistics in order to further evaluate the claims made by stakeholders related to reaffirmation agreements. Disclosure is also a form of consumer protection. The trustee is best equipped to receive and evaluate this information. However, the suggested reform will impose costs and burdens on trustees. Accordingly, it is important that there is a prescribed simple form for reporting this data to the OSB. As critics of the PITF Report noted, an overly complex and detailed form will not be appropriate. Further, the American experience suggests that judicial scrutiny of reaffirmation agreements is not a recommended route, as this approach results in high transaction costs, uncertainty, and the use of out-of-court agreements rather than compliance with the legislation. In the absence of empirical data, a complete ban on reaffirmation agreements or the criminalization of non-compliance may be overbearing. Therefore, by requiring the disclosure of reaffirmation agreements to the trustee, an empirical record can be built, while mitigating the potential for abuse.

A second recommendation for reform is that a debtor must positively elect to reaffirm the debt at any time prior to his or her discharge from bankruptcy, provided the creditor agrees, and must continue to make payments according to the original agreement. This is not unprecedented, as similar requirements to take positive action are placed on corporate debtors in the context of executory contracts. Further, by requiring that the original agreement is maintained, the transaction costs associated with negotiating a new agreement are saved, and the fresh start problems associated with reaffirmation are cured. Creditors can decide ex-ante how to structure their loan agreements to anticipate reaffirmation in the event of bankruptcy.

This second recommendation is consistent with that of the Canadian Bar Association. While advocating the over-ruling of

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affirmation by conduct, they note that a complete ban on reaffirmations would offend personal liberty. Similarly, the PITF Report would have explicitly overturned the *Moen* line of cases allowing for reaffirmation by conduct. Indeed, the Industry Canada Report advocated that any action should be focused on reaffirmation by conduct. While the Senate Committee would have initiated an outright ban on all reaffirmation agreements, the requirement for a positive election nonetheless ensures that reaffirmation agreements will not run afoul of the fresh-start principle. Indeed, this proposal is consistent with the aim of the PITF Report in that it requires debtors to make a conscious and informed decision. This proposal therefore strikes a middle ground --- by banning reaffirmations by conduct, it provides a level of consumer protection while still ensuring the law gives effect to contracts that have been freely entered into and protects individual decisions.

The requirement for positive affirmation is consistent with the requirement of American bankruptcy law for a written reaffirmation. As detailed in the previous section of this article,

under American bankruptcy law, if the debtor wishes to reaffirm a debt, he or she must sign a written agreement containing a set of disclosures. An attorney must certify that they have advised the debtor of the consequences of this action; in the event the debtor is not represented by an attorney, the reaffirmation is subject to judicial approval.

A third recommendation for reform applies if a secured debt is reaffirmed and the debtor commits an act of default after emerging from bankruptcy. In such situations, it is proposed that the creditor may repossess the asset but may not assert a claim against the debtor for the deficiency. The rationale behind the "seize or sue" provisions in the provinces that have such legislation provides a basis for this proposed reform. The introduction of this reform into the BIA would also achieve geographic uniformity across the provinces. This reform also furthers the fresh start objective of bankruptcy by making sure that creditors lend responsibly and are not able to pursue a deficiency that was discharged in the bankruptcy. Creditors still benefit as the asset often has limited value to them as compared to the full payment of the loan.

The fourth and final recommendation is that reaffirmation statistics should be reviewed in the next round of BIA legislative review and further amendments considered following this review.

In the absence of a complete Canadian empirical record, there are

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nonetheless clear first steps that can be taken to protect consumers. The American data demonstrates that reaffirmation agreements are a common phenomenon in a jurisdiction that is similar to Canada, with some notable exceptions, in the consumer bankruptcy context. The basic rationale behind "seize or sue" provisions has long been recognized by Canadian courts and operates in furtherance of the "fresh-start" principle that is a fundamental part of bankruptcy law.

In conclusion, the importance of gathering a statistical record to guide any major policy changes in this area is vital. To that end, the collection of statistics is a central part of reform and should guide further amendments in this area as well as other areas of consumer bankruptcy. In the absence of such data today, this article proposes a middle ground; one that ensures a level of consumer protection in all provinces while also protecting individual debtor's choices.

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## APPENDIX - PROVINCIAL "SIEZE OR SUE" STATUTORY PROVISIONS

### PROVINCE

### PROVISIONS

**Alberta Law of Property Act** [122](#)

**Recovery Proceedings s. 53(1)** A secured party may enforce the secured party's right to recover the purchase price owing to the secured party under a purchasemoney security agreement or related agreement either

(a) by proceeding as provided in subsection (4), **or**

(b) by action for a judgment against the debtor.

**British Columbia Personal Property Security Act (the "British**

**Rights and Remedies: Consumer Goods s. 67(1)** Subject to section 58 (3), if a debtor is in default under a security agreement that provides for a security interest in consumer goods, the secured party

Columbia PPSA") [123](#)

may  
(a) exercise his or her rights as provided in section 58,  
(b) proceed as provided in section 61,  
(c) accept surrender of the goods by the debtor, **or**  
(d) subject to the terms of the agreement, bring action to recover a judgment or take proceedings to obtain a certificate under the Creditor Assistance Act against the debtor. **s. 67(6)** If a secured party proceeds under subsection (1) (d) and, as a result of legal proceedings taken to enforce a judgment against the debtor or proceedings to enforce a lien against the goods referred to in subsection (1), the goods are seized and sold and the secured party receives money or other value as a result of the proceedings, the right of the secured party to recover under his or her judgment against the debtor or against a guarantor of or indemnitor with respect to the debtor's obligations under the security agreement is limited to the gross amount realized from the sale of the goods

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referred to in subsection (1) under the proceedings.

**Manitoba The  
Consumer  
Protection Act** [124](#)

**Credit grantor may sue or seize 47(1)** The credit grantor under a credit sale may enforce payment of the outstanding balance in only one of the following ways:  
(a) by suing for all or any part of the outstanding balance;  
(b) by enforcing the credit grantor's security interest in the collateral.

**Northwest  
Territories  
Consumer  
Protection Act** [125](#)

**Right to sue after seizure 64(1)** Subject to subsection (2), where a seller under a time sale repossesses the goods comprised in the time sale, or any portion of the goods, the right of the seller to recover any balance, whether of the price or of the cost of borrowing or both, owing on the goods is after that limited to his or her lien on the goods and his or her right to repossession and sale of the goods, and no action is after that maintainable by the seller to recover the balance or any part of the balance. **64(5)** Where  
(a) a seller has obtained a judgment for the whole of the balance, and  
(b) the goods comprised in the sale, or any of them, are seized under an execution issued pursuant to the judgment referred to in paragraph (a), the right of the seller to recover under the judgment, in so far as it is based on that balance, is limited to the amount realized from the sale of the goods

so seized, and the judgment, to the extent that it is based on that balance and taxed costs, shall be deemed to be fully paid and satisfied but where the amount realized from the sale of the goods exceeds the amount of the judgment and the costs of execution,

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the excess shall be paid to the buyer or to subsequent execution creditors.

**"time sale"** means

(a) any retail sale of goods or of goods and services under which possession of the goods is to be delivered to the buyer, but the transfer of the property in the goods to the buyer is to take place after the delivery on payment by the buyer of the whole or part of the price and cost of borrowing, whether or not the transfer is also subject to the fulfilment of some other condition,

(b) any retail hire-purchase of goods, and

(c) for the purpose of sections 57 to 66, any retail sale of goods or of goods and services in which the seller takes back a chattel mortgage on those goods to secure payment of the whole or part of the price.

**Saskatchewan The  
Limitation of Civil  
Rights Act [126](#)**

**Vendor's right to recover price restricted 18(1)** When an article, the selling price whereof exceeds \$100, is hereafter sold, and the vendor, after delivery, has a lien thereon for all or part of the purchase price, the vendor's right to recover the unpaid purchase money shall be restricted to his lien upon the article sold, and his right to repossession and sale thereof, notwithstanding anything to the contrary in any other Act or in any agreement or contract between the vendor and purchaser. **18(2)**

Subsection (1) does not apply to:

(a) the sale of land with chattels upon an entire consideration;

(b) Repealed. 1988-89, c.52, s.12.

**Yukon Consumers  
Protection Act [127](#)**

**No right to sue after seizure 53(1)** Subject to subsection (2), if a seller under a time sale repossesses

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goods comprised in the time sale, or any portion thereof, the seller's right to recover any balance, whether of the price or of the cost of borrowing or both, owing on the goods so comprised is thereafter limited to the seller's lien on the goods and the seller's right to repossession and sale thereof, and no action is thereafter maintainable by the seller to recover the balance or any part thereof.

**53(5)** If a seller has obtained a judgment for the whole of the balance, and the goods comprised in the sale, or any of them, are seized under an execution issued pursuant to that judgment, the seller's right to recover under the judgment, in so far as it is based on that balance, is limited to the amount realised from the sale of goods so seized, and the judgment, to the extent that it is based on that balance and taxed costs, shall be deemed to be fully paid and satisfied; but if the amount realised from the sale of the goods exceeds the amount of the judgment and the costs of execution, the excess shall be paid to the buyer, or to subsequent execution creditors, as the case may be. "**time sale**" means

(a) any retail sale of goods or of goods and services under which possession of the goods is to be delivered to the buyer, but the transfer of the property in the goods is to take place after the delivery, on payment by the buyer of all or part of the price and cost of borrowing, if any, whether or not the transfer is also subject to the fulfillment of some other condition,

(b) any retail hire-purchase of goods, and

(c) for the purpose of sections 46 to 56, any retail sale of goods or of goods and

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services in which the seller takes back a chattel mortgage on those goods to secure payment of all or part of the price.

## ENDNOTES

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1 See Stephanie Ben-Ishai, "Government Student Loans, Government Debts and Bankruptcy: A Comparative Study" (2006), 44 C.B.L.J. 211, at p. 213; Senate, Standing Committee on Banking, Trade and Commerce, Debtors and creditors sharing the burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (November, 2003) (Chair: The Honourable Richard H. Kroft).

2 Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 172(1)-(2).

3 Ibid.

4 Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1, at p. 33.

- [5](#) Marketplace Framework Policy Branch, Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (Ottawa, Industry Canada, 2002).
- [6](#) Ibid.
- [7](#) Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1, at p. 33.
- [8](#) "Fresh Start: A Review of Canada's Insolvency Laws", 2014 Industry Report (Ottawa, Industry Canada, Office of the Superintendent of Bankruptcy, 2014). The Ministry of Industry's report to Parliament on the provisions and operation of the BIA, tabled on October 22, 2014, identified reaffirmation agreements as the only consumer issue where there was a consensus among stakeholders that statutory reform was required. The 2014 Industry Report refers to a discussion paper ("Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (Ottawa, Industry Canada, 2014)), which does not provide a detailed discussion of the policy and issues at stake in regulating reaffirmation. Accordingly, neither of the reports are referred to in any detail in this article.
- [9](#) Personal Insolvency Task Force, Final Report (Ottawa, Industry Canada, Office of the Superintendent of Bankruptcy, 2002).
- [10](#) Marketplace Framework Policy Branch, *supra*, footnote 5.
- [11](#) Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1.
- [12](#) Personal Insolvency Task Force, *supra*, footnote 9, at p. 29.
- [13](#) Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1, at p. 33.
- [14](#) Personal Insolvency Task Force, *supra*, footnote 9.
- [15](#) Ibid.
- [16](#) Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1, at p. 33; Marketplace Framework Policy Branch, *supra*, footnote 5.
- [17](#) (1986), 62 C.B.R. (N.S.) 143, 36 A.C.W.S. (2d) 382, 1986 CarswellBC 480, [1986] B.C.J. No. 87 (B.C. C.A.) .
- [18](#) *Moen*, *supra*, footnote 17.
- [19](#) *Moen*, *supra*, footnote 17. Professors Ziegel and Buckwold had a well-documented debate about this decision in a series of articles in the late 1990s. See Tamara M. Buckwold, "Holding the High Ground: The Position of Secured Creditors in Consumer Bankruptcies and Proposals" (1999), 37 Osgoode Hall L.J. 277; Tamara M. Buckwold, "Post-Bankruptcy Remedies of Secured Creditors: As Good as it Gets" (1999), 31 C.B.L.J. 436; Jacob S. Ziegel, "Post-Bankruptcy Remedies of Secured Creditors: Some Comments on Professor Buckwold's Article" (1999), 32 C.B.L.J. 142. The case law on the validity of reaffirmation is now well settled.
- [20](#) *Moen*, *supra*, footnote 17.
- [21](#) (2011), 210 A.C.W.S. (3d) 252, 2011 BCSC 1453, 2011 CarswellBC 3158 (B.C. Master) .
- [22](#) *Simms*, *supra*, footnote 21, at para. 5.
- [23](#) *Simms*, *supra*, footnote 21, at para. 6.
- [24](#) *Simms*, *supra*, footnote 21, at para. 23.
- [25](#) *Simms*, *supra*, footnote 21, at paras. 10-16.
- [26](#) *Manulife Bank of Canada v. Planting* (1996), 43 C.B.R. (3d) 305, 68 A.C.W.S. (3d) 20, 1996 CarswellOnt 4965, [1996] O.J. No. 4594 (Ont. Gen. Div.), reversed in part (1998), 76 A.C.W.S. (3d) 897, 1998 CarswellOnt 159, [1998] O.J. No. 74 (Ont. C.A.) .
- [27](#) *CIBC Mortgage Corp. v. Stenerson* (1998), 4 C.B.R. (4th) 226, 220 A.R. 248, 79 A.C.W.S. (3d) 181, 1998 CarswellAlta 388, [1998] A.J. No. 446 (Alta. Q.B.) .

- 28 *CIBC Mortgage Corp. v. Coleski* (1999), 13 C.B.R. (4th) 17, 180 N.S.R. (2d) 2, 557 A.P.R. 2, 92 A.C.W.S. (3d) 190, 1999 CarswellNS 302, [1999] N.S.J. No. 336 (N.S. S.C.) .
- 29 *Coleski* , supra , footnote 28, at para. 14.
- 30 R.S.C. 1985, c. C-36.
- 31 Marketplace Framework Policy Branch, supra , footnote 5.
- 32 Ibid.
- 33 Saul Schwartz, "Personal Bankruptcy Law: A Behavioural Perspective", in Johanna Niemi Kiesiläinen, Iain Ramsay and William C. Whitford, eds., *Consumer Bankruptcy in Global Perspective* (Oxford, Hart, 2003), p. 61, at p. 72.
- 34 Ibid.
- 35 Personal Insolvency Task Force, supra , footnote 9, at p. 30.
- 36 Ibid.
- 37 Ibid.
- 38 Ibid. , at p. 29.
- 39 Ibid. , at p. 30.
- 40 Ibid. , at p. 29.
- 41 Ibid. , at p. 30.
- 42 Ibid. , at p. 30.
- 43 Ibid. , at p. 31; Saul Schwartz, supra , footnote 33.
- 44 Personal Insolvency Task Force, supra , footnote 9, at p. 31.
- 45 Ibid.
- 46 Ibid.
- 47 Ibid.
- 48 Ibid. , at p. 32.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid.
- 52 Ibid.
- 53 Ibid.
- 54 Ibid.
- 55 Ibid. , at p. 33.
- 56 Anthony J. Duggan et al. , *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials* , 2nd ed. (Toronto, Emond Montgomery, 2009), at p. 568; Standing Committee on Banking, Trade and Commerce, supra , footnote 1, at p. 34.
- 57 Personal Insolvency Task Force, supra , footnote 9, at p. 32, note 31.
- 58 Ibid.
- 59 Ibid.
- 60 Ibid.
- 61 Standing Committee on Banking, Trade and Commerce, supra , footnote 1, at p. 36. Organizations such as the Canadian Bar Association, CAIRP and the Insolvency Institute of Canada, Omega One Ltd., and Canadian Bankers Association submitted recommendations to the Senate Committee concerning reaffirmation agreements. See Canadian Bar Association, "Submission on the Five-Year Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act " (May, 2003), at p. 24, online: <<http://www.cba.org/cba/submissions/pdf/03-25-eng.pdf>>; Canadian Association of Insolvency and Restructuring Professions and the Insolvency Institute of Canada, "Submission on Personal

Insolvency Reform" (March 2003), online:

<[http://www.cairp.ca/\\_files/file.php?fileid=fileaCczVFjybx&filename=file\\_Mar262003.pdf](http://www.cairp.ca/_files/file.php?fileid=fileaCczVFjybx&filename=file_Mar262003.pdf)>; Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1, at p. 35.

[62](#) *Ibid.*, at p. 35.

[63](#) Standing Committee on Banking, Trade and Commerce, *supra*, footnote 1, at p. 36; Marketplace Framework Policy Branch, *supra*, footnote 5.

[64](#) *Ibid.*, at p. 61.

[65](#) *Ibid.*

[66](#) *Ibid.*

[67](#) *Ibid.*

[68](#) *Ibid.*, at p. 62.

[69](#) *Ibid.*

[70](#) *Ibid.*

[71](#) For a complete summary of provincial "seize or sue" statutory provisions, see Appendix A.

[72](#) New Zealand Law Commission, "Consumers and Repossession: A Review of the Credit (Repossession) Act 1997, Chapter 3: Repossession and the right to repossess" (Wellington, The Commission, April, 2012), online:

<<http://r124.publications.lawcom.govt.nz/chapter+3%3A+repossession+and+the+right+to+repossess/chapter+3%3A+debtors%92+liability+for+outstanding+amounts>>. The New Zealand Law Commission's work in this area is one of the few law reform reports that the author could locate dealing with the area of law under which lenders seek to enforce repossession of goods over which they took security which also considered the Canadian seize or sue provisions in a comparative and detailed manner.

[73](#) Jacob S. Ziegel, "Canadian Perspectives on Challenges of Consumer Bankruptcies" in Jacob S. Ziegel, ed., *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law* (Oxford, Hart, 1998), p. 411, at p. 422.

[74](#) New Zealand Law Commission, *supra*, footnote 72.

[75](#) *Ibid.*

[76](#) *Ibid.*

[77](#) *Re Nielsen* (2010), 69 C.B.R. (5th) 124, 17 P.P.S.A.C. (3d) 126, ( sub nom. Nielsen (Bankrupt), Re) 498 A.R. 173, 498 N.R. 173, 191 A.C.W.S. (3d) 32, 2010 CarswellAlta 1260, 2010 ABQB 464 (Alta. Q.B.), at paras. 15-37.

[78](#) Conditional Sales Act, R.S.A. 1980, c. C-21.

[79](#) *Re Nielsen*, *supra*, footnote 77, at para. 37.

[80](#) R.S.B.C. 1996, c. 359.

[81](#) *Jacobs v. Laumaillet* (2010), 17 P.P.S.A.C. (3d) 272, 192 A.C.W.S. (3d) 1004, 2010 CarswellBC 2326, 2010 BCSC 1229 (B.C. S.C. [In Chambers]), at para. 41.

[82](#) 11 U.S.C. (Bankruptcy) (1978); Bankruptcy Judges Division Administrative Office of the United States Courts, Bankruptcy BASICS (Administrative Office of the United States Courts, November, 2011), at p. 5.

[83](#) *Ibid.*

[84](#) *Ibid.*, at p. 6.

[85](#) *Ibid.*

[86](#) *Ibid.*

[87](#) *Ibid.*, at p. 13.

- [88](#) Bankruptcy Code, *supra* , footnote 82, at § 727(a)(1).
- [89](#) Bankruptcy Judges Division Administrative Office of the United States Courts, *supra* , footnote 82, at p. 19.
- [90](#) *Ibid.*
- [91](#) *Ibid.*
- [92](#) Bankruptcy Code, *supra* , footnote 82, at § 524(c).
- [93](#) Bankruptcy Judges Division Administrative Office of the United States Courts, *supra* , footnote 82, at p. 19.
- [94](#) *Ibid.*
- [95](#) *Ibid.*
- [96](#) *Ibid.*
- [97](#) *Ibid.*
- [98](#) Bankruptcy Code, *supra* , footnote 82, at § 524(k).
- [99](#) Bankruptcy Code, *supra* , footnote 82, at § 524(d), (m).
- [100](#) Bankruptcy Code, *supra* , footnote 82, at § 524(f).
- [101](#) See Amber J. Moren, "The Debtor's Dilemma: Economic Analysis of Asset Retention in Consumer Bankruptcy" *Yale L.J.* (forthcoming); Marianne B. Culhane and Michaela M. White, "Debt After Discharge: An Empirical Study of Reaffirmation" (1999), 73 *Am. Bank L.J.* 709 (While 72% of debtors indicated that they intended to reaffirm vehicle debt, 2/3 of those reaffirmations were not filed in court.); Jean Braucher, "Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act" (2005), 13 *Bankr. Inst. L. Rev.* 458; David B. Wheeler and Douglas E. Wedge, "A Fully-Informed Decision: Reaffirmation, Disclosure and the Bankruptcy Abuse and Consumer Protection Act of 2005" (2005), 79 *Am. Bank. L.J.* 789.
- [102](#) See Moren, *supra* , footnote 101; Culhane and White, *supra* , footnote 101; Braucher, *supra* , footnote 100; Wheeler and Wedge, *supra* , footnote 101.
- [103](#) See Moren, *supra* , footnote 101; Culhane and White, *supra* , footnote 101; Jean Braucher, *supra* , footnote 101; Wheeler and Wedge, *supra* , footnote 101.
- [104](#) See Moren, *supra* , footnote 101; Culhane and White, *supra* , footnote 101; Braucher, *supra* , footnote 101; Wheeler and Wedge, *supra* , footnote 101.
- [105](#) United States of America, Office of Judges Programs Statistics Division, "2012 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Washington, D.C., Administrative Office of the United States Courts, 2013), at p. 52.
- [106](#) *Ibid.*
- [107](#) *Ibid.*
- [108](#) *Ibid.*
- [109](#) Daniel A. Austin and Donald R. Lassman, *Reaffirmation Agreements in Consumer Bankruptcy Cases* , 2nd ed. (Alexandria, Virginia, American Bankruptcy Institute, 2009), at p. 31.
- [110](#) *Ibid.*
- [111](#) *Ibid.* , at p. 32.
- [112](#) *Ibid.*
- [113](#) *Ibid.*
- [114](#) *Ibid.*
- [115](#) *In re Vargas* , 257 B.R. 157 (U.S. N.J. Bkcty. Ct. 2001) , at p. 166.
- [116](#) Austin and Lassman, *supra* , footnote 109.

- [117](#) Ibid.
- [118](#) Ibid.
- [119](#) Ibid.
- [120](#) Bankruptcy Code, *supra* , footnote 82, at § 524(c)(6).
- [121](#) Austin and Lassman, *supra* , footnote 109.
- [122](#) Law of Property Act, R.S.A. 2000, c. L-7, s. 53(1).
- [123](#) Personal Property Security Act, R.S.B.C. 1996, c. 359, s. 67.
- [124](#) The Consumer Protection Act, C.C.S.M. c. C200, s. 47(1).
- [125](#) Consumer Protection Act, R.S.N.W.T. 1988, c. C-17, s. 64.
- [126](#) The Limitation of Civil Rights Act, R.S.S. 1978, c. L-16, s. 18.
- [127](#) Consumers Protection Act, R.S.Y. 2002, c. 40, s. 53.