SASKATCHEWAN
LAW REVIEW

407 ETR, Moloney and the Contested Meaning of Rehabilitation in Canada's Personal Bankruptcy System

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I. INTRODUCTION

Every year, over one hundred thousand Canadians turn to the *Bankruptcy and Insolvency Act*[1] for relief from their indebtedness.[2] They require assistance handling debt loads that they have no realistic chance of ever repaying. Their debts may cause them other problems such as significant stress or the denial of privileges such as a driver's or professional licence. Individuals also come to the bankruptcy system with a range of problems that have caused them financial difficulties. Individuals may have mismanaged their finances because they lack basic financial literacy skills. Individuals may have lost a job and lack aptitudes that readily translate into employment in another position. An individual's financial hardship may result from a physical or mental illness: a cancer diagnosis or an addiction can have serious financial consequences. The individual's financial problems may result from, or be aggravated by, factors entirely beyond his or her control, such as shifts in the labour market, the insolvency of an employer-sponsored pension plan, or gaps in provincial health care coverage. At the other end of the spectrum,

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1 RSC 1985, c B-3 [*BIA*].

2 In each of the last two years for which statistics are available, over 118,000 consumer insolvencies were filed, including both bankruptcies and proposals (Office of the Superintendent of Bankruptcy, "Table 2: Insolvencies Filed by Consumers", Insolvency Statistics in Canada—2014 (Ottawa: Innovation, Science and Economic Development Canada, 25 May 2015), online: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03358.html>, archived: <https://perma.cc/AC6A-9C3C>). The number of individuals starting insolvency proceedings would be higher than these numbers suggest, because some individuals would file as "business bankruptcies" if over 50% of their debt was incurred operating a business (Office of the Superintendent of Bankruptcy, "Glossary", Insolvency Statistics in Canada—2014 (Ottawa: Innovation, Science and Economic Development Canada, 29 May 2015), online: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03356.html>, archived: <https://perma.cc/45ZR-HE9V>).

the individual may end up in bankruptcy as a result of his or her misfeasance by way of fraud, tax evasion or criminal conduct that results in a significant restitutionary or civil award.

The bankruptcy system aims to rehabilitate individual debtors, but the meaning attached to the word rehabilitation shifts depending on the context in which it is used. It can refer to the forgiveness of pre-bankruptcy debts and the removal of other disadvantages stemming from those debts. Rehabilitation is also used to describe a process that debtors are expected to undergo before they are entitled to receive a discharge. When debtors have engaged in misconduct, they are required to show that they have rehabilitated their character and will no longer engage in the types of misfeasance that resulted in their financial difficulties. When debtors have suffered financial hardships as a result of some personal condition—such as an addiction or a lack of financial literacy—they may be required to show that they have received treatment for the condition before they will be able to get a discharge. In these circumstances, rehabilitation is a prerequisite to getting a discharge.

In the recent cases of *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*,[3] and *Alberta (Attorney General) v. Moloney*,[4] the Supreme Court of Canada ("SCC") considered the rehabilitative purpose of the *BIA*. The SCC was asked whether provincial legislation could deny discharged bankrupts regulatory approvals needed to drive on the basis of discharged debts. The SCC answered the question in the negative, and held that the provincial legislation was inoperative to the extent that it conflicted with the *BIA*.

This paper locates the SCC's decisions in a larger conversation about what rehabilitation means in the Canadian personal bankruptcy system. I trace two competing notions of rehabilitation, one that focuses on relief from past indebtedness, and one on reformation, education and treatment of the individual debtor. These two conceptions of rehabilitation can conflict, and they do so dramatically in the context of mandatory debt repayment plans. Mandatory debt repayment can be cast both as contrary to the first type of rehabilitation (i.e., debt relief), and also as a tool for achieving the second type (i.e., reformation, education and treatment). That conflicting goals exist in the bankruptcy system is not surprising: a fundamental feature of the

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3 2015 SCC 52, [2015] 3 SCR 397 [*407 ETR*], aff'g *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited*, 2013 ONCA 769, 369 DLR (4th) 385 [*407 ETR* CA], rev'g *Moore v 407 ETR Concession*, 2011 ONSC 6310, 30 MVR (6th) 137 [*407 ETR* Sup Ct].

4 2015 SCC 51, [2015] 3 SCR 327 [*Moloney*], aff'g *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68, 569 AR 177 [*Moloney* CA], aff'g *Moloney v Alberta (Administrator of the Motor Vehicle Accident Claims Act)* 2012 ABQB 644, 73 Alta LR (5th) 44 [*Moloney* QB].

bankruptcy system is that it must balance the—often competing—interests of multiple stakeholders including debtors, creditors and the broader Canadian public. Bankruptcy policy debates centre around what balance to strike, or trade-off to make, between these diverging interests. The debate becomes confused, and the balance struck obscured by ambiguity in how the language of rehabilitation is used. This paper has both a descriptive and a prescriptive component. I document how thoroughly the competing meanings of rehabilitation have permeated the operation of the bankruptcy system and debates over its reform. I aim to inject some precision into the language used to discuss the rehabilitative goals of the bankruptcy system, which in turn will allow for a more transparent discussion of what balance should be struck between the different stakeholders.

My examination of the divergent meanings of rehabilitation in bankruptcy starts with an overview of the licence denial cases: *Moloney* and *407 ETR*. In these cases, the SCC held that provincial legislation frustrates the rehabilitative aim of the *BIA* when it requires a discharged bankrupt to make payments toward a pre-bankruptcy debt. The SCC's approach in these cases exemplifies a conception of rehabilitation as debt relief. In Parts III and IV, I compare this conception of rehabilitation with a countervailing one, which focuses on the reformation, education or treatment of the individual bankrupt. This countervailing conception emphasizes the importance of financial counselling and characterizes mandated payments as a tool of rehabilitation, instead of an impediment to it. In Part III, I report on how these contrasting conceptions of rehabilitation shape the decisions of bankruptcy courts. In Part IV, I examine how they are reflected in reports prepared by the legislative and executive branches of the federal government. In Part V, I revisit the licence denial cases and argue that the SCC could have reached a different conclusion if it had emphasized the countervailing conception of rehabilitation, and the (perceived) salutary effects of mandated payments. Then, I consider why this ambiguity is problematic and offer suggestions for dispelling it. Part VI concludes by underlining the contemporary relevance of the debate over the meaning of rehabilitation in personal bankruptcy, and connecting the debate to theoretical questions about the therapeutic potential of law that have engaged the broader legal community.

II. THE LICENCE DENIAL CASES

On November 13, 2015, the SCC released reasons in companion cases *407 ETR* and *Moloney*.[5] Both cases required the Court to apply the

5 *407 ETR, supra* note 3; *Moloney, supra* note 4.

paramountcy doctrine. Under the paramountcy doctrine, validly enacted provincial legislation will be inoperative to the extent it conflicts with federal legislation. The paramountcy doctrine recognizes two types of conflicts: "(1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment."[6] It was alleged that the provincial legislation conflicted with the discharge provisions of the *BIA*.

Before analyzing how the paramountcy doctrine was applied in the licence denial cases, it will be helpful to provide a thumbnail sketch of the bankruptcy process. When individuals make assignments into bankruptcy, they turn over (most of) their assets to a licensed insolvency trustee.[7] Trustees are private-sector professionals who administer bankruptcy files. Trustees realize value from the bankrupts' assets, by selling property and liquidating investments, and then distribute the proceeds to creditors.[8] At the end of the process, individuals receive a discharge, which releases them from (most) pre-bankruptcy debts.[9] A discharge is the primary benefit available to individuals in bankruptcy.

The provincial legislation under consideration in *407 ETR* and *Moloney* allowed branches of the provincial government to deny driving privileges, such as licences or vehicle permits, to a debtor on the basis of a debt that had been discharged through bankruptcy. In determining whether the provincial legislation was inoperative, the courts were given an opportunity to characterize the rehabilitative purpose of the *BIA* and consider whether it was frustrated by the provincial legislation. In this section, I provide an overview of the two cases including the background facts and the lower court decisions. Then I parse the SCC's reasons in detail. The SCC's reasons illustrate one conception of rehabilitation, which emphasizes the power of the discharge to relieve individuals from past indebtedness.

A. *407 ETR CONCESSION CO. v. CANADA*

The legislation under consideration in *407 ETR*, the *Highway 407 Act, 1998*,[10] governed a toll highway that was operated as a public-private partnership between 407 ETR Concession Company, a private company, and the Provincial Government of Ontario. Individuals were required to pay a toll each time they drove on the highway. Under the provisions

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6 *Moloney*, *ibid* at para 18.
7 *BIA*, *supra* note 1, s 71.
8 *Ibid*, ss 136-154.
9 *Ibid*, s 178(2).
10 SO 1998, c 28 [*407 Act*].

of the *407 Act*, 407 ETR Concession Company could alert the Registrar of Motor Vehicles when a person had failed to pay a toll debt, and the Registrar was then mandated to refuse to issue a vehicle permit to the delinquent debtor.[11] This legislative provision provided the 407 ETR Concession Company with a tool for compelling payment of toll debts from recalcitrant individuals.

The bankrupt in *407 ETR* had been a truck driver, and prior to bankruptcy he incurred significant debts of almost $35,000 by driving on the highway.[12] He made an assignment into bankruptcy in November 2007, and eventually received an absolute discharge in June 2011.[13] Due to a post-assignment injury, the individual retrained as a car salesperson and required a vehicle permit for his employment; however, even after he had been discharged, the Registrar of Motor Vehicles continued to deny him a vehicle permit on the basis of the *407 Act*.[14]

The bankrupt applied for and received an order from a Registrar in Bankruptcy compelling the Registrar of Motor Vehicles to issue him a permit. A Motions Judge of the Ontario Superior Court set aside the Registrar in Bankruptcy's order, on consent. The bankrupt then applied for the same relief from the Superior Court. The Court dismissed the application, holding that there was no conflict between the provincial legislation and the *BIA*, because the *407 Act* "does not affect in any way the equitable distribution of the property of a bankrupt."[15] The bankrupt was then prepared to settle the matter with 407 ETR Concession Company, but the Superintendent of Bankruptcy applied for and was granted leave to appeal the Superior Court judge's order, on the basis that it was a matter of precedential value.[16] The Ontario Court of Appeal overturned the Superior Court judge's decision, and granted an order declaring that the toll debt was discharged and directing the Ministry of Transportation to issue licence plates to the bankrupt.[17]

The Ontario Court of Appeal found that the *407 Act* was inoperative because it frustrated the rehabilitative purpose of the *BIA*.[18] It impeded the financial rehabilitation of the debtor by "permitting a creditor to insist on payment of pre-bankruptcy indebtedness after a bankruptcy

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11 *Ibid*, s 22(4). See also *407 ETR* CA, *supra* note 3 at para 24, discussing the mandatory language used in the legislation.

12 *Ibid* at para 6.

13 *Ibid* at paras 7, 10.

14 *Ibid* at paras 8-9.

15 *407 ETR* Sup Ct, *supra* note 3.

16 *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited*, 2012 ONCA 569, 354 DLR (4th) 67.

17 *407 ETR* CA, *supra* note 3 at para 118.

18 *Ibid* at paras 115-16, 118.

discharge."[19] Additionally, the legislation deprived a discharged bankrupt of a vehicle permit, which in a "vast" province such as Ontario could be "essential to employment as well as family transportation requirements and responsibilities."[20]

407 ETR Concession Company appealed the decision, and the Supreme Court of Canada granted leave on May 8, 2014.[21]

B. *ALBERTA (ATTORNEY GENERAL) v. MOLONEY*

The legislation under consideration in *Moloney*, the Alberta *Traffic Safety Act*,[22] allowed the provincial government to collect a debt from an individual who caused a motor vehicle accident while driving without insurance.[23] An uninsured driver may not be in a position to pay compensation to a person injured in such a motor vehicle accident. Instead, the injured party is given a right to recover payment from the provincial General Revenue Fund. The injured party must obtain a judgment against the uninsured driver, and then assign the judgment to the Administrator of the *Motor Vehicle Accident Claims Act*[24] in exchange for payment.[25] The Administrator may then attempt to recover the judgment from the uninsured driver. To compel payment, the Administrator is granted the power under the provincial *TSA* to deny debtors a driver's licence until they either repay the debt in full, or make suitable arrangements to do so.

The bankrupt in *Moloney* had been in a motor vehicle accident in 1989, while driving without insurance. A judgment was entered against him for approximately $195,000 as a result of the accident. He entered into an arrangement with the Administrator to make monthly payments toward the debt, but made little headway: twelve years later he still owed a similar amount.[26] He assigned himself into bankruptcy in 2008 and received a discharge in 2011. The Administrator took the position that, notwithstanding the bankrupt's discharge, it could continue to refuse to issue a driver's licence on the basis of the pre-bankruptcy judgment. The bankrupt applied for an "order staying the suspension of his driver's licence because of the unpaid debt."[27]

The trial judge found an operational conflict between the *TSA* and the *BIA* to the extent that the government used its power to

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19 *Ibid* at para 99.
20 *Ibid* at para 113.
21 *407 ETR* CA *supra* note 3, leave to appeal to SCC granted, 35696 (8 May 2014).
22 RSA 2000, c T-6 [*TSA*].
23 *Ibid*, ss 102-103.
24 RSA 2000, c M-22.
25 *Ibid*, s 5.
26 *Moloney* CA, *supra* note 4 at para 3.
27 *Ibid* at para 7.

suspend a driver's licence as a method for collecting a discharged debt.[28] The former was declared inoperative and the suspension of the bankrupt's driver's licence was stayed.[29]

The Court of Appeal affirmed the trial judge's decision. It held that the licence suspension provisions in the *TSA* frustrated two purposes of the *BIA*—the fresh start of the debtor and the equal treatment of creditors. The Court reasoned that imposing payment obligations on a debtor based on pre-discharge liabilities "flies in the face of the rehabilitative objectives of the bankruptcy regime."[30] It further explained that driving is a "central feature of Alberta life" and "many Albertans depend on a driver's licence for their livelihood, their economic prosperity, and therefore their ability to rehabilitate themselves after being discharged in bankruptcy."[31] Additionally, the Court of Appeal held that the *TSA* frustrated the equitable distribution of property under the *BIA*: the Administrator could share in dividends from the bankrupt's estate, but then also compel further payments post-discharge, resulting in recovery exceeding that of other creditors.[32]

The Attorney General of Alberta appealed the decision, and the Supreme Court of Canada granted leave on June 12, 2014.[33]

C. THE SUPREME COURT OF CANADA'S DECISIONS

The SCC released its reasons in *Moloney* and *407 ETR* on November 13, 2015, along with a third decision about the intersection of Saskatchewan farm debt legislation and the national receivership provisions in the *BIA*.[34] The Court held the Alberta and Ontario legislation to be inoperative. The SCC released longer reasons in *Moloney*, and similar, shorter reasons in *407 ETR*. In both cases the court split seven to two. The majority and minority concurred that the provincial legislation was inoperative, but differed in their justifications for reaching this conclusion.

The majority reasons in *Moloney*, authored by Justice Gascon, found a direct conflict between the provincial and federal legislation: "[T]he provincial law says 'yes' ('Alberta can enforce this provable claim'), while the federal law says 'no' ('Alberta cannot enforce this provable claim')."[35] In other words, the Alberta legislation was

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28 *Moloney* QB, *supra* note 4 at paras 46-48.
29 *Ibid* at para 49.
30 *Moloney* CA, *supra* note 4 at para 42.
31 *Ibid* at para 47.
32 *Ibid* at paras 50-51.
33 *Ibid*, leave to appeal to SCC granted, 35820 (12 June 2014).
34 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 SCR 419.
35 *Moloney*, *supra* note 4 at para 63. The majority's analysis of the frustration of purpose test is discussed at paragraph 77 and following.

rendered inoperative under the first branch of the paramountcy test. The majority additionally found that the legislation was rendered inoperative under the second branch of the paramountcy test: Justice Gascon concurred with the Alberta Court of Appeal's conclusion that the provincial legislation frustrated the rehabilitative purpose of the *BIA*'s discharge provision. Echoing the reasons of the Ontario Superior Court of Justice in *407 ETR*, Justice Gascon determined that that the *TSA* did not frustrate the goal of the *BIA* to provide for equitable distribution amongst creditors. The province's ability to collect payments after a debtor's discharge did not impact how the debtor's estate was divided during bankruptcy proceedings: "The assets to be distributed to creditors remain the same, and they are still allocated according to the bankruptcy scheme and any priorities it dictates."[36]

Justice Côté and Chief Justice McLachlin dissented from the majority's reasons, but not the result. They would have found the provincial legislation to be inoperative under the second branch of the paramountcy test, but not the first. In other words, they agreed that the provincial legislation frustrated the purpose of the federal legislation, but saw no direct conflict between the two: a bankrupt was not put in an impossible situation, he or she could comply with both pieces of legislation by "either opt[ing] not to drive or voluntarily pay[ing] the discharged debt."[37] The disagreement between the majority and minority centred on how a court should approach determining whether compliance with both laws was impossible: the minority urged courts to apply a higher threshold before finding an operational conflict.[38]

The reasons in the shorter *407 ETR* decision echoed *Moloney*. Justice Gascon, writing for the majority, found an operational conflict between the Ontario legislation and the discharge provisions of the *BIA*.[39] Additionally, he held that the former frustrated the rehabilitative purpose of the latter.[40] Justice Côté, writing for the minority, held that it was possible to comply with both pieces of legislation, but that the provincial legislation was rendered inoperative because it frustrated the purpose of the *BIA*.[41]

At first blush, it is difficult to see how the SCC could have arrived at any other conclusion. The logic of its analysis is straightforward, and seemingly uncontroversial. The *BIA* rehabilitates debtors by

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36 *Ibid* at para 88.
37 *Ibid* at para 123.
38 *Ibid* at para 122.
39 *407 ETR*, *supra* note 3 at para 27.
40 *Ibid* at para 31.
41 *Ibid* at para 41.

discharging their debts. The provincial legislation allowed a creditor to enforce an otherwise discharged debt, thereby eroding the degree to which the debtor was rehabilitated. On closer inspection it will become evident that the law in this area is significantly more complex than it first appears. I contend that the SCC could have arrived at the exact opposite conclusion. It could have found that instead of frustrating the rehabilitative purpose of the *BIA*, the provincial traffic legislation advanced this purpose by imposing a debt on the bankrupt. In the next section, I illustrate this possibility by synthesizing case law from bankruptcy courts that reflects divergent views of what it means to rehabilitate debtors: sometimes the courts hold that debtors are rehabilitated when debts are forgiven, other times the courts try to rehabilitate debtors by imposing payment obligations on them.

III. APPLICATION FOR DISCHARGE HEARINGS

Courts grapple with what it means to rehabilitate a debtor at application for discharge hearings. In my prior research, I reviewed a decade's worth of written decisions from application for discharge hearings, and tracked the different ways in which judicial officers authoring the decisions characterize rehabilitation.[42] Divergent views on rehabilitation emerge from this review. In this section, I provide some background on when application for discharge hearings are held, and then marshal evidence to show how the reasons of judicial officers reflect two views of rehabilitation: one focused on the discharge as a tool for effecting rehabilitation and another focused on rehabilitation as a prerequisite to getting a discharge.

Application for discharge hearings occur in a small number of bankruptcy files—roughly 10 per cent.[43] Recall that the effect of the discharge is to release an individual from most pre-bankruptcy debts. Most individuals who make an assignment into bankruptcy will be

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42 As part of a larger project, I reviewed 282 reported decisions from application for discharge hearings released between 2003 and 2013 (see Anna Jane Samis Lund, *Discretionary Decision-making by Trustees in Canada's Personal Bankruptcy System* (PhD Thesis, University of British Columbia Peter A Allard School of Law, 2015) [unpublished]).

43 In his study of bankruptcies filed in Toronto in 1994, Iain Ramsay found that oppositions were lodged in 14% of all cases (Iain D.C. Ramsay, "Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis" (1999) 37:1-2 Osgoode Hall LJ 15 at 69). The Office of the Superintendent of Bankruptcy's 2012 records indicate that 74,731 new bankruptcies were commenced (Office of the Superintendent of Bankruptcy Canada, "Table 1: Total Insolvencies", Archived—Insolvency Statistics in Canada—2012 (Ottawa: Innovation, Science and Economic Development Canada, 24 March 2015) online: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03063.html>, archived: <https://perma.cc/H5H4-RNHK>). Oppositions were filed in 7,012 cases in 2012 [statistics provided by the Office of the Superintendent of Bankruptcy on file with the author].

automatically discharged after a set amount of time has elapsed, without being required to appear at an application for discharge hearing.[44] For example, a first time bankrupt with no surplus income will be automatically discharged after nine months. An individual may be denied an automatic discharge if someone lodges an opposition to the individual's discharge. A licensed insolvency trustee, a creditor or the federal Office of the Superintendent of Bankruptcy may lodge an opposition, and when such an opposition is lodged it triggers a court hearing at which the presiding judicial officer must decide whether the individual should be discharged.[45] Discharge hearings also occur in some files where the individual bankrupt has no entitlement to an automatic discharge: individuals who are bankrupt for the third (or fourth or fifth) time and individuals who make assignments into bankruptcy with large tax debts do not receive an automatic discharge. In such cases, the trustee is tasked with bringing an application for the bankrupt's discharge.[46]

When judicial officers hear applications for discharge, they have a number of options for disposing with the applications.[47] They can grant an absolute discharge, which takes effect immediately. They can delay the discharge to a future date, or stipulate that it will only take effect once the debtor has fulfilled one or more conditions. They can refuse a bankrupt's discharge, with the result that the individual will remain in bankruptcy until he or she can convince a judicial officer that he or she deserves to be discharged. The judicial officers may also adjourn an application *sine die* (i.e., indefinitely), leaving it to the bankrupt to bring the matter back before a court. Judicial officers often explain their decisions on applications for discharge as being motivated by a desire to ensure that the individual is rehabilitated.

A common characterization of rehabilitation offered by judicial officers is narrowly financial: "It allows an insolvent debtor who is overburdened by debt to employ a process by which he or she can shed those debts and obtain a 'fresh start.'"[48] According to this characterization, the very act of discharging an individual's debts rehabilitates them. As newly unencumbered individuals, they are expected to engage as productive members of the workforce, consumers, and risk-taking entrepreneurs.[49]

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44 *BIA, supra* note 1, s 168.1.

45 *Ibid*, s 168.2.

46 *Ibid*, ss 169, 172.1.

47 *Ibid*, s 172.

48 *Montalban (Re)*, 2013 BCSC 683 at para 13, 100 CBR (5th) 167.

49 For a discussion of how debt relief encourages productive labour, see Thomas H. Jackson, "The Fresh-Start Policy in Bankruptcy Law" (1985) 98:7 Harv L Rev 1393. For a discussion of how it encourages consumption, see Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1999) at 100; *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy*

Judicial officers voice concern that impeding the debtor's access to a discharge undermines the debtor's rehabilitation. In one case, a student had borrowed money from a bank to finance an engineering degree, but subsequently developed health issues with both mental and physical components, left school, and was unemployed and living at home with his mother.[50] The judicial officer granted the debtor an absolute discharge, reasoning that a refusal or a suspension would only be "another impediment to [the debtor] in dealing with his substantial personal problems."[51] In another case, the judicial officer rejected the creditor's suggestion that a debtor's discharge be conditioned on a large payment, because it would take the debtor eight years to satisfy the payment.[52] The judicial officer reasoned that such a delay would overly retard the debtor's financial rehabilitation.[53] Instead, the judicial officer suspended the debtor's discharge for fourteen months, during which time the debtor was required to continue to make surplus income payments.[54] These decisions reflect a narrow conception of the fresh start, where debtors are rehabilitated through the release of their debts.

In a similar vein, the courts recognize that denying a debtor a discharge may result in a debtor experiencing additional burdens or disadvantages. Remaining undischarged can impact a debtor's ability to earn income from an occupation. For instance, the debtor may require a professional licence to carry out work, but be disentitled from holding that licence while bankrupt. In one case, where evidence of such a conundrum was before the court, the judicial officer granted the debtor a discharge, suspended for only one day.[55] The judicial officer recognized that a longer discharge could impact the debtor's

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and Insolvency Legislation (Ottawa: Information Canada, 1970) (Chair: Roger Tassé) at para 2.1.06 [Tassé Report], citing John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin, 1967) at 49. Thomas Telfer notes that this justification for discharge was marshaled in support of re-enacting a federal bankruptcy law, which occurred in 1919 after almost 40 years without one (Thomas G.W. Telfer, "Access to Discharge in Canadian Bankruptcy Law and the New Role of Surplus Income: A Historical Perspective" in Charles E.F. Rickett & Thomas G.W. Telfer, eds, *International Perspectives on Consumers' Access to Justice* (Cambridge, UK: Cambridge University Press, 2003) 231 at 258 [Telfer, "Access to Discharge"]). For a discussion of how the discharge encourages entrepreneurialism, see John M. Czarnetzky, "The Individual and Failure: A Theory of the Bankruptcy Discharge" (2000) 32:2 Ariz St LJ 393; see also UNCITRAL, *Legislative Guide on Insolvency Law* (New York: United Nations Publications, 2005) at 281-82.

50 *Abdo (Re)*, 2009 NSSC 338, 283 NSR (2d) 398.

51 *Ibid* at paras 19, 23-24.

52 *Gray (Bankrupt), Re*, 2012 NBQB 362, 397 NBR (2d) 95.

53 *Ibid* at para 26.

54 *Ibid* at para 27.

55 *Maas (Re)*, 2007 NSSC 218, 257 NSR (2d) 113.

ability to work, and reasoned that "[h]e must be able to work, if he is to re-establish himself."[56] Cases like this reflect a broader fresh start approach that goes beyond providing the debtor with a financial blank slate, but continues to promote rehabilitation by granting a discharge.

Contrary to this approach, in a number of decisions, judicial officers conceive of rehabilitation as a prerequisite that must be achieved before a debtor will be discharged. Judicial officers may equate rehabilitation with education, reflecting a belief that many individuals are driven to bankruptcy because they lack an adequate level of financial literacy. Sometimes, a judicial officer may be of the opinion that the mere fact of making an assignment into bankruptcy is enough to jolt debtors into better financial choices—that the debtors "[learn] from what has happened to them."[57] Many judicial officers require more evidence of rehabilitation before they will grant a debtor a discharge.

A debtor completing duties during bankruptcy may be some evidence that the debtor has been rehabilitated. A bankrupt's duties include attending counselling, which allows a debtor "to learn from his or her financial mistakes with a view to not repeating them."[58] Other duties include providing monthly income and expense reports to one's trustee, as well as the information the trustee needs to complete tax returns. Judicial officers regularly enforce debtor compliance by denying discharges to debtors who fail to complete their duties. As one noted, "Parliament did not impose duties on bankrupts for their convenience, but to foster rehabilitation, and as part of the price, if you will, of society's absolution of debt."[59]

A debtor's post-assignment conduct may lead a judicial officer to conclude that a debtor has not yet undergone sufficient rehabilitation and consequently should not be granted a discharge. For instance, a tax protestor who makes an assignment into bankruptcy to escape a large tax debt to Canada Revenue Agency ("CRA") demonstrates a lack of rehabilitation when he continues to maintain that he has no obligation to pay tax.[60] A second time bankrupt, whose bankruptcies

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56 *Ibid* at para 35.

57 *Spencer (Re)*, 2009 NSSC 34 at para 17, 285 NSR (2d) 4. See also *Lohrenz, Lillian May (Re)*, 2007 BCSC 1823 at para 59, 38 CBR (5th) 41.

58 *Montalban (Re)*, *supra* note 48 at para 19. See also the discussion of counselling in Part IV-C-1, below.

59 *Re Rahman*, 2010 ONSC 4377 at para 57, 70 CBR (5th) 290. See also *The Bankruptcy of Daniel William Lynn*, 2009 MBQB 333, 249 Man R (2d) 43 [*Re Lynn* 2009]; *Bankruptcy of Daniel William Lynn*, 2011 MBQB 79, 264 Man R (2d) 309.

60 *Crischuk (Re)*, 2013 BCSC 1413 at para 23, 2013 DTC 5139. See also *Re: Berenbaum*, 2011 ONSC 72 at paras 34-35, 73 CBR (5th) 1; *Brydges (Re)*, 2009 NBQB 25 at paras 19-21, 345 NBR (2d) 89; *Arsenault (Re)*, 2008 NBQB 134 at para 37, 336 NBR (2d) 1.

were both caused by gambling, demonstrates a lack of rehabilitation by continuing to "yield to the sweet temptations of Lady Luck, and her siren song of easy fortunes and riches."[61] The extravagant spender evidences a lack of rehabilitation when his post assignment choices include a six month stay at a Belizean resort, and maintaining a membership at an elite private club.[62]

Judicial officers may also draw inferences about the extent to which a debtor has been rehabilitated from the attitude the debtor displays toward the court—and the trustee. The debtor need not "approach the court as a penitent might approach the confessional" but "[s]ome personal acknowledgement of blame and acceptance of individual responsibility for the consequences that the bankruptcy has wrought, however, are essential."[63] Courts infer a lack of rehabilitation when a debtor displays a lack of remorse or contrition, or appears too willing to heap blame on another party.[64] These attitudes are inconsistent with the acknowledgement of blame and acceptance of personal responsibility that are perceived to be a key part of the rehabilitation process.

Where the debtor's conduct and attitude has "demonstrated that rehabilitation was of little or no concern to him,"[65] judicial officers may attempt to craft discharge orders that "ensure the process results in a meaningful education and learning experience to avoid repeat bankruptcies."[66] When crafting rehabilitative discharge orders, judicial officers may favour a large conditional payment on the premise that it has a "salutary and rehabilitative effect."[67] In one case, the judicial officer opted to condition the debtor's discharge on a repayment obligation of an amount equal to 40 per cent of the proven liabilities, rather than refusing the discharge.[68] The judicial officer reasoned that a refusal would only be punitive, whereas a conditional order could be rehabilitative, because the debtor could still obtain a discharge through "hard work and financial discipline."[69] Similarly, in another case the judicial officer conditioned the debtor's

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61 *Tang (Re)* (2007), 29 CBR (5th) 258 at para 7 (Ont Sup Ct).

62 *Jabs (Re)*, 2010 BCSC 1325 at paras 27, 42-43, 82-86, 71 CBR (5th) 121.

63 *Bankruptcy of Garness*, 2004 BCSC 1260 at para 19, 5 CBR (5th) 51.

64 *Fast v PricewaterhouseCoopers Inc.*, 2010 SKQB 217 at para 47, 355 Sask R 311; *Re Lynn* 2009, *supra* note 59 at para 130; *Coutu (Re)*, 2012 ONSC 2977 at para 12.

65 *Brydges (Re)*, *supra* note 60 at para 24.

66 *Re Rotvold (Bankrupt)*, 2005 ABQB 661 at para 11, 14 CBR (5th) 218.

67 *Ledrew, Re* (2005), 13 CBR (5th) 63 at para 29, 18 RFL (6th) 417 (Ont Sup Ct).

68 *Fida (Re)*, 2008 CanLII 2600 at para 18 (Ont Sup Ct). The conditional payment amount of $68,400 was particularly onerous considering the debtor reported earning a monthly income of only $2,000 (*ibid* at para 4).

69 *Ibid* at para 17. See also *Jabs (Re)*, *supra* note 62 at para 85; *Nagy v Canada (National Revenue)*, 2010 SKQB 124 at para 47, 353 Sask R 287.

discharge on a modest repayment obligation of $8,100, reasoning that it was in the debtor's "best interests to create and maintain a payment plan for the monies due to the trustee."[70] And in a third case, the judicial officer found that the debtor had lived extravagantly at the expense of his creditors and conditioned the debtor's discharge on making forty-eight monthly payments of $1,000. The judicial officer reasoned that the payments would force the debtor to "'curtail his expenses...and live within his means.'"[71]

In addition to payments, judicial officers craft creative conditions to remedy debtors' behaviours. An individual whose bankruptcy was precipitated by unpaid taxes may be required to show that post-assignment tax obligations have been dealt with to CRA's satisfaction.[72] In cases where gambling is a contributing factor to the debtor's financial difficulties, the judicial officer may order the debtor to attend counselling or to undertake not to gamble for a set period of time.[73] Where the debtor has lived with undue extravagance, the Court may condition the debtor's discharge on attending further financial counselling sessions to help the debtor learn "to avoid consumer temptation...so as to live within her means."[74]

This second group of decisions characterizes rehabilitation as something a debtor must do prior to receiving a discharge. People rehabilitate themselves by completing the duties assigned to them during bankruptcy, and fulfilling conditions imposed on them in discharge orders. Often, the conditions include mandatory payments.

IV. LEGISLATIVE AND EXECUTIVE REPORTS

As the foregoing synthesis of case law reveals, there is "general uncertainty and confusion over what is meant by rehabilitation."[75] One academic suggested that the ways in which the term is used is reminiscent of Lewis Carroll's Humpty Dumpty, who pronounced, "When *I* use a word it means just what I choose it to mean—neither

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

71 *Arsenault (Bankrupt), Re*, 2008 NBQB 134 at paras 40-43, 336 NBR (2d) 1, citing *Ngoka, Re* (1998), 5 CBR (4th) 252 at 20, 174 Sask R 3 (QB).

72 *Ashbee (Re)*, 2008 CanLII 32822 at paras 12, 16 (Ont Sup Ct). See also *Arsenault (Bankrupt), Re*, *ibid.*

73 In *Teatro (Re)*, 2009 CanLII 14395 (Ont Sup Ct) at para 20, the debtor's discharge was conditional upon the debtor lodging an undertaking with the Alcohol and Gaming Commission not to gamble for a five-year period.

74 *Salmon (Re)*, 2009 CanLII 68826 at para 14 (Ont Sup Ct). In *Herd (Re)*, 2009 BCSC 1627 at paras 22-23, 60 CBR (5th) 158, the trustee asked that the debtor be required to submit income and expense reports for a further thirty-six months "to drive home...the need for financial discipline"—however, the judicial officer had even less faith in the degree to which the debtor had learned from his bankruptcy and refused a discharge altogether.

75 Tassé Report, *supra* note 49 at para 2.1.19.

more nor less."[76] On the one hand, rehabilitation may mean simply releasing a debtor from debts that he or she cannot pay. This release of debts is regularly described as giving a debtor a "fresh start." However, the ways in which rehabilitation is used to describe the goals of the personal bankruptcy system are broader than a mere release of debts. A person may suffer other disadvantages related to past indebtedness. In the *Moloney* and *407 ETR* cases, individuals had been denied the licences and registration necessary to drive. To be fully rehabilitated, debtors may need a discharge that restores privileges, which were lost as a result of over-indebtedness. Conversely, rehabilitation is sometimes characterized as something that occurs prior to the discharge, often as a prerequisite for getting a discharge. Debtors may need to establish that they have addressed the underlying causes of their financial difficulty before they are entitled to the benefit of debt relief.[77]

This ambiguity over what it means to rehabilitate a debtor permeates bankruptcy law beyond application for discharge hearings. A close reading of legislative and executive reports that examine the personal bankruptcy system reveals the same divergent meanings of rehabilitation as emerged from the analysis of case law in Part III. In this section, I synthesize the divergent ways that rehabilitation is talked about in the following:

- The 1970 *Report of the Study Committee on Bankruptcy and Insolvency Legislation*;[78]
- The 1986 *Report of the Advisory Committee on Bankruptcy and Insolvency*;[79]

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76 John D. Honsberger, "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37:1-2 Osgoode Hall LJ 171 at 174, citing L. Carroll, *Alice's Adventures in Wonderland & Through the Looking-Glass* (New York: Penguin Books, 1960) at 188 [emphasis in original].

77 Parallels can be drawn between the two different meanings attributed to rehabilitation in Canada's personal bankruptcy system and two divergent philosophies identified by Jacob Ziegel in his comparative study of national consumer insolvency regimes. On the one hand, the American bankruptcy regime adopts a fresh start philosophy, emphasizing speedy release from one's debts. On the other hand, Continental European and Scandinavian countries often require debtors to submit to multiple years of mandatory payments regimes (see Jacob S. Ziegel, *Comparative Consumer Insolvency Regimes: A Canadian Perspective* (Oxford: Hart, 2003) at 147 [Ziegel, *Comparative Regimes*]).

78 *Supra* note 49.

79 Canada, *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*, 2nd ed (Ottawa: Minister of Supply and Services, January 1986) (Chair: Gary F. Colter) [Colter Report].

- The 1997 Standing Senate Committee on Banking, Trade and Commerce, "Twelfth Report";[80]
- The 2002 Industry Canada Report, *Report on the Operation and Administration of the* Bankruptcy and Insolvency Act *and the* Companies' Creditors Arrangement Act;[81]
- The 2002 Report of the Personal Insolvency Task Force;[82]
- The 2003 Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden*;[83]
- The 2014 Industry Canada Discussion Paper, "Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*";[84] and
- The 2014 Industry Canada Report, *Fresh Start: A Review of Canada's Insolvency Laws*.[85]

The competing conceptions of rehabilitation have not gone unnoticed by insolvency academics and my discussion in this section will draw on scholarly commentary to annotate the legislative and executive reports.[86] This exercise illustrates that the ambiguity around the meaning of rehabilitation is not an idiosyncrasy of the application for discharge hearings, but is central to how the parties responsible for designing and reforming the bankruptcy system think about its aims and justify its content.

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80 Senate, Standing Committee on Banking, Trade and Commerce, "Twelfth Report" in *Journals of Senate*, 35th Parl, 2nd Sess, No 66, Appendix B (4 February 1997) (Chair: Michael Kirby) [1997 Senate Report].

81 Industry Canada, *Report on the Operation and Administration of the* Bankruptcy and Insolvency Act *and the* Companies' Creditors Arrangement Act (Ottawa: Industry Canada, 2002) [2002 Industry Canada Report].

82 Personal Insolvency Task Force, *Final Report* (Ottawa: Industry Canada, August 2002) (Chair: Yoine Goldstein) [PITF Report].

83 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: Richard H. Kroft) [2003 Senate Report].

84 Industry Canada, "Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*" (Ottawa: Industry Canada, 2014) [2014 Discussion Paper].

85 Industry Canada, *Fresh Start: A Review of Canada's Insolvency Laws* (Ottawa: Industry Canada, 2014) [2014 Final Report].

86 For a discussion of rehabilitation in the context of corporate reorganization, see Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 42-46.

A. FRESH START: DEBT FORGIVENESS

Rehabilitation is frequently connected to, and sometimes usurped by the idea of a "fresh start." The concept of a fresh start is predominantly about debt relief. It is defined as the "discharge from debt, subject to reasonable conditions."[87] Measures that impose financial obligations on a debtor post-discharge are characterized as obstacles to a fresh start. Reaffirmation agreements, where a debtor agrees, or is implied to have agreed, to pay back a pre-bankruptcy debt, are described as being inconsistent with the fresh start.[88] Likewise, non-dischargeable liabilities, which survive bankruptcy and include student loans, are cast as obstacles to the fresh start.[89] One of the members of the Personal Insolvency Task Force noted with concern that enabling trustees to enforce payment of their fees after bankruptcy would erode the fresh start by imposing liabilities on a bankrupt post-discharge.[90] The 2014 Final Report characterizes licence denial regimes, like the ones under consideration in *Moloney* and *407 ETR*, as "violat[ing]" this financial fresh start, because they make individuals liable for pre-bankruptcy debts.[91] The fresh start is cast as among the "key objectives"[92] or "basic purposes" of bankruptcy law.[93]

B. FRESH START: NOT JUST DEBT FORGIVENESS

The reports recognize that release of one's debts is not, without more, sufficient to give a debtor a fresh start: debtors cannot re-engage as productive members of society if forced to give up all of their property when they make an assignment into bankruptcy. Instead, debtors are entitled to retain some property, which has been deemed exempt under either provincial or federal legislation.[94] Exemptions do not

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87 Colter Report, *supra* note 79 at 18. See also the 1997 Senate Report, *supra* note 80; 2003 Senate Report, *supra* note 83 at 9; 2014 Discussion Paper, *supra* note 84 at 11.

88 2002 Industry Canada Report, *supra* note 81 at 60; 2003 Senate Report, *ibid* at 34; PITF Report, *supra* note 82 at 29; 2014 Final Report, *supra* note 85 at 13. For more on reaffirmation agreements see Stephanie Ben-Ishai, "Reaffirmation of Debt in Consumer Bankruptcy in Canada" (2015) 56:2 Can Bus LJ 238.

89 2003 Senate Report, *ibid* at 50; PITF Report, *ibid* at 104. The Colter Report recommended removing "debt or liability for goods supplied as necessaries" from the list of non-dischargeable debts because it impedes the object of bankruptcy legislation to "release the insolvent debtor from as many liabilities as possible" (*supra* note 79 at 73). See also Ziegel, *Comparative Regimes*, *supra* note 77 at 161, where the author calls for the list of non-dischargeable debts to be revised "in the light of its practical impact and theoretical foundations *and having regard to the extent to which it prevents the rehabilitation of debtors who may otherwise deserve it*" [emphasis added].

90 PITF Report, *ibid* at 44.

91 *Supra* note 85 at 13.

92 2014 Discussion Paper, *supra* note 84 at 11.

93 Colter Report, *supra* note 79 at 18.

94 *BIA*, *supra* note 1, s 67.

impact the degree to which bankrupts' debts are forgiven, but they are intended to provide bankrupts with the means necessary to maintain themselves and earn a living after bankruptcy. The 2003 Senate Report characterizes exemptions as "play[ing] an important role in ensuring that bankrupts receive a fresh start."[95] In addition to the exempt property they retain at the outset of a bankruptcy, debtors are entitled to retain some of the income earned during bankruptcy.[96] The PITF Report notes that the rehabilitation of debtors is advanced by allowing debtors to keep income as "bankrupts must be able to maintain a reasonable standard of living while they are bankrupt."[97] Rehabilitation here is not something that results from one's discharge, but it is still closely tied to the idea of a financial fresh start. By exempting some property and income the bankruptcy system avoids placing newly discharged bankrupts in the undesirable situation of being unable to support themselves and at risk of immediately incurring new debt to make ends meet.[98] The exemptions bolster the fresh start provided through the discharge of debts.

C. REHABILITATION AS A PREREQUISITE

In an article published in 1999, John Honsberger, a Canadian insolvency lawyer, argued that the concept of rehabilitation is in flux: rehabilitation as "restoration of the bankrupt to his or her former debt-free status"—the fresh start—had been replaced by a broader view of rehabilitation as "a change in the economic attitudes and values of a bankrupt to ones that are more socially acceptable, and will improve his or her social and economic situation."[99] This approach is evident in the application for discharge hearings, when the focus is on addressing the underlying cause of debtors' financial difficulty, by ensuring the debtors fulfilled their duties during bankruptcy, and by imposing additional obligations on the debtors under a conditional discharge order. A similar theme emerges in the reports when they discuss mandatory counselling, proposals and other compulsory payments.

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95 *Supra* note 83 at 221.

96 Bankrupts are entitled to retain everything that falls below a threshold amount, and half of any income they earn during that period which exceeds the threshold (see *BIA*, *supra* note 1, s 68; Office of the Superintendent of Bankruptcy, "Surplus Income", Directive No 11R2-2016 (Ottawa: Industry Canada, 23 February 2016) [Surplus Income Directive]).

97 *Supra* note 82 at 38. Similarly, the importance of providing debtors with post-assignment income to enable their fresh starts was cited as a reason for retaining s 68.1 of the *BIA*, which makes pre-bankruptcy assignments of wages ineffective after the commencement of a bankruptcy (see 2002 Industry Canada Report, *supra* note 81 at 77-78).

98 Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 40.

99 *Supra* note 76 at 173-74.

1. Mandatory Counselling

Starting in 1992, it became mandatory for individual bankrupts to receive financial counselling before they could be discharged.[100] Individuals undergo two counselling sessions.[101] The first session covers basic financial literacy skills, including money management, spending and shopping habits, warning signs of financial difficulty, and obtaining and using credit. The second session reaffirms the financial literacy skills taught in the first session, and then broadens the conversation to identify and address non-budgetary causes of financial difficulty.[102] Debtors who fail to attend counselling lose their entitlement to an automatic discharge and must appear before the court at an application for discharge hearing.[103]

The legislative and executive reports repeatedly connect financial counselling to the idea of rehabilitation. The Tassé Report was written before financial counselling was made mandatory. It recommends that the government fund financial counselling services, arguing that financial counsellors have "a major role" to play "in the financial rehabilitation of the debtor."[104] The 2002 PITF Report draws a similar connection between rehabilitation and counselling.[105] The 2003 Senate Report characterizes mandatory counselling as "an important component in the financial rehabilitation of individuals," noting that it helps "insolvent debtors to manage better their financial affairs; changing behavior; and developing skills and acquiring knowledge."[106] As these reports make clear, financial counselling can be characterized as rehabilitative because it aspires to educate the debtor. In the current system, this education is a prerequisite to getting a discharge.

2. Rehabilitating Debts: Proposals and Other Compulsory Payments

In application for discharge hearings, courts will impose payments on debtors as part of a conditional discharge order, and will justify the payment as having a salutary impact on the debtor. This is not the only example of individuals being compelled to repay debts "for their own good." This section identifies other compulsory payments

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100 *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, SC 1992 c 27, s 58.

101 *BIA*, *supra* note 1, s 157.1; Office of the Superintendent of Bankruptcy, "Counselling in Insolvency Matters", Directive No 1R3 (Ottawa: Industry Canada, 14 August 2009) at para 5.

102 *Ibid* at paras 6-7.

103 *BIA*, *supra* note 1, s 157.1(3).

104 Tassé Report, *supra* note 49 at para 3.1.27.

105 *Supra* note 82 at 78.

106 *Supra* note 83 at 43. See also Wood, *supra* note 98.

justified with reference to rehabilitation including proposals, surplus income payments, and legislative amendments that require additional payments from tax debtors and student loan borrowers.

The legislative and executive reports repeatedly link compulsory payments, imposed through proposals, to the rehabilitation of the debtor. Proposals are an alternative to bankruptcy.[107] Individuals make a proposal to their creditors to repay a portion of their debts, usually over a number of years. Before the proposal becomes binding, the creditors have an opportunity to vote on it, and a court may review it.[108] Once all the proposed payments have been made, the debtor will be discharged from paying the remainder of his or her pre-proposal liabilities.[109] Generally, proposals take longer than bankruptcy: many last three to five years, whereas a first time bankrupt will usually be discharged after nine to twenty-one months.[110]

Proposals are intended to provide creditors with greater recovery than if the debtor made an assignment into bankruptcy, but the reports also justify them in terms of the rehabilitative benefits they provide to the debtor. The Tassé Report likens the rehabilitative effect of proposals to the "rehabilitation of a person convicted of a crime through the facilities of the probation service."[111] The 2014 Discussion Paper notes that proposals allow debtors "to achieve financial rehabilitation."[112]

Even if debtors opt for bankruptcy instead of a proposal, they may be subject to mandatory payments under the surplus income regime. Under the surplus income regime, individuals are entitled to retain any income they earn while bankrupt if it falls below a threshold amount, but they must pay to their trustee half of any income they earn that exceeds the threshold amount during the bankruptcy period.[113] For instance in 2016, a single person earning

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107 There are two types of proposals. Division I proposals are available to corporations or individuals. Division II proposals are restricted to individuals with less than $250,000 in debt, excluding mortgage debt on a principal residence (*BIA*, *supra* note 1, ss 50(1), 66.11 "consumer debtor", 66.12).

108 In a Division I proposal, it is mandatory to hold a creditors' vote (*ibid*, s 54). In a Division II proposal, a creditors' vote is only required if directed by the official receiver, or requested by one or more creditors holding, in aggregate, 25 per cent of proven claims (*ibid*, ss 66.15, 66.18, 66.19). A court hearing is mandatory in a Division I proposal (*ibid*, s 58). In a Division II proposal, a court hearing is only required if the official receiver or another interested party requests one (*ibid*, s 66.22).

109 *Ibid*, ss 65.3, 66.38.

110 A Division II proposal must be completed within five years (*ibid*, s 66.12(5)). Time periods before a debtor receives an automatic discharge are set out in the *BIA* (*ibid*, s 168.1).

111 *Supra* note 49 at para 3.1.23.

112 *Supra* note 84 at 10.

113 See *supra* note 96 and accompanying discussion.

a net income of $2,500 per month would be required to make monthly payments of $205.50 to his or her estate.[114] Non-payment of surplus income is a ground upon which a discharge may be refused, suspended, or made conditional.[115]

The surplus income regime can be characterized as rehabilitative in two senses. As discussed above, it ensures that debtors are entitled to retain a minimum amount of income during bankruptcy with which they can support themselves. On the other hand, the surplus income regime shares a number of similarities with proposals. A proposal lasts slightly longer (three to five years) than a bankruptcy with surplus income (twenty-one to thirty-six months), but in both scenarios the individuals must manage their budget so as to make regular payments over an extended period of time.[116] Mandated, regular payments under a proposal are characterized as rehabilitative and, considering the similarities between proposals and surplus income payments, one could extend this characterization to the surplus income requirements.

Thomas Telfer has argued that when mandatory payments are characterized as rehabilitative, this represents a significant departure from using the term to connote a fresh start. He published a piece in 2003 reflecting on the 1997 amendments to Canada's bankruptcy legislation. A number of reforms had been introduced at that time to encourage debtors to opt for proposals instead of assignments into bankruptcy. Telfer argued that these reforms reflected a change in how Parliament was casting the idea of rehabilitation: instead of rehabilitating debtors, the system was increasingly focused on rehabilitating debts.[117] This recasting of rehabilitation occurred in response to concerns over a sharp rise in the number of individuals making assignments into bankruptcy, and the suspicion that these individuals could pay more.[118]

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114 Surplus Income Directive, *supra* note 96 at Appendix A.

115 *BIA*, *supra* note 1, s 173(1)(m).

116 For a comparison of proposals and surplus income payments, see Jacob Ziegel, "Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies" (2006) 7:2 Theor Inq L 299 at 309-311 [Ziegel, "Facts on the Ground"].

117 "Access to Discharge", *supra* note 49 at 232.

118 *Ibid* at 231. Telfer notes that the trend of restricting access to discharge was not new, and drew analogies between the amendments passed in 1997 and the post-Confederation trajectory from a liberal approach to the discharge in *The Insolvent Act of 1869*, SC 1869, c 16, passed in 1869, to a more restrictive version passed in 1875, *The Insolvent Act of 1875*, SC 1875, c 16, culminating in the repeal of federal insolvency legislation in 1880, *An Act to repeal the Acts respecting Insolvency now in force in Canada*, SC 1880, c 1, and the complete abolition of the discharge (Telfer, "Access to Discharge", *ibid* at 250-54).

Other recent changes to the bankruptcy regime reflect an emphasis on rehabilitating debts. In a piece from 2007, Stephanie Ben-Ishai catalogues elements of the 2005 amendments to the *BIA* that have the effect of compelling payments from bankrupt individuals.[119] The amendments, which were eventually adopted in a modified form in 2009, substantially lengthened, from nine to twenty-one months, the period during which a first time bankrupt is required to make surplus income payments if earning over a threshold amount.[120] The amendments created a new category of bankrupt for individuals who make assignments into bankruptcy with large personal income tax debts.[121] A personal income tax debtor does not receive an automatic discharge, but must appear at an application for discharge hearing.[122] The presiding judicial officer must grant a suspended or conditional discharge, or refuse the discharge: the judicial officer cannot grant an absolute discharge.[123] Finally, Ben-Ishai notes that the amendments retained the non-dischargeability provisions for student loan debt. Individuals with student loans remain responsible for repaying those loans notwithstanding being discharged from bankruptcy, subject to some exceptions.[124]

Telfer's and Ben-Ishai's work underlines how the term rehabilitation has been stretched to accommodate new meanings. They characterized a series of reforms as changing the subject of rehabilitative measures from individuals to debts. Based on this paper's synthesis of case law and reports, I would suggest an addendum to this analysis. Recent measures do not only seek to "rehabilitate debts": the executive, legislative and judicial branches have adopted the view that mandatory payment schemes have a salutary impact on the debtors, too. The result is a paradox: freedom from debt is rehabilitative, and payment of debt is rehabilitative.

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119 "Discharge" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy & Insolvency Law* (Markham: Lexis Nexis Canada, 2007) 357 at 366-67.

120 *Wage Earner Protection Program Act*, SC 2005, c 47, s 100 [*WEPPA*]; *BIA*, *supra* note 1, s 168.1.

121 *WEPPA*, *ibid*, s 105. Individuals qualify as a "personal income tax debtor" if they have more than $200,000 in personal income tax debt, and the tax debt makes up seventy-five per cent or more of their total unsecured proven claims (*BIA*, *supra* note 1, s 172.1).

122 *BIA*, *ibid*, s 172.1(1).

123 *Ibid*, s 172.1(3).

124 *WEPPA*, *supra* note 120, s 107(2). Individuals will be discharged from their student loan debts if more than seven years has elapsed between the time the individuals ceased being students, and when the individuals became bankrupt (*BIA*, *supra* note 1, s 178(1)(g)). Where at least five years have elapsed between the time individuals ceased being students and when the individuals became bankrupt, the individuals can apply to the court for a discharge of their student loan debts (*ibid*, s 178(1.1)).

In *Moloney* and *407 ETR*, the SCC was required to characterize the rehabilitative purpose of bankruptcy law as part of its application of the paramountcy test. It did not seek to resolve the debate over what the term means, but its conclusion points firmly toward a fresh start understanding: individuals are rehabilitated when they are relieved of their debts and restored to other privileges by operation of a bankruptcy discharge. At the same time, there are instances in its reasons where the SCC uses the term rehabilitation to mean the pre-discharge reformation of an individual. In the next section, I document the varied meanings attributed to rehabilitation by the SCC in *Moloney* and *407 ETR* and I argue that the SCC could have decided the cases differently if it had placed less emphasis on the debtor's fresh start and more on the salutary effects of compelled payments.

V. BACK TO *407 ETR* AND *MOLONEY* AND THEN, ONWARDS

A. FRESH START: NARROW AND GENEROUS APPROACHES

The SCC's reasons in the *407 ETR* and *Moloney* cases reflect the multiple meanings of rehabilitation; however, the emphasis is on a fresh start through debt relief. In *Moloney*, the majority of the SCC characterized rehabilitation as "financial"—being achieved through the discharge of debts.[125] The majority determined that Alberta's legislation was inconsistent with the rehabilitative purpose of the federal legislation because it allowed a debt to survive bankruptcy, adding to the list of non-dischargeable debts, and eroding the fresh start that Parliament intended to give debtors.[126] In *407 ETR*, the majority characterizes Parliament's purpose as "providing discharged bankrupts with the ability to financially rehabilitate themselves"[127] by "freeing them from past indebtedness."[128]

Moloney and *407 ETR* are not entirely straightforward cases about releasing an individual from pre-bankruptcy debts, because in both cases the individuals could have avoided making further payments on their debts if they did not want a driver's licence or vehicle permit. It was on this basis that the minority of the SCC was prepared to hold that dual compliance was possible.[129] The individuals were seeking more than just the discharge of debts, they wanted access to a privilege that was being denied to them on the basis of their pre-bankruptcy indebtedness. In a case comment on the Court of Appeal decisions in

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125 *Supra* note 4 at para 36.
126 *Ibid* at paras 78-81.
127 *Supra* note 3 at para 28.
128 *Ibid* at para 30. The appellate courts in both Alberta and Ontario had endorsed similarly financial conceptions of rehabilitation (*407 ETR* CA, *supra* note 3 at paras 29-30, 41, 84, 99, 111, 115; *Moloney* CA, *supra* note 4 at para 43).
129 *Moloney*, *supra* note 4 at para 123.

407 ETR and *Moloney*, Craig Jones, a constitutional litigator turned academic, characterizes this view of rehabilitation as "generous," as it goes beyond the financial and reaches the social consequences suffered by individuals as a result of over-indebtedness.[130] The SCC reasons suggest a slightly narrower scope: the discharge cannot address all the social consequences of over-indebtedness, but it can ensure that government administered privileges are not denied to an individual on the basis of a released debt.[131] To the extent that the discharge ensures access to these privileges, it can properly be characterized as generous.

B. NOT JUST REHABILITATING DEBT, DEBT AS REHABILITATION

The outcomes in *Moloney* and *407 ETR* point toward a fresh start conception of rehabilitation, where a discharge rehabilitates an individual by releasing pre-bankruptcy debts and compelling government actors to restore privileges to the individual. At the same time, the SCC's reasons acknowledge that rehabilitation can refer to a process that a debtor must undergo prior to receiving a discharge. In *Moloney*, Justice Gascon noted that there are provisions in the *BIA*, in addition to the discharge, that advance the rehabilitative aims of the legislation. He cited, amongst others, mandatory credit counselling and the surplus income provisions.[132] As discussed above in the context of legislative and executive reports, mandatory credit counselling seeks to address the underlying causes of a debtor's financial difficulty and completion of the counselling sessions is a prerequisite to getting an automatic discharge. The surplus income requirements impose regular, mandatory payments on an individual, much like a proposal, and these compulsory payment schemes have been justified on the basis that they have an ameliorative impact on the debtor. The SCC mentioned financial counselling and surplus income payments in passing, but they did not figure prominently in the Court's analysis of the *BIA*'s purpose, nor the degree to which it is frustrated by the provincial legislation.

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130 Craig E. Jones, "Taking the 'Fresh Start' Seriously: A Case Comment on *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited* and *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*" in Janis P. Sarra & The Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law 2014* (Toronto: Carswell, 2015) 405 at 412, citing Thomas G.W. Telfer, "Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law, 1867-1880" (2010) 60:2 UTLJ 603 at 606 and *Canadian Bankers' Association and Dominion Mortgage and Investments Association v Attorney-General of Saskatchewan*, [1956] SCR 31 at 46, [1955] 5 DLR 736.

131 *Moloney*, *supra* note 4 at para 83.

132 *Ibid* at para 38.

Having regard for the debate over what rehabilitation means in the personal bankruptcy system, the SCC could have constructed a drastically different analysis on the second stage of the paramountcy test. It could even have reached the opposite outcome using the same rationale: the SCC could have concluded that the provincial legislation did not frustrate the rehabilitative aims of bankruptcy law, but rather that the mandated provincial payments advanced the *BIA*'s rehabilitative purpose. Such a conclusion would be consistent with a recurring theme in bankruptcy law, namely that individuals benefit when they are forced to repay debts. The executive and legislative reports marshal this idea in support of encouraging debtors to choose proposals over bankruptcy. Judicial officers reference the idea when they impose payments on bankrupts as a condition of their discharge.

The provincial legislation under consideration in *Moloney* and *407 ETR* operated with a similar logic to the surplus income requirements, a proposal, or a discharge order that is conditional on a payment. Under each of these latter regimes, the debtor must make payments to receive the benefit of a discharge. Under Ontario's and Alberta's traffic legislation, the debtor was required to make payments in exchange for receiving the regulatory approvals needed to drive. The Alberta legislation explicitly contemplated that the individual may enter into a repayment plan with periodic payments, when immediate repayment of the full amount owing to the Administrator was not feasible.[133] The debtor would then be able to get a driver's licence as long as he or she made the agreed upon periodic payment. The SCC could have extended the logic by which compulsory surplus income, proposals, and conditional order payments are deemed to be rehabilitative, and determined that the payments imposed under the provincial traffic legislation were rehabilitative as well.

Emphasizing an alternative conception of rehabilitation may not have changed the SCC's ultimate decisions in *407 ETR* and *Moloney*. The SCC may still have held the provincial legislation to be inoperative on the basis that it directly conflicted with the federal legislation. Or the SCC may have differentiated the provincial mandatory payment scheme from its federal counterparts on the basis that it was less flexible, and therefore more of an impediment to a debtor's fresh start. Under surplus income regimes,[134] proposals[135] and conditional orders,[136] individuals are usually only required to pay back a portion

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133 *TSA*, *supra* note 22, s 103. A similar repayment scheme was available under the comparable legislation in Ontario *(Ontario (Finance) v Clarke and Superintendent of Insurance for Ontario*, 2013 ONSC 1920 at para 8, 115 OR (3d) 33 [*Clarke*]).

134 See e.g. *BIA*, *supra* note 1, s 68(3).

135 *Ibid*, ss 66.13(2)(a), 66.14(a)(ii).

136 *Ibid*, s 172(3).

of their debt, and the amount can be adjusted having regard for an individual's ability to pay. Conversely, the provincial schemes require payment in full—or in the case of Alberta, up to $200,000—regardless of an individual's ability to pay.[137] Even if it were to draw such a distinction, the SCC would still need to grapple with the fact that rehabilitation can mean both payment of, or release from debt.

C. THE MANY MEANINGS OF REHABILITATION: WHAT'S TO BE DONE?

The possibility that the SCC could have characterized the provincial payment regime as both consistent with or contrary to the rehabilitative aim of bankruptcy should give one pause. The ambiguity around what rehabilitation means may cause all manner of difficulties. It makes it difficult to predict how the law will be applied. It also increases the risk that similarly situated parties will be treated differently, because they will be subject to differing interpretations of how they can best be rehabilitated. And it engenders confusion—actors in the bankruptcy system could both agree that measures should be adopted to rehabilitate debtors, but have completely different measures in mind because they have adopted conflicting views of what it means to rehabilitate a debtor.

I make three recommendations for what should be done to dispel the confusion caused by the multiple meanings of rehabilitation. First, that legal actors adopt fresh terminology that distinguishes between the different meanings of rehabilitation. Second, that legal actors work to be transparent when seeking to reconcile the competing interests of stakeholders in the bankruptcy system. Third, that researchers carefully scrutinize whether mandatory payments have a salutary impact on the debtor.

My first recommendation is that actors in the bankruptcy system could dispel significant confusion by adopting greater precision in how they talk about rehabilitation. Instead of the fraught language of rehabilitation, actors may instead opt to speak of relief from debt, and reformation, education or treatment of the debtor. In using this language, they would develop a way of speaking about rehabilitation as relief from over-indebtedness as a goal that is separate and distinct from rehabilitation as treatment of the underlying causes of over-indebtedness. By adopting greater clarity and nuance in how they write about these concepts, actors in the bankruptcy system can more precisely communicate with each other about how they conceive of rehabilitation, and the consequences that flow from a given conception.

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137 *TSA*, *supra* note 22, s 102(2). The $200,000 cap reflects "the amount that would have been covered by insurance if the driver had complied with the legislation" (*Moloney*, *supra* note 4 (Factum of the Appellant at para 26)).

Legislators will be able to more clearly articulate their intent when passing laws. Judges will be able to more clearly articulate their reasons for decision. Lawyers will be able to more clearly argue about what the outcome of a case should be.

My second recommendation is that legal actors work to be transparent about what balance they are striking amongst the interests of different stakeholders in the personal bankruptcy system: debtors, creditors and the Canadian public. The question of balance is a difficult one, because the stakeholders' interests often conflict. Each meaning attributed to rehabilitation strikes a different balance between the interests of these stakeholders—and ambiguity in how the term is used may be obscuring the balance being struck.

Releasing a debtor from his or her debts directly benefits the debtor, but it can also benefit the broader Canadian public. The discharged bankrupt may be more motivated to work hard and consume goods and services. In *Moloney* and *407 ETR* both debtors worked in jobs where they were required to drive, and the discharge of their traffic debts facilitated their post-discharge employment. But debt relief for the debtor can run counter to the creditors' interest in maximizing recovery.

Educating individuals so that they can address the underlying causes of their financial difficulties may benefit the individual, and also the broader Canadian public. For example, the bankrupt in *Moloney*, whose debt resulted from causing an accident, might benefit from driver's education.[138] He would then be a safer driver and less likely to incur liabilities by causing motor vehicle accidents. Other Canadians also stand to benefit from the debtor receiving driver's education—it is safer to travel on the road, and they do not have to bear the costs of future motor vehicle accidents. This type of rehabilitation does not clash with a creditor's wish to maximize recovery, as its impact on the creditor's interest is largely neutral. And if the tool selected for educating the debtor amounts to imposition of mandatory payments, this—in fact—can advance the creditor's goal of maximizing recovery.

One may be able to explain the popularity of repayments as a tool of rehabilitation because they seem to offer a way of catering to the interests of all the key stakeholders in the bankruptcy system: the debtor (purportedly) learns important lessons about budgeting, discipline and thrift; the creditors recover some value; and the public is reassured that the bankruptcy system is not being abused,

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138 Mr. Moloney's lawyers suggested that "[i]f the Province was concerned about public safety...then there would surely be additional conditions on the Respondent obtaining a licence such as driver education or a driving test" (*Moloney*, *ibid* (Factum of the Respondent at para 34)).

because debtors are required to make some contribution before they receive the benefit of a discharge.

One might even be able to understand the multiple meanings of rehabilitation as reflecting the changing interests of powerful stakeholders in the bankruptcy system. Telfer has commented on how parties may use the dominant ideas in public discourse to advance their own interests.[139] In his historical analysis of Canada's insolvency legislation between 1867 and 1919, he argued that creditors marshaled the idea of debt forgiveness for debtors in order to garner legislative support for a discharge. Their central motivation was not mercy for debtors. They wanted a discharge primarily for a self-interested reason: the discharge would encourage debtors to cooperate in the bankruptcy process and thereby maximize creditor recovery.[140] This focus on forgiveness is consonant with the first meaning of rehabilitation identified in this paper, that is, as debt relief. As creditors came to view their interests as advanced by mandatory debt payments, the meaning of the term rehabilitation may have undergone a shift to include the second meaning identified in this paper, that is, as reformation, education or treatment of the debtor.

Admittedly, there may be good reasons, other than rehabilitation, to require debtors to repay some of their debts. It can increase recoveries for creditors. It may deter debtors from taking undue advantage of the bankruptcy system to discharge debts they are able to repay.[141] It may reassure members of the Canadian public that the bankruptcy system is not a haven for indolent or evasive debtors.[142] These reasons have merit. But if the bankruptcy system is imposing payments on debtors to meet these ends, those responsible for imposing payments should be transparent about what they are attempting to achieve, instead of dressing up deterrence and creditor recovery in the guise of rehabilitation.

Being transparent about the goals motivating a legislative innovation, or an outcome in a court case, facilitates a deeper discussion about whether the bankruptcy system is striking the right balance amongst the interests of competing stakeholders: debtors in need of

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139 Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, 2014) at 67-71.

140 *Ibid* at 135-36.

141 Notably, the Colter Report recommended the adoption of a precursor to the surplus income regime, not because it would rehabilitate the debtor, but because it was necessary to counteract the "public perception that there has been an abuse of the bankruptcy process" (*supra* note 79 at 71).

142 See Wood, *supra* note 98 at 38 (describing prevention of fraud and abuse, and protection of the integrity of the bankruptcy system as key objectives of bankruptcy law).

relief, creditors seeking recovery of their claims, and the broader Canadian public. Conversely, when legislative amendments and written decisions, aimed at achieving the goals of these latter two stakeholders, are reframed as rehabilitative and benefiting the debtor, it may obscure the trade-offs being made between these competing interests.

My third recommendation is that researchers probe whether compelling debtors to make payments has a salutary effect, and does indeed help them to avoid financial difficulties in the future. The idea is intuitively attractive, but intuition can be an unsatisfactory basis for policy, especially in a situation where one's intuition may point toward a misapprehension of facts. Repayment as a tool for rehabilitating individuals presupposes certain causes of an individual's financial difficulty. The individuals are taken as culpable, or at least complicit in their financial failure, otherwise there would be little reason for attempting to rehabilitate them. It also presupposes that imposing payments on the individual will address the underlying causes of the individual's financial difficulty. It may be wise to adopt a heightened degree of scrutiny when examining the purported salutary effect of debt repayment on a debtor, since the popularity of this intuition may be attributable to how it benefits other stakeholders.

The Alberta Court of Appeal in *Moloney* CA refused to accept that the payments imposed by the provincial traffic legislation were rehabilitative. Recall that the individual's debt stemmed from causing a traffic accident while driving without insurance. The Court of Appeal noted that the debtor was being denied motor vehicle privileges on the basis of an unpaid debt, and not on other evidence of unsuitability such as a lack of "the necessary insurance,"[143] "a poor driving record, or a future inability to operate a motor vehicle safely."[144] All that debtors needed to do to establish that they were now responsible drivers was to repay the debt: "[E]ven the most irresponsible driver can apparently get his licence back, so long as he agrees to sufficiently generous monthly payments."[145] The Court of Appeal was troubled by the lack of connection between the cause of the individual's financial difficulties and the proposed cure.

Should the Court of Appeal's reticence about the rehabilitative power of payments be applied more broadly? Proposals, surplus income payments, and conditional orders have all been justified on the basis of their ability to rehabilitate the debtor. Different explanations can be advanced for how compulsory payments may be rehabilitative: they force the debtors to work harder and thus earn more, they force

143 *Supra* note 4 at para 45.
144 *Ibid* at para 40.
145 *Ibid* at para 45. See also *Clarke, supra* note 133 at para 54.

a debtor to learn and apply budgeting skills,[146] they help the debtor rebuild his or her feelings of self-worth,[147] or they impose a curative bout of character-building suffering on the debtor. It may be time to test these explanations. A helpful avenue for further research would be a literature review that identifies evidence that supports and challenges these explanations. Such research would ideally provide an account of the benefits and harms debtors experience when they are subjected to mandatory repayment regimes, as well as criteria that legislators and judges could apply to determine when mandatory repayments will be most beneficial, and when they may do more harm than good.

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146 A lack of financial literacy skills is frequently cited as one cause of personal bankruptcy in Canada (Micheline Gleixner & Michael J. Bray, "Canadian Consumer Insolvency: The Implementation of Emerging International Best Practices" in Janis P. Sarra & The Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) 397 at 429, 433). Telfer quotes the Parliamentary Secretary to the Minister of Industry as opining, in an excerpt from the debate on the 1997 amendments, that: "[T]he legislation before us puts more pressure on debtors to rehabilitate. It encourages consumers to act more responsibly by repaying at least a portion of their debts when they can" ("Access to Discharge", *supra* note 49 at 244, citing *House of Commons Debates*, 35th Parl, 2nd Sess, No 88 (22 Oct 1996) at 5532 (Morris Bodnar) [*Debates*]). This approach to financial discipline has been described as "budgetism," whereby a person arranges for the "external discipline of one's finances"—usually in the form of regular payment commitments. Budgetism can be contrasted with traditional notions of thrift. A thrifty person saves up money before making a purchase, and exerts discipline in saving. A person living according to a theory of budgetism spends first, and then exerts discipline in repaying the borrowed amounts (Lendol Calder, *Financing the American Dream: A Cultural History of Consumer Credit* (Princeton, NJ: Princeton University Press, 1999) at 297, citing William H. Whyte Jr., "Budgetism: Opiate of the Middle Class", *Fortune* 53:5 (May 1956) 133 at 172).

147 Telfer reports that in discussions predating the 1997 Amendments, the Parliamentary Secretary to the Minister for International Trade noted that by repaying debts over the longer period of a proposal, "Canadians could maintain their dignity. It is not a dignified thing for many Canadians to be forced into personal bankruptcy" ("Access to Discharge", *ibid* at 244, citing *Debates*, *ibid* at 5543 (Ron MacDonald)). Discussing the stigma of making an assignment into bankruptcy in the United States, see generally Michael D. Sousa, "Bankruptcy Stigma: A Socio-Legal Study" (2013) 87:4 Am Bank LJ 435. In a study of Canadian Division II proposals, Janis Sarra heard from many bankruptcy trustees who were of the opinion that the growth in Division II proposals was driven by individuals who viewed filing a proposal as carrying significantly less social stigma than making an assignment into bankruptcy ("Economic Rehabilitation: Understanding the Growth in Consumer Proposals Under Canadian Insolvency Legislation" (2009) 24:3 BLFR 383 at 448). Ziegel suggests that the surplus income regime can give debtors "the psychological satisfaction of knowing that they have met the statutory requirements" ("Facts on the Ground", *supra* note 116 at 310).

VI. CONCLUSION

In the recent decisions of *Moloney* and *407 ETR*, a majority of the SCC decided the cases on the basis that there was a direct conflict between valid federal and provincial legislation. Under the paramountcy doctrine, the provincial legislation was inoperative to the extent of the conflict. The frustration of purpose analysis was a secondary—and technically superfluous—reason for rendering the provincial legislation inoperative. Yet the SCC's discussion of rehabilitation remains an important subject for analysis and reflection because it is part of a larger story about the contested meaning of rehabilitation in the personal bankruptcy system.

This paper has traced two streams of thought about what it means for the bankruptcy system to rehabilitate individuals: either it means using the discharge to release debts and restore (some) privileges; or it means reforming, educating, and treating the individuals. This exercise has uncovered a paradox about the relationship between rehabilitation and debt: debt is both a burden from which individuals need relief, and a corrective tool to which individuals are subjected. Ambiguity over what it means to rehabilitate a debtor in the personal bankruptcy system is problematic for a number of reasons. It makes it difficult to predict how the law will be applied, because contradictory outcomes can be justified using exactly the same rationale of rehabilitation. It engenders confusion in judicial reasons and legislative deliberation. It can obscure how the interests of different stakeholders are being reconciled before the courts and in Parliament.

This paper makes three recommendations for addressing the problems caused by the ambiguity around the meaning of rehabilitation in the personal bankruptcy system. First, that legislators, judicial officers and other actors in the bankruptcy system adopt a more precise vocabulary with which to discuss the aims of the system, and avoid using the term "rehabilitation" to describe divergent, sometimes contradictory goals. Second, that legislators, judicial officers and other actors in the bankruptcy system aim to be transparent when identifying which stakeholders benefit from a legislative or judicial outcome, and which ones are harmed. Some legislative amendments and court decisions have been justified on the basis that they rehabilitate the debtor, but the salutary effect on the debtor is debatable, and the amendment or decision clearly advantaged another stakeholder, such as the creditors or the Canadian public. This conflation of interests makes it more difficult to assess whether or not the bankruptcy system is appropriately balancing the interests of competing stakeholders. Third, that researchers examine whether compulsory repayments have a salutary impact on debtors.

The debate over what rehabilitation means in the bankruptcy system is by no means new, but it is of contemporary relevance. The

BIA is undergoing a statutorily-mandated review.[148] Industry Canada carried out a public consultation in the summer of 2014. In October 2014, James Moore, then Minister of Industry, presented Parliament with a report of recommendations flowing from the consultation.[149] The *BIA* contemplates a year-long process, during which a Parliamentary committee reviews and reports back on Industry Canada's recommendations.[150] This process has been delayed by the federal election in 2015, which resulted in a new government taking office. When Parliament returns to the legislative review process, there is an opportunity to clarify how the language of rehabilitation is used, which will allow for a more transparent and coherent debate about how the competing interests of different stakeholders should be reconciled.

The debate over what rehabilitation means in personal bankruptcy law is not occurring in a vacuum, but illuminates theoretical debates that have engaged the broader legal community. For example, the emerging field of therapeutic jurisprudence starts from the premise that substantive rules, legal processes and conduct of legal actors can either enhance or detract from the mental and physical health of individuals who come in contact with the legal system.[151] Scholars working in the field have a reform agenda, attempting to reconfigure substantive rules and legal processes, and to reshape the conduct of legal actors, so as to provide users of the legal system with better health outcomes.[152] The debate over what rehabilitation means in the Canadian personal bankruptcy system veers into the realm of therapeutic jurisprudence, especially when interventions are justified on the basis that they will enhance the individual debtors' well-being. Thinkers working in the field of therapeutic jurisprudence may be able to enrich their theoretical accounts by studying the ways in which the bankruptcy system can improve the well being of individuals, and the limits of its power to do so. Insolvency scholars may be able to draw important insights about the role of the personal bankruptcy

148 *BIA*, *supra* note 1, s 285.

149 2014 Final Report, *supra* note 85.

150 *BIA*, *supra* note 1, s 285(2).

151 Bruce J. Winick, "The Jurisprudence of Therapeutic Jurisprudence" (1997) 3:1 Psychol Pub Pol'y & L 184 at 185, 187, 201. Therapeutic jurisprudence is sometimes described as seeking to enhance the "well-being" of individuals. Michael King suggested that this term is so broad that, if adopted, it could result in therapeutic jurisprudence becoming essentially a meaninglessly ambiguous concept. Instead, he suggests limiting the concept of therapeutic jurisprudence to approaches that are concerned with the physical and psychological health of individuals (Michael S. King, "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32:3 Melbourne UL Rev 1096 at 1116).

152 Winick, *ibid* at 187-88.

system from the literature on therapeutic jurisprudence. Therapeutic jurisprudence recognizes that the well being of the individual is not the only aim toward which law should aspire; sometimes trade-offs are necessary. By examining how therapeutic jurisprudence navigates such trade-offs, insolvency scholars may enhance their understanding of how to balance the competing private and public interests that make personal insolvency law a dynamic field of study and practice.