POST-BANKRUPTCY REMEDIES OF SECURED CREDITORS: AS GOOD AS IT GETS

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I. INTRODUCTION

This article focuses on two related lines of judicial reasoning established by decisions of the Courts of Appeal of British Columbia and Saskatchewan in *Seaboard Acceptance Corporation Ltd. v. Moen*[1] and *Andrew v. FarmStart.*[2] The companion issues they raise affect the right of secured creditors to enforce their security and the debt supporting it after their debtors' discharge from bankruptcy. Decided in 1986 and 1988 respectively, these cases cannot by any stretch of even the academic imagination be regarded as new. Why, then, might they merit the present authorial attention of a commercial law professor, much less the practical interest of the lawyers and judges to whom this discussion is primarily directed?

The problems presented by these judgments attracted my attention rather fortuitously in the course of research for a broader article on issues affecting secured creditors in the context of consumer bankruptcy. To my surprise, the rather alarming judicial direction the cases establish has generated no real comment in more recent decisions on either doctrinal or policy bases, in spite of its practical significance in commercial as well as consumer bankruptcies. Propelled by the ancient scholarly maxim "better

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1. (1986), 62 C.B.R. (N.S.) 43 (B.C.C.A.).
2. (1988), 71 C.B.R. (N.S.) 124, 54 D.L.R. (4th) 406 (Sask. C.A.), leave to appeal to S.C.C. refused 73 C.B.R. (N.S.) xxvii, 57 D.L.R. (4th) viii.

late than never", this article thus represents a first step towards remedying that deficiency.

The questions explored arise primarily in the context of a debt or payment obligation created before the debtor's eventual bankruptcy and secured by a security interest in real or personal property. They are superficially simple. First, can a secured creditor enforce her debtor's personal promise to pay the secured debt after the debtor has been discharged from bankruptcy? Second, can a secured creditor enforce her security interest against property acquired by the debtor after her discharge, either through an increase in her equity in the collateral[3] or through appreciation in the collateral's value?

In *Manulife Bank of Canada v. Planting*,[4] an Ontario court said yes to the first question, on application of the reasoning of the British Columbia Court of Appeal in *Seaboard.* The second question was addressed, specifically as to its first aspect, by the Saskatchewan Court of Appeal in *FarmStart*, and was similarly answered in the affirmative. In the respectful view of the author, both answers are wrong. Secured creditors are in a remarkably good position relative to other creditors in the circumstances ensuing from their debtors' bankruptcy. However, their position cannot be as good as these cases would have it, for taken together the cases virtually eliminate even those relatively minor substantive limitations imposed on the rights of secured creditors by Canadian bankruptcy law.[5]

The judgments rendered in these cases give no indication that the courts were cognizant of the doctrinal or policy objections that might be raised against their respective conclusions. In both *Seaboard* and *FarmStart*, legal rules were stated and applied with no articulated reflection on central tenets of bankruptcy law. Unfortunately, the meager attention paid these decisions in subsequent cases offers little in the way of support either for the views they represent or for conclusions to the contrary.

3. Such an increase would ordinarily flow from the full or partial satisfaction of debt supporting a security interest or interests having priority over that of the creditor seeking to enforce her security.
4. (1996), 43 C.B.R. (3d) 305 (Ont. Ct. (Gen. Div.)), affd 76 A.C.W.S. (3d) 897, [1998] O.J. No. 73 (C.A.).
5. Canadian bankruptcy law is comprised primarily of the provisions of the federal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as amended S.C. 1992, c. 1, c. 27, 1997, c. 12, hereafter the BIA).

The issues raised by these decisions must be addressed in accordance with the fundamental precepts of bankruptcy. The *in personam* and *in rem* rights of secured creditors as against the debtor and her property following the latter's discharge from bankruptcy are determined by the interplay of two key principles.[6] The first is that an order of discharge releases the bankrupt from all claims provable in bankruptcy.[7] Since the debt or monetary obligation secured by a mortgage or security interest is a claim provable in bankruptcy,[8] the debtor is "released" by discharge of the personal obligation to pay it. However, release of the debt supporting the security interest does not nullify the proprietary rights inhering in that interest.

The security interest is saved by the principle that a trustee in bankruptcy is entitled to distribute only the "property of the bankrupt",[9] which comprises all non-exempt real and personal property owned by the bankrupt at the date of bankruptcy, as well as property acquired by her between commencement of the bankruptcy and the date of discharge.[10] To the extent that the bankrupt's property is subject to a security interest, the secured creditor is entitled to

6. A secured creditor has both a right to sue on the debtor's personal promise to pay — *i.e.*, to enforce a monetary obligation, and a right to seize and (ordinarily) sell the property held as security, whether it be real or personal property. The proceeds of sale must be applied to retirement of the outstanding debt. In this discussion, secured creditors are viewed generically as having a security interest in that property, which may be called the collateral. No distinction is made between security interests in real property (still ordinarily called mortgages) and security interests in personal property, unless the text indicates otherwise.
7. BIA s. 178(2) provides: "Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy." Subsection (1) categorizes the claims from which the bankrupt is not released. Debts arising from ordinary secured or unsecured loan transactions are released under the general terms of subsec. (2) unless they are tainted by fraudulent conduct on the part of the debtor or the loan was extended under a statutory student loan program and the bankruptcy occurs within the time prescribed in subsec. (1)(*g*). As to the latter, see S.C. 1998, c. 21, s. 103.
8. The general provisions of BIA ss. 124(1) and (5) contemplate the filing of a proof of claim by a secured creditor, while ss. 127 to 134 define the rights of secured creditors in greater detail. A secured creditor may prove a claim against the assets of the debtor available for distribution by the trustee for the entire amount of the debt owed if she elects to surrender her security to the trustee. If she elects to retain her right to realize the security, she may prove a claim for any deficiency after deducting the net realization value or the assessed value of the security from the total amount of the debt.
9. BIA, s. 67.
10. Use of the expression "property *owned* by the bankrupt" is here intended in the broadest sense, encompassing proprietary interests of all kinds, including equitable interests and other kinds of proprietary claim that represent something less than full "ownership" of the property to which they relate. See the definition of "property" in BIA s. 2(1).

take it and apply its value (ordinarily through seizure and sale) in satisfaction of the debt she is owed. The property charged with the security interest is thus not viewed as property of the bankrupt and is accordingly exempt from distribution by the trustee. The secured creditor is entitled to realize against the property to the extent of her interest during the course of the bankruptcy and even after the bankrupt's discharge, notwithstanding the fact that the debt that originally sustained creation of the interest cannot be enforced against the bankrupt personally.[11]

These principles reflect the highly solicitous attitude of Canadian bankruptcy law towards secured credit.[12] A secured creditor is fundamentally unaffected by her debtor's bankruptcy to the extent that the outstanding debt can be satisfied through seizure of the property subject to the security interest. Since the secured creditor's entitlement to the collateral removes it from the pool of assets available for distribution to unsecured creditors, a secured creditor may recoup all or most of the debt owed while unsecured creditors recover little or nothing at all.[13] Moreover, once default under the terms of the security agreement is established the secured creditor may determine the timing of the exercise of her rights of realization.[14] Default typically occurs through non-payment of an instalment of the secured debt or by virtue of the invocation of bankruptcy proceedings by or against the debtor.

11. See *Pelyea v. Canada Packers Employees Credit Union Ltd.* (1969), 13 C.B.R. (N.S.) 284, 11 D.L.R. (3d) 35 (Ont. C.A.). This assumes, of course, that the secured creditor has not elected to surrender her security to the trustee (s. 127(2)), and the trustee has not elected to redeem it (s. 128(3)). Though a security interest does not make the secured creditor "owner" of the property constituting the collateral, it does constitute a vested proprietary interest conferring *in rem* rights entitling the creditor to take the property in satisfaction of the debt it secures. Since a debtor's unsecured creditors have no proprietary interest in her assets that might compete with the interest of a secured creditor either before or after the debtor's bankruptcy, neither they nor the trustee in bankruptcy acting on their behalf have any basis at common law upon which to displace the rights accompanying the secured creditors' interest.

12. See R.C.C. Cuming, "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 C.B.L.J. 17.

13. Secured creditors are privileged even as compared with those creditors who are statutorily "preferred", since the claims of the latter must be satisfied from the bankrupt's unencumbered assets, a typically limited commodity.

14. This is subject only to the provisions of the BIA designed to enable the trustee to appraise the value of the property claimed as security, and to ensure that any residual value after deduction of the secured claim is made available for the benefit of the estate through exercise of her right of redemption, or through mandatory sale of the collateral. See ss. 79 and 127-135. In addition, the exercise of rights of realization may be postponed for up to six months by order of the court. See s. 69.3(2), considered in *Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd.*, [1994] N.W.T.R. 184 (S.C.), vard 27 C.B.R. (3d) 190, [1995] N.W.T.R. 65 (S.C.).

These basic principles define the framework of the discussion to follow.

II. THE SECURED CREDITOR'S RIGHT TO ENFORCE THE PERSONAL OBLIGATION TO PAY AFTER THE DEBTOR'S DISCHARGE FROM BANKRUPTCY

The legislative intention embodied in s. 178(2) of the Bankruptcy and Insolvency Act is clear. Upon receiving a discharge from bankruptcy, a debtor is "released" from all claims provable in bankruptcy. Though such claims are ordinarily manifested in a debt and most easily discussed in those terms, they include any claim to enforce a contractual obligation of payment. For example, the obligation to pay instalments of rent that have not yet fallen due is not an obligation in debt. Rather, it is an obligation to perform a contractual promise of payment.[15] "Release" from that contractual obligation can only mean release from the obligation to pay the sums promised. Similarly, release from a claim to recover an outstanding debt means release of the obligation to pay the debt.

The judgment of the Supreme Court of Canada in *Holy Rosary Parish (Thorold) Credit Union Ltd. v. Bye*[16] suggests that s. 178(2) nullifies claims provable in bankruptcy. Referring to a debt incurred before the debtor's bankruptcy, the court said, "The debt has now gone by operation of law."[17] Similarly, the Ontario Court of Appeal in *Pelyea v. Canada Packers Employees Credit Union Ltd.*[18] said that the debt secured by an assignment of the debtor's interest in an employee profit sharing plan was "extinguished" by s. 178(2),[19] though the security which was in existence at the date of bankruptcy was not.[20] These and a number of other authorities were recently reviewed by Scarth J. in *Tildesley v. Weaver*[21] in support of his

15. This concept underlies the decision of the Supreme Court of Canada in *Keneric Tractor Sales Ltd. v. Langille, infra*, footnote 30.
16. (1967), 61 D.L.R. (2d) 88, 10 C.B.R. (N.S.) 15 (S.C.C.).
17. *Ibid.*, at p. 90.
18. *Supra*, footnote 11.
19. As referred to in these cases, the statutory discharge provision was numbered differently under previous versions of the federal bankruptcy statute than it now is, but its wording is unchanged.
20. These cases were followed in *Manufacturer's Life Insurance Co. v. Burton* (1976), 22 C.B.R. (N.S.) 207 at p. 211, [1976] I.L.R. 1-779 *sub nom. Burton v. Toronto-Dominion Bank* (Ont. H.C.J.).
21. (1998), 81 A.C.W.S. (3d) 590, [1998] B.C.J. No. 1838 (S.C.).

conclusion that the order of discharge extinguishes a debt comprising a claim provable in bankruptcy.

Others have suggested that s. 178(2) does not extinguish the debts and payment obligations owed by the bankrupt at the time of bankruptcy.[22] On that view, contractual obligations assumed by the debtor prior to her bankruptcy continue to exist after her discharge, but are unenforceable. This interpretation is consistent with the statutory wording, which indicates that the bankrupt is "released" of provable claims, not that they are extinguished.[23]

Whether pre-bankruptcy obligations are extinguished by s. 178(2) or merely rendered unenforceable, it is clear that a secured creditor has no legal right to compel their performance through action on the debtor's contractual promise of payment. The discharge provision of the BIA is the statutory incarnation of the fresh start policy often expressed as one of the primary objectives of the bankruptcy system. The "honest but unfortunate" debtor is allowed to wipe her financial slate clean and begin again, free of a burden of debt that cannot realistically be satisfied.[24] The price of that emancipation is the bankrupt's surrender of all of her non-exempt property. The discharge of overextended debtors is not motivated exclusively by the compassion of federal legislators. An individual whose income and assets can never satisfy the existing claims

22. See *Kryspin (Re)* (1983), 44 C.B.R. (N.S.) 232, 142 D.L.R. (3d) 638 (Ont. S.C.(Bkcy.)), *Handelman (Re)* (1997), 48 C.B.R. (3d) 29 (Ont. Ct. (Gen. Div.)), *Gagnon v. Fiducie Desjardins* (1992), 17 C.B.R. (3d) 92, [1992] R.J.Q. 2244 (Que. S.C.), affd [1993] A.Q./Q.J. No. 1645 (C.A.).

23. This approach implies that the contract giving rise to the obligation rendered unenforceable continues in existence through bankruptcy and after discharge, though it cannot be enforced against the bankrupt. The view that the debt or claim is extinguished conversely implies that the contract is itself avoided for if it were not, the obligations arising under it must remain. This point lends support to the less common view that the debt or claim is not extinguished, but is simply rendered unenforceable. If, as in *Seaboard*, the debtor continues to make payments to the creditor after her discharge, the conclusion that the contract is no longer in existence might sustain an action for recovery of those payments as moneys had and received or under general restitutionary principles. If the debtor's payments are made in return for use of property owned by the creditor, the latter might defend on that basis. In other cases, however, there would be no obvious defence to the action. The Quebec Supreme Court in fact rejected an argument of this kind advanced on behalf of a bankrupt mortgagor who had continued to make mortgage payments after his discharge in *Gagnon v. Fiducie Desjardins, ibid.*, approved on this point by Master Funduk in *Scotia Mortgage Corp. v. Winchester*, [1997] 8 W.W.R. 142 at p. 145, 46 C.B.R. (3d) 314 (Alta. S.C.). If the contract is still in existence, though unenforceable against the discharged bankrupt, payments made under it would not be recoverable, as there could be no basis for a claim of unjust enrichment.

24. *Posner (Re)* (1960), 3 C.B.R. (N.S.) 49 (Man. Q.B.). Innumerable cases could be cited in support of the "fresh start" principle. For a selection, see L.W. Houlden and B.G.

of her creditors cannot participate constructively in the economic life of the community. She is effectively neutralized as an economically productive social resource. The demands of economic growth, as well as social morality, mandate action on the part of the state to give such debtors an opportunity to rehabilitate themselves financially.

Consider the application of s. 178(2) and its underlying policy to the facts presented to the British Columbia Court of Appeal in *Seaboard Acceptance Corporation Ltd. v. Moen.*[25] The terms of the contract giving rise to the dispute were typical of the sort of transaction commonly called an open-end lease.[26] Under it, the bankrupt defendant leased an automobile from Seaboard Acceptance, a finance company, for a term of three years during which she was to pay instalments of rent. At the conclusion of the term the vehicle was to be returned to the lessor, who could sell it either to the lessee or to a third party. The lessee agreed to pay Seaboard the difference between the amount recovered on sale of the vehicle and a sum predetermined by the contract. The lessee had no right to terminate the lease during its term and in the event of a default, including the institution of bankruptcy proceedings, Seaboard was entitled to repossess the vehicle and recover all sums remaining payable under the contract. The objective of this transaction was clear. Having paid the purchase price of the vehicle leased to the bankrupt, Seaboard was intended to recover that sum and interest through the instalments of rent and the final payment. The litigation arose because, some time after receiving her discharge from bankruptcy, the lessee stopped making payments on the car and returned it to Seaboard Acceptance. Seaboard then sued Ms Moen for the "rent" accruing due during the remainder of the three-year term and the final contract payment, which together represented in substance the balance of the purchase price of the vehicle originally advanced by Seaboard, along with interest.

At the time of the bankruptcy, Seaboard's rights against the bankrupt were twofold. They were entitled to enforce her personal promise to pay the sum remaining due under the terms of the contract. In addition, their proprietary rights of ownership entitled

Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed. (Toronto: Carswell, 1998) at pp. H§11(1) and H§24(1).

25. *Supra*, footnote 1.

26. For a good discussion of the purpose and form of this kind of transaction, see Ronald C.C. Cuming and Roderick J. Wood, *British Columbia Personal Property Security Act Handbook*, 3rd ed. (Toronto, Carswell, 1996) at pp. 42-43.

them to repossess the vehicle. There is little doubt that this transaction would be considered "in substance" a security agreement under current personal property security legislation. However, the court's decision was directed exclusively to the lessee's contractual payment obligation, without regard to the rights of either party in relation to the leased vehicle. The security features of the transaction were material to the decision in factual but not doctrinal terms. That is, the fact that the lessee continued in possession of the vehicle after her discharge from bankruptcy affected the court's conclusion regarding the continued viability of the personal obligation to pay. However, the lessor's proprietary rights in the vehicle (whether as owner or as security holder) did not in themselves mandate the continuation of that obligation. Though a "lease" of this kind would now be subject to the British Columbia Personal Property Security Act,[27] that fact would therefore not alter the result dictated by the court's reasoning on the issue of post-discharge enforcement of the personal obligation to pay.

In response to the lessee's contention that she had been released by her discharge from the obligation to make the payments prescribed by the contract of lease, the court said:[28]

> [T]he contract continued throughout the bankruptcy and continued after the discharge from bankruptcy; it was never terminated in accordance with its provisions for termination, and the fact that there might have been a claim provable in bankruptcy, or that a claim provable in bankruptcy might have been made, does not affect the fact that the contract itself continued and continued to regulate the relationship of the parties after the discharge from bankruptcy.

This conclusion rested on the fact that the bankrupt had maintained payments and retained possession of the car throughout her bankruptcy and thereafter, constituting what the court called endorsement of the contract following discharge. Lambert J.A. specifically indicated that there had not been a novation of the contract, merely a "continuation" of it.[29]

The trial judge had decided in favour of Seaboard on the ground that its claim was not a claim provable in Ms Moen's bankruptcy. The Court of Appeal declined to address that issue, since it was able to conclude that Seaboard was entitled to recover even on the

27. R.S.B.C. 1996, c. 359. The Act came into effect in 1990, two years after the decision in *Seaboard*.
28. *Supra*, footnote 1, at p. 147.
29. *Ibid.*

assumption that the claim was provable in the bankruptcy.[30] One would have thought that this preliminary assumption would have proven fatal to Seaboard's action. If the claim provable in bankruptcy emanated from the lessee's promise of payment under the contract, the straightforward application of s. 178(2) should have led inexorably to the conclusion that the bankrupt lessee was, after her discharge, no longer obliged to satisfy that claim. Even if the payment obligations created by the contract were not extinguished but rendered unenforceable by that provision, she was clearly "released" of her obligation to satisfy them.

Similarly, the fact that the contract between the parties may have continued to exist after the lessee's discharge was irrelevant to the enforceability of any right of payment that the lessor had under it. The lessee's continuation of payments was simply a strategic device to avert repossession of the car. Certainly, those payments were made in recognition of the contract and in that sense "affirmed" its existence. However, the affirmation of the contract in that sense does not override the operation of s. 178(2).[31] The court's

30. The question of whether Seaboard's claim was a claim provable in bankruptcy takes on renewed importance if one rejects the Court of Appeal's theory of "continuation" of the lease. However, the decision of the Supreme Court of Canada in *Keneric Tractor Sales Ltd. v. Langille* (1987), 43 D.L.R. (4th) 171, [1987] 2 S.C.R. 440 clearly leads to the conclusion that Seaboard's claim to enforce the personal promise to pay was a claim provable in bankruptcy within the meaning of the BIA. In *Keneric Tractor Sales,* the court held that the ordinary principles of contract law apply to a claim arising from breach of a lease, whether it be a lease of land or of chattels. A lessor's contractual right as against the lessee is the right to enforce performance of the obligations undertaken by the lessee. That right arises at the time the contract is made. The primary device for enforcement of contractual rights is, of course, a claim for damages for breach of a contractual obligation, or obligations, by the other party. A lessor's claim for damages against a lessee in breach is quantifiable through the application of the general contract principle that the claimant is entitled to the sum that would put her in the position she would have been in had the lessee's obligations under the lease been performed. If the lease in *Seaboard* were a true lease, Seaboard's "claim" against Ms Moen at the date of her bankruptcy would be the right to enforce her personal obligation to pay the sums promised. After the initiation of bankruptcy proceedings, that right could be enforced by filing a proof of claim for the amount that would be recoverable in an action for breach of contract. The quantum of damages would depend upon the losses actually caused by the breach, qualified by the obligation to mitigate. That sum might or might not equal the payments remaining unpaid under the lease. In *Keneric,* the Supreme Court rejected the view that was adopted by the trial judge in *Seaboard,* namely, that a lessor's monetary claim against a defaulting lessee is limited to unpaid instalments of rent due from time to time. Since no instalments of rent remained unpaid at the time of Ms Moen's bankruptcy, the judge reasoned, incorrectly, that Seaboard did not have a claim provable in bankruptcy.
31. In *Godin (Re)* (1926), 7 C.B.R. 725 (Que. S.C.), the debtor made payments after his discharge to a creditor who had filed a proof of claim in the bankruptcy. The court held that the payment did not restore the claim.

belief that the payment obligation was sustained by continuation of the contract overlooks both the clear intention of the statute and the Supreme Court of Canada's unequivocal view of its operation, as expressed in *Holy Rosary Parish (Thorold) Credit Union v. Bye.*[32]

A creditor may circumvent the operation of s. 178(2) if the defaulting debtor can be persuaded to revive the debt through novation of the original contract. This approach is particularly attractive when the creditor has a right to seize property that the debtor wishes to keep. That right will most often derive from the creditor's right to enforce a security interest in collateral securing the debt. In a case involving a true lease, the lessor is entitled to repossess the vehicle by virtue of her rights of ownership. In either situation, the creditor may agreed to refrain from exercising her right to seize or repossess the property in return for the debtor's promise to pay the full amount remaining due under the contract. The creditor's surrender of the present right to take possession constitutes consideration for the debtor's new promise to pay the balance of the debt.[33]

In *Seaboard,* Lambert J.A. specifically rejected the view that there was a novation of the contract following the bankrupt's discharge. This conclusion is warranted on the facts stated in the case. Novation requires a conscious decision on the part of the

32. *Supra,* footnote 16.
33. A contractual novation of just this kind was the subject of *Bellevue Acceptance Corporation v. Lessard* (1959), 1 C.B.R. (N.S.) 276 (Que. S.C.). The court concluded that the debtor's post-discharge promise to pay the entire balance of a debt secured against his television set under a conditional sales agreement entered into before his bankruptcy was enforceable. However, in *Trans Canada Credit Corp. v. Wolfe* (1994), 28 C.B.R. (3d) 237, 99 Man. R. (2d) 271 (Q.B.), the court held that a new security agreement entered into between the bankrupt and the secured creditor after the date of bankruptcy was not enforceable on the ground that no new consideration had been given by the creditor, though the bankrupt was permitted to retain possession of the vehicle in which the creditor held security on the basis of the new agreement. The court said that the agreement would have been enforceable if Trans Canada Credit had repossessed the vehicle and then reconveyed it to the bankrupt, taking appropriate security. This reasoning is clearly wrong. If return of the vehicle to the bankrupt could constitute consideration for her promise to pay the full amount of the debt owing, including the deficiency, so too could Trans Canada's deferral of their right to repossession. In either case, the debtor retains possession where she would otherwise have lost it, in return for her new promise of payment. In is clear that, under general contract law principles, the forbearance to enforce an existing legal right can be consideration for a reciprocal promise. This is so even if the right purportedly foregone proves not to have been valid, provided the parties bona fide believed that it was: see *Attorney General of British Columbia v. Deeks Sand & Gravel Co.*, [1956] S.C.R. 336 at p. 343, 2 D.L.R. (2d) 305 and *Stott v. Merit Investment Corp.* (1988), 48 D.L.R. (4th) 288, 63 O.R. (2d) 545 (C.A.).

debtor to pay a debt that she would otherwise not be obliged to satisfy in return for the creditor's agreement to waive a present right of seizure. The continued maintenance of payments, accompanied by the creditors's *de facto* restraint, does not in itself signify the exercise of the deliberate choice required to found a novation.[34] This appears to have been the view of the court in *Seaboard.*

The significance of *Seaboard* remained largely if not entirely unrecognized for quite some time after judgment was rendered. The decision might have slipped into obscurity were it not for its rescue by Howden J. of the Ontario Court of Justice in the 1996 case of *Manulife Bank of Canada v. Planting.*[35] In *Manulife*, Howden J. applied *Seaboard* to a mortgagee's claim for a deficiency.[36] The action was based on two mortgages, both of the same property.[37] Like the lessee in *Seaboard*, the mortgagors had made payments through their bankruptcies and following their discharge. When they stopped making payments sometime after the date of their discharge,

34. Since Seaboard did not know of the lessee's bankruptcy until she returned the vehicle after her discharge, they cannot be blamed for failing to initiate a consensual novation of the payment obligation. However, the fact remains that no novation was achieved. Furthermore, the lessee's failure to disclose her bankruptcy cannot, even in combination with the maintenance of payments, estop her from subsequently relying upon the rights arising from her statutory discharge. It is clear that an estoppel cannot supercede an obligation to perform a statutory duty (*Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, [1994] 1 S.C.R. 80, 110 D.L.R. (4th) 449). Even if the elements of estoppel were otherwise found to exist in these circumstances, analogous reasoning would dictate that an estoppel cannot supercede the operation of a statutory provision that directly precludes the enforcement of a debt.

35. *Supra*, footnote 4. There appear to be no reported decisions referring to *Seaboard* in the ten-year interval between the date of its reporting and the date of Mr Justice Howden's decision in *Manulife*. Though *Seaboard* was mentioned in an unreported judgment rendered just nine months before *Manulife* — namely *Abe Dick Masonry Ltd. v. Garrett* (1996), 62 A.C.W.S. (3d) 431, [1996] O.J. No. 1180 (Gen. Div.), revd 79 A.C.W.S. (3d) 221 (C.A.) — it was distinguished without appraisal of its merits.

36. Howden J. also referred to *Gagnon v. Fiducie Desjardins, supra*, footnote 22. However, the decision is clearly not authority for the view adopted in *Manulife*. In it, the court affirmed a mortgagee's right to foreclose on its mortgage following the mortgagor's discharge, and recognized the post-discharge continuation of the debt underlying the security. However, the validity of a post-discharge deficiency claim was clearly denied, at p. 99:

    En d'autres terms, l'obligation que est la support de la garantie demeure mais les dispositions particulières de la *Loi sur la faillite* font en sorte que le paiement ne pent provenir que de la réalisation de cette garantie.

37. The plaintiff bank also relied upon a promissory note and a guarantee. However, the evidence was not sufficient to establish the execution of the promissory note, and the defendants' liability on the guarantee was not differentiated by the court from their liability under the mortgage to which it related.

the mortgagee sued. On its motion for summary judgment, Howden J. stated the primary issue as follows:[38]

> The issue on these motions is whether the defendants' assignment in bankruptcy in 1992 and the parties' conduct subsequent thereto can be said to amount prima facie to a release of the defendants' personal promise and covenant to pay the balance owing, or at least a release of any personal obligation over and above the value of the secured property.

With no real explanatory analysis, he concluded that the debtors were not released from their debt or any portion thereof. The grounds stated for that conclusion were that the creditor had not proven a claim in bankruptcy, and the debtors had remained in possession of the security and paid interest on the debt throughout the bankruptcy. As in *Seaboard*, the decision in favour of the creditor explicitly did not rest on a novation of the contract, since the parties had not in fact agreed to a new mortgage arrangement, though one was contemplated.[39]

There is no discernable reason for the significance attached by the court to the fact that the mortgagee had not proven a claim in the mortgagors' bankruptcies. The debt secured by the mortgages sued upon was certainly a provable claim falling within the scope of s. 178(2). That provision refers explicitly to the release of all claims "provable" in bankruptcy, not to those that have actually been "proved", or in respect of which a proof of claim has been filed. Creditors clearly cannot avoid the discharge provision by neglecting to file a proof of claim. In fact, Manulife's failure to prove a claim in the bankruptcies may have indicated that they expected to recover nothing more from the bankrupts than the value of their security.

The actual continuance of payments by the mortgagors should have had no more import in this case than should the maintenance of payments by the lessee in *Seaboard*. The parties had no power to transform what was at best a statute-barred debt into an enforceable one. Nevertheless, judgment was granted "in accordance with the statement of claim". Howden J. thus appears to have awarded both a monetary sum based on the promise to pay and an order for possession of the property pursuant to Manulife's proprietary claim as mortgagee. The mortgagors' appeal to the Ontario Court of Appeal was dismissed without reasons, except as to the liability of

38. *Supra*, footnote 4, at p. 307.
39. *Ibid.*, at p. 312.

one of the defendants under a guarantee executed before bankruptcy.[40] The court apparently saw no contradiction in its finding that, "Any guarantee executed by him was executed prior to the bankruptcy and there could be no continuing liability thereunder."[41]

The line of reasoning originating in *Seaboard* and endorsed by *Manulife* seems to be catching on. At least two Alberta judges have recently been presented with creditors' arguments based on those cases.

In *CIBC Mortgage Corp. v. Stenerson*,[42] Hart J. of the Alberta Court of Queen's Bench applied *Seaboard* and *Planting*, granting the mortgagee bank a deficiency judgment for that portion of the secured debt that could not be recovered through realization against the property. He found that the mortgagor had "affirmed the contractual relationship with the (bank) by making the required mortgage payments throughout the bankruptcy", concluding that "the contractual and statutory provisions continued to apply" and that the bank did not lose its right to claim a deficiency judgment by reason of the mortgagor's bankruptcy. There was no discussion of a doctrinal foundation for the view that maintenance of payments "affirms" a contractual relationship in such a way as to avoid the statutory release of the debt arising from that relationship.

Master Funduk was similarly faced with a submission based on *Seaboard* in *Scotia Mortgage Corp. v. Winchester*.[43] *Seaboard* was easily distinguished from the facts before him, since the bankrupt Winchester had not maintained loan payments after her discharge. However, Master Funduk's explanation of the reasoning in *Seaboard* is revealing. After quoting Lambert J.A. to the effect that there was a "continuation of the contract", and that the contract was "in effect . . . endorsed by the defendant after discharge",[44] he said: "What the court [in *Seaboard*] appears to say is that a new contract was entered into after the bankrupt went into bankruptcy. Post bankruptcy contracts are not caught by a bankruptcy."[45]

40. *Supra*, footnote 4.
41. With equal lack of exegesis, the Ontario Court of Appeal dismissed an appeal in *Manulife Bank of Canada v. Scalisi*, [1998] O.J. No. 774 (C.A.), offering these reasons: "The motions judge was correct in applying *Manulife Bank of Canada v. Planting* (1996) 43 C.B.R. (3d) 305 to the facts of this case." The judgment appealed from is similarly unreported.
42. [1998] A.J. No. 446, 220 A.R. 248, 4 C.B.R. (4th) 226 (Q.B.).
43. *Supra*, footnote 23.
44. The quoted passages are taken from *Seaboard*, *supra*, footnote 1, at pp. 146-47.
45. *Ibid.*, at p. 146.

This observation is surprising, given that Lambert J.A. explicitly denied a novation of the contract. It may, however, have been motivated by Master Funduk's reluctance to acknowledge the anomalous concept of a contractual "continuation" supporting post-discharge recovery of a deficiency. This supposition is consistent with his previously expressed view that the amount owing on the mortgage as at the date of bankruptcy was a claim provable in the bankruptcy, and was thus discharged through the operation of s. 178(2).[46]

One might speculate on tenable explanations for this cluster of cases, but to do so at any length is not likely to be particularly profitable. However, it is worth observing that *Seaboard*, *Manulife* and *Stenerson* all involved the pursuit of a deficiency claim by a creditor who was owed a debt enforceable through the exercise of a proprietary entitlement.[47] If the debts subject to collection in these cases had been unrelated to a proprietary claim held by the creditor, it seems highly unlikely that the courts would have found them fully recoverable after discharge solely on the basis of the continuation of payments, whether the creditor had filed a proof of claim in the bankruptcy or not. The maintenance of payments through bankruptcy and following discharge in such a situation would almost certainly signify nothing more than misjudgment or ignorance on the part of the debtor. The emasculation of the mandatory wording of s. 178(2) through an undeveloped theory of "continuation" of the contract would, in such circumstances, be quite unacceptable.

The courts' judgments in *Seaboard* and *Manulife* are doctrinally insupportable. However, some might argue that there are, in cases of this kind, good policy reasons for the post-discharge enforcement of a contractual obligation incurred before bankruptcy. Such an obligation may be enforced after a bankrupt's discharge if there is a novation of the original contract through a new agreement between debtor and creditor. If the revival of a pre-bankruptcy debt through novation is permissible, why is the preservation of

46. *Ibid.*, at p. 144.
47. Both *Manulife* and *Stenerson* involved deficiency claims arising from real property mortgages that the debtors had unsuccessfully attempted to maintain in order to avert foreclosure. The decisions may have been influenced by a misconception of the "hands off" approach chosen by Parliament with respect to secured creditors' rights against the property of their bankrupt debtors. However, the post-discharge survival of the security interest must not be confused with the enforceability of the underlying debt.

that debt through post-discharge "continuation" or "affirmation" so objectionable?

In both *Seaboard* and *Manulife*, the courts found that there had not been a novation of the contracts in question. These findings were appropriate, since the debtor clearly had not promised in either case to pay the full amount of the debt outstanding in return for the creditor's agreement to refrain from exercising rights of seizure. A novation or, to use more conventional terminology, a renegotiation of the original contract is defensible on the ground that the debtor is given an opportunity to direct her mind to the question of whether the collateral in question is so important to her that its retention justifies payment of a debt from which she would otherwise be released. If she decides that it is, the bargain manifested by the new contract is enforceable, regardless of the objective value of the collateral as compared with the sum to be paid.[48] If such a contract is tainted by duress or unconscionability, the question of enforceability can be addressed on that basis.

Unfortunately, the courts in *Seaboard* and *Manulife* effectively imposed a contractual novation on the debtors where they had been given no opportunity to consider and decide the pertinent question. In each case, the contract was renegotiated and the original contractual obligations renewed by the court on the debtors' behalf on the basis of a course of conduct that, in the courts' own view, did not support a finding of intentional novation.[49]

There is no data available in Canada from which inferences may be drawn regarding the frequency of post-bankruptcy renegotiation or novation of contractual obligations supporting a claim provable in bankruptcy. Informal investigations suggest that pre-bankruptcy

48. The conceptual justification for enforcement of a reaffirmation agreement made after the debtor's discharge should apply equally to one made after bankruptcy but before discharge. If a debtor can revive a pre-bankruptcy debt by agreeing to pay it after the debt has become unenforceable, surely she can do so prospectively by renegotiating terms of payment before the debt becomes unenforceable, provided that she is a bankrupt at the date of the new agreement. BIA s. 178(2) relieves the bankrupt of claims "provable in bankruptcy", which by definition are debts and liabilities arising from obligations incurred prior to the date of bankruptcy (s. 121(1)). These obligations can be identified at any time after the commencement of the bankruptcy, whether before or after discharge.

49. In *Tildesley v. Weaver, supra,* footnote 21, the court held that a positive promise made after the debtor's discharge to pay a pre-bankruptcy debt was not enforceable in the absence of consideration. The argument that a moral obligation to pay debts released through bankruptcy constituted consideration for a promissory note given by the debtor was rejected.

secured payment obligations are often renegotiated after the institution of bankruptcy proceedings with a view to enabling consumer debtors to remain in possession of the collateral. However, it appears that banks, at least, may be satisfied with short-term repayment of a sum approximating the current market value of the collateral. The deficiency is frequently written off.[50]

The situation in the United States is dramatically different. There, novation through what is known as "reaffirmation" agreements is commonplace, particularly in the context of secured credit.[51] However, such agreements are expressly contemplated and regulated by statute, apparently in recognition of the possibility that debtors may be manipulated into unfair reaffirmations by creditors exploiting the opportunity to revitalize debt that would otherwise be discharged.[52] In many cases, a debtor has a significant personal interest in retention of the item of collateral in question, either because she views it as a necessity or because she has some emotional or aesthetic attachment to it. The difference between the personal value of the collateral to the debtor and its market or resale value has appropriately been called its "hostage value".[53] Where collateral has significant hostage value, the debtor may be prepared to repay a sum significantly greater than its market value for the sake of avoiding repossession.

The United States Bankruptcy Code attempts to protect debtors who may, for these and other reasons, be subject to creditor manipulation. It provides that reaffirmations must be made before the

50. These observations are, admittedly, quite speculative in that they are not supported by comprehensive empirical investigation and are based instead on informal conversations with a random selection of bankruptcy trustees and bank officials, addressing the question primarily in a consumer context. However, they appear to be borne out by the paucity of case law addressing disputes that might be expected to arise from contracts renegotiated after the onset of bankruptcy. The issue is, of course, quite different in a situation involving an incorporated debtor, since such debtors are not entitled to a discharge unless their creditors have been paid in full: see BIA s. 169(4). Business debtors who wish to restructure their financing are likely to do so through a "Division I" proposal to creditors: see BIA ss. 50-66.

51. For a discussion of the use of reaffirmation agreements in the United States, see Elizabeth Warren, "A Principled Approach to Consumer Bankruptcy" (1997), 71 Am. Bank. L.J. 483 at note 38.

52. See 11 U.S.C. § 524(c).

53. I owe this expression to Professor William C. Whitford, Emeritus Professor of Law at the University of Wisconsin-Madison. He in turn ascribes it to Robert E. Scott, "Rethinking the Regulation of Coercive Creditor Remedies" (1989), 89 Col. L. Rev. 730. Professor Whitford also deserves my sincere gratitude for his enormous contribution to my understanding of American bankruptcy law, and for his enrichment of my own thinking on the problems discussed in this article.

bankrupt's discharge, and that evidence must be presented to the bankruptcy court through the affidavit of an attorney indicating that the bankrupt has been properly advised and that the agreement is not unduly onerous. If the bankrupt is not represented by a lawyer, the court must hold a hearing to determine if the reaffirmation is in the best interest of the debtor, unless the collateral is real property.[54]

The American position on this question explicitly recognizes the risk of injustice inherent in legal practices that deny discharged bankrupts the debt relief that the bankruptcy system is designed to provide. A departure from the fundamental policies represented by the discharge provision of the BIA is unjustified in the absence of a thoughtful and persuasive argument to the contrary. *Seaboard* and the decisions following it offer no such argument. In the absence of a manifest novation of the contract giving rise to pre-bankruptcy debt or payment obligations, such obligations should therefore not be enforced against the debtor personally following her discharge from bankruptcy.

III. THE SECURED CREDITOR'S RIGHT TO ENFORCE THE SECURITY INTEREST AGAINST EQUITY ACCRUING OR PROPERTY ACQUIRED AFTER THE DEBTOR'S DISCHARGE FROM BANKRUPTCY

There is no doubt that a secured creditor's proprietary interest in the debtor's property survives the debtor's bankruptcy and her discharge. To the extent that a bankrupt's property is subject to the proprietary rights of another person, it is not regarded as "property of the bankrupt" and does not vest in the trustee for distribution among the bankrupt's unsecured creditors.[55] If the debtor is in default under the terms of a contract conferring a security interest, the secured creditor is therefore entitled to recover the debt secured by that interest through seizure and sale of the collateral at any

54. In spite of the statutory protections offered bankrupts by the Bankruptcy Code, the National Bankruptcy Review Commission concluded in its recent report that debtors are exploited by some creditors, particularly those who exercise the leverage created by their rights of realization against collateral to extort the reaffirmation of disproportionate levels of debt. See Warren, *supra*, footnote 51.

55. See text at footnote 9.

time,[56] whether during the bankruptcy, or following the bankrupt's discharge.[57] Since security agreements invariably provide that the initiation of bankruptcy proceedings by either the debtor or a third party constitutes a default in performance by the debtor, secured creditors' rights of realization are triggered by the bankruptcy itself, regardless of whether the debtor is delinquent in fulfilment of her payment obligations.[58]

Security interests are taken to satisfy a simple functional objective, namely, to ensure that the debt secured will be paid. In the event that the debtor fails or refuses to pay, the value of the property subject to the security interest (the collateral) may be applied towards satisfaction of the debt, ordinarily through the proceeds of its sale. Since bankruptcy, or the financial crisis inducing it, is one of the most common reasons for a debtor's failure to repay debt, the provision of security would offer little protection to a secured creditor if her rights of realization were terminated by bankruptcy. This objective justifies the protection of secured creditors' rights in property acquired by the debtor before her bankruptcy. However, the essential objective of s. 178(2) of the BIA would be largely frustrated by the extension of those rights to property acquired by a debtor after her discharge.

The proper resolution of problems arising in connection with the proprietary claims of secured creditors depends upon an accurate conception of the nature of a security interest. The generic "security interest" in personal property defined by the Personal Property Security Acts of the Canadian provinces and territories is "an interest in personal property that secures payment or performance

56. This is subject to the procedural rules established by provincial legislation governing secured creditors' rights of realization against land and personal property respectively. Those sections of the BIA designed to enable the trustee to capture any equity the bankrupt might have in the collateral for the benefit of the estate may also come into play in appropriate circumstances: see ss. 69.3(2) and 127 to 134.

57. BIA s. 69.3(2) exempts secured creditors from the automatic stay imposed by s. 69.3(1). It effectively provides that a secured creditor may realize or otherwise deal with his security after the debtor's bankruptcy in the same manner as he could were the debtor not bankrupt.

58. Throughout this discussion, the term "security interest" is used generically and includes the interest of a mortgagee of land as well a security interest in personal property, unless the context indicates the latter connotation only. The terms "security agreement", "secured creditor" and "debtor" similarly include mortgage, mortgagee and mortgagor respectively.

of an obligation".[59] Such an interest does not represent a transfer of ownership from debtor to creditor. It is designed solely "to provide an alternative source of compensation should the debtor fail to perform her obligations to the secured party".[60]

The concept of a security interest in a debtor's property is, in the minds of many lawyers, filtered through the common law notions of property inculcated in every Canadian law student. However, the conceptual distortion created by that historic eyepiece has contributed to a lamentable lack of clarity in legal thinking on this subject. Lawyers schooled in the English common law tradition understand "property" in two related but significantly different senses. Property may be a corporeal or incorporeal "thing". Property of the "thing" type is the collateral subject to a security interest. However, lawyers may understand "property" quite differently in their conception of a person's relationship to property of the "thing" type. In that connotation property is a purely abstract entity denoting a cluster of rights relating to the collateral. The concept of "title", which in turn is associated with ownership, is central to the theoretical construct defining property of this kind.

This sort of thinking invites the legal mind to associate a security interest with title to the collateral, rather than with the collateral itself. The result is a great deal of needless confusion. A PPSA security interest is nothing more than the body of rights ascribed to its holder by statute. In essence it is a right to payment of a debt, enforceable against the collateral. This simply means that in the event of a default in payment, the secured creditor can appropriate the collateral to satisfaction of the secured debt in the manner prescribed by the statute — ordinarily, through seizure and sale. Because the right to satisfaction of the secured debt relates directly to identified property, a security interest is properly characterized as proprietary, though it is neither "title" nor "ownership" in the traditional sense.

59. Though the Canadian Personal Property Security Acts are not in all respects identical, they share the same basic conceptual and functional approach to security in personal property. All define a security interest in the same general terms. For example, see Personal Property Security Act, 1993, S.S. 1993, c. P-6.2, s. 2(*qq*)(i).

60. Cuming and Wood, *supra*, footnote 26, at p. 22. The authors also suggest that a security interest is roughly equivalent to the equitable charge.

The PPSA security interest may be viewed as the statutory analogue of the equitable charge,[61] which is in turn intimately related to the earlier "hypothecation" or hypothec of Roman law.[62] The latter has been described in these terms:[63]

> The property [subject to the hypothecation] is appropriated to the creditor so that on default he or she is entitled to pursue certain remedies against it and not merely against the debtor. The creditor has certain rights of a proprietary character, but they can only be realised in the event of default.

The rights conferred by a hypothec constitute an interest in the subject property in that they attach to and remain enforceable against it, even if it is sold or otherwise dealt with by the debtor. However, they are not rights of ownership. They simply symbolize an entitlement to the property for purposes of payment of a debt. Because the hypothec represents nothing more than security for a debt, it is dependent on the debt's continued existence.[64] Understood in these terms, it is not necessary to mediate a secured creditor's claim to collateral through the common law concept of title.[65] One need only understand that a security interest gives the creditor rights in and to the collateral itself, which rights derive solely from the right to repayment of the secured debt.

The rights of a mortgagee of land under the law governing a Torrens land registration system are equivalent in this sense to those conferred upon the holder of a security interest by the PPSA.[66] A Torrens system of land law governs real property rights in many of the provinces, as well as in the territories.[67] In Torrens jurisdictions, a

61. Cuming and Wood, *ibid.*
62. Ronald C.C. Cuming, "The Internationalization of Secured Financing Law: the Spreading Influence of the Concepts UCC, Article 9 and its Progeny", in *Making Commercial Law; Essays in Honour of Roy Goode* (Oxford, Clarendon Press, 1997), p. 507.
63. Eward I. Sykes and Sally Walker, *The Law of Securities*, 5th ed. (New South Wales, The Law Book Company Limited, 1993), pp. 17-20.
64. *Ibid.*, at p. 18.
65. The title of the debtor is relevant in that it is a precondition of attachment of a security interest to a particular item of collateral that the debtor own that collateral, or have proprietary rights in it — see Saskatchewan PPSA, s. 12. However, the security interest attaches to the collateral itself, not to the debtor's title. It can thus be enforced against the collateral even if it the debtor transfers her title to a third party: see the Saskatchewan PPSA, s. 30.
66. The mortgage of Torrens title land is described by Sykes and Walker, *supra*, footnote 63, at p. 18 as a charge of the kind comprised by the Roman hypothec.
67. The Torrens system is the only method of registration in Saskatchewan, Alberta, British Columbia, the Northwest Territories and the Yukon. The legislation in all of those jurisdictions is entitled the Land Titles Act: see e.g. R.S.S. 1978, c. L-5. The Torrens system co-exists with the old deed registration system in Manitoba, Ontario and New Brunswick: see Real Property Act, R.S.M. 1988, c. R30 (as amended), Land Titles Act, S.N.B. 1981, c. L-1.1 (as amended) and the Land Titles Act, R.S.O. 1990, c. L.5.

mortgagor retains title to the mortgaged land, subject to a charge in favour of the mortgagee arising from the contract of mortgage.[68] Like the PPSA security interest, this charge can be understood as the embodiment of the cluster of rights ascribed to the mortgagee by the pertinent statute.[69] Since the charge entitles the mortgagee to satisfy the mortgage debt through the proceeds of sale of the subject property or through acquisition of the mortgagor's title via foreclosure, it comprises a proprietary right or interest in the land. However, the proprietary interest held by a real property mortgagee does not represent a transfer of ownership from debtor to creditor.[70]

Both the personal property security interest and the charge created by a mortgage of land must therefore be conceived relative to the amount of debt secured. The secured creditor has a claim against the subject property only to the extent of the debt outstanding, for her fundamental right is simply a right to payment of the amount of the debt through the proceeds of sale of that property.[71]

The common law principles governing the rights of mortgagees in non-Torrens jurisdictions proceed on a different conceptual footing. At common law, a mortgagee obtains title to the land subject to the mortgage in accordance with the terms of the mortgage contract. The proprietary rights represented by "title" to property are envisaged as relating to the land as an undivided entity, embracing whatever value may inhere in it at a given point. Since title (unlike security) is not conceptually dependent on a right to payment, one might argue that in a non-Torrens system a mortgagee's proprietary rights are not defined or limited by the amount of the debt owed.

Statistics regarding the proportion of registrations made under the Torrens system in those jurisdictions as at the early 1990s may be found in Joseph E. Roach, *The Canadian Law of Mortgages of Land* (Toronto, Butterworths, 1993), pp. 8-9. Roach states that in Manitoba, over 95% of titles are registered under the Torrens system, while Torrens registrations amount to only 15% in Ontario and comprise a "very limited" number in New Brunswick.

68. The statutory mortgage or charge is described by Roach, *ibid.*, at pp. 8-16. See also W.B. Rayner and R.H. McLaren, *Falconbridge on Mortgages*, 4th ed. (Agincourt, Canada Law Book, 1977), pp. 205-10.
69. See *ibid.* at p. 209.
70. *Smith v. Nat. Trust Co.* (1912), 45 S.C.R. 618 at pp. 639-40.
71. Both a mortgagee of land and the holder of a PPSA security interest may in some circumstances elect to take title to the property in satisfaction of the debt as an alternative to sale. However, they will not in practice be permitted to do so where the property is worth more than the debt secured. *Cf.* Roach, *supra*, footnote 67, at pp. 93-94, a section headed "Conversion from Foreclosure to Sale".

However, this view ignores the fact that the judicial invention of the mortgagor's equity of redemption has qualified the character of a mortgagee's title in a very significant way. The limits of space preclude an exhaustive analysis of the development of the equity of redemption. However, it is said to constitute the mortgagor owner of the property, subject to the legal rights of the mortgagee.[72] In *Petranik v. Dale*, Dickson J. stated the law as summarized by Kekewitch J. in *Tarn v. Turner*, who described the equity of redemption as an equitable estate amounting to "a fee simple subject to a charge".[73]

The legal rights of the mortgagee are therefore necessarily qualified by the amount of debt secured by the mortgage. She is entitled to exercise her rights of realization through foreclosure or sale for the sole purpose of satisfying her monetary claim. A common law mortgage thus operates in the same way as does a Torrens system mortgage, though its historic origins may colour a modern lawyer's view of its legal effect.

The proprietary rights associated with all forms of security survive the debtor's bankruptcy, subject to the operation of s. 178(2). Though the debt supporting a security interest is released by that provision at the date of the bankrupt's discharge,[74] the secured creditor's proprietary rights in and to collateral in existence at that point are unimpaired. However, the principles described above dictate that release of the debt precludes attachment of the security interest to property acquired by the debtor thereafter.

Whether the effect of s. 178(2) is to extinguish the debt or to render it unenforceable, it cannot support the creation of an interest in property acquired after the date of discharge. It would be nonsensical to argue that an unenforceable debt can support a security interest, for if the debt is unenforceable, the secured creditor can *ipso facto* have no right to take collateral to enforce its payment.

The language employed by many courts in connection with the operation of s. 178(2) suggests that pre-bankruptcy debt is extinguished by the bankrupt's discharge. However, the choice of

72. *Petranik v. Dale*, [1977] 2 S.C.R. 959 at p. 986, 69 D.L.R. (3d) 411 at p. 432, *per* Dickson J. quoting from Holdsworth. The relevant principles are discussed by Roach, *supra*, footnote 67, under the heading "Nature of the Equity of Redemption" at pp. 33-35, and at p. 311.

73. *Petranik, ibid.*, at p. 432 D.L.R., citing *Tarn v. Turner* (1988), 39 Ch. D. 456 at p. 460, 58 L.T. 558 at p. 559.

74. See text at footnotes 15 to 24.

vocabulary does not necessarily reflect a considered decision on this question, since it is typically addressed to a different point. It appears in connection with assertion of the principle that debt incurred before bankruptcy cannot be recovered by a secured creditor following the debtor's discharge, which principle can be supported on either view. The theory that the debt is only rendered unenforceable by s. 178(2) is preferable to the alternative, because it accounts for the continued viability of a secured creditor's proprietary interest. Since that interest represents nothing more than a right to resort to the subject property for payment of the debt, the notion that the proprietary right survives extinction of the debt is conceptually untenable.

The rights of a secured creditor attempting to enforce her security after the debtor's discharge from bankruptcy have been addressed in several cases. In *Manufacturer's Life Insurance Co. v. Burton,*[75] Robins J. said:[76]

> While s. 148(2) [now 178(2)] extinguishes the debts owed by a bankrupt at the time of bankruptcy, it does not release the security of a creditor which validly existed at the time of bankruptcy; the security continues in force although, as *Bye* and *Pelyea* establish, it cannot attach to assets which come into existence subsequent to the date of discharge.

The authorities referred to are *Holy Rosary Parish Credit Union Ltd. v. Bye*[77] and *Pelyea v. Canada Packers Employees Credit Union.*[78] The importance of the Supreme Court of Canada's decision in *Holy Parish* cannot be overstated. It held that an assignment of wages given before the debtor's bankruptcy could not be enforced against wages that accrued due to him after his discharge. The decision rested on the finding that the debt underlying the assignment was released by the discharge provision of the statute. The assignment attached to wages due prior to discharge and on that basis could be enforced as a vested proprietary interest even after discharge. However, release of the debt meant that nothing remained after discharge to support a further proprietary claim. Similarly, in *Pelyea,* the Ontario Court of Appeal granted a credit union's post-bankruptcy claim to enforce an assignment of the debtor's interest in an employee profit-sharing plan to the extent of money accrued

75. *Supra,* footnote 20.
76. *Ibid.,* at p. 212.
77. *Supra,* footnote 16.
78. *Supra,* footnote 11.

due to him at, but not after, the date of his discharge. The court cited *Holy Rosary* in support of its conclusion.[79]

The decisions in these cases are readily understood and indisputably correct. The nature of the collateral claimed by the secured creditors was such that a clear distinction could be drawn between property in existence at the date of discharge and property acquired by the debtor after discharge. Units of property acquired before the moment of discharge were available to the secured creditor, while those acquired thereafter were not. Quite different circumstances were presented to the Saskatchewan Court of Appeal in *Andrew v. FarmStart*.[80]

In *FarmStart*, a parcel of land owned by the bankrupt was subject to three mortgages, the first two of which secured debts cumulatively greater than the value of the land. FarmStart, the governmental lending agency holding the third mortgage on the land, accordingly filed in the bankruptcy as a preferred creditor, on the basis that the value of its security was nil. A small dividend was paid on its claim and the bankrupt was discharged. The debts secured by the first and second mortgages were thereafter paid and the mortgages discharged from the debtor's title, substantially increasing the mortgagor's equity in the property.[81] When the mortgagor subsequently sold the land, FarmStart asserted a claim to the proceeds on the basis of its mortgage, which was still registered. Both the majority and dissenting judgments focused primarily on the question of whether FarmStart had, by its conduct, surrendered its security to the trustee, thereby precluding subsequent reliance on its proprietary rights. However, having established that the security had not been surrendered, the majority went on to hold that FarmStart was entitled to assert its claim as mortgagee on the ground that,

79. *Ibid.*, at p. 291.
80. *Supra*, footnote 2.
81. Use of the term "equity" is not strictly accurate in this context, since it originated as an abbreviated reference to a mortgagor's equity of redemption in property subject to a common law mortgage. Under such a mortgage, the mortgagee acquires legal title to the property, subject to the mortgagor's right, pursuant to the equity of redemption, to demand a reconveyance upon satisfaction of the mortgage debt. In a Torrens or PPSA system, the debtor need not invoke an equity of redemption to recover title to her property on payment of the secured debt because she retains title throughout the transaction. However, the term is commonly used by lawyers and others to describe that portion of the total value of an item of collateral that is not subject to the secured creditor's claim for payment of the secured debt — that is, the difference between the value of the collateral and the outstanding debt.

"A secured creditor may realize upon his security after discharge of the bankrupt."[82] The court relied on *Pelyea* as authority.

The question of the mortgagee's post-discharge rights was complicated in this case by the fact that it was not claiming a new unit of property acquired by the mortgagor after bankruptcy. The parcel of land subject to the secured claim remained the same throughout. However, the debtor's equity in the land had increased in value following his discharge, and it was that newly acquired equity that the third mortgagee sought to attach.

In assessing FarmStart's post-discharge claim, the court did not rigorously examine the nature of a mortgagee's rights in the property comprising the collateral. Instead, it took the reasoning that in *Pelyea* determined a secured creditor's claim to units of property acquired by the bankrupt debtor before her discharge and applied it uncritically to FarmStart's claim to equity acquired after the debtor's discharge, which is quite a different thing. The resulting decision was, in the respectful view of the author, wrong.

FarmStart was decided in the legal context of a Torrens system of land law. Since the charge held by a mortgagee under that system is wholly accessory to the right to be paid the debt secured, it cannot attach to property of any kind acquired by the debtor once the debt has become unenforceable. The operation of this principle may be demonstrated through the metaphorical conception of the collateral in that case as a "pool" of value containing 150,000 units, each worth $1.

In *FarmStart*, the "pool" was subject to a first mortgage securing a debt of $100,000, a second mortgage securing $75,000 and FarmStart's third mortgage, securing just over $19,000. To quote the court:[83]

> It is common ground that at all times, up to and including the date of the discharge of the bankrupt and the trustee in bankruptcy, the value of the third mortgage in favour of the respondent was nothing, because the amount due on the first and second mortgages exceeded the value of the land.

Though the debts of the first and second mortgagees were secured by mortgages on the "pool" as a single entity, neither were

82. *Supra*, footnote 2, at p. 139.

83. *Ibid.*, at p. 132. Though the quantum of debt owed was indicated in the judgment, the value of the land was not. The sum of $150,000 chosen for the hypothetical is therefore a speculative amount, being less than the debt cumulatively owed the first two mortgagees. The calculations referable to that sum are similarly figurative.

entitled to its entire value. In the event of the mortgagor's default, each was entitled to take from the "pool" units of value equivalent to the amount of debt they were owed. Since the "pool" could only be sold as a whole (which is, of course, the case if it represents a single item of collateral), the mortgagees were entitled to seize and sell it, and apply the proceeds realized to satisfaction of the secured debts in order of their priority.

The second mortgagee was apparently undersecured. Since the right to payment, embodied in their interest, could only be satisfied through the value of the collateral, its claim was, on the facts hypothesized, unsecured to the extent of $25,000. There simply were not enough units of value in the "pool" to satisfy its claim.

As at the date of discharge, the debt owed FarmStart was fully unsecured. Since the proprietary interest represented by a mortgage is simply a right to payment attaching to the collateral, FarmStart in fact had no such interest at that time. There were no units of value available in the "pool" to be applied to payment of its claim. Though FarmStart had registered a claim against the debtor's title, there was no property to which a third mortgagee could attach. The declaration of FarmStart's claim through registration of a document could not create an interest in non-existent property.[84] When this fact is recognized, the application of the reasoning of the Supreme Court of Canada in *Holy Rosary*, echoed by the Ontario Court of Appeal in *Pelyea*, is fatal to FarmStart's post-discharge claim. Since the debt obligation arising from the contract of mortgage had already been released, there was nothing upon which FarmStart could base a proprietary claim dependent by definition on a right to payment of a debt.

This analysis exposes the error in the court's application of the reasoning in *Pelyea* to FarmStart's claim. *Pelyea* affirmed the principle that a secured creditor cannot claim an interest in property acquired by the debtor after his discharge from bankruptcy. The post-discharge accretion of equity through the "freeing up" of units of value in the "pool" is the same as the acquisition of new units of value, or property by the debtor. The outcome in a case like FarmStart should be the same whether the debtor acquires

84. It is not clear whether the property was ever of sufficient value to support FarmStart's mortgage. If it was, the proprietary interest they had at that time was lost by devaluation of the property (*i.e.*, the loss of the units of value in the "pool" to which the interest was attached).

new equity following her discharge through the satisfaction of prior secured claims, through appreciation in the value of the collateral or through the acquisition of a new item of collateral.

The situation in *FarmStart* may be compared to one in which a creditor claims a security interest in all the debtor's present and after-acquired property. If, for example, the debtor had purchased a new combine rather than paying off the first two mortgages, a security interest registered by FarmStart against all his present and after-acquired property could not have been claimed in that combine. Why? Because the debt secured would no longer have been enforceable, and thus could not have supported a security interest representing a right to payment of that debt. The fact that money was invested in the acquisition of equity in the debtor's land rather than a new physical asset should not affect the parties' position.

A critic of this view might argue that the explanatory device of the hypothetical "pool" represents a misconception of the relationship between the interest of a secured creditor and the property held as collateral. The hypothetical draws a direct relationship between the amount of the debt secured and correlative units of value in the collateral. On the critic's view, a secured creditor's interest represents a proprietary right attaching to the whole of the debtor's title. If the debtor defaults under the security agreement, the secured creditor is therefore entitled to assume all the rights of ownership associated with title to the collateral. This is consistent with the common law basis for the exercise of rights of foreclosure by a mortgagee. The mortgagee may foreclose the mortgagor's equity of redemption in the event of her default, thereby freeing her existing legal title of the interest of the mortgagor and anyone asserting an interest in the equity of redemption (most notably, subsequent mortgagees). The mortgagee thus becomes owner of the collateral and may apply its entire value to satisfaction of the mortgage debt. The value of the collateral at the date of the debtor's discharge is, on this view, simply irrelevant.

There is a certain metaphysical appeal to this argument. Its plausibility stems from the abstraction of the English common law conception of title to property, embracing as it does an invisible but nonetheless real universe of legal and equitable titles and interests of considerable variety, each of which is conceived of as an idea — a concept of indeterminate size and value — not a monetary claim. However, if such a universe once existed, it has been supplanted both by new statutory doctrine and a new commercial reality.

Under Torrens land titles legislation and the contemporary PPSAs, a mortgage or security interest represents nothing more than a monetary claim associated with identified physical property. It is neither ownership, nor a right to become owner.[85] As such, the amount of the claim necessarily represents the notional "size" of the secured creditor's interest, and therefore relates directly to the monetary value of the collateral. The debt supporting that claim is in fact secured only to the extent that the collateral is of sufficient value to satisfy it.[86]

85. In some circumstances, a mortgagee may obtain an order of foreclosure, which does vest title to the property in the mortgagee. Similarly, the PPSAs permit a secured creditor to elect to retain collateral in satisfaction of her claim to the secured debt — an election which in effect operates in the same way as a judicial foreclosure. However, secured creditors will not be allowed to exercise these remedies if the debtor has equity in the property (as did the debtor in FarmStart). In such cases, the collateral must be sold, and the proceeds apportioned between the secured creditor and the debtor. Foreclosure does not, therefore, represent the exercise of rights of ownership. It simply constitutes a payment device that may be invoked where the secured creditor's claim is established, and is equal to or greater than the value of the collateral. Rather than selling the collateral and applying all of the proceeds to the existing debt, the secured creditor keeps the collateral itself: see *supra*, footnote 68.

86. This characterization of a security interest is, of course, not limited in application to the resolution of questions of entitlement arising in connection with the debtor's bankruptcy. At first blush, it may seem inconsistent with the PPSA usage of the terms "secured creditor" and "security interest", since it suggests that persons can qualify as secured creditors or as holders of security interests only if the property designated as collateral has sufficient value to support their claim. For example, one who has registered a financing statement against collateral that is fully encumbered by prior interests would not be "secured" and could not profess to hold a security interest in that collateral. However, while such a person may not hold the substantive rights associated with a security interest, she must be viewed as having the procedural rights ascribed to a secured creditor under the Act. The conceptual view of a security interest advanced in this article does not preclude the conferral of procedural rights on persons who *claim* to hold a security interest. A creditor who registers a financing statement under the PPSA is presumptively treated as a secured creditor under the Act, for purposes of determining her rights in the collateral or challenging the rights of another, regardless of whether the collateral has sufficient value to support her alleged interest. She is entitled to the notices prescribed in the Act and may otherwise avail herself of its procedural provisions. The substantive issue of whether she is in fact secured and is as such entitled to participate in the value of the collateral may hinge on questions of valuation and priority that depend upon the application of provisions of the Act itself. A person claiming to hold a security interest must therefore be allowed the benefit of those provisions as a "secured creditor" until such time as it is determined that she is substantively unsecured in whole or in part. However, the right to resort to the statutory provisions directed to procedure and standing cannot transform an obligation that is in substance unsecured to one supported by a proprietary entitlement. The semantic complexity of framing each provision of the Act so as to identify whether it applies to a person who in fact has a security interest, to one who simply claims a security interest, or to both, would be

The common law mortgagee does formally acquire title to the mortgaged land. However, that title is not substantively the same as ownership. It is the substantive and functional equivalent of the charge represented by a PPSA security interest or a Torrens system mortgage. A common law mortgagee who is owed less than the value of the mortgaged property is not permitted to foreclose the equity of redemption. The mortgage debt must be recovered through sale of the property, just as it would in a Torrens jurisdiction. From a policy perspective, there is no reason to differentiate between a Torrens system mortgage and a common law mortgage.[87] A mortgage in any Canadian common law jurisdiction is nothing more than security for a monetary payment obligation. The determination of a mortgagee's proprietary rights according to an anachronistic conception of the parties' respective titles would truly amount to a triumph of form over substance.

The view that the security interests created by modern legislation are not defined in monetary terms is functionally unrealistic as well as doctrinally unsound. Secured creditors in fact define a security interest by its relationship to the monetary value of the collateral — not by a metaphysical notion of entitlement to an undesignated share in an indeterminate legal abstraction. In the modern world of secured credit, property and proprietary interests are items of commercial value defined by the monetary sum indicative of their worth.

The correct approach to problems of this kind is illustrated by the judgment of Ferguson J. in *Patrie v. Royal Bank*.[88] The facts directly parallel those of *FarmStart*, except that the collateral in issue was an automobile, rather than land. At the time of the bankrupt's discharge, two security interests were registered against the vehicle as collateral. Because its value was less than the amount required to satisfy the debt owed the first secured creditor, the bank, as holder of the subordinate security interest, filed a proof of claim

overwhelming, particularly in view of the fact that a person who falls within one category at one point in time might subsequently fall into another. Though the terminology of "secured creditor" and "security interest" may not, therefore, relate directly to any one of those substantive meanings, the meaning and effect of a given provision is readily ascertainable if interpreted in accordance with the conceptual and functional structure of the Act.

87. "Common law" here includes second and subsequent mortgages, which are in fact equitable mortgages. For a summary explanation of such mortgages, see Roach, *supra*, footnote 67, at p. 311.

88. (1994), 27 C.B.R. (3d) 89 (Ont. Ct. (Gen. Div.)).

in the bankruptcy as an unsecured creditor. After the bankrupt's discharge, the first security interest was satisfied through payment in full of the debt secured. The bank then sought to enforce its alleged security interest in the vehicle. In vacating the registration of the bank's security interest and denying its claim, the court reasoned as follows:[89]

> What happened in the present case is that the bankrupt acquired additional property after his discharge in the form of unencumbered equity in the vehicle. That additional property is not subject to the (bank's) security agreement. At the time of the bankrupt's discharge, there was no property for the (bank's) lien to apply to as the entire value was subject to the prior secured interest of CIBC . . .

The court quoted and, in this case, properly applied *Pelyea* as authority for its decision.

The conclusion that post-discharge accretions in the value of collateral are not subject to a secured creditor's proprietary claim may require valuation of the collateral as at the date of discharge. In most cases, the collateral will consist of property that can be appraised quite readily using market values. However, circumstances of the kind presented to the Saskatchewan Court of Appeal in *Chetty v. Burlingham Associates Inc.* are more problematic. In that case, the court considered the claim of a bank to a security interest in fees paid to a lawyer after his discharge from bankruptcy.[90] The fees were payable on a contingency basis under a contract made before the lawyer's bankruptcy. The lawyer achieved a settlement of the client's claim about three months after his discharge. However, he apparently had rendered services on the client's behalf both before and after his assignment, and subsequent to his

89. *Ibid.*, at p. 92.

90. (1995), 121 D.L.R. (4th) 297, 31 C.B.R. (3d) 161 (Sask. C.A.). The fees were initially claimed by the trustee in bankruptcy for the benefit of the estate. When the bank became aware of the payment, it demanded payment of the amount owed it pursuant to its general security agreement and assignment of accounts. The facts do not indicate whether the bank's claim was less than the amount of the payment, but the fact that the trustee was party to the action and the manner in which the court framed its judgment suggest that it must have been. The judgment was primarily addressed to the question of whether the "contract" between the bankrupt and his clients was property of the bankrupt within the meaning of the BIA, such that it vested in the trustee as part of the bankruptcy estate. The court concluded that it was, though it might more accurately have framed its analysis in terms of whether the right of payment under the contract, rather than the contract as such, was property of the bankrupt. Having decided that point, the court concluded rather summarily that the bank was entitled to have its claim satisfied from the proceeds of the contract.

discharge. Relying on *FarmStart*, the court found that the lawyer's discharge did not prevent the bank from relying on its security. However, that conclusion is valid only on the assumption that the account was, at the date of discharge, worth the sum ultimately paid. Since the contingency triggering the right to payment had not occurred as at the date of discharge and might never have occurred, it might be argued that at the critical time the account was worth nothing.[91]

The conclusion that a secured creditor is not entitled to accretions in the value of collateral (or of the debtor's equity in it) occurring after the debtor's discharge from bankruptcy has been justified on doctrinal or conceptual grounds. It is also supported by the widely acknowledged social and economic policies underlying the fresh start principle of bankruptcy law, mentioned earlier.[92] The relevance of that principle in this connection is demonstrated by the Saskatchewan Court of Appeal's decision in *Zemlack v. Deloitte, Haskins & Sells Ltd.*,[93] which addressed a trustee's claim to equity in land acquired by a debtor after her discharge from bankruptcy.

The decision in *Zemlack* rested on the findings that there was no non-exempt equity in the home at the time of the discharge, and that non-exempt property acquired by the bankrupt through appreciation in the value of the home after discharge could not be appropriated to payment of the discharged debtor's debts. The court viewed the post-discharge appreciation in the debtor's equity as property acquired after discharge. It pointed out that the fresh start policy was manifested in the principle that post-discharge earnings and acquisitions are immune from attachment by the bankrupt's creditors. If such earnings and acquisitions are used to pay down the mortgage on the bankrupt's home, thereby increasing its equity, they should no more be subject to the claims of the debtor's creditors than if they are invested elsewhere.[94] Implicitly,

91. Leave to appeal the decision to the Supreme Court of Canada was refused without reasons: (1995), 34 C.B.R. (3d) 73*n*, 126 D.L.R. (4th) vii. The issues raised on the application for appeal included (a) whether the bankrupt's right of payment under the contingency agreement was "property of the bankrupt", (b) if so, whether the property should have been valued at the date of bankruptcy for purposes of determining the trustee's entitlement, and (c) whether the bank's security interest attached to the contingency fees.

92. See text at footnote 24.

93. [1987] 6 W.W.R. 114, 66 C.B.R. (N.S.) 1.

94. *Ibid.*, at pp. 125-26 W.W.R.

the same reasoning was relevant both to property acquired by the debtor after her discharge in bankruptcy through appreciation in the value of the collateral (the actual situation in *Zemlack*), and to property that might be acquired through an increase in the debtor's equity achieved by the payment of secured claims (the situation hypothesized by the court in *Zemlack*). The court concluded that the trustee was not entitled to maintain a caveat against the bankrupt's title after her discharge from bankruptcy.

Some would argue that this outcome is, in the context of secured financing, unfair to secured creditors who advance credit or funds on the basis of an expectation that they can recover from whatever value the collateral may have at the date of realization. However, this argument assumes an improbable lack of financial sophistication on the part of secured creditors. Secured credit is undoubtedly advanced on terms reflecting the likelihood that it will be recovered through realization in the event of the debtor's bankruptcy. Such factors as the existence of prior security interests, the possibility of bankruptcy and the potential realization value of the collateral when bankruptcy occurs are surely included in creditors' lending decisions. If the risk turns out to be higher than anticipated, there is no reason to shift it to the debtor, particularly at the expense of essential principles of bankruptcy law.

The fact that a secured creditor is in a position to preserve her right to recover pre-bankruptcy debt if the debtor can be persuaded to renegotiate the security agreement is also pertinent. A novation occurring after the date of bankruptcy[95] will preserve the enforceability of the debt. If the collateral, or the debtor's equity in it, appreciates after the bankrupt's discharge, the still vital debt may attach to that increase in value. This would alter the outcome in any case in which a creditor's inability to assert a secured claim after the debtor's discharge is otherwise dictated by the release of the debt upon which the claim depends.

IV. CONCLUSION

Canadian bankruptcy law protects the realization rights deriving from security interests to such an extent that the general assumption that secured creditors are unaffected by their debtors' bankruptcy is understandable. However, that assumption has

95. The date of bankruptcy is the date of filing of the petition or assignment. See BIA s. 2.1.

demonstrably led to fuzzy legal thinking about secured creditors' post-discharge remedies in a number of cases.

The view that the decisions in *Seaboard Acceptance Corporation Ltd. v. Moen*[96] and *Manulife Bank of Canada v. Planting*[97] are wrong is, one would think, fairly uncontroversial. Section 178(2) of the BIA clearly relieves bankrupt debtors of any obligation to pay pre-bankruptcy debt after their discharge. If interpretive authority for this conclusion were ever required, it was clearly provided by the Supreme Court of Canada in *Holy Rosary Parish (Thorold) Credit Union Ltd. v. Bye*[98] Discharged bankrupts are released of their personal obligation to pay secured debt after bankruptcy, whether or not they have maintained payments on a voluntary basis during the bankruptcy proceedings or thereafter.

In *Holy Rosary*, the Supreme Court made it equally clear that security interests cannot be enforced against property acquired by bankrupt debtors after their discharge. Post-discharge accretions in a debtor's equity in property subject to a pre-bankruptcy security interest is in reality after-acquired property. Following *Holy Rosary*, it is therefore not subject to the proprietary claim of the secured creditor, a conclusion antithetical to the decision of the Saskatchewan Court of Appeal in *Andrew v. FarmStart*. The validity of this conclusion may be less than obvious to lawyers understandably constrained by the conceptual stipulations of traditional title-based thinking about security. However, it is clearly mandated by the doctrinal infrastructure of contemporary security interests, as well as by the policy and principles of bankruptcy law.

The position of secured creditors faced with their debtors' bankruptcy is, under existing bankruptcy law, "as good as it gets". If it is to get better yet, let that be the result of the considered judgment of Parliament, not the inadvertence of lawyers.

96. *Supra*, footnote 1.
97. *Supra*, footnote 4.
98. *Supra*, footnote 16.