Avoiding Bankruptcy at a High Cost: The Dangers of the Canadian Debt Relief Industry

Stephanie Ben-Ishai[1] *and Emily Han*[2]

Canadian debt relief can come in different and often unclear forms, including providing refinancing offerings, counselling sessions and defending against debt enforcement. New and emerging forms of consumer lending have offered convenience and quick access to funds, but may have compromised transparency of loan terms or are monitored in a fragmented regulatory landscape. Debt counsellors and debt settlement services often offer overlapping services, make referrals to each other and impose non-standardized fees on individual debtors. Overall, a complicated regulatory and industry framework has developed in Canada as a result of the interaction between the broad but largely unregulated debt relief industry, which assist debtors before the initiation of bankruptcy, and the highly concentrated and regulated consumer bankruptcy process.

This article's central thesis is that without transparency in these debt relief industries and a more wholistic regulatory approach to debt relief regulation, conflicts of interest and inadequate service standards will interfere with consumers' ability to make informed decisions and regain financial stability. For debtors who experience deteriorating financial circumstances, many look to various counselling and debt relief options to avoid the often prohibitive costs associated with bankruptcy. In this space of financial distress and uncertainty, there is room for predatory debt relief providers to extract profits without adding benefits to vulnerable consumers — a risk that is exemplified by the class-action suit in Pearce v. 4 Pillars Consulting Group Inc.[3] *While advancing consumer protection can come in the form of policy development and improving access to legal services, it is also important to strengthen consistent enforcement of existing regulations. This article*

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1 Distinguished Research Professor, Osgoode Hall Law School. Sben-ishai@osgoode.yorku.ca. The authors thank Professor Gail Henderson for helpful comments and also participants in the 2023 Queen's Commercial Law Symposium. We also wish to acknowledge that the themes explored in this article are related to a larger empirical project testing assumptions around fees in bankruptcy, among other issues, together with Professors Kulkarni and Irving at the University of Virginia. The funding provided by the Law Foundation of Canada and the Social Sciences Research Council are gratefully acknowledged.

2 Osgoode Hall Law School, JD, 2023.

3 See *Pearce v. 4 Pillars Consulting Group Inc.*, 2019 BCSC 1851, 2019 CarswellBC 3170 (B.C. S.C.); affirmed 2021 BCCA 198, 2021 CarswellBC 1519, 53 B.C.L.R. (6th) 68, 461 D.L.R. (4th) 205, [2021] 11 W.W.R. 20 (B.C. C.A.) [*4 Pillars BCSC*], the decision and reasons for which were upheld by the British Columbia Court of Appeal in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, 2021 CarswellBC 1519, 53 B.C.L.R. (6th) 68, 461 D.L.R. (4th) 205, [2021] 11 W.W.R. 20 (B.C. C.A.) [*4 Pillars BCCA*].

contributes to the assessment of debt relief industries and highlights areas where there is uneven regulatory oversight in Canada. Further research into new forms of credit, international approaches to consumer lending regulation, consumer behaviour and effectiveness of debt relief practices will be needed to adequately understand risks and opportunities facing all stakeholders.

L'allégement de la dette au Canada peut prendre différentes formes, souvent peu claires, notamment des offres de refinancement, des séances de conseil et des mesures de défense contre l'exécution de la dette. Les formes nouvelles et émergentes de prêts à la consommation ont offert un aspect de commodité et un accès rapide à des fonds, mais elles peuvent avoir compromis la transparence des conditions de prêt ou elles peuvent être contrôlées dans un milieu réglementaire fragmenté. Les conseillers en endettement et les services de règlement de dettes proposent souvent des services qui se chevauchent, se recommandent les uns les autres et imposent des frais non standardisés aux débiteurs individuels. Dans l'ensemble, un cadre réglementaire et sectoriel complexe s'est développé au Canada en raison de l'interaction entre le secteur de l'allégement de la dette, vaste mais largement non réglementé, qui aide les débiteurs avant que ne soit déclenchée une faillite, et la procédure en matière de faillites personnelles, très concentrée et réglementée.

La thèse centrale du présent article est qu'en l'absence de transparence dans ces secteurs de l'allégement de la dette et d'une approche réglementaire plus globale de l'allégement de la dette, les conflits d'intérêts et les normes de service inadéquates entraveront la capacité des consommateurs à prendre des décisions éclairées et à retrouver une stabilité financière. Les débiteurs dont la situation financière se détériore se tournent souvent vers diverses options de conseil et d'allégement de la dette pour éviter les coûts souvent prohibitifs associés à la faillite. Ces difficultés financières et cette incertitude offrent aux fournisseurs prédateurs offrant des services d'allégement de la dette la possibilité de tirer des profits sans apporter d'avantages aux consommateurs vulnérables — un risque illustré par l'action collective dans l'affaire Pearce v. 4 Pillars Consulting Group. Si l'amélioration de la protection des consommateurs peut passer par l'élaboration de politiques et l'amélioration de l'accès aux services juridiques, il est également important de renforcer l'application cohérente des règlements existants. Cet article contribue à l'évaluation des industries d'allégement de la dette et met en évidence les domaines dans lesquels la surveillance réglementaire est inégale au Canada. De la recherche supplémentaire sur les nouvelles formes de crédit, les approches internationales en matière de réglementation des prêts à la consommation, le comportement des consommateurs et l'efficacité des pratiques d'allégement de la dette sera nécessaire pour bien comprendre les risques et les possibilités qui s'offrent à toutes les parties prenantes.

1. INTRODUCTION

Over the past several years, the Canadian government has implemented monetary policy to reduce inflation that has tightened financial conditions. In light of higher borrowing costs, Canadian households are expected to face financial pressure as their mortgage terms come up for renewal, which could raise mortgage costs by a median of 20% by 2026.[4] The Organization for Economic Cooperation and Development (OECD) reports Canadian household debt, made up of mortgage loans and consumer debt with interest, to be 187.24% of net household disposable income in 2022.[5] Canadian consumer debt reached an all-time high of CAD $2.4 trillion in the third quarter of 2023, driven by consumers obtaining additional credit products and Gen Z and new Canadians entering the credit market.[6]

A 2022 report prepared for Credit Counselling Canada, a national association and accrediting body of credit counsellor agencies in Canada, found that 24% of Canadians indicated they had fallen behind on payments with 13% reporting missing payments more frequently since the onset of Covid-19.[7] Data indicate that, among several factors that push a consumer into insolvency, consumers often identify financial mismanagement and loss of income in concert with family emergencies as two main reasons for filing for bankruptcy.[8] In evaluating debt relief options, responses from a 2023 Credit Counselling Canada survey showed that 73% of respondents borrowed or withdrew or cut back on savings to manage debts.[9]

Following persistently high interest rates, managing personal and household debt is expected to become even more challenging for many Canadians. As consumers in financial distress find themselves interacting with the consumer loan refinancing and credit counselling industries, this article provides a timely

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4 Stephanie Hughes, "Bank of Canada sees signs Canadians are having trouble keeping up with their debt" (18 May 2023), online: *Financial Post* < https://financialpost.com/news/economy/bank-of-canada-flags-household-debt-banking-stress-key-risks > .

5 OECD, "Household debt" (2022), online: *OECD iLibrary* < https://doi.org/10.1787/de435f6e-en > .

6 Salmaan Farooqui, "Consumer debt, credit delinquencies on the rise, Equifax report says" (6 December 2023), online: *The Globe and Mail* < https://www.theglobeandmail.com/investing/personal-finance/household-finances/article-consumer-debt-credit-delinquencies-equifax/ > .

7 Matthew M. Young, "Canadian Consumer Experience and Concerns with Digital Debt Payment During Covid-19: Year One Technical Report to Stakeholders"(March 2022), online: *Credit Counselling Canada* < https://creditcounsellingcanada.ca/wp-content/uploads/2022/05/Greo-Angus-Reid-Report-Digital-Debt-Payment-During-COVID-19.pdf > at 4.

8 Sue L. McGregor, "Tailoring Bankruptcy Insolvency Education to Ensure Solvency Literacy" (2020) 31:1 Journal of Financial Counseling and Planning at 59.

9 Credit Counselling Canada, "2023 Consumer Debt Report" (2023), online: *Credit Counselling Canada* < https://nomoredebts.org/wp-content/uploads/2023/02/credit-counseling-society-2023-credit-survey-report-final.pdf/ > .

overview of the market players, their business models, and identifies regulatory gaps related to consumer protection and access to justice. An understanding of these industries reveal law and policy reform opportunities to help Canadian consumers access quality and value-added debt management services. In restoring financial wellbeing, consumers would be more prepared to lead a higher quality of life, support their family and dependents, and invest in their future.

Figure 1, below, presents a snap-shot of how non-bankruptcy or bankruptcy adjacent industries interact and share consumer information. Canadians who engage with credit products generally interact with at least some of these industries as they canvass available sources of credit, seek to reduce costs of borrowing, or negotiate or defend against creditors in legal proceedings. Within these bankruptcy adjacent industries, market players partner with each other, make referrals and expand or tweak their offerings to mitigate default risk or to fill service gaps.

Figure 1: Interactions between market players offering consumer lending, non-bankruptcy debt relief and consumer debt collection services.

This article examines interrelated, bankruptcy adjacent industries which offer consumer lending, credit rating, debt counselling and assistance against predatory debt enforcement. In the subsequent sections, this article explores various opportunities to enhance consumer protection, such as mandating that debt negotiation services may charge fees only when such negotiation is successful, and increasing the number of jurisdictions that impose meaningful monetary penalties when debts are wrongfully collected. Where consumers need help defending against streamlined debt enforcement, this article discusses a potential trend towards the relaxation of unauthorized practice of law rules in the context of leveraging legal technology for the benefit of vulnerable debtor defendants. Ultimately, the regulatory framework poses opportunities to foster risk-controlled alternatives consumer lending, strengthen consumer protection, clarify that common debt relief services are subject to provincial legislation and provide practical avenues for debtors to dispute inaccurate credit rating records or to defend against predatory collection lawsuits.

2. EMERGING SOURCES OF HIGHLY ACCESSIBLE CONSUMER LOANS

Innovations in technology and in business models have improved consumers' access to financial products and services that are outside the traditional banking system. Importantly, as an example, peer-to-peer lending, micro-loans, mortgages and invoice financing introduce a significantly broader lender base for ordinary consumers. However, there are contradictory priorities between lenders, borrowers and the peer-to-peer platform itself, which may not be immediately evident to consumers. In particular, lending platforms seek to attract more and more borrowers, often without consideration of the purpose of

the loan, which exposes lenders to higher credit risk and can lead borrowers to borrow irresponsibly.[10]

At the same time, new technologies can be used to improve the customer-lender interaction and lower operational costs, while making borrower screening and monitoring more comprehensive through alternative data sources.[11] For many borrowers, rather than funding a special purchase, an unsecured personal loan from a more accessible, fintech lender is helpful for consolidating debt that came with higher interest rates.[12] Where debtors are strapped for cash after prolonged periods of inflation and interest rate hikes, low-barriers to credit products can appear attractive. This article discusses the growing popularity of buy now, pay later products as well as the growing profitability of installment loan lenders. The regulatory environment for each type of loan product is summarized along with policy development concerns to curb predatory practices.

(a) Buy Now, Pay Later Products and Regulations

Buy now, pay later (BNPL) products have grown in popularity from developments in e-commerce technology, increased retail e-commerce sales and low interest rates emerging from the global pandemic. These offerings are rapidly expanding into physical stores as well, facilitated by the prevalence of scannable barcodes and QR codes at point-of-sale.[13] These loans were once used for larger purchases such as furniture and cars, but more recently, BNPL products have become available for household goods, travel, clothing and entertainment purchases.[14] For merchants, BNPL options can help reach customers who cannot otherwise proceed with the purchase, or spend more than the customer had initially planned.[15] When merchants see expanded sales and benefits in

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[10] Galit Klein, et al., "Why do peer-to-peer (P2P) lending platforms fail? The gap between P2P lenders' preferences and the platforms' intentions" (2023) 23 Electronic Commerce Research at 713.

[11] Tobias Berg et al., "FinTech Lending" 14:1 (2022) Annual Rev Finance Econ at 188 [Berg].

[12] Eldar Beiseitov, "The Role of Fintech in Unsecured Consumer Lending to Low- and Moderate-Income Individuals" (29 September 2022), online: *Federal Reserve Bank of New York* < https://www.newyorkfed.org/medialibrary/media/newsevents/events/regional_outreach/2022/092922/2022-09-29-eldar-beiseitov-fintech-personal-loans-ny-fed > [Beiseitov].

[13] Giulio Cornelli et al., "Buy now, pay later: a cross-country analysis" (December 2023), online: *BIS Quarterly Review* < https://www.bis.org/publ/qtrpdf/r_qt2312e.pdf > at 62 [Cornelli].

[14] Christine Dobby, "'Buy now, pay later' online purchasing programs are taking off — but providers aren't reporting growing debts to credit bureaus" (4 May 2023), online: *Toronto Star* < https://www.thestar.com/business/buy-now-pay-later-online-purchasing-programs-are-taking-off-but-providers-aren-t-reporting/article_d93c97d4-a01a-5f19-9bd9-15c1197f25dc.html? > [Dobby].

[15] Marco Di Maggio et al., "Buy Now, Pay Later Credit: User Characteristics and Effects

transferring credit and fraud risk from themselves to the BNPL platform, a wider adoption of BNPL offerings will likely follow.

A pilot study published by the Financial Consumer Agency of Canada (FCAC) found that the most common reasons for Canadians to use a BNPL product were: (1) to help the consumer budget, (2) to help the consumer afford the purchase and (3) to avoid interest and fees.[16] BNPL arrangements were expected to increase by 20% to reach USD $9.6 billion in Canada in 2023.[17] Younger consumers are most likely to use BNPL products, though Canadians of all ages are increasingly using BNPL.[18] TransUnion's study into BNPL also suggests that more than half of BNPL consumers in Canada have opened multiple BNPL loans in a year, which could suggest unmonitored loan-stacking by consumers.[19] An analysis of U.S. consumer data shows that BNPL products are particular popular among consumers with less access to liquid resources, and those who spend more on non-essential consumption and who are more likely to incur overdraft fees, are also more likely to use BNPL products in any given month.[20]

There can be significant costs to borrowing through BNPL arrangements. Consumer Protection British Columbia highlights that missing a payment or failing to make full payment at the end of the loan term could see the interest rate increase from 0% to 37.99%, depending on the agreement.[21] One year after the FCAC's pilot study, the FCAC still appears to be in progress of developing specific guidance on BNPL or and other point-of-sale credit products. According to its December 2022 publication, the FCAC recommends that the borrower contact the BNPL plan provider or the retail, including the federally regulated financial institution, or making a complaint through a provincial or territorial consumer protection office.[22]

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on Spending Patterns" (September 2022), online: *NBER Working Papers* <https://www.nber.org/system/files/working_papers/w30508/w30508.pdf> at 6 [Di Maggio].

16 FCAC, "Pilot Study: Buy Now Pay Later Services in Canada" (2021), online: *Government of Canada* <https://www.canada.ca/en/financial-consumer-agency/programs/research/pilot-study-buy-now-pay-later-services-in-canada.html> at 4.

17 Statista, "Estimated transaction value of buy now, pay later (BNPL) in Canada in 2022, with forecasts for 2023 and 2028" (January 2023), online: *Statista* <https://www.statista.com/statistics/1379475/bnpl-transaction-value-in-canada/>.

18 Jordan Fleguel, "As 'buy now, pay later' grows, expert warns of regulatory gaps" (10 January 2024), online: *BNN Bloomberg* <https://www.bnnbloomberg.ca/as-buy-now-pay-later-grows-expert-warns-of-regulatory-gaps-1.2020274>.

19 Dobby, *supra* note 14.

20 Di Maggio, *supra* note 15 at 9.

21 Consumer Protection BC, "Buy now, pay later plans: what you need to know" (January 2024), online: *Consumer Protection BC* <https://www.consumerprotectionbc.ca/2024/01/buy-now-pay-later-plans-what-you-need-to-know/>.

22 FCAC, "buy now pay later plans" (15 December 2022), online: *Government of Canada*

Aside from FCAC's efforts, a combination of banking, consumer protection and privacy legislation likely apply to businesses offering BNPL products. According to the Bank for International Settlements, global regulatory approaches to lower consumer debt risks in the BNPL sector have been highly varied.[23] As of late 2023, Australia has introduced credit licencing requirements and caps on fees for missed or late payments for BNPL platforms.[24] In the United Kingdom, the United States and Canada, regulators are actively examining consumer protection concerns but have not introduced tailored or uniform regulation for BNPL offerings.[25] Outside of regulator-driven analysis, there is limited academic discussion on loan stacking behaviour through BNPL products or mechanisms whereby new lending platforms connect concerned debtors to debt management or counselling support. While this article presents the progress made in certain jurisdictions, further monitoring of licencing requirements and systemic financial risk mitigation efforts around the world will be needed to support comprehensive policy development.

In sum, BNPL offerings help consumers postpone payments without additional costs, if repayment is well-managed. The swift rise in global acceptable of such arrangements raises concerns for regulatory authorities on two primary fronts: consumer protection as against inadequate disclosure of terms and conditions and unfair consumer complaint mechanisms, and the accumulation of credit risk. From the perspective of lenders and investors, sustained growth of BNPL users coupled with higher delinquency rates could also warrant monitoring a direct or indirect effect on the rest of the financial system.[26] Although there has been much social science and legal scholarship on payday loan use and regulation, the effects of newer and smaller-dollar credit products on lower-income consumers are largely unknown.[27] Newer loan products may become viable and cheaper refinancing options for consumers facing economic hardship, or may pose different sets of risks that are not immediately evident.

(b) Growth of Different Unsecured Personal Loans

Aside from BNPL platforms, various start-ups are introducing consumer-facing debt relief and refinancing options through websites and mobile apps, with some enterprises witnessing rapid growth. Rapid loans, or installment loans, have also become common alternatives to payday loan offerings in Canada.[28]

< https://www.canada.ca/en/financial-consumer-agency/services/loans/buy-now-pay-later.html > .

23 Cornelli, *supra* note 13 at 69.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.* at 72.

27 Carlie Malone & Paige Skiba, "Regulation and Recent Trends in High-Interest Credit Markets" (2020) 16 Annu. Rev. Law. Soc. Sci. 323.

This section discusses both fintech lending to consumers and problematic installment loan practices.

On fintech offerings, American data shows that unsecured personal loans are growing faster than other types of consumer debt and more than half of total personal loan balances in 2022 originated from fintech offerings.[29] Despite signs of growth, many fintech lending models have not been tested in protracted recessions, nor have they experienced the cyclicality of loan supply and demand.[30] The rapid expansion of product and service offerings by fintech companies are also attracting investor scrutiny. SoFi, which is known for student loan and auto loan refinancing and had went public through a SPAC in 2021, saw its stock price fall over 40% between January 2022 and January 2024.[31] Part of the adjustment stems from analysts contending that the stock should be regarded as a bank, rather than a technology company.[32] Similarly, Rocket Companies, once the largest mortgage originator in the US, suffered from the high interest rate environment and saw its stock price fall more than 40% through 2022.[33]

With personal loans offered by fintech start-ups, borrowers are no longer asked to provide a track record of on-time credit card payments to qualify for a loan. Leveraging artificial intelligence, big data and secure API connections to banking data, lenders automate lending decisions and can serve customers across long distances and rely on a more holistic consumer profile as compared to a credit score. New technologies can make digital payments, online banking, peer-to-peer lending more accessible for consumers, especially in remote areas and for those without a credit history. On the other hand, predatory practices in certain niches like digital payday loans can expose vulnerable populations to high interest rates and missed opportunities to build savings.

In contrast to the United States market landscape, where there is a greater proportion of consumer-facing new market entrants, fintech ventures in Canada are largely bank-driven.[34] This means that the fragmentation of regulation exists

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[28] Brandie Weikle, "Rapid loans at up to 47% interest 'one notch short of loan-shark stuff,' says debt counsellor" (30 January 2024), online: *CBC News* < https://www.cbc.ca/radio/costofliving/rapid-loans-payday-lenders-interest-1.7095874 > .

[29] Beiseitov, *supra* note 12.

[30] Berg, *supra* note 11 at 202.

[31] Google Finance, "SoFi Technologies Inc" (2024), online: *Google Finance* < https://www.google.com/finance/quote/SOFI:NASDAQ?sa = X&ved = 2ahUKEwjt64Ga-m82EAxWGl4kEHb2XA7IQ3ecFegQIUhAX > .

[32] Alex Harring, "Morgan Stanley downgrades SoFi, says stock should be valued like a bank" (13 July 2023), online: *CNBC* < https://www.cnbc.com/2023/07/13/morgan-stanley-downgrades-sofi-says-stock-should-be-valued-like-a-bank.html > .

[33] Jonathan Douglas & Kevin McAllister, "Fintech Consumer Lending" (2022), online: *Protocol* < https://www.protocol.com/power-index/fintech/consumer-lending/gfxk8ea6lh9gdxzc-2656872525 > .

[34] Ryan Clements, "Regulating Fintech in Canada and the United States: Comparison,

in Canada for non-bank fintech firms that are outside the supervision of the Office of the Superintendent of Financial Institutions (OSFI),[35] but fragmentation is not pervasive due to the dominance of large banks.[36] Currently, broad consumer protection legislation prohibits fintech consumer agreements from being unfair to consumers. Where fintech companies carry on business as deposit-takers, the federal *Trust and Loan Companies Act*[37] or the equivalent provincial scheme may impose regulation on the fintech company.[38] Fintech lending companies may also be in the "business of trading" and accordingly must find an exemption from the dealer registration requirement.[39] This uncertain classification of fintech start-ups' business activities can be a significant cost and entry barrier for new entrants.[40] The rapid evolution of the industry, along with the increasing complexity of fintech enterprises individually can pose regulatory challenges relating to securities regulation, anti-money laundering laws, consumer data protection and promoting market competition.

Where consumers turn to additional alternative lenders, installment loans provide liquidity to borrowers with credit scores in the lower spectrum, between 300 to 600. As policy development leaned towards tightened regulation over payday loans,[41] some payday lenders have moved to offer larger installment loans as well as placing new restrictions on qualifying income sources that excludes social support payments, when structuring such loans.[42] Consequently, these loans are larger than payday loans, but carry higher interest rates and are structured with shorter repayment periods than bank-sponsored loans. Unfortunately, CBC reporting has found a history of confusing and misleading representations, and a lack of transparency and documentation for consumers of installment loan arrangements.[43] Journalists found that sales

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Challenges and Opportunities" 12:23 (2019) The School of Public Policy Publications at 8, online: < https://doi.org/10.11575/sppp.v12i0.67954. > [Clements].

35 *Ibid*. at 3.

36 *Ibid*.

37 *Trust and Loan Companies Act*, S.C. 1991, c. 45.

38 David Wallace & Rebecca Khan, "Top 5 Legal Considerations When Launching a FINTECH Startup" (12 July 2020), online: *McInnes Cooper LLP* < https://www.mcinnescooper.com/publications/top-5-things-to-consider-when-launching-a-fintech-start-up/ > .

39 British Columbia Securities Commission, "Fintech Business Models" online: *British Columbia Securities Commission* < https://www.bcsc.bc.ca/industry/financial-technology-innovation/fintech-business-models > .

40 Clements, *supra* note 34 at 18.

41 Brian Dijkema, "Banking on the Margins: The Changing Face of Payday Lending in Canada" (June 2019), online: *Cardus* < https://www.cardus.ca/wp-content/uploads/2023/05/The-Changing-Face-of-Payday-Lending-in-Canada-CARDUS.pdf > at 6.

42 Mohammed El Hazzouri et al., "Vulnerable consumer experiences of (dis) empowerment with consumer protection regulations" (2023) 57 J Consum. Aff. at 1078.

43 Jeannie Stiglic, "'Canadians deserve better': Experts decry 'outrageous' interest rates by

agents at the common payday and installment loan chains downplayed interest rates by providing a monthly interest rate, and by making misleading statements that the loan provider was a "secondary bank."[44] All four lenders investigated also declined to provide sample contracts or agreements to the anonymous shopper, and would only provide documentation after the customer signs to accept the loan agreement.[45]

Installment loan lenders report regular payments to major Canadian credit bureaus, which can help improve a borrower's credit score over time. An installment loan can indicate a diversification of that customer's credit mix and shows lenders that the individual can successfully manage different types of credit.[46] However, for those facing financial instability, or seeing major unexpected expenses, the burden of continuous installments can lead to late payments or defaults. Similar to penalties imposed for BNPL products, a borrower may see severe monetary penalties, in addition to their default being reported to credit rating agencies. As will be discussed in the subsequent section, while the collaboration between lenders and credit rating agencies should objectively reflect a borrower's creditworthiness, outdated information, bias or mistakes in reporting can lead to higher cost of borrowing for already vulnerable consumers for a long time before errors can be corrected.

3. THE POWER IMBALANCE BETWEEN CONSUMERS AND CREDIT RATING AGENCIES

The two main credit rating agencies that operate in Canada are Equifax and TransUnion. Both agencies use consumer financial information, credit history, past loans, defaults and public records to generate credit reports and credit scores. These credit reports are then sold to potential lenders, landlords, employers, insurers and other parties wishing to screen individuals for transactions. Lenders use credit reports to determine whether to extend funds and, if so, at what interest rates. Landlords use the reports to make leasing and deposit decisions and employers may use them in the hiring process.

A credit score ranges between 300 — 900 and indicates the creditworthiness of a borrower. Many factors may affect the credit score, including how long the consumer has had credit, whether they carry a balance on their credit cards, whether they regularly miss payments, their amount of outstanding debt, being close to or above credit limits, recent credit applications, records involving a collection agency and insolvency or bankruptcy records.[47] The higher the credit

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alternative lenders" (30 January 2021), online: *CBC News* <https://www.cbc.ca/news/canada/alternative-lenders-marketplace-1.5891676>.

44 *Ibid.*

45 *Ibid.*

46 Kevin Nishmas, "Best Installment Loans for Bad Credit in Canada for February 2024" (1 February 2024), online: *Forbes Advisor* <https://www.forbes.com/advisor/ca/personal-loans/best-installment-loans-for-bad-credit/>.

score, the less risky the borrower, which qualifies the consumer to essential goods, services, and opportunities.

Credit rating agencies act as gatekeepers to the financial system and are governed by provincial legislation in Canada. In Ontario, the *Consumer Reporting Act*[48] specifies registration and management of credit rating agencies. Some safeguards are prescribed to protect the accuracy of consumer reports. For instance, credit rating agencies are mandated to adopt all procedures reasonable to ensure accuracy and fairness in the contents of their consumer reports.[49] Consumer credit reports shall not contain credit information based on evidence that is not the best evidence reasonably available.[50] Credit rating agencies further cannot include any unfavourable personal information unless it has made reasonable efforts to corroborate the evidence and indication for lack of corroboration should accompany such unfavourable personal information.[51]

(a) Barriers to Dispute Errors in Consumer Reports

Given the high stakes of summarizing the creditworthiness of an individual to prospective lenders, landlords and employers, errors on credit reports can be severely consequential.[52] Reliable and recent data on how widespread the issue is in Canada is very limited, thought errors in credit reports has been a long-standing issue. The most relevant data from the US is from 2013 and it indicates that 21% of consumers had confirmed errors in their credit reports.[53] As such, more studies into consumer dispute experiences and timeliness of remediation will be required to appreciate the prevalence of the issue and the lengths of time that an error will remain on a consumer credit report.

From a regulatory perspective, the safeguards set by the *Consumer Reporting Act* is vague. For instance, reasonableness of procedure and of evidence are undefined in the statute. There are also implications from the power imbalance between creditors and consumers created by the credit rating agencies' reliance on creditors or furnishers of information. In cases where furnishers send bad

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47 FCAC, "Credit report and score basics" (3 May 2023), online: *Government of Canada* <https://www.canada.ca/en/financial-consumer-agency/services/credit-reports-score/credit-report-score-basics.html>.

48 *Consumer Reporting Act*, R.S.O. 1990, c. C.33. [CSA]

49 *Ibid*., s. 9(1).

50 *Ibid*., s. 9(3)(a).

51 *Ibid*., s. 9(3)(b).

52 Ryan Bolger, "Door Shut and Ears Plugged: How Consumer Reporting Casts Identity Theft Victims out of Financial Society and How the Law Can Be Harmonized to Bring Them Back" (2020) 15:1 Brook J Corp Fin & Com L at 157 [Bolger].

53 Federal Trade Commission, "Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003" (2014), online: *Federal Trade Commission* <https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf>.

information to the credit agency or where a consumer alleges fraud, credit rating agencies still generally defer to information provided by furnishers over concerns of the consumer.[54] The FCAC notes that if a creditor that reported the information agrees that there is an error, the credit rating agency will update the credit report. But, if the lender confirms that the information is correct from their records, the agency will leave the consumer report unchanged.[55]

From there, the consumer has the burden to pursue complaint-resolution procedures with the creditor or with their financial institution, or add a consumer statement explaining their position within the credit report.[56] However, even if the consumer chooses to add a consumer statement, there is no guarantee that a lender or landlord who reviews the report will look behind the credit score and read the accompanying credit report and any consumer statement.

Particularly with identify theft issues, credit rating agencies ought to know that furnishers are conflicted sources of information, but credit rating agencies nonetheless defer to furnishers.[57] Often, the credit rating agency does not mention to the furnisher that the individual alleged fraud, which could have prompted a more thorough internal verification process on the part of the furnisher lender.[58] If a furnisher does not suggest corrections, the agency will continue to publish the disputed trade-line without examining additional documents, interviewing the consumer, or triggering a review escalation.[59] Inadequate review mechanisms are in place because there is a very low threshold that a credit rating agency must meet in addressing the complaint of a consumer: the consumer reporting agency shall use its best endeavours to confirm or complete the information contained in a consumer file and shall correct the information in accordance with good practice.[60] In additional to reasonableness, "best endeavours" and "good practice" are left undefined, giving much discretion to credit rating agencies to control the content of their credit reports.

(b) Complaint Procedure and Appeal Routes

A consumer may also file a complaint with the Registrar of Consumer Reporting Agencies (RCRA), though there are limited remedies available. The RCRA has order-making power, including the power to compel agencies to amend or delete any information, or to restrict the use of any information, that in

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54 Bolger, *supra* note 52 at 159 & 160.

55 FCAC, "Checking for errors on your credit report" (15 November 2022), online: *Government of Canada* < https://www.canada.ca/en/financial-consumer-agency/services/credit-reports-score/check-errors.html > .

56 There is no charge to add a consumer statement. TransUnion allows a statement up to 100 words and Equifax allows a statement of up to 400 characters.

57 Bolger, *supra* note 52 at 160.

58 *Ibid.* at 161.

59 *Ibid.*

60 CSA, *supra* note 48, s. 13(1).

the RCRA's opinion is inaccurate, incomplete or non-compliant with provisions of the *Consumer Reporting Act*.[61] It is worth highlighting that this jurisdiction to order amendment or deletion is limited to technical errors on a credit report, and there is no obligation on the RCRA to ask the credit rating agency or a creditor to furnish proof of a debt.[62]

In the proposed subsection 16.1 that is not yet in effect, the *Consumer Reporting Act* specified inquiry powers held by the RCRA. The provisions allow the RCRA to inquire into the credit rating agency's practices in connection with any of the requirements of the *Consumer Reporting Act*. There must be an opportunity for the credit rating agency to be heard, after which the RCRA may order the agency to amend or discontinue practices, but no more than what is reasonably necessary to be in compliance with the legislation.[63]

Pursuant to subsection 14(3), where the consumer or the credit rating agency considers themself aggrieved by a decision of the RCRA, either party may apply to the License Appeal Tribunal for a hearing.[64] At the hearing, the License Appeal Tribunal can, but is not obliged to, require the credit rating agency to disclose the source of any information contained in its files.[65] Thus, in practice, there is little transparency surrounding the proof and source of debts information for a concerned consumer, especially where the dispute concerns the substance or merit of the information. Outside of the License Appeal Tribunal process, consumers may pursue actions framed as negligence or defamation against credit rating agencies.[66] However, not many consumers have the expertise and resources to fund litigation against credit rating agencies.

The development and growth of the consumer credit reporting industry have been associated with decreasing costs of consumer credit and increased availability of credit, but the system rests on the accuracy of credit reports.[67] Vague or inadequate requirements for credit rating agencies to address consumer complaints, or credit rating agencies deferring to furnishers where there is clear conflicts of interest, risk pushing vulnerable consumers out of financial society over administrative errors and cases of identity theft. As noted previously, the

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61 *Ibid*., s. 14.

62 2018 amendments to the *Consumer Reporting Act* (Ontario) are not yet in effect. The amended subsection 14(1) would give the Registrar the option, but not the obligation, to order a consumer reporting agency to obtain proof of credit and personal information contained in a consumer file from the source of that information. See also Kent Glowinski, "Don't Get Enough Credit — The Need for an Impartial Consumer Credit Report Appeal Tribunal in Ontario" (2009) 22:1 JL & Soc Pol'y at 7 [Glowinski].

63 *Consumer Reporting Act*, *supra* note 48, s. 16.1(3).

64 *Ibid*., s. 14(3).

65 *Ibid*., s. 14(4).

66 Glowinski, *supra* note 62 at 15.

67 Paul T. Lyons, "The Fair Credit Reporting Act and the Consumer Credit Information System: Why Errors Persist and Furnishers Should Play a Greater Role in Ensuring Accuracy" (2021) 13:2 NE U LR at 444.

consumer credit score is used to determine eligibility for work, housing, and substantial purchase opportunities. Adequate safeguards provided by legislation or a credit reporting agency's policy, and timely correction of any mistakes, are essential for equitable access to credit products for all Canadian consumers.

4. THE COMPLEX LANDSCAPE OF CREDIT COUNSELLING INDUSTRIES

In Canada, the upfront cost of consumer bankruptcy, combined with widespread misunderstanding of its processes and benefits, has opened a space for the growth of the credit counselling industry since the early 2000s.[68] Through one-on-one counselling, group seminars on personal finance topics, and devising debt management plans, professional and customized debt counselling services can be essential in helping people out of financial difficulty. By contrast, poor advice can mislead a customer's priorities, delay recovery from debt, and have a devastating impact on those who are already struggling.

Debt counselling agencies can operate as for-profit or non-profit organizations. Credit counselling is a private process that is distinct from services offered by licensed insolvency trustees (LITs), who are regulated by the federal Office of the Superintendent of Bankruptcy (OSB) and charges fees regulated by the OSB.[69] The regulation of credit counselling services varies at the provincial and territorial level, and often involves laws governing non-profits and charities. The services that counselling agencies offer and the fees they charge can vary greatly. Credit counsellors' main sources of revenue consist of "voluntary contributions" made by creditors based on the amount collected for them by the counsellor, along with fees paid by the debtors for debt management advice.[70] Whether a debtor ends up with a credit counsellor or with a LIT may be determined by marketing efforts, which can portray credit counsellors as community-based, debtor-friendly non-profit organizations.[71] In practice, being influenced to work with a credit counsellor may not be in a debtor customer's best interest.[72]

Generally, credit counselling agencies help set up repayment plans for debtors that involve the debtor paying 100% of the balance owed over a period of three to four years.[73] Credit counsellors encourage creating a Debt Management Plan (DMP) that includes interest relief and a repayment

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[68] Stephanie Ben-Ishai & Saul Schwartz, "Credit Counselling in Canada: An Empirical Examination" 29:1 Canadian Journal of Law and Society (2013) at 19 [Ben-Ishai].

[69] *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, s. 129(1) [*BIA General Rules*]. The BIA General Rules on fees are also vague and almost impossible for a consumer to understand or comparison shop.

[70] Ben-Ishai, *supra* note 68 at 18.

[71] *Ibid.* at 19.

[72] *Ibid.*

[73] *Ibid.* at 5.

arrangement over time. This voluntary agreement is made between the debtor and some or all of their creditors. Where a DMP is accepted, the debtor customer makes regular payments to the credit counselling agency and the counsellor uses the funds to pay creditors according to the DMP.[74] Even though DMPs are informal proposals that involve full payment of the balance owed, records from a DMP can appear on a consumer's credit report for up to two years after the consumer pays off their debts.[75]

Other times, credit counsellors may offer debt settlement services. In the credit counselling industry, debt settlement usually involves the debtor paying less than the full amount that they owe. Each settlement is dependent on an individual's financial situation and a hired credit counsellor will negotiate with creditors on behalf of the consumer. Since debt settlement requires a lump sum payment to offer to a creditor, it may not be a viable option for those without savings or those experiencing financial hardship.

If a debtor's creditors agree to the settlement offer, the debtor must pay the debt settlement company, and the company then pays the relevant creditors. Where the customer cannot fund a lump-sum payment, some credit counsellors offer the customer a loan, suggesting it will help finance the lump-sum repayment and repair their credit score at the same time.[76] This type of loan usually has a high interest rate and may never release funds to the customer, since the loan supposedly covers the company's services and programs.[77] It is noteworthy that under the Ontario *Collection and Debt Settlement Services Act* (CDSSA)[78] regulations, no person who is registered who holds themself out to the public to arrange for payment of debt to another person can engage in the business of lending money, except to the extent the person has bought a debt and is renegotiating terms for payment of that debt.[79] Thus, credit counselling agencies that offer debt management or debt settlement services may be operating in contravention of Ontario's regulations, or of similar provincial prohibitions, if they are also in the business of offering loans to advice-seeking consumers.

The FCAC cautions that debt settlement companies may still charge fees even where negotiations with creditors fail.[80] While Manitoba[81] and Nova

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[74] ISED, "Compare debt solutions" (30 March 2023), online: *Government of Canada* <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/compare-debt-solutions>.

[75] FCAC, "How long information stays on your credit report" Government of Canada (3 May 2023), online: <https://www.canada.ca/en/financial-consumer-agency/services/credit-reports-score/information-credit-report.html>.

[76] FCAC, "Using a debt settlement company" Government of Canada (19 June 2023), online: <https://www.canada.ca/en/financial-consumer-agency/services/debt/debt-settlement-company.html> [FCAC Debt Settlement].

[77] *Ibid.*

[78] *Collection and Debt Settlement Services Act*, R.S.O. 1990, c. C.14 [*CDSSA*].

[79] R.R.O. 1990, Reg. 74: General, s. 13(15) [*CDSSA Reg*].

[80] FCAC Debt Settlement, *supra* note 76.

Scotia[82] mandate that debt settlement or debt management firms may charge fees only after a settlement acceptable to the debtor has been successfully negotiated, other provinces are either silent on whether debt settlement must be successful, or merely imply in the provision language that an agreement with creditors will be reached in the course of providing and charging consumers for debt settlement services. It is important to remember that debt settlement cannot: (1) guarantee a debtor that their debts will be reduced by a large percentage, (2) prevent creditors and collection agencies from seizing salary or bank funds, (3) stop phone calls and communications from creditors or (4) handle government-regulated proceedings that release the customer from debt.[83]

(a) Regulatory Framework Across Canadian Provinces

From a review of the regulatory framework of all nine common-law provinces, each province regulates those who offer or undertake to act for a debtor in arrangements or negotiations with the debtor's creditors, in consideration of a fee. As such, despite differences in legislation terminology, debt relief services that are popularly known as debt management or debt settlement services are most likely subject to provincial legislation across Canada.

Every common law province requires providers of regulated debt management services to be registered and licensed. Every province other than Ontario mandates the service agency to provide a security or surety bond as part of the licensing application or licensing renewal.[84] Aside from the surety bond requirement, how Ontario's legislation defines the scope of regulated debt settlement services, the prohibition against false and misleading advertising, administrative penalty provisions and contents of an enforceable debt settlement agreement are representative across Canada. To illustrate how credit counselling firms who engage in regulated debt management services are typically governed, Ontario's regulatory framework will be used as an example in the remainder of this section.

For Ontario, the CDSSA governs individuals and organizations that obtain or arrange for payment of money owing to another person or hold oneself out to the public as providing such a service.[85] Credit counselling agencies would fall within the scope of the CDSSA when they hold themselves out to the public as providing DMP-related or debt settlement services.[86] In the case of *Ontario*

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81 *Consumer Protection Regulation*, M.R. 227/2006, s. 28(2) [*Man Reg*].

82 *Collection and Debt Management Agencies Regulations*, N.S. Reg. 5/2021, s. 25(2) [*NS Reg*].

83 FCAC Debt Settlement, *supra* note 76.

84 In 2014, Ontario revoked provisions in R.R.O. 1990, Reg. 74 that required those who obtains or arranges for payment of money owing to another person to provide a bond valued between $5000 and $45,000.

85 *CDSSA*, *supra* note 78, ss. 1(1), 2(0.1) [*CDSSA*].

86 *Ibid*., s. 2.1.

(Ministry of Consumer & Business Services) v. Gnish,[87] which interpreted the *Collection Agencies Act*[88] that was the predecessor to the CDSSA, confirmed that the scheme applied beyond those who act for creditors to a wide group of "all those who deal with [debtors]."[89] All service providers who arrange for payment of money owing to another person must register with the Registrar of Collection Agencies (RCA) before carrying on business.[90] The CDSSA imposes these organization registration requirements, advertising and business practice guidelines, as well as officer and director examination requirements[91] to protect debtors.

Debt settlement services is broadly defined in the CDSSA to be offering to act for a debtor in arrangements or negotiations with the debtor's creditors or receiving money from a debtor for distribution to the debtor's creditors, where the services are provided for a fee.[92] In order to provide debt settlement services to a customer, a service provider must enter into an agreement with that customer.[93] The requirement to have a written service agreement is also found across all examined jurisdictions. Such agreements must disclose all information that is reasonably necessary to explain the sources of that counselling or collection agency's funding.[94] Where interpretation of a debt settlement services agreement is reasonably ambiguous, the CDSSA directs interpreting the agreement to the benefit of the debtor.[95] These consumer protection apply to all debt settlement services agreements, which should cover both DMP and colloquial debt settlement services. Importantly, consumers should note that customized debt advice, without any interaction between the service provider and the consumer's creditors, is likely not captured by the higher service standards governing debt settlement service agreements.

(b) Improve Enforcement of Regulations

The extent of regulation over a debt counselling agency depends on the business activities of that particular service provider. There is an anti-avoidance provision in section 2.1 that is helpful for extending CDSSA requirements to transactions that in substance arranges consumer debt payments or settles

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87 *Ontario (Ministry of Consumer & Business Services) v. Gnish*, 2004 ONCJ 399, 2004 CarswellOnt 5967 (Ont. C.J.) at para. 36 [*Ontario OCJ*].

88 *Collection Agencies Act*, R.S.O. 1960, c. 58. This historical legislation's "collection agency" definition is substantially the same as the current definition of a "collection agency" in *CDSSA* subsection 1(1).

89 *Ontario OCJ*, *supra* note 87 at para. 36.

90 *CDSSA*, *supra* note 78, s. 4(1).

91 *CDSSA Reg*, *supra* note 79, s. 15.

92 *Ibid.*, s. 1(1).

93 *Ibid.*, s. 16.5(1)(a).

94 *Ibid.*, s. 16.5(1)(c).

95 *Ibid.*, s. 16.5(5).

outstanding debt.[96] However, clarity on whether different forms of debt management advice and credit re-establishment services are subject to the CDSSA, along with a standard terms and conditions will help more consumers understand the scope and goals of credit relief services. Beyond the Ontario CDSSA, standardizing debt management service terms and conditions can be implemented in every common law province to improve safeguards for consumers who have little bargaining power against debt relief firms.

The *Pearce v. 4 Pillars Consulting Group Inc.* [97] case outlines concerns of consumers in response to predatory practices of unregistered debt restructuring service providers in British Columbia. It provides insight into the overlap of federal and provincial regulation over debt relief businesses, and particularly on how some operators attempt to circumvent registration requirements and consumer protection laws through marketing and curtailed service offerings. In *4 Pillars*, the defendants offered debt restructuring services to consumers in British Columbia and across Canada through franchisee stores.[98] Between 2016 and 2019, the defendants earned high fees, including an initial amount of at least $500,[99] from their insolvent clients when the defendant debt advisors were not licensed to provide debt restructuring services under the *Business Practices and Consumer Protection Act* (BPCPA)[100] nor the *Bankruptcy and Insolvency Act* (BIA).[101] Specifically, the consumer plaintiffs argued that the defendants almost exclusively prepared consumer proposals for its customers, as well as recommended to LITs to file these proposals, and contacted customers' creditors to advise them that the agency was working on the debtor's behalf.[102]

For BPCPA issues, it was arguable that the service provider defendants fall within the definition of a "debt repayment agent" who acts for or represents a debtor in negotiations with the debtor's creditors.[103] The defendants in *4 Pillars* tried to demonstrate that the BPCPA regulations did not apply to them because they did not enter into agreements with a debtor's creditors and their business model involved a LIT to act as an intermediary.[104] This raises the question of whether to allow indirect participation in negotiation, through drafting a consumer proposal, to fall within the BPCPA provision.[105] Given that it was

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[96] *Ibid*., s. 2.1.

[97] *4 Pillars BCSC*, *supra* note 3, affirmed *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, 2021 CarswellBC 1519, 53 B.C.L.R. (6th) 68, 461 D.L.R. (4th) 205, [2021] 11 W.W.R. 20 (B.C. C.A.).

[98] *Ibid*. at para. 8.

[99] *Ibid*. at para. 26.

[100] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*].

[101] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[102] *4 Pillars BCSC*, *supra* note 3 at para. 25.

[103] *Ibid*. at para. 49.

[104] *Ibid*. at para. 38.

[105] *Ibid*. at para. 39.

inappropriate to determine the statutory interpretation issue at a class action certification hearing, Justice Mayer at the British Columbia Supreme Court (BCSC) found that the plaintiffs' claims concerning alleged breaches of the BPCPA were not bound to fail.[106]

With respect to BIA issues, it was arguable that some of the debt counselling, drafting of consumer proposals, and filing and investigating a consumer debtor's financial affairs carried out by the defendants were activities which can only be carried out by LITs under BIA subsection 66.13(2).[107] Though, the defendants point out that the LITs they work with have a screening role and the essence of their restructuring service is helping a debtor negotiate with a LIT, rather than with a creditor.[108] This characterization of their services may have been fleshed out in a trial that would have provided more clarity on whether counselling services may be offered to support LITs without contravening the BIA. The activities of the debt counselling agency to attract clients who may have qualified for filing a consumer proposal may also violate BIA section 202(1)(f), which makes it an to directly or indirectly solicit or canvass any person to make an assignment or a proposal under the BIA.[109] Assessing these claims, Justice Mayer did not find that the plaintiffs' argument that the defendants were providing services and charging fees in contravention of the BIA was bound to fail.[110]

Justice Mayer's decision to certify the class action was upheld by the Court of Appeal for British Columbia (BCCA). Since the BCCA decision, many of the franchisee defendants have entered into a partial settlement agreement that involved $6 million to compensate class members' claims, class counsel fees, and any related expenses.[111] While *4 Pillars* is not a decision on the merits of a contravention of the BPCPA but a decision in the context of certifying a class action, the case insightfully discusses counselling activities that fall under provincial regulation and additional but interrelated activities which fall under the federal BIA regime.

Another implication of the *4 Pillars* case has to do with giving effect to class action waiver clauses contained in a debt management service provider's standard form customer contract. At the BCSC, Justice Mayer noted that the complexity and relatively low potential value of individual claims against bad-actor debt relief service providers meant that upholding a waiver clause would frustrate the administration of justice.[112] At the BCCA, the Court found that the class action waiver clause drafted by the defendant restructuring businesses was

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[106] *Ibid*. at para. 48.

[107] *Ibid*. at para. 76.

[108] *Ibid*. at para. 42.

[109] *Ibid*. at para. 78.

[110] *Ibid*. at paras. 76 & 77.

[111] *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCSC 136, 2021 CarswellBC 3826 (B.C. S.C.) at para. 39.

[112] *4 Pillars BCSC*, *supra* note 3 at para. 179.

unconscionable and therefore invalid.[113] As such, the *4 Pillars* decision may have far-reaching implications on the enforceability of similar waiver clauses, whether consumer plaintiffs have statutory or common law causes of action against sophisticated or potentially misleading debt relief service providers.

In sum, improving the enforcement of existing regulations will play a crucial role in protecting consumers and raising the debt management service quality industry-wide. No new case law discussing debt counselling services has been reported since *4 Pillars* in any Canadian jurisdiction, which could indicate difficulties in bringing individual or class proceeding claims against bad-actor debt counselling agencies. Further academic or industry analysis into the scale of debt service providers who claim to offer overlapping services with LITs, or any aggregate spending by Canadians on informal debtor counselling services will shed light on any emerging trends and issues. Professional debt counselling and management, if monitored and carried out to serve customers' best interest, can help vulnerable groups achieve financial stability. On the other hand, if irresponsible or self-serving practices continue, and debt counselling service providers abuse the trust of their clients, then consumers may see added stress and financial burden from their experience.

(c) Improve Fee Transparency

Another aspect is improving the transparency and fairness of debt counselling fees. In contrast to the regulation of fees charged by LITs,[114] the fees charged by registered debt settlement services providers are not capped in three of nine Canadian common law provinces. Most provinces mandate that fees charged cannot exceed 15% of the money actually collected from the debtor for distribution to the debtor's creditors, or 10% of the debt owing in a debt repayment agreement.[115] Setting fee caps to be proportional to debts owed or settled allows consumers to pay somewhat proportionally to their ability to pay. These limits also provide certainty to consumers when seeking debt counselling and may encourage more consumers to find appropriate help. Provinces may further explore designing different fee caps for different complexities of debt settlement services offered.

Meanwhile, almost all provincial regulations are silent on charging referral fees, and thus permits service providers to refer customers to each other for compensation even when customers are unaware of such referral arrangements. On eliminating conflict of interest that may be brought by referral fees, regulation can be amended to prohibit debt settlement service providers from receiving referral fees. Such an amendment would follow the United Kingdom

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[113] *4 Pillars BCCA*, *supra* note 3 at para. 247.

[114] *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, s. 129(1).

[115] *Debt Collection and Repayment Regulation*, B.C. Reg. 295/2004, s. 15; *Collection and Debt Repayment Practices Regulation*, Alta. Reg. 194/1999, s. 12.1(4); *Man Reg*, *supra* note 81, s. 28(1); *CDSSA Reg*, *supra* note 79, s. 27(1); *NS Reg*, *supra* note 82, s. 25(1); *Collection Agencies Act*, R.S.P.E.I. 1988, c. C-11, s. 17.1(5).

Financial Conduct Authority (UK FCA)'s recent ban, which prohibits regulated "debt packagers" from receiving referral fees from debt solution providers.[116] The UK FCA hopes to encourage good quality debt advice, where solution providers recommend solutions that are in the best interests of the debtor, rather than solutions that are more profitable for debt advice firms.[117] In the United States, the Consumer Financial Protection Bureau passed regulations prohibiting anyone from accepting or paying a fee or kickback that is part of a settlement service involving a federally related mortgage loan, as defined in the same regulations.[118] Enacting similar restrictions or mandating a monetary cap on fees of different ranges of total indebtedness will promote fair and reasonable fee structures for Canadian debtors.

A recent position paper published by the OSB refers to certain concerns discussed in this section, including how LITs enter into business relationships with unregulated individuals or debt advisors, which negatively impact the integrity of the consumer insolvency system.[119] That position paper highlights how debtors should understand that they do not require a debt advisor to access an LIT and LITs generally offer a free initial consultation.[120] Still, in 2022, largely unregulated debt advisors provided advice on approximately 22% of consumer proposals.[121] While the OSB's position paper explores gaps in regulation and recommends LIT professionals understand potential issues with accepting referrals or being asked to work with debt advisors, the paper advocates for best practices from the perspective of LITs. There is little discussion from the perspective of a consumer who would be navigating these overlapping service industries, nor advocacy for improved mechanisms for recourse when consumers fail to receive value added services from unregulated market players.

Consumers turn to credit counselling agencies to find a pathway to financial recovery. It follows that regulations across Canadian common law jurisdictions should not inadvertently encourage poor debt advice or encourage excessive personal debt management services for debtors to pay. When debtors are willing to pay for debt management services, fees should be reasonable and proportionate to the services provided. If not, exorbitant fees can push

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[116] Vishala Sri-Pathma, "Debt advisor referral fees banned by regulator" (2 June 2023), online: *BBC News* < https://www.bbc.com/news/business-65779455 > .

[117] Skynews, "Debt advice firms banned from receiving referral fees" (2 June 2023), online: *Yahoo News* < https://uk.news.yahoo.com/debt-advice-firms-banned-receiving-061300217.html?guccounter = 1 > .

[118] 12 C.F.R. Part 1024 (Regulation X) 1024.14(b).

[119] Government of Canada, "The Adverse Effects of the Debt Advisory Marketplace on the Insolvency System" (7 December 2023), online: *Government of Canada* < https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/licensed-insolvency-trustees/adverse-effects-of-the-debt-advisory-marketplace-on-the-insolvency-system > .

[120] *Ibid.*

[121] *Ibid.*

vulnerable consumers further into debt, which defeats the purpose of debt relief services. Agencies should be incentivized to provide a balanced view of all options available to the debtor and debt counselling employees should be knowledgeable of insolvency options outside of credit counselling, including referral to a LIT where appropriate.

This paper canvassed the existing fee restrictions implemented in the UK and the US, though further research into new categories of fees that service providers charge, or whether fee caps hinder service standard improvements will provide additional context to fee issues. On improving certainty of debt management service fees, provinces may consider using explicit language to indicate that only services that reach a successful debt settlement agreement may be charged, as is the case in Manitoba, Nova Scotia and PEI. For jurisdictions that do not mandate service fee caps, there are opportunities to model after regulations that contain such caps, like British Columbia's Debt Collection and Repayment Regulation. For any of these options, an unsophisticated consumer needs to have a way to compare fees across providers.

5. DEFENDING AGAINST "ASSEMBLY LINE" DEBT ENFORCEMENT

"Assembly line" debt enforcement describes the high-volume, mechanized process used by debt collection agencies to recover unpaid consumer debts. It implies a largely streamlined process, with little consideration for the unique facts of each case. The process involves issuing notices to debtors, filing lawsuits, and securing judgments against individual debtors. The assembly line debt enforcement industry exists because institutional creditors are expected to outsource debt collection in an effort to distance themselves from debtor consumers and to preserve their brand and relationship with the general public.[122] Outsourced debt collection also gains efficiency through economies of scale and increases the rate of repayment.

Critics have long pointed out that assembly line debt collection can be abusive of court processes and can cause significant harm to individual defendants.[123] This is because errors often result from the high volume of

[122] Shawn McGrath, "Debt Collection Agencies in Canada Industry Report" (August 2021), online: *IBISWorld* <https://www.ibisworld.com/canada/market-research-reports/debt-collection-agencies-industry/> at 9.

[123] See for example, commenting on the *U.S. Fair Debt Collection Practices Act*, Robert Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts" (1984) 18:3 Law & Soc'y Rev 323; Mary Spector, "Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts" (2011) 6:2 Va. L. & Bus. Rev. at 257; Judith Fox, "Rush to Judgment: How the *Fair Debt Collection Practices Act* Fails to Protect consumers in Judicial Debt Collection" (2013-2014) 13 Fla. St. U. Bus. Rev. at 37; Lisa Stifler, "Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions" (2017) 11:1 Harv. L. & Pol'y. Rev. at 9 [Stifler]; Daniel Wilf-Townsend, "Assembly-Line Plaintiffs" (2022) 135:7 Harv. L. Rev. at 1705 [Wilf-Townsend].

cases being submitted and because well-funded and sophisticated enforcement plaintiffs are often set up against low-income and vulnerable debtors. Debt buyers can find litigation or threat of litigation to be a cheap and efficient way to collect debts, leveraging the statistic that very few defendants will appear in court.[124] Other times, when defendants do participate, the impersonal enforcement process makes it difficult to dispute incorrect charges, negotiate payment plans that are realistic, or allow the defendant extra time to seek legal or financial aid. By participating in a lawsuit, debtor defendants are also forced to spend money to fight the lawsuit, even when it is an unwarranted lawsuit, which exacerbates financial hardship.[125] U.S. researchers have suggested that filing fees imposed by state courts could be viewed as an unconstitutional procedural and economic barrier to participation in the legal process.[126] Relatedly, where consumers suffer losses from inadequate provision of debt management services or have had to pay exorbitant fees, there are significant barriers to access justice given the low potential value of individual claims.

Advocates and lawmakers have proposed for more oversight and fair practices in the debt enforcement industry to further transparency, curbing of predatory collection practices, and promoting awareness of debtors of their rights. Nevertheless, Manitoba is the only jurisdiction to set an explicit penalty for wrongfully collected debts. Under its *Consumer Protection Act*, where any person charges a debtor through a prohibited practice with any amount that is not rightfully collectable, the debtor may recover from the creditor three times the amount of the charges that were wrongfully collected. This remedy for wrongful collection is very broad, as it covers "any person", and exists in addition to general administrative penalty provisions. The penalty gives both consumers and authorities an alternative option to combat non-compliance. Accordingly, imposing a similarly significant penalty may be an effective deterrent that other Canadian jurisdictions may consider.

The subsequent section discusses the implications of the provision of legal advice after the *Upsolve v. James*[127] case in the United States. Being a recent challenge against unauthorized practice of law prohibitions, *Upsolve* advocates for room to allow community-based non-profit organizations to help debtors defend their rights during debt collection litigation. Data shows that consumer litigants who participate in the court proceedings have a better chance of negotiating a resolution and of having the case dismissed.[128] In the interest of helping ordinary consumers, similar exceptions to unauthorized practice of law prohibitions in Canada may be needed to ensure that debtors are aware of their

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[124] Stifler, *ibid.* at 92.

[125] *Ibid.* at 99.

[126] Claire Raba & Dalie Jimenez, "Pay to Plead: Finding Unfairness and Abusive Practices in California Debt Collection Cases" SSRN (2023) at 56 [Raba].

[127] *Upsolve v. James*, 604 F.Supp.3d 97 (S.D. N.Y., 2022) [*Upsolve*].

[128] Raba, *supra* note 125 at 57.

rights and are equipped to dispute unmeritorious claims, before incurring significant personal and monetary costs of litigation.

(a) Development of Legal Technology

A large set of cases brought through Assembly Line litigation, where debtor consumers are defendants, will likely never reach the stage of written opinions, much less published, precedential appellate opinions.[129] Where a few cases have the potential to generate meaningful development of the law on consumer debt relief or large-scale debt enforcement, the repeat-player plaintiffs have strong incentives to pursue only those cases that might benefit them, and abandon cases that might lead to unfavourable outcomes.[130] Over time, the development of law will likely favour repeat and sophisticated parties at the expense of debtor one-off defendants.[131] In Canada, the limited number of reported decisions on the scope of the CDSSA or the BPCPA as it relates to debt relief services may support the hypothesis that service providers are highly selective of the cases they pursue or defend.[132]

New technologies offering self-help resources can be essential for spreading awareness of consumer rights and for publishing plain-language guides for debt collection defendants. However, these programs and resources often collide with rules around unauthorized practice of law as they cater to consumers facing threats of litigation or for checking limitation periods on their debts. Recently in *Upsolve v. James*[133], a Southern District of New York court found that the free speech clause of the United States First Amendment can limit the application of unauthorized practice of law rules relating to a free-to-use software that helps non-lawyer volunteers work with individual debtor litigants. The non-profit was concerned about potential enforcement action by the New York State Attorney General and obtained a preliminary injunction to protect its program from litigation.

The *Upsolve* case may signal a relaxation of unauthorized practice of law rules pertaining to certain legal information and advice tools. Although the ruling most likely applies specifically to Upsolve's program, it is a positive step towards helping consumers answer debt collection lawsuits, which accounts for roughly a quarter of all lawsuits filed in New York.[134] On the other hand, the *Upsolve* case was opposed by some New York civil legal services organizations, which argue that a wide array of services already exist for low-income New

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[129] Wilf-Townsend, *supra* note 123 at 1749.

[130] *Ibid.*

[131] *Ibid.*

[132] At the time of writing, only one other case cited *BPCPA* s. 125, which sets out the definitions of a "collection agent" and a "debt repayment agent."

[133] *Upsolve*, *supra* note 127.

[134] Institute for Justice, "Right to Provide Legal Advice" (4 January 2023), online: *Institute for Justice* < https://ij.org/case/right-to-provide-legal-advice/ > .

Yorkers facing debt collection lawsuits.[135] These organizations contend that Upsolve should prioritize referring debtors to existing free legal services attorneys or ensure that attorneys will supervise non-lawyer volunteers.[136] Since the granting of the preliminary injunction, the New York Attorney General's office has filed an appeal to the 2nd U.S. Circuit Court of Appeals.[137]

Upsolve offers a self-service software tool for users to learn about bankruptcy processes, legal documentation, and debt management best practices.[138] By offering a technology solution, Upsolve has the capacity to serve many more individuals than local, staff-driven legal aid organizations. Even at the stage of gathering debtor's information through comprehensive questionnaires, if privacy can be adequately protected, legal technology innovation can synthesis the information and evaluate the most relevant legal options for any individual customer at very low costs. For helping Canadian consumers, a similar hosted service to Upsolve can use plain-language to explain clear rules in the CDSSA, like how it is guaranteed that consumers cannot pay to their creditor any money in addition to the amount owed.[139] An automated frequently-asked-questions service could also outline rules surrounding threatening a debtor with litigation when debt collectors have no intention to pursue litigation, and how some Canadian court have began to assess evidentiary issues at a higher standard in favour of vulnerable debtors.[140]

(b) Implement Low-Risk Exceptions to Unauthorized Practice of Law Prohibitions

In Canada, there has been an efforts from the Law Society of Ontario[141], the Law Society of British Columbia[142] and the Barreau du Qu bec[143] to develop innovative legal services while helping service providers comply with risk-based monitoring and reporting requirements. Known as regulatory sandboxes, such

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[135] Sara Merken, "NY legal orgs oppose nonprofit's plan to give debt collection law advice" *Reuters* (14 April 2022), online: < https://www.reuters.com/legal/litigation/ny-legal-orgs-oppose-nonprofits-plan-give-debt-collection-law-advice-2022-04-14/ > .

[136] *Ibid.*

[137] *Ibid.*

[138] Jonathan Petts, "How Is Upsolve Free?" (21 March 2023), online: *Upsolve* < https://upsolve.org/learn/transparency/ > .

[139] *CDSSA*, *supra* note 78, ss. 22, 22.1.

[140] See for example, *EOS Canada v. Young*, 2023 BCPC 8, 2023 CarswellBC 114 (B.C. Prov. Ct.).

[141] Dale Smith, "Law Society of Ontario approves regulatory sandbox for legal tech" (22 April 2021), online: *The Canada Bar Association* < https://www.nationalmagazine.ca/en-ca/articles/legal-market/regulatory/2021/law-society-of-ontario-approves-regulatory-sandbox > .

[142] Law Society of British Columbia, "Innovation Sandbox", online: *Law Society of British Columbia* < https://www.lawsociety.bc.ca/priorities/innovation-sandbox/ > .

[143] Cristie Ford, "The Legal Innovation Sandbox" (2023) Am. J. Comp. L. at 18.

initiatives provides the opportunity to carve out defined exemptions within an otherwise comprehensive statutory prohibition on non-lawyers providing legal services.[144] Legal service innovators, especially those designing consumer-facing solutions that may improve timely access to justice, should be encouraged to grow within regulatory sandboxes. These sandbox initiatives may hold the potential to free legal service regulators from some of its rule-policing obligations, while still protecting the public interest and managing the extent of technical disruption to the practice of law.[145]

It is important to highlight that the success of a regulatory sandbox is hard to measure. There is limited academic discussion on consumer-facing legal technologies and whether new solutions can sustainably operate and keep up with changing regulations in the long-term. A handful of successful cases, including Ontario's two approved program participants as of mid-2023,[146] can indicate careful selection by regulators or an insufficient need for, or interest in, particular types of legal technology innovation.[147] Still, implementing a sandbox approach facilitates knowledge exchange in both directions that greatly exceeds the level of disclosure regulated entities typically like to share with their regulator.[148]

It remains to be seen whether successful and accurate legal technology programs, aimed at consumer debt relief like Upsolve, will develop in Canada. In the meantime, *Upsolve*'s victory at the United States District Court supports the vision of helping vulnerable members of the public access much-needed legal aid, on their path to building financial stability. Empowerment of consumer debtors is at the heart of innovative legal aid. Online and mobile services allow remote access to service and affordable services. By allowing legal technology solutions to grow, consumers can have additional choice in navigating the complexities of legal proceedings, which contributes to a more equitable justice system. When effective advice can reach a borrower facing highly consequential debt enforcement proceedings, it may well help vulnerable borrowers avoid the high costs of bankruptcy.

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[144] *Ibid*. at 4.

[145] *Ibid*. at 58.

[146] Zena Olignyk, "Ontario regulator approves real estate legal tech firm Doormat as part of innovation program" (12 Jul 2023), online: *Law Times News* < https://www.lawtimes-news.com/practice-areas/real-estate/ontario-regulator-approves-real-estate-legal-tech-firm-doormat-as-part-of-innovation-program/377793 > .

[147] Dirk Zetzsche et al., "Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation" (17 August 2017), online: *European Banking Institute Working Paper* < https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 3018534 > at 58.

[148] *Ibid*. at 59 & 60.

6. CONCLUSION

After persistently high inflation over 2022 and 2023, consumer segments are managing a combination of a high cost of living, sustained high costs of borrowing, complex housing and mortgage dynamics, which all make ordinary consumers more vulnerable to delinquency. Following the consumer borrowing journey, from accessing a wider source of loans, to debt management and counselling, to facing debt enforcement risk, this article describes the regulation of consumer debt market players and insights into policy development. The complex regulatory landscape formed in part from increased complexity of modern financial systems, the need to maintain accessibility of credit, and consumer protection objectives.

First, consumer-facing lenders, including BNPL platforms, are growing rapidly, but have not been tested through changing or severe economic environments. The complexity of new offerings and with fintech services partnering with each other and with institutional players, regulators are tasked with understanding novel risks to the integrity of the Canadian financial system. Being slow to implement consumer protection mechanisms, there are risks for unmonitored loan-stacking and further misalignment of interests between lenders, the platform and borrowers.

Credit rating agencies are gatekeepers of the financial system. Their processes and policies affect each consumer looking to build a high credit score, which can lead to substantial savings over their lifetime. However, the way credit rating agencies must address consumer concerns or disputes is loosely regulated. Credit rating agencies continue to rely heavily on creditors for information, which exacerbates the power imbalance between creditors and debtors.

When consumers want to proactively manage their outstanding debts, they may turn to a range of debt-relief providers. It is important to note that providers in jurisdictions without service fee caps or unclear fees may charge greatly varying fees. There is policy development opportunity to promote the provision of practical and value-add debt counselling or management services, so that consumers truly benefit from the debt management or debt settlement services that they pay for. Adopting a fee cap that is proportional to a debtor's ability to pay adds transparency and supports equitable access to important debt relief help. Another aspect may be prohibiting referral fees to reduce the conflict interest of consumer-facing debt relief firms. The recent *4 Pillars* case gave insight into how some credit restructuring service providers curtail their offerings to fall outside of the BIA or a provincial regulatory scheme. It should not be left solely to unsophisticated consumers to exercise caution in dealing with any unlicensed service providers and to seek help from the consumer affairs offices, that they may not even realize the need for.

Even with the help of debt counsellors or debt settlement services, a consumer may face debt enforcement agencies who employ high-handed tactics to pressure repayment of debts. To further consumer protection, provinces may

consider modeling after Manitoba's express penalty provision in cases of wrongful debt collection. For the vast number of time-barred claims that will likely be left undefended by individual debtors, a software screening tool like Upsolve's filing application could be developed in legal regulatory sandboxes to help identify clear incidences of time-barred claims and dispute them on the consumer's behalf.

In summary, this article surveyed interrelated industries that provide consumer-facing debt solutions. These industries encompass new technology platforms that have made consumer loans increasingly accessible and fast to obtain approve. The article examined processes of consumer creditworthiness evaluation, credit or debt advisors and "assembly line" litigation for debt recovery. Almost every Canadian will interact with one or more of these industries as they contemplate major purchases, seek employment or rental opportunities, try to manage their debt burdens or negotiate with creditors. In contrast to the highly concentrated and regulated consumer bankruptcy process, which carries its own problems, regulation of debt relief service industries leading up to initiating consumer bankruptcy is uneven. Across different aspects of bankruptcy adjacent industries, there is limited academic discussion and data collection efforts to assess prevalent business practices and consumer trends. While public attention to debt relief service industries grows, this article provides a timely canvass of the existing regulatory frameworks and highlights gaps for a more wholistic policy development approach in the debt relief space.