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Credit Counselling in Canada: An Empirical Examination

Stephanie Ben-Ishai and Saul Schwartz

Abstract

When debt becomes unmanageable, two options for a consumer debtor in Canada are: (1) enlisting the services of a bankruptcy trustee, and (2) becoming a client of a not-for-profit credit counselling agency. Each of these options is regulated differently and has public and private dimensions. At first glance, these two options might seem to illustrate the potential of multiple legal orders to better serve the public. In this paper, however, we argue, based on empirical research on the credit counselling industry, that while this pluralism has potential to facilitate debt relief in Canada, it has failed to do so. The lines between public and private options have been blurred to the point where they are difficult to discern, and the consumer debtor is ultimately disadvantaged.

Keywords: credit counselling, bankruptcy, overindebtedness, debt management, credit repair

Résumé

Au Canada, lorsque le niveau d'endettement devient difficile à gérer, deux options s'offrent au débiteur : (1) faire appel aux services d'un syndic de faillite ou (2) devenir client d'un organisme de conseil en crédit à but non lucratif. Chacune de ces options est soumise à une réglementation différente et comporte des aspects publics ainsi que privés. À première vue, ces deux options sembleraient démontrer le potentiel présenté par des multiples ordres juridiques qui permettraient de mieux servir le public. Cependant, dans cet article, nous soutenons, à partir d'études empiriques sur l'industrie du conseil en crédit, que malgré le potentiel de ce pluralisme pour faciliter effectivement l'allègement de la dette au Canada, il a échoué à le faire. Les lignes de démarcation entre les options privées et publiques ont été brouillées à tel point qu'il est difficile de les discerner et, au bout du compte, c'est le débiteur qui en fait les frais.

Mots clés : conseil en crédit, faillite, surendettement, gestion de la dette, réhabilitation du crédit

I. Introduction

When debt becomes unmanageable, two of the main options for a consumer debtor in Canada involve enlisting the services of either a bankruptcy trustee or a

not-for-profit credit counselling agency.¹ Each of these options is regulated differently and has public and private dimensions. At first glance, the existence of at least two options might seem to better serve the public. In this paper, however, we argue, based on empirical research on the credit counselling industry and a historical understanding of how overindebtedness has been dealt with, that while the multiple options have the potential to facilitate debt relief in Canada, that potential has not yet been realized. The lines between public and private options have been blurred to the point where they are difficult to discern, and the consumer debtor is ultimately disadvantaged.

Margaret Atwood's recent and highly acclaimed non-fiction account of the nature of debt, *Payback: Debt and the Shadow Side of Wealth*,² illustrates the confusion. The following passage is an example:

Nowadays, those drowning in debt have a resource that wasn't always available in the past: they can declare personal bankruptcy and more or less walk away from the whole mess. There are agencies that help you do this, for a cut. "Settle for less than you owe," coo the subway advertisements. True, there are drawbacks—your credit rating will be affected, and you'll lose some of your flashier toys—but you won't be thrown into a cold, dark dungeon where you'll have to live on cheese rinds and moldering bread, and where the other prisoners will steal your silk handkerchief and your boots and your cuff buttons. Not usually. Not here. Not yet.³

Atwood's description confuses the two main debt relief options. In a personal bankruptcy, private actors, called bankruptcy trustees, serve as the intermediaries between a consumer debtor and bankruptcy; trustees are regulated by the federal Office of the Superintendent of Bankruptcy (OSB). While bankruptcy trustees operate and work for private accounting firms, the fees they can charge are set by OSB regulations and are not a "cut." Various requirements are placed on consumer bankrupts, and bankrupts do not "more or less walk away from the whole mess."

The subway advertisements Atwood describes push debtors toward a private process known as credit counselling. Credit counselling is a largely unregulated process that is deeply problematic from a consumer protection perspective, because debtors often make contributions towards a payment plan that offers no discharge of their debts and is often inferior to procedures available through the publicly regulated bankruptcy process. Even though this process is operated by private agencies and funded in part by private sector creditors, the agencies claim non-profit status and thus receive a public subsidy in the form of tax relief.

In reality, neither of the two main options for dealing with debt is fully private or fully public, and neither is easily accessible to low-income debtors. The result, contrary to what Atwood suggests, is a dearth of options for dealing with overindebtedness in Canada. And many people do live in a form of cold, dark debt dungeon—here and now.

¹ Among the other options are negotiating with individual creditors, signing up with a for-profit credit counselling agency, or "doing nothing." These options will be described later in the paper.

² Margaret Atwood, *Payback: Debt and the Shadow Side of Wealth* (Toronto: Anansi, 2008).

³ Atwood, *supra* note 2 at 132.

In the sections that follow, we document, first, the main private and public options for dealing with overindebtedness in Canada and describe how the lines between public and private have been blurred in each instance. We then detail our current understanding of the not-for-profit credit counselling industry and provide a brief history of that industry. Part III reports on mystery calls made to non-profit credit counselling agencies that demonstrate the conflict between the agencies' stated purpose and their role as agents of large creditors.⁴ In part III, we also suggest that credit counselling agencies do not in fact offer a viable "private" alternative to community assistance or true credit counselling. Part IV concludes by sketching the changes to the regulation of each regime we would like to see: an accessible public bankruptcy system, not-for-profit credit counselling agencies held to a higher standard, and government support for non-profit agencies that provide impartial debt advice.

II. The Public and Private Sector Debt Relief Options

The multiple options available to Canadians seeking debt relief can be seen as a form of legal pluralism. Legal pluralists argue that it is not possible to understand regulation by merely studying formal legal relationships between the state and its citizens. In recent applications, legal pluralists have pointed to new forms of private law that complement, and sometimes even supplant, traditional forms of law. For example, corporate codes of conduct now influence how workers are treated and operate alongside traditional labour law. Similarly, private governance mechanisms, such as the "Smartwood" timber certification program⁵ or the Fairtrade Labelling Organization coffee standards,⁶ operate alongside traditional environmental law. The hope is that these new forms of law or new behavioural norms can be developed from the ground up and have regulatory impacts at least as large as traditional legal reform.

The private debt relief institutions—the not-for-profit credit counselling agencies foremost among them—are part of a more general pattern in North America. In Canada, as in the United States, private providers now commonly "furnish social services such as health care, and fulfill local government responsibilities such as waste collection and road repair; they also increasingly perform such traditionally public functions as prison management."⁷ Following the same path as our American neighbours, but at a slower pace, the private for-profit and not-for-profit sectors have become mechanisms for delivering government-funded services in Canada. These private providers are subject to private or "soft" regulation⁸

⁴ We made calls only to the largest agencies. A number of far smaller agencies exist across Canada and our findings may not apply to them.

⁵ Rainforest Alliance, *Timber Legality Verification*: Rainforest Alliance <<http://www.rainforest-alliance.org>>.

⁶ Fairtrade International, *What is Fairtrade?*: Fairtrade International <<http://www.fairtrade.net>>.

⁷ Jody Freeman, "The Private Role in Public Governance" (2000) 75 NYUL Rev 543 at 552.

⁸ Jerry Mashaw defines "soft law" as consisting of "social accountability regimes" and being "infinitely negotiable, continuously revisable, often unspoken; oscillating between deep respect for individual choices and relentless social pressure to conform to group norms." Jerry L. Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance," in Michael W. Dowdle, ed., *Public Accountability: Design and Experience* (Melbourne: Cambridge University Press, 2006) 115 at 125.

rather than the traditional regulation of the public sector. The regulation of these institutions has not developed as quickly as the institutions themselves. A recent Canadian example involves Ornge, a private air ambulance service that was awarded a major government contract in 2005 and is now under criminal investigation. The Ontario ombudsman claims his office received seventeen complaints about Ornge—including an alleged misuse of funds—but did not have the authority to investigate them as a result of the private contract that had been entered into between the government and Ornge.⁹

The focus on new and alternate legal spaces can conceal the crucial role of public regulation in these spheres. That is, the increase in private provision does not necessarily imply a reduction in government regulation.¹⁰ Given the commingling of the public and private spheres, attention needs to be paid to the conditions necessary to “sustain or curtail new conceptions of the public good”¹¹ in a privatized market.

How do these ideas apply to the debt relief institutions in Canada? We argue that the multiple debt relief options, described below, do not provide adequate protection to all debtors and are particularly ill adapted to the needs of debtors living on low incomes.

Bankruptcy is one of two official and public legal processes by which Canadian debtors who are unable to repay their debts as they come due can obtain relief. A debtor who files for bankruptcy will be discharged from most debts (excluding, for example, spousal support and recent government-funded student loans¹²) in exchange for any non-exempt assets that he or she holds.¹³ Trustees charge bankrupts a fee of approximately \$1,500 that can be paid in installments over the period prior to discharge, and there is also a possibility to extend payments after the discharge. Discharge usually occurs after nine months,¹⁴ but debtors who have “surplus income” will not be discharged until twenty-one months after filing and will have to contribute a portion of their surplus income to their creditors.¹⁵

The second public process, known as a consumer proposal, is an agreement reached between debtors and their creditors to repay part of the debts owed. Consumer proposals typically require payments over a five-year period¹⁶ but often allow debtors to maintain control over some assets, usually including the family home. The trustee administering a consumer proposal will generally take a percentage of the monthly payment by the debtors as a fee, with most proposals costing in the range of \$10,000 to \$14,000.

⁹ See Maria Babbage, “Ornge Scandal: Ontario Liberals Got Warnings As Early As 2004,” *The Huffington Post* (28 May 2012): http://www.huffingtonpost.ca/2012/05/28/ornge-scandal-ontario-helicopters_n_1550827.html.

¹⁰ As Ian Ayres and John Braithwaite put it in *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1991) at 11, “there is a tendency to confuse privatization and deregulation as the same issue when indeed privatization is often accompanied by an increase in regulation. . . . Privatization and deregulation can be negatively correlated social trends.”

¹¹ Freeman, *supra* note 7 at 549.

¹² *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 178(1).

¹³ *Bankruptcy and Insolvency Act*, *supra* note 11 at s 67(1)(b).

¹⁴ *Bankruptcy and Insolvency Act*, *supra* note 11 at s 168(1)(a)(i).

¹⁵ *Bankruptcy and Insolvency Act*, *supra* note 11 at s 168(1)(a)(ii).

¹⁶ *Bankruptcy and Insolvency Act*, *supra* note 11 at s 66.12(5).

Both bankruptcies and consumer proposals are administered by bankruptcy trustees, private actors who are regulated and licensed by the OSB. Their activities are governed by the *Bankruptcy and Insolvency Act* (BIA) and by “soft” regulation in the form of professional codes of conduct applicable to accountants and to trustees.¹⁷ While it has proven difficult to estimate the number of debtors who are discouraged from filing because of the fee, several scholars, including ourselves, believe that the number is non-trivial; trustees believe otherwise.¹⁸

The current system once faced competition from an entirely public alternative. In 1972, at a time when the number of consumer bankruptcies began to rise in Canada and the supply of private bankruptcy trustees was limited, the OSB developed a publicly administered bankruptcy program, known as the Federal Insolvency Trustee Agency (FITA), for debtors who could not afford a private bankruptcy trustee.¹⁹ Despite the fact that this program was used by one-third to one-half of consumer bankrupts, the program was abandoned in 1979, at the urging of the private trustee community.²⁰ The impetus from the trustees to abolish the program came from their realization that they could earn a profit on a consumer bankruptcy, even if the bankrupt had no assets. Ramsay quotes one trustee as stating, “[Trustees] realized that their fees did not depend on the assets of the bankrupt but they could get a very nice fee just out of income tax refunds and so on.”²¹

Following the termination of the Federal Insolvency Trustee Agency, the OSB developed the Bankruptcy Assistance Program (BAP), in which participating trustees agree to provide consumer bankruptcy services to those who cannot find a trustee willing to take their cases. Pursuant to this service, the OSB helps a debtor find a trustee if the debtor’s debts are mostly personal rather than business-related, and if the debtor can demonstrate that she or he has made at least two attempts to find a trustee.²² As we have demonstrated in an earlier study, BAP is not a low-cost bankruptcy program. Rather, it is a rarely used and largely unknown program that functions mainly as a trustee referral service.²³

Credit counselling agencies (CCAs) are a private alternative to the regulated consumer bankruptcy and consumer proposal procedures. In essence, these agencies—whether organized on a for-profit or a not-for-profit basis—set up repayment plans for debtors that involve the debtor paying 100 percent of the balance owed at the start of the plan over a three or four year period.²⁴ The creditors

¹⁷ Office of the Superintendent of Bankruptcy Canada, “About Us”: Office of the Superintendent of Bankruptcy Canada <<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home>>. Also, see Canada, Office of the Superintendent of Bankruptcy Canada, *Code of Ethics for Trustees in Bankruptcy* (Ottawa: Superintendent of Bankruptcy Canada, 2000).

¹⁸ Stephanie Ben-Ishai & Saul Schwartz, “Bankruptcy for the Poor?” (2007) 45 Osgoode Hall LJ 471.

¹⁹ Iain Ramsay, “Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada” (2003) 53 UTLJ 379 at 388, cited in Stephanie Ben-Ishai, “The Gendered Dimensions of Social Insurance for the ‘Non-Poor’ in Canada” (2005) 43 Osgoode Hall LJ 289 at 304.

²⁰ Ramsay, *supra* note 19 at 388, cited in Ben-Ishai, *supra* note 19 at 304.

²¹ Iain Ramsay, “Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy” (2000) 74 Am Bank LJ 399 at 408, cited in Ben-Ishai, *supra* note 19 at 304.

²² Ben-Ishai & Schwartz, “Bankruptcy for the Poor?”, *supra* note 18 at 480.

²³ *Ibid.*

²⁴ CCAs consistently claim to provide a plethora of other services in addition to repayment plans. Evidence of those other services among the large CCAs is difficult to discern.

typically agree to lower or eliminate any future interest charges for as long as the plan is in force.²⁵ The agencies receive a percentage (typically 10 percent) of what the debtors pay to the creditors from the debtors themselves and an additional percentage (typically about 20 percent) from the creditors.²⁶ Non-profit agencies (and the creditors) characterize these payments as “voluntary contributions.”²⁷ Compared to bankruptcy, where the first legislation dates back to the nineteenth century, CCAs have a much shorter history in Canada.

Credit Counselling Services of Metropolitan Toronto (CCSMT), which opened in the summer of 1966, was the first not-for-profit CCA in Canada.²⁸ In the beginning, CCSMT’s only employees were its executive director, George E. Penfold, one counsellor, and a secretary. The fledgling agency had arisen from a committee formed by the Social Planning Council of Toronto in 1965.

According to the *Globe and Mail*, “[t]he cost of the credit counselling service is borne by the credit-granting business community and the federal and provincial governments.”²⁹ From the mid-1960s until 1991, the provincial government generally subsidized 60 percent of the operating expenses of not-for-profit CCAs in Ontario, including CCSMT.³⁰ Most of these agencies were based in particular communities and grew rapidly in number to ten in 1973, to twenty-eight by 1978, and to thirty in 1991.³¹ In general, the federal government transferred money to the province to help with the provincial contribution, although the federal percentage varied over time. Ontario CCAs also received grants from the United Way.³²

From the beginning, creditors played several important roles for the CCAs. First, they returned to the CCAs a small percentage—less than 10 percent, it seems—of the funds they received as a result of the activities of the CCAs.³³ Second, staff from the creditors took up positions on the boards of directors of the CCAs. In addition, the employees of the CCAs had often held previous jobs in the credit-granting community. For example, Penfold, the executive director of CCSMT from its inception until the mid-1980s, had previously worked for the Household Finance Corporation; the first CCSMT counsellor had previously been a “credit manager.”

The tension between serving poor debtors and collecting outstanding debts for creditors arose almost immediately. This can be seen in an exchange of letters in

²⁵ Stephanie Ben-Ishai & Saul Schwartz, “Debtor Assistance and Debt Advice: The Role of the Canadian Credit Counselling Industry” in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2011) 351 at 384.

²⁶ Ben-Ishai & Schwartz, “Debtor Assistance,” *supra* note 25 at 384.

²⁷ *Ibid.*

²⁸ The following four pages are based on the account published in Ben-Ishai & Schwartz, “Debtor Assistance,” *supra* note 25. Estaban Uribe & Amanda Tait, “Credit Counselling: A Way Forward” The Public Interest Advocacy Centre (30 March 2007): The Public Interest Advocacy Centre <<http://www.piac.ca>>.

²⁹ “Metro Credit Counselling Opens Centre Tomorrow,” *Globe and Mail* (20 September 1966), p 11.

³⁰ “A Decade of Debt Lies Ahead,” *Globe and Mail* (9 May 1980); Warren Potter, “Budget Now for Christmas,” *Toronto Star* (10 December 1985), E512; Ellen Roseman, “Credit Counsellors Face Money Worries,” *Globe and Mail* (23 November 1991), B6.

³¹ Reports of the Ministry of Community and Social Services, various years.

³² Roseman, *supra* note 30 at B6.

³³ *Ibid.*

the *Globe and Mail* between Moses McKay, a former CCSMT board member, and Penfold. On May 20, 1968, McKay wrote that “the taxpayers who pay over 80% through the federal and provincial taxes of the cost of running the Credit Counselling Service should know that this organization resembles a collection agency more than a debt counselling organization.”³⁴ The issue that McKay raised was that the clients who were being referred to CCSMT were generally only those who had income beyond that deemed necessary to maintain a moderate standard of living and who agreed to use that “excess” income to repay their debts.³⁵ Those who either did not have money enough to live on or who would require more than three years to repay their outstanding debts were not helped. In a May 24, 1968 letter responding to McKay, Penfold took issue with the characterization of CCSMT as a “collection agency,” citing a Social Planning Council of Toronto document that had concluded that the CCSMT was a “valuable and useful service.”³⁶ The exchange ended with McKay writing back on May 30, 1968 that Penfold’s point was irrelevant as long as CCMST was refusing to help those who had no means to repay their debts.³⁷ The exchange between McKay and Penfold has remained relevant to this day. We argue below that modern CCAs provide little help to those who are unable to enter a debt management plan (DMP).

In the fall of 1991, the New Democratic Party government of Bob Rae announced that it was ending its subsidy of the CCAs.³⁸ In the legislature, the Minister of Community and Social Services argued that creditors needed to play a larger role in financing credit counselling.³⁹ This unexpected announcement forced the CCAs to either close or find other sources of funds. The identity of the “other source of funds” rapidly became clear as creditors took the place of the provincial government as the major source of revenue for the CCAs. The reliance on funding from creditors should have immediately raised questions about how the CCAs were to manage the now increased tension between serving the interests of clients—handling their debts in the most effective way—and serving the interests of its funders—collecting as much as possible on the debts owed. In retrospect, it seems naïve for the Minister to have believed that a major change in funding would not lead to a major change in the character of the CCAs.

In 2005, the CCA landscape was greatly altered by the start-up of InCharge Debt Solutions Canada (IDS), then a subsidiary of the Florida-based InCharge Debt Solutions.⁴⁰ Following the “new school” US credit counselling model, IDS worked with clients almost exclusively over the telephone. By contrast, the Credit

³⁴ Moses McKay, “Credit Counselling,” *Globe and Mail* (20 May 1968).

³⁵ McKay, *supra* note 34.

³⁶ G. E. Penfold, “Credit Counselling,” *Globe and Mail* (24 May 1968).

³⁷ McKay, “Credit Counselling,” *Globe and Mail* (30 May 1968).

³⁸ “Credit Advice Trimmed,” *Globe and Mail* (9 November 1991), A7.

³⁹ See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 1st Sess, Vol A (19 December 1991) at 1450 (Hon Mrs Boyd): <<http://hansardindex.ontla.on.ca/hansardeissue/35-1/1102a.htm>>. The Minister also pointed out that cuts to federal funding for social programs made the action necessary. In addition, she hoped that “the federal bankruptcy bill” would mandate creditor contributions.

⁴⁰ IDS and Credit Canada (the name under which Credit Counselling Services of Metropolitan Toronto now does business) announced their merger early in 2012, forming Credit Canada InCharge Solutions.

Counselling Service of Metropolitan Toronto (which now operates under the name of Credit Canada) runs several centres in the Greater Toronto Area (GTA) where clients can receive in-person counselling if they so choose. IDS operated out of a small office park in suburban Mississauga, from offices well equipped for telephone counselling but without much space for in-person counselling. In 2006, a second “new school” credit counsellor—Consolidated Credit Counseling Services of Canada (CCCS)—set up operations in the GTA. Where Credit Canada once had the GTA “market” to itself, it now faced two strong competitors who seemed heavily focused on setting up and administering debt management plans, assigning other activities a secondary role. Neither IDS nor CCCS has any visible interaction with any GTA community; that is, they may be not-for-profits, but they are not community-based.⁴¹

One consequence of the increased competition has been an advertising battle waged on GTA buses and subways and on the Internet. CCCS reported spending \$1.2 million on advertising, closely followed by IDS at \$1.1 million and Credit Canada at \$800,000.⁴²

According to the forms that all registered charities are required to file with the Canada Revenue Agency, Credit Canada had fallen by 2010 to third position among Canadian not-for-profit CCAs. The biggest agency, as measured by the size of revenues, was CCCS, which listed revenues of \$6.5 million for the fiscal year ending in October 2010. IDS was second, with reported revenues of \$5.4 million at the end of calendar 2009. At the same time, Credit Canada reported revenues of \$4.5 million. The merger of IDS and Credit Canada presumably relegates CCCS to second place.

Outside Ontario, the industry developed more slowly. According to Margaret Johnson, one of its founders, the Credit Counselling Society of British Columbia (CCCSBC) arose in 1996 from the interest of the Credit Grantors Association of Vancouver in the credit counselling model that was then in place in Ontario.⁴³ Johnson and Scott Hannah, who would later be appointed as the executive director of the new agency, were hired by the Credit Grantors Association to go to Toronto to observe the operations of CCCMT and to talk with two of its principals, Duke Streiger and Laurie Campbell.

Armed with an initial contribution of \$250,000 from the Credit Grantors Association, the Credit Counselling Society soon began operations. On November 8, 1996, the *Vancouver Sun* announced the opening of the first CCCSBC office.

⁴¹ The Congressional Report on abuses by the US credit counselling industry entitled “Profiteering in a Not-for-profit Industry” distinguished between “old school” credit counsellors that had been community-based and “new school” credit counsellors that lacked any such base. See US, *Profiteering in a Not-for-profit Industry: Hearing Before the Permanent Subcommittee on Investigation*, 108th Cong (24 March 2004): Senate Committee on Homeland Security & Governmental Affairs <http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=35837baf-2e06-4ab6-95fa-624fbf2aae76>.

⁴² The current paragraph and the following one are based on the T3010 forms filed by the CCAs mentioned. The forms for each CCA are available online: Canada Revenue Agency, Charities Listing <<http://www.cra-arc.gc.ca/chrts-gvng/lstngs/menu-eng.html>>.

⁴³ E-mail communication with Margaret Johnson, President, Solutions Credit Counselling Service, (10 July 2011).

According to Scott Hannah, its first and only director, CCCSBC aimed to “complete government programs and provide an alternative to private credit counselling services which may charge substantial fees.”⁴⁴ The new not-for-profit agency would receive “the bulk of its funding from banks, credit unions and credit card issuers.” Operationally, the Society was funded by a contribution of 25 percent of all money collected for the banks and 15 percent of all funds collected for finance companies, retailers, and other creditors. In addition, debtors using the services of the Society paid the Society 10 percent of all monies paid to their creditors, up to a maximum of fifty dollars per month.

Credit Counselling Services of Alberta (CCSA) was a not-for-profit organization established in 1997 with funding from the provincial government.⁴⁵ The new service was to take over the operation of Alberta’s Orderly Payment of Debts (OPD) program.⁴⁶ By design, the province gradually removed its annual funding, and CCSA became self-sufficient, in part by charging for personalized financial counselling.

The most recent development in this industry was a change in the method by which the major banks funded the CCAs. Under an agreement administered by the Canadian Bankers Association, the major banks had established a standard “fair share” percentage of debtor repayments that the creditors return to the CCAs.⁴⁷ In the fall of 2009, the creditors decided to determine the percentage that they would return to the CCAs on a case-by-case basis.⁴⁸

As the above history suggests, credit counselling agencies in Canada could once claim that they were “community-based” in the sense that debtors in a particular geographic area (e.g., Metropolitan Toronto, Hamilton, or Barrie) enrolled in agencies that were based in the same geographic area. With the entry of the agencies that had American ties, and with services being advertised on the Internet and provided over the telephone, any link there might have been between a local community and a particular credit counselling agency has become weaker.

Nonetheless, part of the justification of the 10 percent fee that credit counselling agencies charge their customers is that “we are a community service and the fee helps us to exist.” For the large CCAs, the notion of “community” is an empty one—the debtor may well live far away from the physical location of the CCA and the debts are likely to be owed to a creditor located far away from the debtor or the CCA.

⁴⁴ Michael Kane, “Credit Advisors Open Office in Royal City,” *Vancouver Sun* (8 November 1996).

⁴⁵ Credit Counselling Services of Alberta Ltd. (CCSA), “About Us”: Credit Counselling Services of Alberta Ltd. (CCSA) <<http://www.creditcounselling.com/home.html/>>. Part X of the BIA gives provinces the option of administering an Orderly Payment of Debts (OPD) program that allows debtors to pay all of their debts over a four- year period with future interest limited to 5 percent. Only Alberta, Saskatchewan, and Nova Scotia offer OPD programs, and they are relatively small in scope.

⁴⁶ CCSA, *supra* note 45.

⁴⁷ Ben-Ishai & Schwartz, “Debtor Assistance,” *supra* note 25 at 356.

⁴⁸ Brenda Bouw, “Banks Pull Out of National Credit Counselling Donation Program; Individual System Instead That Some Worry Will Be More Onerous,” *Canadian Press* (26 August 2009), cited in Ben-Ishai & Schwartz, “Debtor Assistance,” *supra* note 25 at 356.

The notion of a community solution to the overindebtedness of a community member has historical roots, but the historical solutions were very different from the reality of most interactions between debtors and credit counselling agencies. One idea of a community is that of a close-knit group that believes that it can deal with debt problems on its own. For example, in June 2012, Monroe Beachy, the sole proprietor of A&M Investments and a man known as the “Amish Madoff,” was sentenced to six and a half years in prison for defrauding investors of an estimated \$16.8 million. In response to his earlier bankruptcy filing, Beachy’s Amish creditors filed a letter requesting that the Northern District of Ohio dismiss his bankruptcy filing and allow the “Plain Community Alternative” to operate. The Plain Community Alternative is described as follows:

[T]he organizational techniques by which [the Plain Community Alternative] proposes to respond here have been developed over centuries, and now reflect routine practice within this church community when human failings or natural causes create practical needs. The Amish Church formed . . . [t]he A&M Trustee Committee [which] is responsible for designing and implementing an Amish Alternative Plan to Monroe Beachy’s bankruptcy that would enable the over 2,550 Amish and/or Plain Community Creditors of Monroe Beachy to protect their interests while not abridging their faith.⁴⁹

As a number of recent historical monographs demonstrate, consumer lending and enforcement was once dealt with primarily by nonreligious communities—especially in the working-class context. To the extent that a public, state-based legal option was available for dealing with overindebtedness, it generally operated as a final threat or as the backdrop to true community-based solutions. For example, Sean O’Connell has written extensively on the debts of working-class families in the United Kingdom in the late nineteenth century. O’Connell documents the predominantly local nature of credit, extended by local moneylenders and check traders (who sold an early form of prepaid credit cards) and collected by tallymen, the historical counterpart to today’s “doorstep lenders.” One of O’Connell’s central points is that this system existed in part to avoid recourse to the court system, which was expensive for creditors and could lead to prison sentences for the debtors.⁵⁰

III. Mystery Calls to Credit Counselling Agencies

One might think that non-profit credit counselling agencies would be a source of help for low-income debtors who are unable to afford a trustee, especially given the elimination of the public trustee program. After all, CCCS describes itself as “a registered charitable not-for-profit organization operating to help families end financial crisis and solve money management problems through education.”⁵¹ IDS, according to its most recent Revenue Canada filing, was a “social service

⁴⁹ *Re: Monroe L. Beachy Debtors* (June 2012, Ohio 10-62857 (Ohio Bankr)). See: <http://s3.documentcloud.org/documents/314823/amish-community-cites-religious-freedom.txt>.

⁵⁰ Sean O’Connell, *Credit and Community: Working Class Debt in the UK Since 1880* (Oxford: Oxford University Press, 2009).

⁵¹ Canada, Canada Revenue Agency, *2011 Registered Charity Information Return for Consolidated Credit Counselling Services of Canada*, (Ottawa, Canada Revenue Agency, 2011).

agency established to educate and counsel the public in management of personal credit and problems of debt.⁵² Credit Canada offers “[p]rograms to educate the public in the management of personal credit and to provide unbiased counselling in personal debt management and reduction, alternatives to bankruptcy and credit re-establishment.”⁵³

Given the 2003 Congressional investigation of US non-profit credit counselling agencies—which found widespread violations by CCAs of the rules surrounding the operation of non-profit organizations⁵⁴—we think it would be unwise to accept such claims at face value. We therefore decided to do some “mystery shopping.”

We created three personas for mystery callers, who would represent potential CCA clients. Our first hypothetical CCA client, “Tom,” was conceived as someone who would benefit financially from filing for bankruptcy. Tom is a thirty-year-old single man working as a government employee and earning \$3,400 per month, after taxes. His monthly expenses, without debt payments, are about \$3,000. Tom has \$3,000 in assets that might be lost in bankruptcy. Tom owes \$20,000 in student loans, the amount remaining eight years after leaving school; by design, the student loan debt would be dischargeable in bankruptcy. Tom also has other dischargeable debts: two large credit card balances that total about \$26,000. His monthly minimum payments on the credit card debts total about \$600; he is not making payments on the student loans. Again by design, if Tom were to dramatically cut his expenditures, he could afford payments resulting either from a debt management plan formulated by a CCA or from a consumer proposal arranged by a bankruptcy trustee. Alternatively, he could file for bankruptcy, and after either nine or twenty-one months in bankruptcy, discharge all of his debts.

“Nicole,” the second hypothetical debtor, has monthly expenses that far exceed her monthly income. With some thought, her expenses could be reduced but not by enough to make a DMP affordable. Her debts consist of a large outstanding line of credit and an overdraft balance at her bank. This debtor is a single mother, with two teenage daughters, who has substantial equity in her own home. Because of the imbalance between her income and expenses, however, she increased her mortgage last year in order to pay down her debts. By design, Nicole cannot afford payments required by either a debt management plan or a consumer proposal. In bankruptcy, she would lose her house and is reluctant to do so. She is in need of counselling to reduce her expenses so that she can stop spending more than she earns.

“Annie” has a recent degree in environmental studies but is also qualified as a dental hygienist. At the moment, however, she has no current employment and no current income and is living with friends. Her debts include student loans and outstanding credit card balances. She needs advice about how to handle her debts in the short run and in the longer term, when she anticipates having a job.

⁵² Canada, Canada Revenue Agency, *2011 Registered Charity Information Return for InCharge Debt Solutions Canada*, (Ottawa, Canada Revenue Agency, 2011).

⁵³ Canada, Canada Revenue Agency, *2011 Registered Charity Information Return for Credit Counselling Service of Toronto*, (Ottawa, Canada Revenue Agency, 2011).

⁵⁴ *Profiteering in a Not-for-profit Industry*, *supra* note 41, cited in Ben-Ishai & Schwartz, “Debtor Assistance,” *supra* note 25 at 369.

Overall, our research assistants made twelve calls to large non-profit credit counselling agencies: Tom made five calls, Annie made four, and Nicole made three. All of the calls were recorded, and the recordings are available from the authors. The research we undertook was approved in advance by the Research Ethics Boards of our universities.

The central question that motivated our investigation was whether the CCAs functioned as impartial providers of information about how best to handle their callers' debt problems. That is, we wanted to get some insight into whether the statements in the forms filed with the Canada Revenue Agency represented the primary nature of the business in which the CCAs were engaged.

From these calls, we can draw three provisional lessons related to our central question. Before identifying those lessons, we should note that not all the CCAs behaved in the same way. It was clear that the advice from one of the CCAs was particularly distant from its stated purpose, while that of another was much closer to the purpose provided to the Canada Revenue Agency. We are prevented by our ethics protocols, however, from publishing the identities of the specific agencies.

Lesson #1: The CCAs provide little in the way of meaningful budget counselling

The main plank of the argument that CCAs provide counselling as a public service rests with their universal provision of a first counselling session, usually over the phone, but potentially occurring in person, and lasting about one hour. Both Tom and Nicole went through these first sessions. Roughly three-quarters of the conversations consisted of the counsellor working with the debtor to construct a list of monthly income and expenses and a list of assets and debts.

Without a doubt, constructing a budget is a useful first step for any debtor to take, if they have not yet done so. Simply noting that buying lunch can easily cost \$2,000 per year, or that smoking a pack of cigarettes every day will cost almost \$4,000 per year, can be revelatory to some debtors. And admonishments to distinguish between "wants" and "needs" and to make a list before going grocery shopping may have some impact on the debtors' behaviour. However, constructing a budget also serves as a way for the counsellor to ascertain whether the debtor is eligible for a debt management plan or whether some other option is more appropriate.

Tom

In all of the calls made by Tom, the CCA counsellors first collected information from Tom about his income and expenditures. In three of the calls, the counsellors then moved quickly to convince Tom to agree to quite draconian cuts in his expenditures. In a fourth call, the counsellor decided that Tom should not use any insolvency procedure and needed only to dramatically reduce his spending in order to repay his debt. The counsellor conducting the fifth call recommended, after making less drastic cuts to Tom's current budget, consulting a bankruptcy trustee immediately.

The three counsellors who suggested drastic reductions to Tom's budget were clearly trying to bring his budget into the "window" of qualification for their DMP.

To enter that window, expenses must be reduced to a point where monthly income is sufficient to cover both reasonable living expenses and the required monthly payments to the creditors (including the monthly payment to the CCA). When a DMP is possible, as it was for Tom as long as the budget cuts were drastic enough, conversations about the initial budget arrived at a point like this, where Tom's income is not enough to cover both his current monthly expenses and the required debt payment:

Counsellor T1:⁵⁵ Your payment to us would be \$960 and that is added to your monthly expenses. You are a bit short for our program, you're about \$347 short. You'd be in the red so what we do in such a case is go back to your budget, see where we can do some trimming to your budget, OK?

Tom and the counsellor then went through his previously constructed budget, item by item, looking to cut at least \$347 per month from his expenses. After doing this, Counsellor T1 said:

OK, that's fine. So this looks good now. So, now, we have got you into the positive. If you stick with this budget, you will be eligible for our program, the debt management program.

In the second call by Tom, the budget calculation yielded expenses that were \$656 dollars less than his monthly income. The counsellor told Tom that the cost of paying off his debts (not including his student loan debt) would be \$1,050, leaving a deficit of about \$400 per month. The conversation then continued as follows:

Counsellor T2: This is where we start talking about the budget. Our fee is \$105, included in [the required \$1,050 payment]. You only have \$656. So, if you have \$1,050 . . . you need \$394 more income or probably less expenses. So this is where trimming your budget comes in. You need to cut 400 bucks in order to even try to do our program . . . this is where we have to change your spending. What would you change about this budget?

After making further cuts, Counsellor T2 concluded this part of the session with:

So now you have \$1,075 and we need \$1,050. So now you could do a program with us.

Note that the payment to the creditor was about \$950 in both cases. The only difference was that this agency charges a fee of roughly 10 percent on top of the payment to the creditors.

The third call by Tom followed a similar path. After constructing the initial budget, Counsellor T3 noted the gap between income and expenses and said:

What we have to do now is we go through the budget and we say OK let's see where we could adjust some spending to try and create a surplus into the budget.

With no small effort—for example, when Tom said it would be difficult to stop smoking, the counsellors suggested that he could cut the cost of smoking by rolling his own cigarettes—the counsellors were able to create a surplus in the budget, allowing Tom to be eligible for a DMP.

⁵⁵ We assigned each counselling session a letter (T, A, or N) and a number. Each letter corresponds to one of the persona. The number indicates the order of calling (e.g., T2 represents Tom's second telephone counselling session).

In these calls, very little attention was given to how Tom would actually implement the cuts to his spending. Counsellors T1 and T3 suggested that Tom keep track of his food expenses to see where he could cut back, and Counsellor T2 suggested using the “envelope system.” Counsellor T3 suggested that Tom could reduce his clothing expenses by asking himself whether he needed or wanted the new clothes. No advice was given as to how to implement the required changes in other areas. Indeed, if we combine all the cuts that Tom agreed to with any one of the counsellors, he could cut his expenses by another \$300 per month. Doing so, however, would imply that he was not in need of any concessions by his creditors, who would therefore refuse to agree to the plan and eliminate the need for the CCA as an intermediary. Crucially, all three of the counsellors stopped looking for savings when the DMP first became possible.

The remaining two calls by Tom were quite different from those just described and quite different from each other.

Counsellor T4 took the view that Tom did not need a debt management plan or any form of bankruptcy:

Counsellor T4: You don't have a problem, except that you spend too much money.

Counsellor T4 explained that any of the options offered by a CCA or a bankruptcy trustee would have an impact on Tom's credit rating and seemed to view that as a very negative outcome. For example, she said:

Technically, you can bankrupt your student loans right now and you can bankrupt your debts but that's seven years of not being able to get any credit or you can get credit but you're going to those [high interest] lenders and paying 34 percent, 38 percent interest and you don't want to do that.

Counsellor T4 offered to put Tom on an eight-week spending plan that would see him create two separate bank accounts, one for necessities (e.g., food, shelter, and debt service) and another for whatever was left over. The agency would then help Tom, in unspecified ways, to carry out the plan. Interestingly, this agency charges twenty-five dollars for the initial counselling session and for the spending plan. However, it was the only call that offered fairly specific counselling—the eight-week spending plan—that might result in a more stable economic situation.

The final call made by Tom resulted in what we viewed, a priori, as his best option. Of course, our view is only one of many possible outcomes, and what is “best” will depend on one's normative views. In this fifth call, the counsellor first went through Tom's current income. Then, in a less aggressive way than Counsellors T1–T3, he talked about each expenditure, asking Tom to specify by how much he could “realistically” reduce its cost. At the end of that process, Tom's expenses were still too high to support the DMP. Rather than going back to reduce expenses even further, Counsellor T5 said that DMP was “not really an option that we would recommend.” Instead, he said:

The next couple options that you might have, that I believe would be a recommendation for your circumstances, is basically talking to a trustee. A trustee would allow you go through a legal process of either exploring a

consumer proposal or a bankruptcy. I think you might be able to go through a consumer proposal as opposed to a bankruptcy but the trustee would be able to tell which was better for your particular circumstance.

Nicole

In Nicole's case, Counsellor N1 mentioned two issues that were relevant to deciding whether a DMP would be appropriate for her. Noting that Nicole had substantial equity remaining in her home, the counsellor said,

I'm not sure that our program is the most appropriate program for you. You do have equity in the property and if we were to try and send out a proposal to [the bank] asking them to stop charging interest and to accept a payment over approximately four years, they may question why you need a program like ours if there's an ability to make the payments . . . That's the creditors, not credit counselling.

Nicole's income was about \$4,000 per month and her expenses, without any debt service payments, were about \$4,800. According to Counsellor N1, the payment required to pay off her debts would be about \$550 per month for forty-eight months so that her budget would have to be cut by \$1,350 per month, an unlikely possibility. Counsellor N1 thus told Nicole that "her program," the DMP, was not a good option.

To her credit, Counsellor N1 spent sixteen minutes and forty seconds going through Nicole's budget *after* ascertaining that the DMP would not be appropriate and suggested reductions in her spending that would make her expenses, not including her existing debt payments, equal to her income.

In general, the procedure debtors follow in order to undertake credit counselling is to make a first call to the CCA. That call generally involves only the collection of basic contact information and the scheduling of a later counselling session. The second CCA that Nicole called, however, asked her financial questions during the initial call:

Counsellor N2: Now what I can do for you right now is figure out what a monthly payment would look like . . . so you're owing about \$19,000 so an estimated monthly payment through our program would be approximately \$438 per month. That would be for between three and a half or four years. Do you think that's a payment you could afford?

Nicole: Uhh . . . not the way I'm going.

Counsellor: OK. Now, let's see . . . if you can't afford a credit counselling payment, a debt management payment, your next options would be a consumer proposal or a bankruptcy.

This call lasted about eight minutes and did not result in a second counselling session. Having ascertained that Nicole was not a good candidate for a DMP, Counsellor N2 redirected Nicole to a bankruptcy trustee. Note that the first CCA that Nicole called could have performed the same upfront triage. Instead, the agency set up a free hour-long counselling session. In terms of resolving Nicole's debt problems, the result was bound to be the same since, by design, Nicole's expenses considerably exceeded her income, ruling out a DMP. Clearly, however,

Counsellor N2 essentially “screens out” those who are unlikely to be able to afford a DMP before an hour’s worth of counselling is offered.

Some of the calls turned out to be quite short. This was especially true for Annie, who was careful to tell each counsellor that she currently had no job and no income. One of the five calls—to the agency whose actions belied their stated purpose—lasted only three minutes. Annie was told that, “with what we do here, you’re going to need some kind of income coming in,” and the call ended. Two other calls ended quickly but concluded with the counsellors telling Annie that she was eligible for a free thirty-minute assessment of her budget and advice about what to do about her debts when she had a source of income. The fourth call made by Annie—to the agency whose actions were more consistent with their statement to the Canada Revenue Agency—took close to thirty minutes, even after the counsellor was told that Annie had no current income. That counsellor provided a few pieces of useful information but ended the call, as did the previous two, with an offer to set up a more formal session when Annie had a more stable source of income.

Lesson #2: The various options for resolving the debtor’s financial problems are not presented in anything like a complete and impartial manner. In particular, personal bankruptcy is not presented as a viable option

Tom’s persona was created in such a way that bankruptcy would convey substantial financial benefits. He had no assets, and his large debts would be dischargeable in bankruptcy. Nonetheless, Counsellor T1 never mentioned the word “bankruptcy.” Instead, she presented a consolidation loan as the only alternative to the DMP:

Counsellor T1: [As an alternative to the DMP] I would recommend going for a consolidation loan, you know, paying all this off at a much lower rate than what you have been because let’s say a consolidation loan . . . I don’t even know what loans are nowadays, 6 percent, or four, whatever. . . . you’re paying 20 on the CIBC credit card, 12 to CIBC overdraft . . . CIBC line of credit we’ve got 18, so all of those would be pretty well cut in half. You’d be paying a lot less interest and therefore paying off your principal sooner.

When Counsellor T2 told Tom that bankruptcy was an alternative, he explicitly asked for a comparison of bankruptcy versus the DMP:

Tom: The word bankruptcy makes my skin crawl . . .

Counsellor T2: I understand that, this is not a bankruptcy that we do.

Tom: For sure, can you just for comparison, can you like tell me the “bad” of bankruptcy versus . . .

Counsellor: It’d be an R9 for seven years, it would cost you considerably more because you have what’s called surplus income.⁵⁶

⁵⁶ Credit ratings are assigned on a scale from R1 to R9 with R9 being the worst rating. Agreeing to a DMP results in a credit rating of R7-R9. A personal bankruptcy results in an R9 credit rating for seven years after the bankrupt’s discharge. See Office of Consumer Affairs, “Credit report, credit score and credit rating”: Industry Canada <<http://www.ic.gc.ca>>.

Tom: OK.

Counsellor: So it may not cost you as much as that but it would be quite a big penalty for you because you have extra money so it's going to be a fairly expensive bankruptcy for you with a worse credit rating than what you have now. You do have money to pay back the debt, you will get a better credit rating and you're going to get a credit card at the end of the program.⁵⁷ We'll help you with the budgeting, every year I'm going to meet you, we're going to go through your budget . . . you can track your expenses, I'm going to help you get on track. You'll be much better at managing your money . . . if you're doing a bankruptcy, you don't have that kind of help . . . talking about the budget, controlling the spending, learning how to manage your money better, that's what we provide.

Such a presentation of the costs of bankruptcy is quite misleading. While it is true that a straight bankruptcy would lead to an R9 appearing on Tom's credit report for six to seven years depending on the province, this is not the case for a consumer proposal. For a consumer proposal, the information would be removed three years after the completion of the proposal. This is comparable to credit counselling, which would imply a negative credit rating that would be removed from the report two to three years after the debts are repaid.⁵⁸

The bankruptcy would cost about \$1,500 and, assuming his financial situation did not change, would be accompanied by surplus income payments of about \$1,000 per month for twenty-one months before he would be entitled to an automatic discharge. However, all of Tom's debts, including his student loans, would be discharged in a bankruptcy, and his surplus income payments would finish with his discharge from bankruptcy. On the DMP, Tom would pay \$1,050 per month for forty-eight months, including \$105 per month paid to the CCA as a service fee, and he would still have his student loans to repay. Another option for Tom would be a consumer proposal, with higher upfront fees but the possibility of completing the proposal in a shorter period of time and the ability to restore his credit rating sooner.

Nicole had equity in a home plus a paid-off car and would lose the home (and possibly the car) if she were to go through bankruptcy. Like Tom, however, a consumer proposal, might be an option for her. In a bankruptcy, Nicole's equity in her home would be treated as "property," which vests in the trustee. If she does not live in a province with a homestead exemption or a monetary exemption level that is higher than the amount of the equity in her home, the trustee would sell Nicole's home, pay back the secured creditor(s), and make the balance available for the benefit of her unsecured creditors. In a consumer proposal, as in a DMP, Nicole could negotiate an arrangement where she would pay her creditors over a period of time. She would not be required to sell her home, as the debtor's property does not vest in the trustee, as is the case in a straight bankruptcy.

⁵⁷ The counsellor has switched to talking about the DMP; she had previously mentioned that at the end of DMP, Tom's bank would offer him a secured credit card, one that requires prepayment.

⁵⁸ *Supra*, note 56.

Lesson #3: *The nature of the fees charged by the CCA is never highlighted and the contribution made by the creditors to the CCA is never mentioned*

Canadian CCAs have two main sources of revenue. The most important consists of payments—termed “voluntary contributions”—made by creditors (mainly the five largest chartered banks) as a function of the amounts collected for them by the CCAs. Until recently, most creditors made a “voluntary contribution” of 22 percent of the amounts forwarded to them by the CCAs. The second source of revenue is the fee paid by the debtors. Here, the CCAs vary. Some charge roughly 10 percent, some roughly 20 percent, and others a small fixed fee.⁵⁹

None of the CCAs tell potential clients about the “voluntary contributions” that they receive from the credit industry. The CCA websites either do not contain that information or hide it well.⁶⁰ The fee charged to the debtor by the CCA is evident in the agreement that the debtor is asked to sign and is mentioned in the counselling session.

Summary of Mystery Calls

The description of the key lessons coming out of the mystery calls suggests that the large CCAs provide little in the way of meaningful budget counselling, and that they do not completely and impartially convey the various options open to debtors for the resolution of their financial problems—particularly consumer bankruptcy. In addition, CCAs fail to accurately explain the nature of the fees they charge or mention the contributions made by creditors. In a majority of cases, when the caller’s circumstances and scenario did not meet the required qualifications of the CCA, the call either ended without meaningful budget counselling, or an attempt was made to force the caller’s situation into the requirements of the CCA’s program, ignoring the more appropriate alternatives available to the caller. This is highlighted in particular by Tom’s case: despite his scenario being developed specifically to be appropriate for bankruptcy, only one of the CCAs presented bankruptcy in an accurate manner as a viable option in his circumstances.

The focus of a majority of the CCAs appeared to be on fitting the caller into the requirements of their DMP. When this could not be achieved, the call often ended with little or no meaningful counselling, with the exception of a few instances when the counsellor continued the counselling session or offered an additional one. In regards to bankruptcy specifically, this alternative was often presented with

⁵⁹ The CCAs tell clients that the fee is either 10 percent or 20 percent. However, as indicated in the discussion between “Tom” and Counsellor T2, the amount paid to the CCA was to be \$1,050, and the CCA would retain \$105 as a fee. Thus, the amount paid to the creditors would be \$945 (\$1,050-\$105). The \$105 fee is 11.1 percent of the \$945 paid to the creditors. For that reason, we say “roughly 10 percent” rather than “10 percent.”

⁶⁰ However, the Canadian Banker’s Association (CBA) has publicly supported CCAs. Following a recent television documentary on the topic, the CBA responded by requiring the CCAs to reduce the number DMPs they put debtors into and increase the amount of time spent on counselling. However, the enforcement mechanisms are unclear and our interviews suggest progress has not been made in this direction. “Putting credit counselling to the test” *Marketplace* (19 March 2010) (video): Canadian Broadcasting Company <http://www.cbc.ca/marketplace/2010/the_debt_trap/main.html>.

a negative connotation and with the negative consequences emphasized, despite the possibility of it being the best alternative. In regards to the fees charged by CCAs, although the fees charged to the debtor are included in the agreement signed by the debtor and in the initial counselling session, the “voluntary contributions” received from creditors are not well communicated and are nonexistent or well hidden on the CCA websites. This demonstrates an unwillingness on the part of the CCAs to be open and honest about the entire fee structure of their organizations.

The mystery calls also suggest that the majority of the CCAs are not operating in a manner that is consistent with the statements filed with the CRA. While all three of the CCA descriptions included the element of education, this seemed to be missing from the phone calls. The focus appeared to be very narrowly on presenting the DMPs offered by each CCA, rather than on educating each individual about the potential alternatives and solutions. Although claiming to do so, the large CCAs are not really operating as an alternative to the historical community-based solutions to overindebtedness. In many cases, the CCAs fail to realize that fulfilling the roles outlined in their CRA descriptions, particularly as regards education, may often require that the options to which CCAs claim to be an alternative, bankruptcy in particular, be presented and encouraged as a viable alternative to DMPs. This of course presents a dilemma to the CCAs, which would need to suggest options and alternatives that are counter to their own interests.

IV. Conclusion

The current legal orders available to Canadians to deal with overindebtedness are not satisfactory. The CCAs are a private, self-regulated system for resolving insolvency, but it is not possible to understand the contemporary credit counselling industry and its growth without considering the dominant and alternate public option: bankruptcy. Bankruptcy has been largely privatized over the years, and it is not as available in Canada as it might be and as it is in countries such as Australia and the United Kingdom. The upfront cost of bankruptcy, combined with widespread misunderstanding of its costs and benefits, has opened a space for the credit counselling agencies. Even though it is hard to see how the debt management plans offered by credit counsellors to some debtors are superior to the public options of bankruptcy and consumer proposals, the industry has grown rapidly over the past ten years or so. We suspect this has to do with the way the CCAs represent themselves as community-based, debtor-friendly non-profit organizations, whereas they are, more plausibly, debt collectors for the major banks. Bankruptcy and credit counselling are not well-understood legal frameworks for dealing with insolvency, though they offer debtors alternative ways to repay their debts. As a result, whether a debtor ends up with a credit counsellor or a bankruptcy trustee may have more to do with whose advertising has been most effective than with whose system best meets the needs of the debtors.

Ultimately, the type of system we would like to see is one in which there are two or more transparent and efficient legal mechanisms for dealing with overindebtedness. Credit counsellors must be held to a higher standard of transparency

and impartiality. As we have argued elsewhere, bankruptcy, too, needs to be reformed. In particular, it needs to be made more financially accessible to a wider range of debtors. A public system that offers low-income debtors low-cost access to bankruptcy could easily achieve that goal. Neither credit counselling nor bankruptcy currently serves the needs of low-income debtors. Therefore, the reformed system could be an improved version of the current private and public options offered by bankruptcy and CCAs.

Given the complexity of modern debt contracts, it is doubtful that many debtors can fully comprehend the costs and benefits of the options open to them, either within the current system or under our hoped-for model. Some form of neutral debt advice is necessary. In our ideal model, the government would fund some form of advisory service that may go hand in hand with the current focus on financial literacy.

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