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Consumer Credit in Canada: A Regulatory Patchwork

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With unlimited access and consequent increased use of consumer credit in Canada and the federal government's gradual abandonment of consumer credit regulation since Confederation, Provinces and Territories have progressively enacted provincial consumer protection legislation aiming to regulate the consumer credit industry and protect vulnerable consumers.

A review of current provincial and territorial legislative frameworks governing consumer credit reveals significant discrepancies and limitations. Given the expansion of the consumer credit industry and the inherent vulnerability of consumers, the article confirms the need and urgency of strengthening financial consumer protection and provides possible avenues of reform.

It is recommended that Parliament reassert its paramount federal jurisdiction over interest to implement a national comprehensive consumer credit framework in order to promote a sustainable and responsible credit industry while ensuring that Canadian consumers are not only better protected from abusive and predatory lending practices but better equipped to increase their financial health and well-being.

Vu l'accès illimité au crédit à la consommation et son utilisation accrue qui en résulte au Canada, et compte tenu de l'abandon progressif par le gouvernement fédéral de toute réglementation à cet égard depuis le début de la Confédération, les provinces et territoires ont progressivement adopté des lois provinciales et territoriales de protection des consommateurs visant à réglementer le secteur du crédit à la consommation et à protéger les consommateurs vulnérables.

Un examen des cadres législatifs provinciaux et territoriaux actuels régissant le crédit à la consommation révèle des divergences et des limites importantes. Compte tenu de l'expansion du secteur du crédit à la consommation et de la vulnérabilité inhérente des consommateurs, le présent article confirme la nécessité et l'urgence de renforcer la protection financière des consommateurs et propose des pistes de réforme possibles.

Il est recommandé que le Parlement réaffirme sa compétence fédérale prépondérante sur la question des intérêts afin de mettre en œuvre un cadre national complet en matière de crédit à la consommation et de promouvoir un secteur du crédit durable et responsable tout en veillant à ce que les consommateurs canadiens soient non seulement mieux protégés contre les pratiques de prêt abusives et usuraires, mais aussi mieux équipés pour accroître leur santé et leur bien-être financiers.

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It now has been recognized almost universally by scholars, judges, legislators and even the consumer credit industry that measures must be taken by society to avoid the socially unacceptable consequences which too often are by-products of an unregulated consumer credit market.¹

Introduction

Given the historical negative connotations associated with usury and the personal use of credit, consumer credit was initially limited and scarce in Canada at Confederation in 1867. However, spawned by the Industrial Revolution in the 19th century, a new culture of consumerism has thrived since World War II and created an unabating demand for consumer products

1. Ronald CC Cuming, "The Credit Consumer in Trouble: Remedies of Canadian Consumer Creditors" (1968) 15:1 McGill LJ 48 at 48.

and services.² Corresponding consumer spending has catalyzed in turn the development and growth of a new consumer credit industry.³ Still relevant today, consumer credit was defined in 1967 as “credit advanced to individuals to finance their expenditures on goods and services as consumers.”⁴ Financial innovation produced new and more accessible consumer credit products and services and now includes credit card loans, personal lines of credit, title loans, home equity loans, instalment loans, rent-to-own agreements, payday loans and other unsecured personal loans.⁵

Nevertheless, abusive and predatory practices of unscrupulous credit lenders, notably loan sharks, represented a continuing concern for policy makers.⁶ In fact, a review of early federal legislation reveals Parliament’s sustained effort to regulate money lending in Canada in order to protect vulnerable debtors from abusive lending practices.⁷ As a result, not only were usury and money lending regulated but also licensing and supervision of early loan companies were contemplated by federal legislation.

Although early regulation of consumer credit was initially considered unnecessary legislative interference in the free market, it quickly represented the legitimization of a new industry and its acceptance by policy makers pursuant to new norms and values in North America. Analysis of small loan legislation enacted in the United States between 1915 and 1925 confirmed that “the business of money lending has been brought into

2. Stephanie Ben-Ishai, Saul Schwartz & Thomas GW Telfer, “A Retrospective on the Canada Consumer Bankruptcy System: 40 Years after the Tassé Report” (2011) 50 Can Bus LJ 236 at 240-241; Canada, Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living, *Report on Consumer Credit* (1967) (Joint Chairmen: The Honourable David A Croll and Ron Basford) at 10 [Special Joint Committee on Consumer Credit]; Jacob S Ziegel, “Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint” (1968) 68:3 Colum L Rev 488 at 488 [Ziegel, “Consumer Credit Regulation”]; Canada, *Report of the Royal Commission on Banking and Finance*, vol 1 (Ottawa: Queen’s Printer, 1964) (Chair: Dana Harris Porter) at 203 [Royal Commission on Banking and Finance]; Ontario, *Final Report of the Select Committee of the Ontario Legislature on Consumer Credit*, 1965 at paras 56-59 [Ontario, *Final Report 1965*].

3. Mary Anne Waldron, *The Law of Interest in Canada* (Carswell: Toronto, 1992) at 11 [Waldron, *The Law of Interest in Canada*].

4. Special Joint Committee on Consumer Credit, *supra* note 2 at 25.

5. Bank of Canada, “Household Credit” (November 15, 2019), n 1, online: *Bank of Canada* <<https://credit.bankofcanada.ca/householdcredit>> [<https://perma.cc/39DA-4G5W>]; Ben-Ishai, Schwartz & Telfer, *supra* note 2 at 241.

6. Jacob S Ziegel, “Recent Developments in Canadian Consumer Credit Law” (1973) 36:5 Mod L Rev 479 [Ziegel, “Recent Developments”].

7. Mary Anne Waldron, “The Federal Interest Act: It Sure is Broke, But is it Worth Fixin’?” (1997) 29:2 Can Bus LJ 161 at 164 [Waldron, “The Federal Interest Act”]. See also *An Act Respecting Interest*, RSC 1886, c 127; *Pawnbrokers Act*, RSC 1886, c 128; *An Act Respecting Loans in Canada by British Companies*, RSC 1886, c 125; *Companies Act*, RSC 1886, c 119, ss 86-103 [*Loan Companies Act*, 1886]; *An Act respecting Bills of Exchange and Promissory Notes*, RSC 1886 c 123; *The Bank Act*, RSC 1886, c 120.

the light, has changed from an underhanded, semi-legal enterprise which the world stigmatized as loan shark to that of an honorable, commercial venture.”⁸ As Iain Ramsay observed, federal money lending legislation recognized the “legitimacy of the industry, making it extremely difficult to de-legitimise it.”⁹

Since 1969, consistent and sustained statistics recorded by the Bank of Canada have clearly established the resulting expansion of consumer credit in Canada.¹⁰ Already totalling 9.7 billion dollars in 1969, consumer credit increased 322% between 1969 and 1979. Fuelled by the global financial liberalization and deregulation of financial services during the 1980s,¹¹ consumer credit in Canada further increased by 325% and 270% during the next two twenty-year periods culminating in a total amount of 639.4 billion dollars fifty years later in 2019. Moreover, total household indebtedness in Canada has surged to a staggering amount of 2.24 trillion dollars when consumer credit is combined with residential mortgage credit. According to the Bank of Canada, the most recent expansion of household debt is the result of higher house prices, financial innovation, income growth and low interest rates.¹²

As previously confirmed by the Royal Commission on Banking and Finance in 1964,¹³ household spending, including the escalating use of consumer credit, remains an important driver of modern economies.¹⁴ However, in the event fallouts, possibly resulting from a sharp rise in

8. “Current Legislation: The Uniform Small Loan Law” (1923) 23:5 Colum L Rev 484 at 487. See also Anne Fleming, *City of Debtors: A Century of Fringe Finance* (Cambridge, Mass: Harvard University Press, 2018) at 47-77.

9. Iain Ramsay, “Of Payday Loans and Usury: Further Thoughts” (2003) 38:3 Can Bus LJ 386 at 390 [Ramsay, “Payday Loans”].

10. Statistics Canada, “Table 10-10-0118-01, Credit measures, Bank of Canada (x 1,000,000)” (last modified 23 February 2020), unadjusted, DOI: <<https://doi.org/10.25318/1010011801-eng>> [<https://perma.cc/E4HS-Z97G>].

11. Donald JS Brean, “Financial Liberalization in Canada: Historical, Institutional and Economic Perspectives” in Albert Berry & Gustavo Indart, eds, *Critical Issues in International Financial Reform* (New Brunswick, NJ: Transaction Publishers, 2003) 125 at 135: “[B]y 1980 Canada had entered—or had been forced into—a new era of finance. Finance was being liberalized. The forces of change shaping industry and commerce—advances in technology, transportation, communications, international economic integration, financial sophistication—were likewise shaping the Canadian financial sector and the regulations that govern it.” See also Iain Ramsay, “Overindebtedness and Regulation of Consumer Credit” in Thierry Bourgoignie, ed, *Regards croisés sur les enjeux contemporains du droit de la consommation* (Cowansville, QC: Yvon Blais, 2006) at 35 [Ramsay, “Overindebtedness”].

12. Allan Crawford & Umar Faruqi, “What Explains Trends in Household Debt in Canada?” (Winter 2011–2012) Bank Can Rev 3 at 3, 13.

13. Royal Commission on Banking and Finance, *supra* note 2 at 14.

14. Anson TY Ho et al, “Home Equity Extraction and Household Spending in Canada” (September 2019), online: *Bank of Canada* <www.bankofcanada.ca/2019/09/staff-analytical-note-2019-27/> [<https://perma.cc/YN48-LCU3>]; Special Joint Committee on Consumer Credit, *supra* note 2 at 61-63. See also Ramsay, “Overindebtedness,” *supra* note 11 at 35.

interest rates or a decline in employment rates or real estate prices, trigger an economic downturn, the elevated level of household indebtedness also represents a significant vulnerability for the Canadian financial system and economy.¹⁵ On an individual level, sudden financial shocks, such as loss of income, illness, family breakdown or a rise in interest rates, represent potential vulnerabilities to a consumer's ability to service his or her household debt. Along with the financial distress caused by overindebtedness, the social impact of consumer credit has long been recognized: "Overindebtedness creates social costs such as lower productivity, family problems, health problems and potential financial exclusion. These costs are not reflected in the price of credit."¹⁶

Moreover, given the newly discovered profitability of the industry, many modern lending practices specifically target vulnerable consumers, especially low-income, uneducated or financially distressed debtors marginalized by mainstream financial institutions.¹⁷ Financial exclusion from traditional financial services stems from various factors either individually or in combination. Lack of access, either knowledge-based, cost-based or geographically-based, constitutes a major obstacle for some consumers while rejection, either actual or anticipated, resulting from the absence of credit, a poor credit rating, or an existing high level of indebtedness, represents another barrier to affordable credit-enhancing consumer loans.¹⁸

However, with the federal government's gradual abandonment of consumer credit regulation since Confederation, as will be explained in

15. Bank of Canada, "Financial System Review—2019" (2019) at 6, online (pdf): *Bank of Canada* <www.bankofcanada.ca/2019/05/financial-system-review-2019/> [<https://perma.cc/NG6M-8W8J>]; Gino Cateau, Tom Roberts & Jie Zhou, "Indebted Households and Potential Vulnerabilities for the Canadian Financial System: A Microdata Analysis" (Report) in Bank of Canada, *Financial System Review* (December 2015) at 49, online (pdf): <www.bankofcanada.ca/wp-content/uploads/2015/12/fsr-december2015.pdf> [<https://perma.cc/3592-MVHU>]; Jerry Buckland, *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada* (Toronto: University of Toronto Press, 2012) at 11 [Buckland, *Hard Choices*]; Poonam Puri & Andrew Nichol, "Developments in Financial Services Regulation: A Comparative Perspective" (2014) 55:3 *Can Bus LJ* 454 at 460. See also Livio Di Matteo, *Household Debt and Government Debt in Canada* (2017), online (pdf): *Fraser Institute* <www.fraserinstitute.org/sites/default/files/household-debt-and-government-debt.pdf> [<https://perma.cc/3B6V-VWSK>].

16. Ramsay, "Overindebtedness," *supra* note 11 at 37; Canada, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970) (Chair Roger Tassé) at paras 2.1.16-17; Ben-Ishai, Schwartz & Telfer, *supra* note 2 at 242.

17. Ben-Ishai, Schwartz & Telfer, *supra* note 2 at 243; Special Joint Committee on Consumer Credit, *supra* note 2 at 10, 17-18; Buckland, *Hard Choices*, *supra* note 15 at 152.

18. For further details see Brenda Spotton Visano, "Mainstream Financial Institution Alternatives to the Payday Loans" in Jerry Buckland, Chris Robinson & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context: A Mature Industry with Chronic Challenges* (New York: Palgrave MacMillan, 2018) at 149-158 [Buckland, Robinson & Visano, *Payday Lending in Canada*].

Part I of this article, provinces have progressively enacted a vast array of provincial consumer protection legislation aiming to regulate the consumer credit industry and protect vulnerable consumers during the last sixty years. As a result, provinces and territories play a significant role in the regulation of matters related to pawnbroking, unconscionable transactions relief, cost of credit disclosure, fair trade practices, payday loans and other high-cost credit products. The evolution of these provincial statutes governing consumer credit will be explored chronologically in Part II.

Each subset of provincial consumer protection legislation has previously been the subject of in-depth analyses and Canadian studies, reports and publications are referenced throughout the paper. The objective of this article is not to provide a thorough update of previous research, although such an endeavour is certainly warranted, but instead to offer insight into the evolution and progression of financial consumer protection legislation in Canada and to provide the reader with a general overview of its current state in order to contextualize future reform.

A review of the current provincial legislative framework governing consumer credit in Canada will ascertain the extent of such regulation and reveal various discrepancies and limitations. The analysis will further demonstrate that the apparent sporadic, disparate and fragmented nature of provincial consumer credit regulation reduces the effectiveness of consumer protection measures. With the expansion of the consumer credit industry and the inherent vulnerability of consumers, this article will confirm the need and urgency of strengthening financial consumer protection and provide possible avenues for reform.

Given the absence of a national cohesive strategy addressing the recent rise in consumer overindebtedness and insolvency,¹⁹ it is recommended that Parliament reassert its paramount federal jurisdiction over interest to implement a national comprehensive consumer credit framework, to promote a consumer credit industry that is both sustainable and responsible, while ensuring that Canadian consumers are not only better protected from abusive and predatory lending practices but also better equipped to increase their financial health and well-being.

19. Office of the Superintendent of Bankruptcy Canada, “Annual Consumer Insolvency Rates by Province and Economic Region” (last modified 24 May 2019), online: *OSB* <<https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>> [<https://perma.cc/Y5R6-6GJ2>] (according to the OSB statistics, consumer insolvencies have continued their upward trend since 1989 when we disregard the impact of the 2008–2009 financial crisis).

I. *The demise of federal consumer credit legislation*

Pursuant to its exclusive jurisdiction over the subject matter relating to “Interest” granted by the *Constitution Act, 1867*,²⁰ Parliament gradually enacted national legislation dealing with interest and other credit related matters. Indeed, all of the current provisions of the federal *Interest Act* can be traced back to the late nineteenth century.²¹ The essential elements found in today’s *Interest Act* were added piecemeal over a twenty-year period between 1880 and 1900 and were never the subject of a comprehensive debate which examined all facets of the legislation at one time.

The federal Act confirmed the general principle established in Canadian law since before Confederation that the parties to a loan transaction are free to fix their own interest rates unless legislative restrictions apply.²² The Act also sets the rate of interest at six per cent where none had been fixed by the parties or by law. That rate was lowered to five per cent in 1900.²³ The result was a federal *Interest Act* that essentially ensures a borrower is informed of the applicable rate of interest but constitutes minimal and largely ineffectual disclosure requirements given that knowledge of the interest rate is but one part of the equation.²⁴

Comprehension and uniformity are also required in order to make an informed decision and to properly compare different financial options.²⁵ Unfortunately, both objectives were never achieved by this Act. Given the lack of financial literacy of many Canadians, the complexity of financial documents and the absence of a truly encompassing definition of interest as the entire cost of credit, lenders were never obliged to disclose and often times misrepresented the total cost of the loan to the consumer. Today the legislation has been described as “hopelessly dated” with “antiquated provisions” and “functionally dead.”²⁶

20. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(19), reprinted in RSC 1985, Appendix II, No 5.

21. *Interest Act*, CSC 1858 (22 Vict) c 58; RSC 1886, c 127, ss 1, 2 (ss 9-30 repealed SC 1890, c 34); RSC 1906, c 120 (s 4 disclosure requirement added by SC 1897, s 2); RSC 1927, c 102; RSC 1952, c 156; RSC 1970, c I-18; RSC 1985, c I-15; See also Waldron, *The Law of Interest in Canada*, *supra* note 3 at 5-10; Waldron, “The Federal Interest Act,” *supra* note 7 at 164.

22. *Interest Act*, *supra* note 21, ss 2-3.

23. *An Act to amend the Acts respecting Interest*, SC 1900, c 29, s 1.

24. Ziegel, “Recent Developments,” *supra* note 6 at 479-495.

25. Waldron, *The Law of Interest in Canada*, *supra* note 3 at 96-97.

26. Harvin Pitch, “Consumer Credit Reform: The Case for a Renewed Federal Initiative” (1971–1972) 5:2 *Ottawa L Rev* 324 at 325; Thomas GW Telfer, “Preliminary Background Paper on the Canada Interest Act” (Report prepared for the Uniform Law Conference of Canada Annual Conference, Charlottetown, September 2007) at para 1, online: <ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1263&context=lawpub> [https://perma.cc/4QHD-DUDG], citing Jacob S Ziegel, “Is Canadian Consumer Law Dead?” (1994–1995), 24:3 *Can Bus LJ* 417 at 421 and Waldron, “The Federal Interest Act,” *supra* note 7 at 162.

Parliament's first efforts to regulate the consumer credit industry included the *Pawnbrokers Act*²⁷ and the *Money Lenders Act*.²⁸ The latter regulated small money lenders and limited rates of interest to twelve per cent per annum on loans under \$500. In addition, the federal *Loan Companies Act* consolidated previous licensing requirements and prescribed in 1934 an overriding interest rate ceiling of 2.5% per month on all lending companies operating under powers granted by the Parliament of Canada.²⁹ However, despite the above federal legislation, regulation of interest rates in existing statutes did not protect vulnerable debtors from other usurious charges given their "simplistic approach and the absence of a licensing requirement" for non-federally regulated money lenders.³⁰ The *Money Lenders Act* was deemed unenforceable and thus ineffective because "no one was fixed with responsibility for its administration" and the absence of a definition of "interest" hindered any possible prosecution under the statute.³¹ According to Mary Anne Waldron, "[l]enders were evidently quick to understand that a variety of fees and charges could be added to the borrower's bill and increase their return."³²

As a result, the *Small Loans Act* was enacted in 1939 and applied generally to all loans of less than \$500 whether the money lender was federally or provincially incorporated. It limited interest to two per cent per month on a loan for a period of fifteen months or less and to one per cent per month for loans with longer durations.³³ Although it provided initially the necessary legislative framework to a developing consumer

27. *Pawnbrokers Act*, SC 1851 (14 & 15 Vict) c 82; CSC 1859, c 61; RSC 1886, c 128; RSC 1906, c 121; RSC 1927, c 152; RSC 1952, c 204; RSC 1970, c P-5 as repealed by *Miscellaneous Statute Repeal Act*, SC 1980–1983, c 159, (in force 1 December 1983, and replaced in part by the usury provisions of the *Criminal Code*, RSC 1985, c C-46, s 347).

28. *The Money Lenders Act, 1906*, SC 1906, c 32; RSC 1906, c 122; RSC 1927, c 135, as repealed by *An Act to amend the Small Loans Act*, SC 1956, c 46, s 8 (in force upon assent 14 August 1956) [*Money Lenders Act*].

29. *Loan Companies Act*, 1886, *supra* note 7; *The Loan Companies Act, Canada, 1899*, SC 1899, c 41; *Companies Act*, RSC 1906, c 79, ss 177-258 (Loan Companies); *Loan Companies Act*, SC 1914, c 40; RSC 1927, c 27; RSC 1952, c 170; RSC 1970, c L-12; RSC 1985, c L-12.

30. Waldron, *The Law of Interest in Canada*, *supra* note 3 at 11-12; Jacob S Ziegel, "The Legal Regulation of Consumer Credit in Canada" (1966) 31:2 Sask Bar Rev 103 at 106 [Ziegel, "Legal Regulation"]; *Small Loans Act*, SC 1939, c 23, Preamble; 2nd reading, *House of Commons Debates*, 18-4, vol 3 (25 April 1939) at 3203-3207 (Hon JL Ilsley); *William E Thomson Associates Inc v Carpenter* (1989), 69 OR (2d) 545 (CA); Jacob Ziegel, "Time to clarify Canada's lending law," *The Globe and Mail* (20 April 2004, last modified 20 April 2018), online: <<https://www.theglobeandmail.com/opinion/time-to-clarify-canadas-lending-law/article1136034/>> [https://perma.cc/X6MA-9Q46].

31. Special Joint Committee on Consumer Credit, *supra* note 2 at 30-31; Waldron, *The Law of Interest in Canada*, *supra* note 3 at 11-12. See e.g. *R v Climans*, [1938] 2 DLR 711 at para 17, 69 CCC 336 (Ont Co Ct).

32. Mary Anne Waldron, "A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past?" (2011) 50 Can Bus LJ 300 at 303 [Waldron, "A Brief History"].

33. *The Small Loans Act, 1939*, SC 1939, c 23, s 2 (in force on 1 January 1940).

credit industry and applied to all loan companies whether provincially or federally incorporated, the graduated rate ceilings prescribed quickly became totally “unrealistic” and the Act was “totally inadequate” given the rapid escalating cost of money as well as the increased demand for and access to consumer credit.³⁴ Even though the monetary ceiling of \$500 of the *Small Loans Act* was increased in 1956³⁵ to \$1,500, this restriction had become an insubstantially low ceiling and thus easily evaded.³⁶ With this last amendment, interest was permitted up to two per cent per month on the first \$300, one per cent per month on the amount between \$300 and \$1,000 and 0.5% per month on the amount between \$1,000 and \$1,500 on loans by money lenders. According to the 1964 Royal Commission on Banking and Finance, the statute became ineffective and even created a distortion in the availability of small loans within the regulated field since “there [was] no regulation of the substantial amount of larger lending.”³⁷ Moreover, inadequate enforcement of the federal statute is confirmed by the fact that “[b]etween 1940, when the Act came into force, and 1966 there were only 9 prosecutions under the *Small Loans Act*.”³⁸

During World War II, the federal government granted jurisdiction over consumer credit and instalment buying to the Wartime Prices and Trade Board.³⁹ The Board introduced the first consumer credit order in 1941 and restricted the purchase of goods under terms of deferred payment by prescribing a down payment of thirty-three per cent on specified articles along with a minimum \$10 payment and limiting the credit period of an instalment account.⁴⁰ According to the Board’s 1943 Report, the primary objective of these regulations was to curb inflation and prices “through

34. Pitch, *supra* note 26 at 325; Canada, Royal Commission on Prices, *Minutes of Proceedings and Evidence, No 35* (Ottawa: King’s Printer, 1948) at 1910–1912 [Royal Commission on Prices, *Minutes No 35*]. The temporary success of the *Small Loans Act* is highlighted in Special Joint Committee on Consumer Credit, *supra* note 2 at 55; Jacob Ziegel, “Consumer Insolvencies, Consumer Credit and Responsible Lending” in Janis P Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Carswell, 2010) at 355-356 [Ziegel, “Consumer Insolvencies”].

35. *An Act to amend the Small Loans Act*, SC 1956, c 46, ss 1, 6.

36. Ziegel, “Consumer Credit Regulation,” *supra* note 2 at 496; Waldron, *The Law of Interest in Canada*, *supra* note 3 at 16; Waldron, “A Brief History,” *supra* note 32 at 305-306; Special Joint Committee on Consumer Credit, *supra* note 2 at 31; Royal Commission on Banking and Finance, *supra* note 2 at 382. Both federal reports recommended an increase of the maximum amount of the regulated loan from \$1,500 to \$5,000.

37. Royal Commission on Banking and Finance, *supra* note 2 at 209-210; Waldron, *The Law of Interest in Canada*, *supra* note 3 at 16.

38. Ziegel, “Consumer Credit Regulation,” *supra* note 2 at n 181. See also Ziegel, “Legal Regulation,” *supra* note 30 at 107.

39. *War Measures Act*, RSC 1927, c 206; *Wartime Prices and Trade Board Regulations*, PC 1941-6834, (28 August 1941) C Gaz Extra (4 September 1941), s 4(1)(g).

40. Canada, Wartime Prices and Trade Board, *Order 64* (14 October 1941).

a curtailment in the volume of floating credit” and an increase of cash sales.⁴¹

Until the regulations were revoked in 1947 following the war, the Board regularly refined and extended the wartime federal consumer credit regulations.⁴² Several of these changes were further “designed to ensure that the real cost of extending credit would be both paid and realized by those making use of this additional service.”⁴³

A subsequent national experience to regulate consumer credit came during the Korean War, to “take steps to restrain the expansion of purchasing power and the demand for consumer goods by preventing inflationary expansion of currency and credit.”⁴⁴ The regulation adopted in 1950 and revoked in 1952 provided for minimum down payments and maximum loan values (twenty to fifty per cent of cash price of the goods sold), maximum periods of credit (12 to 18 months) and minimum instalment amounts (\$5 to \$10 per month).⁴⁵

Fifteen years later, with the entry of federal banks into the consumer credit market following the liberalization of interest rate caps previously imposed on banks,⁴⁶ Parliament adopted limited banking disclosure and transparency requirements in 1967 pursuant to the *Bank Act*

41. Canada, *Report of the Wartime Prices and Trade Board, September 3 1939, to March 31 1943*, at 5-6: “It also had the effect of conserving labour and critical materials through reduced consumer demand; reducing the costs of doing business arising from bad debts, interest and book-keeping expenses; reducing the volume of outstanding debt of individuals; and accumulating a backlog of demand for industrial products for a later period when labour and materials will again be readily available for civilian needs” [WPTB *Report*, 1939–1943].

42. Canada, *Report of the Royal Commission on Prices*, vol 3 (Ottawa: King’s Printer, 1949) (Chair: Clifford Austin Curtis) at 289-291 [Royal Commission on Prices, *Report*]; Royal Commission on Prices, *Minutes No 35*, supra note 34 at 1874-1875. See Canada, *Wartime Prices and Trade Board, Order 75* (30 December 1941); *Order 87* (19 January 1942); *Order 161* (23 July 1942, effective 1 August 1942); *Order 225* (12 January 1943, effective 1 February 1943); *Order 471* (effective January 1945); *Order 598* (30 January 1946); *Order 622* (16 April 1946); *Order 692*, SOR/47-35 (11 January 1947, effective 13 January 1947). See also Canada, *Report of the Wartime Prices and Trade Board, January 1, 1946, to December 31, 1946 (including important developments up to February 1, 1947)* (Ottawa: King’s Printer, 1947) at 9: “In view of improving supplies and of the heavy task of administration which would have been involved in appropriately adapting the application of these regulations to the changing conditions of supply and demand, the Government did not feel justified in continuing them under its emergency powers.”

43. WPTB *Report*, 1939–1943, supra note 41 at 56.

44. *The Consumer Credit (Temporary Provisions) Act*, SC 1950–1951, c 3, as amended by SC 1951, c 14, expired on 31 July 1953, SOR/52-222, as repealed by *Miscellaneous Statute Repeal Act*, SC 1980–1983, c 159.

45. *The Consumer Credit Regulations*, SOR/50-485 substituted by SOR/51-3 as amended by SOR/51-94 and SOR/51-333 (revoked 6 May 1952, SOR/52-191).

46. *An Act Respecting Banks*, SC 1867, c 11, s 17 (reduced to 6% in 1944 by *The Bank Act*, SC 1944, c 30, s 91 as amended by *Bank Act*, SC 1966–1967, c 87, ss 91(2)–(8), expired 31 December 1967, pursuant to SOR/67-329.

and its constitutional jurisdiction over matters relating to banking.⁴⁷ Notwithstanding these new consumer protection measures, the report of the Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living conclusively confirmed that same year that consumer credit remained a problem and that federal legislation “leaves much to be desired.”⁴⁸

Following unsuccessful attempts to further regulate consumer credit during the 1960s and 1970s,⁴⁹ Parliament hastily repealed the *Small Loans Act* in 1980 without any debate or plan to protect consumers⁵⁰ and replaced it with a criminal interest rate defined as an effective annual rate of interest that exceeds sixty per cent on the credit advanced under an agreement.⁵¹ Consequently, with the exception of a short period during which the *Small Loans Act* was economically relevant, initial federal legislation was a dismal failure from a consumer protection perspective.⁵²

With the evident loopholes and the lack of enforcement, the absence of a federal licensing requirement for all money lenders as well as the impact of inflation and the absence any substantive reform, consumer credit in Canada was essentially unregulated for nearly 100 years.⁵³ Although there was an unsuccessful attempt in the 1970s, no other comprehensive financial consumer protection legislation reform has been introduced to date by the federal government to regulate all forms of credit products and services or all types of credit grantors including provincially regulated companies.

It bears noting that federal regulation has substantially expanded during the last fifty years and now regulates all forms of consumer credit and other financial services offered by all federally regulated financial institutions.⁵⁴

47. *Bank Act*, SC 1966–1967, c 87, s 92; Pitch, *supra* note 26 at 327. See also Canada, Bill S-2, *Finance Charges (Disclosure) Bill*, 5th Sess, 24th Parl, 1962, reintroduced, Bill S-3, 25th Parl, 1962.

48. Special Joint Committee on Consumer Credit, *supra* note 2 at 8.

49. See in particular Bill C-16, *An Act to provide for the protection of borrowers and depositors, to regulate interest on judgment debts, to repeal the Interest Act, the Pawnbrokers Act and the Small Loans Act and to amend certain other statutes in consequence thereof*, 2nd Sess, 30th Parl, 1976.

50. Jacob S Ziegel, “Bill C-44: Repeal of the Small Loans Act and Enactment of a New Usury Law,” in “Comments on Legislation and Judicial Decisions,” (1981) 59:1 *Can Bar Rev* 124 at 188; *Nelson v CTC Mortgage Corp* (1984), 16 DLR (4th) 139, [1985] 2 WWR 560 at para 7 aff’d [1986] 1 SCR 749.

51. *Criminal Code*, RSC 1985, c C-46, s 347 [*Criminal Code*].

52. Special Joint Committee on Consumer Credit, *supra* note 2 at 32; Waldron, “A Brief History,” *supra* note 32 at 303-307.

53. Ziegel, “Legal Regulation,” *supra* note 30 at 106-107.

54. *Cost of Borrowing (Authorized Foreign Banks) Regulations*, SOR/2002-262; *Cost of Borrowing (Banks) Regulations*, SOR/2001-101; *Cost of Borrowing (Canadian Insurance Companies) Regulations*, SOR/2001-102; *Cost of Borrowing (Foreign Insurance Companies) Regulations*, SOR/2001-103; *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104; *Cost of Borrowing (Retail Associations) Regulations*, SOR/2002-263 [*Cost of Borrowing Regulations 2001*].

Given the limited scope of this article, focusing on provincial legislation, the author refers an interested reader to a complementary article analyzing past and current federal legislation regulating consumer credit in Canada.⁵⁵

II. *Provincial legislative response*

It is against this backdrop of ineffective federal legislation that Canadian provinces, pursuant to provincial constitutional heads of power, enacted consumer credit and consumer protection legislation as matters relevant to the “Incorporation of Companies with Provincial Objects” and “Property and Civil Rights in the Province.”⁵⁶ At first, many provinces enacted consumer protection provisions relating to the non-financial terms of credit agreements between buyers and vendors of goods and services. As described by Jacob Ziegel, matters relating to vendor’s credit as opposed to lender’s credit had long been determined to be within provincial jurisdiction.⁵⁷ Consequently, matters relating to sales of goods such as conditional sales, conditions and warranties relating to vendor’s title and quality of goods as well as vendor’s and buyer’s rights and remedies were found throughout provincial legislation in Canada.⁵⁸

In addition, provinces enacted various statutes regulating and licensing provincial companies carrying on the business of the lending of money such as legislation on pawnbroking, money lending and loan corporations, but with few consumer protection provisions.⁵⁹ The notable exception was money-lending legislation enacted in Newfoundland and Ontario in 1907 and 1912 respectively, which included provisions providing relief to debtors from unconscionable bargains with money lenders similar to England’s corresponding statute at the time.⁶⁰ These statutes were, however, on questionable constitutional footing and were not enacted in other provinces. Given the exclusive and paramount federal constitutional

55. Micheline Gleixner, “A Canadian Financial Consumer Protection Code: Is Canada Ready for Round Three?” in Janis P Sarra & Justice Barbara Romaine, eds, *Annual Review of Insolvency Law 2018* (Toronto: Thomson Reuters, 2019) at 57 [Gleixner, “A Canadian Financial Consumer Protection Code”].

56. *Constitution Act, 1867*, *supra* note 20, ss 92(11), 92(13).

57. Ziegel, “Legal Regulation,” *supra* note 30 at 104: “A loan of money involves the charging of interest, but the charge levied by the vendor in return for the privilege of permitting the buyer to pay for the goods over a period of time is not legally characterized as interest.”

58. *Ibid* at 108-111; Jacob S Ziegel, “Retail Instalment Sales Legislation: A Historical and Comparative Survey” (1962) 14:2 UTLJ 143 at 148 [Ziegel, “Retail Instalment”].

59. (NL) *The Money Lenders Act, 1907*, SN 1907, c 5; (NS) *An Act relating to Loan Corporations*, SNS 1904, c 4; (ON) *The Ontario Money-Lenders Act*, SO 1912, c 30; *The Loan Corporations Act*, SO 1897, c 38; (QC) *An Act to amend the Quebec License Law*, SQ 1905, c 13. For pawnbroking legislation see *infra*, note 94.

60. (NL) *The Money Lenders Act, 1907*, *supra* note 59, s 3; (ON) *The Ontario Money-Lenders Act*, SO 1912, c 30, ss 5-6.

jurisdiction over “Interest,” provincial legislation dealing specifically with interest, money lending and lender’s credit was initially considered *ultra vires* provincial jurisdiction.⁶¹

Despite these constitutional issues, Québec enacted legislation regulating consumer credit in 1947. Similar to previous wartime federal consumer credit regulations, the main provisions of the *Instalment Sales Act*⁶² included limited disclosure requirements, a minimum down payment of fifteen per cent for consumer goods with a period of 6 to 24 months to repay depending upon the amount of the unpaid balance as well as a maximum interest rate of three quarters of one per cent of the total of the deferred balance each month of the contract term.⁶³ Following Québec’s lead, other provinces such as Alberta, Manitoba and New Brunswick enacted similar legislation prior to 1963 relating to conditional sales and instalment sales, otherwise known as time sale agreements.⁶⁴

Considering the ineffectiveness of federal legislation and that efforts made to persuade the government to increase the monetary ceiling had failed following the 1956 reform of the federal *Small Loans Act*, the provinces were further forced to intervene for debtors of loans above \$1,500 by adopting new forms of consumer protection measures to provide relief against unconscionable transactions.⁶⁵

Subsequently, a “veritable cornucopia”⁶⁶ as described by Jacob Ziegel, of provincial financial consumer protection legislation began to be enacted following the *Ontario (AG) v Barfried Enterprises Ltd* decision of the Supreme Court of Canada.⁶⁷ Notwithstanding the existence of federal legislation on consumer credit since Confederation, the Supreme Court of Canada restrictively interpreted Parliament’s exclusive constitutional

61. *Lynch v The Canada NW Land Co* (1891), 19 SCR 204 at 212; *Board of Trustees of Lethbridge Northern Irrigation District v Independent Order of Foresters*, [1940] AC 513 at paras 7-8, [1940] 2 DLR 273; *Reference as to the Validity of section 6 of the Farm Security Act, 1944, of the Province of Saskatchewan*, [1947] SCR 394 at 399, 414.

62. *An Act respecting instalment sales*, SQ 1947, c 73 [*Instalment Sales Act*].

63. Royal Commission on Prices, *Minutes No 35*, *supra* note 34 at 1875; Ziegel, “Retail Instalment,” *supra* note 58 at 154-155.

64. (AB) *The Credit and Loan Agreement Act*, SA 1954, c 19; *The Credit and Loan Agreements Act*, RSA 1955, c 66; (MB) *The Time Sale Agreement Act*, SM 1962, c 76 as amended by SM 1963, c 87; (NB) *An Act to Amend Chapter 152 of the Revised Statutes, 1927, The Conditional Sales Act*, SNB 1949, c 38, s 1 repealed by SNB 1959, c 35; see also Ziegel, “Retail Instalment,” *supra* note 58 at 155.

65. Ziegel, “Consumer Credit Regulation,” *supra* note 2 at 496.

66. *Ibid* at 489.

67. *Ontario (AG) v Barfried Enterprises Ltd*, [1963] SCR 570 at 579, 42 DLR (2d) 137 [*Barfried Enterprises*]. See a critique of this decision in Micheline Gleixner, “Reconsidering Legislative Competence over Consumer Credit in Canada” in Janis P Sarra & Justice Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters, 2017) at 248-264 [Gleixner, “Reconsidering Legislative Competence”].

jurisdiction over “Interest” and concluded, in 1963, that “interest” was not synonymous with the “cost of the loan.” As a result, the Ontario *Unconscionable Transactions Relief Act* providing unconscionable transactions relief for money lending contracts unrelated to any sales transaction was therefore determined to be legislation in relation to Property and Civil Rights and the Administration of Justice in the Province, rather than legislation in relation to “Interest.”⁶⁸ In order to validate provincial consumer protection legislation, the majority of the Court concluded that the true nature and character of the contested statute did not relate to “Interest” but rather dealt with rights arising from contract and thus were within provincial jurisdiction.

As a result, all provinces enacted, between 1965 and 1976, some form of consumer credit or consumer protection legislation as well as legislation dealing generally with business or trade practices and thus, incidentally with consumer credit.⁶⁹ These provincial statutes conferred powers almost identical to those found in existing federal legislation regulating small loans as well as other consumer protection measures such as disclosure in lending requirements.⁷⁰ Most of the provincial legislation dealt not only with money lending but also with the sale of goods or services involving credit transactions.⁷¹ Still in force today, provincial legislation provides the majority of the protection given to consumer debtors, the main exception being federal legislation limited to federally regulated financial institutions.⁷²

Given the variety of consumer related provincial measures, and in order to overcome internal trade barriers and harmonize commercial legislation within the country, First Ministers signed in 1994 an *Agreement on Internal Trade*, the denouement of ongoing negotiations since the 1980s.⁷³ In effect since 1 July 1995, the national consensus aimed to eliminate barriers to

68. *The Unconscionable Transactions Relief Act*, RSO 1960, c 410 [ON-UTRA, 1960]; *Barfried Enterprises*, *supra* note 67 at 579.

69. Susan Kathleen Burns, *The Borrowers and Depositors Protection Act: A Case History in Legislative Failure* (MBA Thesis: UBC, 1981) [unpublished] at 10, 59-60; Senate of Canada, *Report of the Standing Senate Committee on Banking, Trade and Commerce on the Subject-Matter of Bill C-16, Journals of the Senate of Canada*, 30-32 (7 July 1977), Appendix (p 775) at 23-24 (Chairman: Senator Slater A Hayden). See also Ziegel, “Legal Regulation,” *supra* note 30.

70. Ziegel, “Consumer Credit Regulation,” *supra* note 2 at 496; Ziegel, “Recent Developments,” *supra* note 6; Pitch, *supra* note 26 at 325.

71. Pitch, *supra* note 26 at 327-328.

72. Ziegel, “Legal Regulation,” *supra* note 30 at 105. For a recent analysis of federal legislation on consumer credit, see generally: Gleixner, “A Canadian Financial Consumer Protection Code,” *supra* note 55.

73. Internal Trade Secretariat, *Agreement on Internal Trade, Consolidated Version* (2015), online: *Internal Trade Secretariat* <www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf> [<https://perma.cc/P3BF-LXVL>] [Internal Trade Secretariat, *AIT*].

trade, investment and mobility within Canada by the streamlining and harmonization of consumer-related regulations and standards while maintaining a high and effective level of consumer protection. The theory was that the reconciliation of different federal, provincial and territorial consumer protection measures would allow Canadian firms to “capitalize on economies of scale by servicing larger markets with the same products” and to benefit from fairer competition.⁷⁴

Along with an Internal Trade Secretariat, a Consumer Measures Committee was created pursuant to this agreement to establish a forum for “national cooperation to improve the marketplace for Canadian consumers” reuniting representatives of the federal and all provincial governments.⁷⁵ With all parties agreeing to implement the principles and template provisions in their jurisdictions, the Committee has since completed five harmonization agreements dealing with collection agencies, cooperative enforcement on consumer related measures, cost of credit disclosure, direct sellers and internet sales contracts.

In addition, the Committee also serves as a research and consultative body to enhance ongoing legislative reforms in its members’ respective jurisdictions. According to the annual reports published by the Internal Trade Secretariat, various working groups on consumer issues had been created to review measures relating to the alternative consumer credit market including payday loans, credit reporting, enforcement best practices and consumer awareness.⁷⁶ Other issues considered by the Committee were the regulation of gift cards and reward programs, identity theft, data-sharing and analysis of consumer complaints as well as unfair terms in consumer contracts.

With a new Canadian Free Trade Agreement, in force since 1 July 2017, and the continued recognition of the importance and necessity of enhancing existing consumer protection regulatory measures, there appeared to be support for future collaboration towards the harmonization of consumer protection legislation.⁷⁷ Unfortunately, despite early concerted efforts with fairly productive results, the Committee on Consumer-Related

74. Internal Trade Secretariat, *Committee of Ministers on Internal Trade Annual Report, The Agreement on Internal Trade, April, 1996 to March, 1997*, at 8, online: *Internal Trade Secretariat* <<https://www.cfta-alec.ca/annual-reports/>> [https://perma.cc/R9HD-42CD].

75. Canada, Innovation, Science and Economic Development, “Consumer Measures Committee” (last modified 7 March 2019) online: *Canada* <cmcweb.ca/eic/site/cmc-cmc.nsf/eng/home> [https://perma.cc/UH63-Z8ED][CMC].

76. Internal Trade Secretariat, *Annual reports*, online: *Internal Trade Secretariat* <www.cfta-alec.ca/annual-reports/> [https://perma.cc/XJL5-MELM].

77. *Canadian Free Trade Agreement*, (1 July 2017), art 400, online: *Internal Trade Secretariat* <www.cfta-alec.ca/canadian-free-trade-agreement/> [https://perma.cc/RGJ5-BUX8].

Measures and Standards does not seem to be active given the absence of any developments on consumer credit related matters in recent annual reports, and no consultations in progress according to its website.⁷⁸

Given the foregoing, provincial legislation is similar in many regards but remains fragmented from province to province and divided into various consumer protection measures, always vulnerable to inconsistencies as a result of unique provincial political ideologies and objectives. As will be revealed in Part III, the federal government's abdication of its responsibilities with respect to the protection of financial consumers has meant that the financial services framework is vulnerable to "confusion and inconsistencies in rate setting and administration of the newly adopted provincial legislation."⁷⁹ Notwithstanding these ongoing challenges of governing a modern financial industry within a federalist framework, it is important to note the scope and extent of provincial legislation.

Although provincial statutes clearly apply to provincially incorporated entities such as credit unions, mutual funds and securities dealers, as well as insurance and trust and loan companies,⁸⁰ the issue remained whether provincial consumer protection legislation also applied to federally regulated financial institutions. This issue was conclusively resolved by the Supreme Court of Canada in *Bank of Montreal v Marcotte*⁸¹ where the Court considered whether conversion charges imposed by several federal banking institutions on credit card purchases made in foreign currencies violated Québec's *Consumer Protection Act*.⁸² The Court rejected the financial institutions' arguments that the provincial statute did not apply to them based on interjurisdictional immunity and federal paramountcy of federal legislation enacted pursuant to the federal head of power relating to banks.⁸³ Rather, the Court concluded that the provincial disclosure provision did not impair the core of the federal banking power and confirmed the applicability of provincial legislation to federally regulated financial institutions:

78. CMC, *supra* note 75.

79. Ziegel, "Consumer Insolvencies," *supra* note 34 at 388; Waldron, "The Federal Interest Act," *supra* note 7 at 161. See also Gleixner, "A Canadian Financial Consumer Protection Code," *supra* note 55 at 57.

80. Canada, Department of Finance, *Reforming Canada's Financial Services Sector: A Framework for the Future* (25 June 1999) at 66, online (pdf): Canada <publications.gc.ca/collections/Collection/F2-136-1999E.pdf> [https://perma.cc/D4P4-YWAY] [Canada, *Reforming Canada's Financial Services Sector* (1999)].

81. *Bank of Montreal v Marcotte*, 2014 SCC 55 [*Marcotte*].

82. *Consumer Protection Act*, CQLR c P-40.1 [*QC-CPA*].

83. *Constitution Act, 1867*, *supra* note 20, s 91(15) ("Banking, Incorporation of Banks, and the Issue of Paper Money.")

Banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion. Provincial regulation of mortgages, securities and contracts can all be said to relate to lending in some general sense, and will at times have a significant impact on banks' operations.⁸⁴

[...]

Just as the basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, if indeed such purpose exists, so too do general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme.⁸⁵

The importance of provincial legislation regulating consumer credit cannot be overstated considering the vast array of consumer protection measures found in provincial legislation applicable to federally and provincially incorporated creditors. Moreover, the alternative financial services market is almost entirely regulated by provincial regulation which aims to protect vulnerable financial consumers who are marginalized by federal financial institutions and often dependent upon fringe financial services. Regulating the various types of consumer credit as well as the various actors in the consumer credit industry, provincial legislation is thus becoming increasingly important from a consumer protection perspective and deserves greater scrutiny.

III. *Provincial consumer protection legislation*

Part III therefore proposes to analyze the historical evolution of provincial consumer credit regulation and in particular consumer protection measures related to pawnbroking, unconscionable transactions relief, cost of credit disclosure, fair trade practices, payday loans and other high-cost credit products. Where relevant, issues relating to disclosure requirements, licensing requirements, limits on the terms of agreements and enforcement mechanisms will be addressed throughout each subsection.

1. *Pawnbroking legislation*

Pawnbroking is one of the oldest social and legal institutions, dating as far back as the Middle Ages, and in Canada to its first colonies. As explained by Jacob Ziegel, “[t]he pledging of chattels as collateral, commonly known as pawnbroking when conducted by a lender operating from fixed premises open to the public, is the oldest security device known to most legal systems.”⁸⁶ The essence of pawnbroking is that the pawnbroker retains

84. *Marcotte*, *supra* note 81 at para 68.

85. *Ibid* at para 79.

86. Ziegel, “Consumer Insolvencies,” *supra* note 34 at 356.

personal property the debtor has pledged as security for the repayment of a small loan. Representing an expensive form of short-term consumer credit, pawnbroking remains an alternative option for many low-income or financially distressed borrowers.⁸⁷ The historical and current appeal of this type of credit for consumers is explained by the simplicity and rapidity of the transaction and the absence of the requirement to meet a credit test since the loans are based on secured collateral.

Iain Ramsay's research revealed in 2001 that a lender's loan was typically between "5-10 percent of the original price of the goods which represents about one third to one-half the price which the broker can expect to receive for the sale of a good during the worst of times," and the repayment rate of pawnbrokers varied from seventy to eighty per cent.⁸⁸ If the loan is not repaid, the borrower is considered to have forfeited the right to redeem the goods pledged as security and the goods could thereafter be resold to recover the amount owed by the borrower.

Although pawnbroking has been the subject of regulation in England since the 16th century, it was first regulated by pre-confederate Ontario and New Brunswick statutes starting in 1851 and subsequently subsumed by the federal government pursuant to its constitutional jurisdiction over matters relating to interest.⁸⁹ Pursuant to the *Pawnbrokers Act*, monthly interest and charges for warehouse storage were limited to five cents for every four dollars when the sum advanced exceeded 20 dollars⁹⁰ which represented an annual percentage rate (APR) of 150%. The federal statute further protected consumers of pawnshops by recognizing a right of redemption as well as imposing criminal sanctions for charging an unlawful rate or forging a pawnbroker's notes.⁹¹ Federal legislation was, however, repealed in 1983 and replaced in part by the usury provisions of the *Criminal Code* which prescribes a criminal interest rate of sixty per cent.⁹²

Notwithstanding what seemed to be a more restrictive interest rate cap on their financial services, the industry, which seemed to be in decline in the 1970s and 1980s, experienced a rebound and pawnbrokers were increasing in number in several provinces by 2000.⁹³ It is, however, to

87. Iain Ramsay, "The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches" (2001) 35:3 Can Bus LJ 325 at 349 [Ramsay, "Alternative Consumer Credit"].

88. *Ibid* at 348.

89. *Pawnbrokers Act*, RSC 1970, c P-5.

90. *Ibid*, ss 4-5.

91. *Ibid*, ss 6-8.

92. *Miscellaneous Statute Repeal Act*, C 1980-1983, c 159, in force on 1 December 1983; *Criminal Code*, *supra* note 51, s 347.

93. Ramsay, "Alternative Consumer Credit," *supra* note 87 at 348; Claude Masse, "Le prêt sur gage

be expected with the recent rise in payday loans that many low-income borrowers have migrated to this newer and even simpler form of high-cost consumer credit, as will be discussed in Part III, section 5.

Since the federal statute did not require that pawnbrokers be federally licensed, several provinces including British Columbia, New Brunswick, Ontario and Québec also enacted, at the end of the 19th century, pawnbrokers legislation similar to the federal statute but with licensing requirements.⁹⁴ These early statutes also provided additional consumer protection measures such as a longer redemption period, and prohibited several unfair and abusive practices.

The pawnbroking industry also has a long history with municipalities and their power to regulate local businesses delegated to them by the provinces via local governance or municipal legislative frameworks.⁹⁵ For example, the *Act to Incorporate the City of Vancouver* of 1886 delegated the right to license, regulate and govern pawnbrokers or dealers in second-hand goods in the city.⁹⁶ As such, pawnbrokers in many municipalities have long been subjected to municipal by-laws and are required to obtain a licence and abide by certain conditions, not so much for the protection of consumer debtors but to prevent these establishments from becoming repositories for stolen property.⁹⁷

In New Brunswick, the power to license businesses and regulate their dealings in personal property was delegated to municipalities in 1966.⁹⁸ A City of Moncton by-law now requires pawnbrokers to obtain

—qu'en est-il et comment est-il contrôlé?" (2000), online: *Réseau juridique du Québec* <www.avocat.qc.ca/public/iipretgage.htm> [<https://perma.cc/CKY8-VW26>].

94. (BC) *Pawnbrokers Act*, RSBC 1897, c 152; (NB) *Pawnbrokers Act*, SNB 1877, c 17; RSNB 1952, c 199 repealed by *Municipalities Act*, SNB 1966, c 20, s 199 [*NB-Municipalities Act*]; (ON) *An Act respecting Pawnbrokers and Pawnbroking*, RSO, 1877, c 148; *The Pawnbrokers Act*, RSO 1937, c 244; (QC) *An Act to Consolidate and Amend the Law respecting Licenses and the duties and obligations of persons bound to hold same*, SQ 1870, c 2, ss 69-105.

95. Office of the Information and Privacy Commissioner for British Columbia, *Local governments and the growth of surveillance* (30 August 2006) at 1, online: *OIPC* <www.oipc.bc.ca/special-reports/1262> [<https://perma.cc/LQN9-V39Z>].

96. *Act to Incorporate the City of Vancouver*, SBC 1886, c 32, s 142(83). See also *An Act to amend and revise the Acts relating to Municipalities*, SM 1884, c 11, s 111(36); *An Act relating to Rag and Junk Shops in the City of Halifax*, SNS 1867, c 85.

97. Department of Justice, Nova Scotia, *Pawn Shop, Buy-Sell and Second-Hand Businesses Legislation Discussion Paper* (May 2006) at 1, online (pdf): *Nova Scotia* <novascotia.ca/just/publications/docs/DISCUSSION%20PAPER%20FINAL.pdf> [<https://perma.cc/RT44-KJA9>]; Ziegel, "Consumer Insolvencies," *supra* note 34 at 357; Buckland, *Hard Choices*, *supra* note 15 at 48-49.

98. *NB-Municipalities Act*, *supra* note 94, ss 112, 199; RSNB 1973, c M-22, ss 165-167.1 repealed and replaced by *Local Governance Act*, SNB 2017, c 18, s 10(1)(h): a local government may make by-laws for municipal purposes respecting (h) businesses, business activities and persons engaged in business; and (n) the acquisition, sale, management, leasing, renting of or any other dealings in personal property, or any interest in personal property. For another example, see *Municipal Government Act*,

a licence and to keep a permanent record of information which includes descriptions of personal property held, the date and time of transactions, the debtors' information including two forms of identification, as well as a record of any sales of the personal property.⁹⁹ In addition, a pawnbroker is not permitted to sell any property pledged as security for a loan before one month has elapsed from the date the borrower was given to redeem the property. Reflecting the earlier provincial statute, property cannot be accepted as security for a loan from a person under the influence of alcohol or drugs, a person under the age of eighteen years, or a person failing to identify themselves or who may be offering stolen or illegally acquired property.

Until recently, provincial legislation regulating pawnbrokers was found in British Columbia, Ontario, Québec and Saskatchewan as well as the three territories.¹⁰⁰ Unlike provinces that rely solely on municipal regulation, provincial legislation in these jurisdictions provides for restrictions and obligations on lenders throughout the province or territory and provides additional financial consumer protection, which is often absent in municipal by-laws. For example, provincial legislation prohibits certain acts, and regulates the pawner's right of redemption, the charging of fees, the cost of credit disclosure requirements, and the recording of pawns and sales.

It has been suggested that some lenders attempt to avoid restrictive pawnbroking regulations by operating as secondhand dealers entering into "buy-sell" arrangements with consumers whereby the "pawner sells the goods to the broker subject to the right to buy the goods back within a period of time."¹⁰¹ These lenders thereby avoid the requirements prescribed in British Columbia, Ontario and Yukon, where the right of redemption of the pawner expires only after one year and, in Ontario, only after notice is provided by first-class prepaid mail for loans between \$15 and \$30 and a subsequent final notice published in a newspaper for loans more than \$30.¹⁰²

SNS 1998, c 18, s 172(i).

99. City of Moncton, by-law L-302, *A By-Law Relating to Pawnbrokers in the City of Moncton* (2006).

100. (BC) *Pawnbrokers Act*, RSBC 1996, c 350 [*BC-Pawnbrokers Act*]; (ON) *Pawnbrokers Act*, RSO 1990, c P.6 [*ON-Pawnbrokers Act*]; (QC) *QC-CPA*, *supra* note 82 (generally applicable to pawnbrokers); (SK) *Pawned Property (Recording) Act*, SS 2003, c P-4.2 [*SK-Pawnbrokers Act*]; (NT) *Pawnbrokers and Second-Hand Dealers Act*, RSNWT 1988, c P-2 [*NT-Pawnbrokers Act*]; (NU) *Pawnbrokers and Second-Hand Dealers Act*, RSNWT (Nu) 1988, c P2 [*NU-Pawnbrokers Act*]; (YK) *Pawnbrokers and Second-Hand Dealers Act*, RSY 2002, c 167 [*YK-Pawnbrokers Act*].

101. Ramsay, "Alternative Consumer Credit," *supra* note 87 at 349-351; Buckland, *Hard Choices*, *supra* note 15 at 149.

102. (ON) *ON-Pawnbrokers Act*, *supra* note 100, ss 20-22; (BC) *BC-Pawnbrokers Act*, *supra* note

In Ontario, the act further provides legal remedies to the debtor should a pawnbroker refuse to give the pledge back upon tender of money owing, and sets the maximum fees in addition to the interest legally payable on the sum lent.¹⁰³ Finally, provincial licensing requirements are imposed in Québec, Nunavut, Yukon and Northwest Territories, as well as in Ontario via its municipalities.¹⁰⁴ In Québec, pawnbrokers are licensed and regulated by the same provisions applicable to other money lenders, including consumer protection provisions against exorbitant or usurious credit costs.¹⁰⁵ Judicial interpretation of these statutory provisions has currently capped the non-exorbitant or non-usurious rate between thirty and thirty-five per cent in this province.¹⁰⁶

Unfortunately, instead of increasing consumer protection and modernizing the statutes, the tendency across the country has been the repeal of provincial and territorial legislation specifically regulating pawnbrokers, beginning with British Columbia in 2002 and the Northwest Territories in 2013.¹⁰⁷ Opposed by the Association of Municipalities of Ontario and the Ontario Association of Chiefs of Police, albeit for enforcement and security concerns rather than consumer protection, Ontario has recently enacted legislation repealing its *Pawnbrokers Act* but it is not yet in force.¹⁰⁸

100, s 12; (YK) *YK-Pawnbrokers Act*, *supra* note 100, s 6.

103. *ON-Pawnbrokers Act*, *supra* note 100, ss 25, 28.

104. (ON) *Ibid*, s 2; (QC) *QC-CPA*, *supra* note 82, s 321; (NT) *NT-Pawnbrokers Act*, *supra* note 100, s 2; (NU) *NU-Pawnbrokers Act*, *supra* note 100, s 2; (YK) *YK-Pawnbrokers Act*, *supra* note 100, s 2. 105. Art 1437, CCG; *QC-CPA*, *supra* note 82, s 8 (originally Art 1040c CCLC).

106. *Capital Corporation c Ferme Maraypier inc*, 2014 QCCS 4587 at para 43; *Riendeau c Compagnie de la Baie d'Hudson*, [2004] JQ no 11070 at para 465, aff'd 2006 QCCA 1379 (28.8% did not contravene provincial legislation); *Riopel c Gagnon*, 2009 QCCQ 2315 at para 102; *Ferlac Inc c Lemay*, 2008 QCCQ 12221; *Bégin c Marcouiller*, 2007 QCCQ 7742 at para 11; *Saviolakis c Immeubles Marai inc*, [2000] JQ no 6962 at para 82, aff'd [2002] JQ no 8381 (CA): "L'emploi des termes "excessif" et "exorbitant" implique que le coût du prêt dépasse la mesure, excède d'une manière exagérée la normalité ou que l'opération équivaut à un abus qui choque l'ordre public, assimilable à un prêt à un taux usuraire." Initially, the Québec Court of Appeal had held in *St-Jacques c Mantha*, [1999] JQ no 1335 at para 57 that 25% was "exorbitant and usurious." See also Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23:3 BFLR 323 at 326 [Ben-Ishai, "Regulating Payday Lenders"]; John C Kleefeld, "Homo legislativus: Missing Link in the Evolution of 'Behaviour Modification?'" (2011) 53 SCLR (2d) 169 at para 52.

107. (BC) *Deregulation Statutes Amendment Act, 2002*, SBC 2002, c 12, s 30 (the Act applied only to loans under \$50); (NT) *An Act to Repeal the Pawnbrokers and Second-Hand Dealers Act*, SNWT 2013, c 24.

108. *Restoring Ontario's Competitiveness Act, 2019*, SO 2019, c 4, Schedule 2, s 1 (not in force); Association of Municipalities of Ontario, "Bill 66—Restoring Ontario's Competitiveness Act, Submission to the Standing Committee on General Government" (18 March 2019), online: *AMO* <www.amo.on.ca/AMO-PDFs/Reports/2019/AMO-Submission-Bill-66-Restoring-Ontario-s-Competi.aspx> [<https://perma.cc/H8WR-WX7A>]; Travis Dhanraj, "Police association says repealing and not replacing Pawnbrokers Act sends 'wrong message' to thieves," *Global News* (24 January 2019) online: <globalnews.ca/news/4883939/pawnbrokers-act-bill-66-ontario/> [perma.cc/78SS-

Despite these legislative setbacks, not all is lost for consumers. As further discussed in Part III, sections 5 and 6, the emergence of new high-cost credit products has put pressure on policymakers in some provinces to enact new financial consumer protection statutes dealing with these financial services. Legislation in Alberta and Québec now regulates high-cost credit products and applies to all lenders including pawnbrokers.

Like other parallel or fringe financial services, the regulatory framework relating to pawnbroking is manifestly inadequate in Canada and the absence of a national strategy to regulate pawnshops in Canada is a concern, as “[t]he inequality in their bargaining positions exposes borrowers to the potential for unfair practices by pawnshops.”¹⁰⁹ This is especially worrisome since existing provisions, whether municipal, provincial or federal, do not seem to be consistently and actively enforced in many cases.¹¹⁰ According to one study in Québec, most pawnbrokers in Montreal violated the criminal interest rate provision, the disclosure requirements in the federal *Interest Act* and the provincial disclosure and licensing requirements of the *Consumer Protection Act*.¹¹¹ Factoring in all storage and administrative fees as required by the *Criminal Code*, annual interest fees charged by pawnbrokers were between 300% and 500% and one pledge agreement charged as high as 1,000%. Similarly, case law in Saskatchewan revealed an effective annual rate of interest charged by a pawnbroker between 472.5% and 541.9%.¹¹²

In summary, since the repeal of the federal statute in 1983, few provinces have enacted legislation to protect consumers who use the services of pawnbrokers, and existing regulation whether local or provincial, when adopted or enacted, does not seem to be enforced. As a result, it is an industry that remains largely unregulated and three levels of governments continue to fail to protect financial consumers against the abusive practices of some, if not most, pawnbrokers.

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109. Ziegel, “Consumer Insolvencies,” *supra* note 34 at 357.

110. Some pawnbrokers in the Moncton area want the provincial governments to start regulating the industry or at least for municipalities to better enforce current regulations. See Paul Cormier, “Moncton pawn shops seek better regulations of their industry,” *Global News* (18 July 2016) online: <globalnews.ca/news/2832373/moncton-pawn-shops-seek-better-regulations-of-their-industry/> [perma.cc/JDV9-REUX]; Ramsay, “Alternative Consumer Credit,” *supra* note 87 at 385; Ann Cavoukian, Information and Privacy Commissioner of Ontario, Order MO-2225 (11 July 2007) at 2, online: <<https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/212499/index.do?q=2225>> [https://perma.cc/8AXK-TEX4].

111. Masse, *supra* note 93.

112. See also *R v Duzan* (1992), 99 Sask R 171, [1992] SJ No 32 (QB) aff’d (1993), 105 Sask R 295, 79 CCC (3d) 552 (CA).

2. *Unconscionable transactions relief legislation*

Originally exercised by the courts of equity, the doctrine of equitable relief or unconscionability has a long judicial history protecting vulnerable parties and setting aside contracts on the basis of unfairness, lack of consent, avoidance of unjust enrichment, undue influence or inequality of bargaining power.¹¹³ In Canada, the common law test of unconscionability and the principles considered objectively by the Court governing the doctrine have been applied inconsistently. Existing appellate case law in Ontario and Alberta appears to require four elements to establish unconscionability:

1. a grossly unfair and improvident transaction;
2. a victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party's knowingly taking advantage of this vulnerability.¹¹⁴

By comparison, the Ontario Court of Appeal has recently suggested that a majority of judges of the Supreme Court of Canada in *Douez* applied the

113. Stephen Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010) 49 Can Bus LJ 378 at 378-385 [Waddams, "Unconscionable Clauses"]; Stephen M Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 444-561 [Waddams, *The Law of Contracts*].

114. *Titus v William F Cooke Enterprises Inc*, 2007 ONCA 573 at para 38 [*Titus*] recently affirmed in *Phoenix Interactive Design Inc v Alterinvest II Fund LP*, 2018 ONCA 98 at paras 38-39; *Cain v Clarica Life Insurance Co*, 2005 ABCA 437 at para 32; *Lydian Properties Inc v Chambers*, 2009 ABCA 21 at paras 13-14. In contrast, while the Newfoundland and Labrador Court of Appeal applied six principles in *Picher v Downer*, 2017 NLCA 13, the Saskatchewan Court of Appeal in *Dolter v Media House Productions Inc*, 2002 SKCA 140 at para 4 (CA) adopted the following three-prong test:

1. Significant inequality in bargaining position exists between the parties based on factors such as the relative knowledge and education of the parties, the financial needs of the weaker party, or other circumstances that coerced the weaker party;
2. The stronger party has used its position of power in an unconscionable manner to achieve a material advantage over the weaker party. If it has not, then the bargain should not be interfered with even though it may be viewed as improvident, provided that it does not otherwise offend the third threshold factor hereinafter stated.
3. The bargain arrived at has given the one party a grossly unfair advantage over the other, or otherwise is sufficiently divergent from community standards of commercial morality to warrant it being set aside. Thus, if the bargain is fair the fact [that] one of the parties was at a material disadvantage because of ignorance, need or other distress is of no moment

See also Rick Bigwood, "Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v. Pitcher*" (2018), 60 Can Bus LJ 124; JA Manwaring, "Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law" (1993) 25:2 Ottawa L Rev 235.

two-prong test first advanced by the British-Columbia Court of Appeal in *Morrison* and considered in obiter by Justice LaForest in *Norberg*:

[A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.¹¹⁵

In addition, legislative unconscionability was enacted to remedy specific contractual grievances. Following the abolition of usury legislation in England, borrowers who remained vulnerable under the common law doctrine were further protected from oppressive loans by early money lending legislation starting with *The Money-lenders Act, 1900*.¹¹⁶ Protection was confined to cases involving some circumstance of harshness or unconscionability other than the excessive cost of the loan. Notably absent in Canada's money lending legislation, these consumer protection measures were nevertheless adopted by Newfoundland in 1907 and Ontario in 1912 in their provincial statutes regulating money lenders, as previously mentioned.¹¹⁷

Similar unconscionable transactions relief legislation was not adopted nationwide by the other provinces since its validity was uncertain given the federal constitutional jurisdiction over matters relating to interest.¹¹⁸ However, within five years of the 1963 Supreme Court of Canada's

115. *Douez v Facebook, Inc*, 2017 SCC 33 at paras 115 (Abella, J concurring), 145 (McLachlin, Moldaver and Côté JJ dissenting) [*Douez*]; *Heller v Uber Technologies Inc*, 2019 ONCA 1 at 60-61; *Morrison v Coast Finance Ltd* (1965), 55 DLR (2d) 710 at 713, 54 WWR 257 (BCCA) [emphasis added] [*Morrison*] subsequently approved in *Norberg v Wynrib*, [1992] 2 SCR 226 at 248, 256, 92 DLR (4th) 449 [*Norberg*]. See also *Canadian Imperial Bank of Commerce v Ohlson*, [1997] AJ No 1185 at paras 20-24, 1997 ABCA 413 and *Harrity v Kennedy*, 2009 NBCA 60 at para 30 both citing with approval *Morrison* and *Harry v Kreutziger* (1978), 9 BCLR 166, 95 DLR (3rd) 231 (CA). See also JohnPaul F Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 Man LJ 187; Waddams, *The Law of Contracts*, supra note 113 at 552; Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 986-989.

116. *The Money-lenders Act 1900* (UK), 63 & 64 Vict, c 51, s 1; *An Act to repeal the laws relating to usury and to the enrolment of annuities* (UK), 1854, 17 & 18 Vict, c 90; Patrick Hastings, *The Law Relating to Money-Lenders and Unconscionable Bargains* (London: Butterworth, 1905) at 11-12, 15.

117. *The Ontario Money Lenders Act*, SO 1912, c 30, ss 5-8; RSO 1914, c 175, ss 4-7; RSO 1937, c 243, title amended to *The Unconscionable Transactions Relief Act* and money lending provisions repealed by *An Act to amend the Money-Lenders Act*, SO 1946, c 58, s 1. See also Cuming, supra note 1 at 69.

118. Cuming, supra note 1 at 69, n 72.

Barfried Enterprises decision¹¹⁹ confirming the constitutional validity of the Ontario statute, most provinces had enacted similar legislation offering broad relief from unconscionable loan transactions to better protect financial consumers from unscrupulous lenders in the emerging consumer credit market.¹²⁰

According to Ronald Cuming, “[t]hese acts give wide powers to the courts to police against usury and harsh and unconscionable results which otherwise would result from the enforcement of consumer credit contracts.”¹²¹ Judicial consideration of these statutes has confirmed that their purpose was to “provide a remedy for unfair loans”¹²² and “to relieve a party to a contract from his obligations where the contract was made absent his informed consent or in circumstances of unequal bargaining power.”¹²³ As confirmed by Joseph Roach, “every province has now enacted legislation to prevent and redress unconscionable transactions by giving full powers to the courts to either cancel or modify such mortgage [or other credit] agreement where it is adjudicated that the costs of the loan are excessive, abusive or unconscionable.”¹²⁴

119. *Barfried Enterprises*, *supra* note 67 at 577.

120. (AB) *The Unconscionable Transactions Act*, SA 1964, c 99; (BC) *Consumer Protection Act*, SBC 1967, c 14, ss 17-20 [*BC-CPA 1967*]; (MB) *The Unconscionable Transactions Relief Act*, SM 1964 (2d Sess), c 13, as amended by SM 1965, c 87; (NB) *Unconscionable Transactions Relief Act*, SNB 1964, c 14; (NL) *Unconscionable Transactions Relief Act, 1962*, SN 1962, No 38; (NS) *Unconscionable Transactions Relief Act*, SNS 1964, c 12, as amended by SNS 1966, c 83; (ON) *ONUTRA*, 1960, *supra* note 68; (PEI) *The Unconscionable Transactions Relief Act*, SPEI 1964, c 35; *Business Practices Act*, SPEI 1977, c 31; (QC) Art 1040c CCLC (added by SQ 1964, c 67, s 1); (SK) *The Unconscionable Transactions Relief Act, 1967*, SS 1967, c 86.

121. Cuming, *supra* note 1 at 69.

122. *Briones v National Money Mart Co*, 2014 MBCA 57 at para 23. See also *Trans Canada Credit Corp v Ramsay* (1980), 27 Nfld & PEIR 144, 74 APR 144 (PEISC) at 154: “This legislation was obviously passed for the protection of persons urgently in need of money but not skilled in the practice of borrowing it and who are thereby more or less defenceless in the hands of lenders, professional or otherwise, who seek to take advantage of them...The intent and purpose of the legislation is to give relief only...where it is obvious that an unfair advantage has been taken of the borrower.”

123. *Milani v Banks* (1997), 32 OR (3d) 557 at 563, 145 DLR (4th) 55 (CA) [*Milani*] citing with approval *Barfried Enterprises*, *supra* note 67 at 577, (Justice Judson): “the theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent.” See also *Ekstein v Jones* (2005), 34 RPR (4th) 280, [2005] OJ No 3497 (SCJ) [*Ekstein*]; *Grand Ridge Estates Ltd v Breadner Holdings Inc*, 2018 ONSC 655 [*Grand Ridge Estates*].

124. Joseph E Roach, *The Canadian Law of Mortgages*, 3rd ed (Markham: LexisNexis, 2018) at 605-606. See recent statutes: (AB) *Unconscionable Transactions Act*, RSA 2000, c U-2 [*AB-UTA*]; (BC) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 7-10 [*BC-BPCPA*]; (MB) *The Unconscionable Transactions Relief Act*, RSM 1987, c U20 [*MB-UTRA*]; (NB) *Unconscionable Transactions Relief Act*, RSNB 2011, c 233 [*NB-UTRA*]; (NL) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, ss 8-17 replacing *Unconscionable Transactions Relief Act*, RSNL 1990, c U-1 [*NL-CPBPA*]; (NS) *Unconscionable Transactions Relief Act*, RSNS 1989, c 481 [*NS-UTRA*]; *Money-lenders Act*, RSNS 1989, c 289 [*NS Money-lenders Act*]; (Nu) *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, ss 50.1–50.6 added by SNU 2017, c 18, s 2 [*NU-CPA*];

In Alberta, New Brunswick, Nova Scotia, Nunavut, Ontario and Prince Edward Island, when the cost of a loan is excessive *and* the transaction is harsh and unconscionable, courts may be called upon to review the contract between the parties. When doing so, the risk and all the circumstances of the money lending transaction must be considered, including any charge given to secure repayment.¹²⁵ As a result, both components must be established. Ronald Cuming further explains: “if the credit charge is reasonable but the other terms of the transaction, such as the provision with respect to repayment or the rights of the lender in the event of default by the borrower, are harsh and unconscionable, the court will not have power to give the necessary relief.”¹²⁶

In comparison, the statutory provision in Manitoba and Saskatchewan is disjunctive. Relief is available when the cost of a loan is excessive *or* the transaction is harsh *or* unconscionable.¹²⁷ Accordingly, relief is still possible if the cost of the loan is excessive but not harsh or unconscionable. Nevertheless, in most cases, excessive interest and costs are usually sufficient in and of themselves to render a contract harsh and unconscionable unless refuted by the lender.¹²⁸ When judicially considered, “[b]oth components are cast against the risk and circumstances at the time the contract is entered.”¹²⁹ In addition to a comparison with the rates in the prevailing market in the area for the same general type of loan involving a similar risk, the excessiveness of the cost of the loan is also determined by the risk associated with the loan, including an examination of the following non-exclusive risk factors for the lender:

- (a) where the borrower is unknown to the lender;
- (b) where the borrower solicited the loan;
- (c) where the loan is for a short period of time;
- (d) where there is urgency on the part of the borrower to obtain funds;
- (e) where the lender has to borrow funds in order to finance the loan;
- (f) where the borrower has a history of previous default;

(ON) *Unconscionable Transactions Relief Act*, RSO 1990, c U.2 [*ON-UTRA*]; (PEI) *Unconscionable Transactions Relief Act*, RSPEI 1988, c U-2 [*PEI-UTRA*]; (QC) arts 1437, 1623, 2332 CCQ; *QC-CPA*, *supra* note 82, s 8; (SK) *The Unconscionable Transactions Relief Act*, RSS 1978, c U-1 [*SK-UTRA*].
125. *AB-UTA*, *supra* note 124, s 2; *NB-UTRA*, *supra* note 124, s 2; *NS-UTRA*, *supra* note 124, s 3; *NU-CPA*, *supra* note 124, s 50.2; *ON-UTRA*, *supra* note 124, s 2; *PEI-UTRA*, *supra* note 124, s 3.

126. Cuming, *supra* note 1 at 70-71.

127. *MB-UTRA*, *supra* note 124, s 2; *SK-UTRA*, *supra* note 124, s 3.

128. *Teresa McCrea Investments Inc v Conley Management Ltd*, 2012 SKQB 374 [*Teresa McCrea*] at para 64 citing *Samuel v Newbold*, [1906] AC 461 at 473.

129. *Quick Auto Lease Inc v Hogue*, 2018 MBQB 126 at paras 28-31.

- (g) the existence of any liens or judgments against the property used to secure the loan;
- (h) the security offered for the amount borrowed.¹³⁰

The second component which requires proof that the transaction was harsh or unconscionable has been described as follows by the Manitoba Court of Appeal:

[T]he debtor must demonstrate both the inequality of the parties and the improvidence of the bargain, before the creditor is obligated to show that a contract freely entered into by the parties was fair, just and reasonable in the circumstances. Only then, if the creditor fails to do so, can the court set aside a valid contract in whole or in part under the Act.¹³¹

In order to overcome the significant legal obstacles encountered in earlier federal money lending legislation previously discussed, the “cost of the loan” is broadly defined in these provincial statutes to include all types of charges and fees in addition to interest costs. For example, according to the New Brunswick statute, the “cost of the loan” has been largely defined as the “whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements.”¹³²

Despite a provision or agreement to the contrary, unconscionable transactions relief legislation grants broad powers to superior courts to provide remedies in any action or proceeding in which the debt is in question, commenced either by the debtor, by a creditor for the recovery of money lent, or by a third party. In Québec, the *Consumer Protection Act* provides the following relief to financial consumers:

The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.¹³³

130. *Primewest Mortgage Investment Corp v Antonenko*, 2018 SKQB 259 at para 54 summarizing the first seven risk factors citing *Teresa McCrea*, *supra* note 128; *Dassen Gold Resources Ltd v Royal Bank*, [1995] 1 WWR 171, 23 Alta LR (3d) 261 (QB) [*Dassen Gold*]; *Milani*, *supra* note 123; *Ekstein*, *supra* note 123. The eighth risk factor is found in *Teresa McCrea*, *supra* note 128 at paras 41, 65 citing *Dassen Gold*, *supra* note 130 at para 141.

131. *Quick Auto Lease Inc v Nordin*, 2014 MBCA 32 at paras 13-14, citing with approval *Milani*, *supra* note 123 at 564. See also *Mintage Financial Corp v Shah*, 2005 ABCA 86 at para 86 [*Mintage Financial Corp*], leave to appeal to dismissed, [2005] SCCA No 192 (QL).

132. *NB-UTRA*, *supra* note 124, s 1.

133. *QC-CPA*, *supra* note 82, s 8. See also Union des consommateurs, *Ending Abusive Clauses in Consumer Contracts: Final Report of the Project* (Montréal: Union des consommateurs, 2011), online (pdf): *Union des consommateurs* <uniondesconsommateurs.ca/docu/protoc_conso/

Likewise, a court, in common law jurisdictions, may in respect of a money transaction

- (a) reopen the transaction and take an account between the creditor and the debtor;
- (b) despite a statement or settlement of account or an agreement purporting to close previous dealings and create a new obligation, reopen an account already taken and relieve the debtor from payment of a sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
- (c) order the creditor to repay the excess if it has been paid or allowed on account by the debtor;
- (d) set aside, either wholly or in part, or revise or alter a security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order the creditor to indemnify the debtor.¹³⁴

A notable exception to this broad power is found in Nova Scotia. In addition to a similar *Unconscionable Transactions Relief Act*, the Nova Scotia *Money-lenders Act* grants the court the above powers only when the amount of interest exceeds the “legal and valid rate in respect of the loan and is not in contravention of any Act heretofore or hereafter enacted by the Parliament of Canada,” which currently stands at nineteen per cent for payday loans in Nova Scotia and sixty per cent for all other loans.¹³⁵

Unfortunately, the consumer seeking reparation is placed at an unfair disadvantage. In addition to financing the litigation process, the onus remains on the debtor to prove the components of the unconscionable transactions.¹³⁶ To overcome this obstacle, several provinces have reformed their statutes to consolidate unconscionable transactions with unfair practices legislation discussed in Part III, section 4. Accordingly, British Columbia, Newfoundland and Labrador and Nunavut statutes not only clarify the circumstances a court must consider, which the supplier knew or ought to have known, but transfers the burden of proof to the

EndAbusiveClauses.pdf> [https://perma.cc/B2AU-H67Z]; Sébastien Grammond, “The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective” (2010) 49:3 Can Bus LJ 345.

134. *NB-UTRA*, *supra* note 124, s 2. See also *AB-UTA*, *supra* note 124, s 2; *MB-UTRA*, *supra* note 124, s 2; *NS-UTRA*, *supra* note 124, s 3; *ON-UTRA*, *supra* note 124, s 2; *PEI-UTRA*, *supra* note 124, s 3; *SK-UTRA*, *supra* note 124, s 3.

135. *NS Money-lenders Act*, *supra* note 124, s 4; *Consumer Protection Act*, RSNS 1989, c 92, ss 18A–18U [*NS-CPA*]; *Re Consumer Protection Act*, 2018 NSUAR 215 [*NSUAR*]; *Criminal Code*, *supra* note 51, s 347.

136. *McHugh v Forbes* (1991), 4 OR (3d) 374 at 377, 1991 CanLII 7199 (CA).

supplier.¹³⁷ For example, in British Columbia, surrounding circumstances which must be judicially considered include:

- whether the consumer was subjected to undue pressure to enter into the transaction;
- whether the supplier took advantage of the consumer's inability or incapacity to reasonably protect his or her own interest;
- whether the total price grossly exceeded the total price in similar ordinary transactions;
- whether there was no reasonable probability of full payment of the total price by the consumer at the time the consumer transaction was entered into; and
- whether the terms or conditions were so harsh or adverse to the consumer as to be inequitable.

More importantly, the British Columbia and Newfoundland and Labrador statutes provide stronger remedies for financial consumers for an unconscionable act or practice by a financial services supplier. With the exception of a mortgage loan to which judicial powers resemble the powers found in the other provinces as described above, the British Columbia statute provides that "if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor."¹³⁸ Moreover, the Newfoundland and Labrador statute grants the Court the discretion to make a declaratory or injunctive order, award damages including exemplary or punitive damages, to make an order rescinding or reopening the transaction, or to make any other order the Court deems appropriate.¹³⁹ One wonders whether these new legal remedies, should they be judicially enforced, will deter abusive and unconscionable practices by consumer lenders.

Although this type of provincial legislation has been enacted throughout the country for more than fifty years and should be part of a debtor's arsenal against creditor abuse, the fact that it has not been used extensively to curb predatory or criminal lending may be indicative of its ineffectiveness to protect consumers. Mary Anne Waldron has previously commented that "although many provinces adopted general unconscionable transaction legislation, litigation under those provisions does not appear to have been frequent, leading one to question whether expecting a consumer to launch a court action in a small loan situation was

137. *BC-BPCPA*, *supra* note 124, s 8; *NL-CPBPA*, *supra* note 124, s 8; *NU-CPA*, *supra* note 124, s 72.4(2).

138. *BC-BPCPA*, *supra* note 124, s 10.

139. *NL-CPBPA*, *supra* note 124, s 10.

realistic.”¹⁴⁰ Recourse to litigation along with the delays and the expense involved most likely represent significant obstacles to a debtor, already burdened by previous indebtedness, who might seek relief in the Courts against the lender.

Another factor may be the uncertainty created by the perceived reluctance of the courts to review the substance of contracts and to set aside such transactions in “the absence of evidence of some form of defect of consent.”¹⁴¹ For example, Justice LeBel in *Miglin v Miglin* explained, in his dissenting opinion, the necessity of judicial restraint as follows:

The stringency of the test for unconscionability reflects the strong presumption that individuals act rationally, autonomously and in their own best interests when they form private agreements. Non-enforcement of the parties’ bargain is only justified where the transaction is so distorted by unequal bargaining power that this presumption is displaced.¹⁴²

To address these constraints, Union des Consommateurs recommended, following a thorough review of abusive clauses in consumer contracts, that consumer organizations and associations should be allowed to seek collective legal redress before the courts on behalf of consumers as is currently permitted in British Columbia and Manitoba.¹⁴³ Likewise, some provinces have delegated the authority to bring an action against a person who has contravened the Act to the Director and request any redress for any damage or loss suffered by the debtor. As Iain Ramsay observed in 2001, however, “[e]ven where such provisions may be enforced by public agencies, in Canada these agencies have shown little enthusiasm for testing the boundaries of unconscionability legislation.”¹⁴⁴ A review of Canadian case law reveals that nothing much has changed.

140. Waldron, “A Brief History,” *supra* note 32 at 304; Ziegel, “Consumer Credit Regulation,” *supra* note 2 at 514-515. See also Ramsay, “Alternative Consumer Credit,” *supra* note 87 at 378; Halsbury’s Laws of Canada (online), *Contracts*, “Excuses for Contractual Obligations: Techniques of Control: Unconscionability and the Protection of Vulnerable Parties: Specific Methods: Unconscionability in Transactions” (IX.2(3)(b)(i)) at HCO-144 “Legislation” (2017 Reissue). See also Cuming, *supra* note 1 at 71.

141. Grammond, *supra* note 133 at 377.

142. *Miglin v Miglin*, 2003 SCC 24 at para 208. See also Grammond, *supra* note 133 at 353; *Grand Ridge Estates*, *supra* note 123; *Mintage Financial Corp*, *supra* note 131 at para 86; Waddams, “Unconscionable Clauses,” *supra* note 113 at 392; *Titus*, *supra* note 114 at para 36: “A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party.”

143. Union des consommateurs, *supra* note 133 at 28-31, 102. *BC-BPCPA*, *supra* note 124, s 172; (MB) *The Consumer Protection Act*, RSM 1987, c C200, s 136.1 [MB-CPA].

144. (AB) *Consumer Protection Act*, RSA 2000, c C-26.3, s 159 [AB-CPA]; *BC-BPCPA*, *supra* note 124, s 171; Ramsay, “Alternative Consumer Credit,” *supra* note 87 at 378.

Given the foregoing, a recommended solution would be that “[i]n the interests of certainty and predictability, the intervention should preferably come from the legislature (Parliament and the provincial legislatures, in Canada’s case), and not be left to the courts to fashion *ex post* in the guise of an unconscionability doctrine.”¹⁴⁵

3. *Cost of credit disclosure legislation*¹⁴⁶

In addition to unconscionable transaction relief provisions, protection of financial consumers from oppressive creditors was further strengthened by cost of credit disclosure legislation enabling consumers to make better financial decisions. As explained by Robert R. Kerton in his study on consumers in the financial services sector, “[t]he proliferation of complex new differentiated financial services, combined with the transformation of traditional sellers, has led to enough noise in the marketplace to confuse all but the most sophisticated of consumers.”¹⁴⁷

Although minimum disclosure requirements of the annual interest rate in credit agreements were first introduced in 1897 when Parliament enacted section 2 of the *Interest Act, 1897*,¹⁴⁸ additional disclosure and transparency requirements followed in the 1967 reforms of the *Bank Act* in response to the explosion of consumer credit and federal banks entering the consumer credit market.¹⁴⁹ At that time, many provinces had already regulated disclosure provisions for sales transactions and by 1971, most provinces had also enacted various consumer protection measures to ensure that consumers were informed of the true cost of credit in lending transactions.¹⁵⁰

145. Ziegel, “Consumer Insolvencies,” *supra* note 34 at 377.

146. See generally: Halsbury’s Laws of Canada (online), *Commercial Law II (Consumer Protection)*, “Financing Protection” (II) at HCP-29-31, HCP-33-34 (2020 Reissue).

147. Task Force on the Future of the Canadian Financial Services Sector, “Principles: Transparency and Redress—Essential Components of Consumer Protection Policy” by Robert R Kerton in Robert R Kerton, ed, *Consumers in the Financial Services Sector*, vol 1: *Principles, Practice and Policy—the Canadian Experience*, Catalogue No F21-6/1998-8-1E-PDF (Ottawa: Task Force of the Future of the Canadian Financial Services Sector, September 1998) at 30.

148. *The Interest Act, 1897*, SC 1897, c 8, s 2: when the annual rate of interest was not disclosed in the contract, interest was capped at six per cent.

149. *Bank Act*, SC 1966–1967, c 87, s 92; *Bank of Cost of Borrowing Disclosure Regulations*, SOR/67-504; Pitch, *supra* note 26 at 327. See also *Consumer Protection Act 1968*, 15 USC § 1601 (1968) [*Truth in Lending Act*]; Bill S-2, *An Act to Make Provision for the Disclosure of Information in Respect of Finance Charges*, 5th Sess, 24th Parl, 1962, reintroduced as Bill S-3, 1st Sess, 25th Parl, 1962 (second reading 6 December 1962).

150. (AB) *The Credit and Loan Agreements Act*, SA 1967, c 11; Alta Reg 310/67, Alta Reg 407/67; (BC) *BC-CPA 1967*, *supra* note 120, Part III, ss 11-16; BC Reg 219/67, BC Reg 251/67, BC Reg 15/68; (MB) *The Consumer Protection Act*, SM 1969, c 4, Part 1, ss 4-27; (NB) *The Cost of Credit Disclosure Act*, SNB 1967, c 6; (NS) *Consumer Protection Act, 1966*, SNS 1966, c 5, as amended by SNS 1967, c 98; NS Reg 8/1966; (ON) *The Consumer Protection Act*, SO 1966, c 23, as amended by SO 1967, c 13; O Reg 207/67, O Reg 265/67; (PEI) *Consumer Protection Act, 1967*, SPEI 1967, c 16; (QC)

Resulting from ongoing negotiations during the 1980s and in accordance with the *Agreement on Internal Trade*, provincial governments and the federal government agreed, in 1998, upon harmonized legislation on cost of credit disclosure provisions. The policy objectives were:

- (a) to ensure that, before making a credit-purchasing decision, consumers receive fair, accurate and comparable information about the cost of credit;
- (b) to ensure that, with respect to non-mortgage credit, consumers are entitled to repay their loans at any time and, in that event, to pay only those finance charges that have been earned at the time the loans are repaid; and
- (c) to ensure that the disclosure is as clear and as simple as possible, taking into account the inherent complexity of disclosure issues related to any form of credit.¹⁵¹

The harmonization template formalized by the Committee on Consumer-Related Measures and Standards was to guide jurisdictions in implementing the agreed upon principles in their respective laws with respect to the cost of borrowing disclosure rules.¹⁵² At that time, all parties agreed that the harmonized cost of credit disclosure legislation must apply to all forms of consumer credit, including fixed credit such as loans for a fixed sum to be repaid in instalments; open credit such as lines of credit and credit cards; loans secured by mortgage of real property; supplier credit such as conditional sale agreements; and long-term leases of consumer goods. At the federal level, similar cost of credit disclosure provisions found in the *Bank Act* and the federal cost of borrowing regulations were initially applicable only to federal banks but are now applicable to all federally incorporated financial institutions.¹⁵³

Accordingly, all provincial and territorial jurisdictions now impose disclosure requirements on credit grantors who extend credit in the

Consumer Protection Act, SQ 1971, c 74, ss 11, 21, 24, 28, 30; (SK) *The Cost of Credit Disclosure Act*, SS 1967, c 85; Sask Reg 273/67, Sask Reg 316/67, Sask Reg 357/67. But see: Richard H Bowes, "Annual Percentage Rate Disclosure in Canadian Cost of Credit Disclosure Laws" (1997) 29 Can Bus LJ 183 at 188, n 16: "None of the statutes were 'pure disclosure' statutes"; Ziegel, "Consumer Credit Regulation," *supra* note 2 at 507-508.

151. Consumer Measures Committee, *Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada: Drafting Template* (1 June 1998) at 3, online (pdf): Canada <[https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost_of_Credit_Disclosure.pdf/\\$file/Cost_of_Credit_Disclosure.pdf](https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost_of_Credit_Disclosure.pdf/$file/Cost_of_Credit_Disclosure.pdf)> [<https://perma.cc/YX4C-KBKH>] [*CMC Draft Template*]. See also Bowes, *supra* note 150.

152. Internal Trade Secretariat, *AIT*, *supra* note 73 at Annex 807.1, s 7; *CMC Draft Template*, *supra* note 151. See also Bowes, *supra* note 150.

153. *Bank Act*, SC 1991, c 46, ss 449-454; *Cost of Borrowing Regulations 2001*, *supra* note 54. See also recent amendments *An Act to amend the law governing financial institutions and to provide for related and consequential matters*, SC 2007, c 6, ss 33, 91, 167, 365.

ordinary course of carrying on their business. The cost of credit may include interest, arrangement fees and other charges, as prescribed by legislation that varies by jurisdiction. In Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, Québec, Northwest Territories, Nunavut and Yukon, the cost of credit disclosure requirements are currently governed by provisions of consumer protection legislation, while New Brunswick, Newfoundland and Labrador and Saskatchewan have separate cost of credit legislation.¹⁵⁴

In addition to the method of calculation of the total cost of borrowing, legislation in all provinces and territories prescribes, as detailed in Appendix A, the various costs and charges to be disclosed as part of a credit agreement, and the time and manner in which such disclosure is to take place. Along with the specific disclosure requirements prior to entering and during the course of the credit agreement by statements of account, notice must also be given of any changes relating to the information disclosed to the consumer. Despite certain disparities, prescribed disclosure requirements for the various types of consumer credit have been largely harmonized across the country.

Additional measures apply to credit cards.¹⁵⁵ Provincial legislation generally focuses on three main consumer protection measures. First, unsolicited credit cards are prohibited. However, in some provinces such as Ontario and Nova Scotia, even if a consumer has not requested the credit card, use of the card will be deemed to constitute written acceptance of the credit agreement.¹⁵⁶ Likewise, while a card may have been solicited without signing an application, the debtor is deemed to have entered into a

154. (AB) *AB-CPA*, *supra* note 144, Part 9. See also s 59(4), (5); *Cost of Credit Disclosure Regulation*, Alta Reg 198/1999 [AB-CCDR]; (BC) *BC-BPCPA*, *supra* note 124, Part 5; *Disclosure of the Cost of Consumer Credit Regulation*, BC Reg 273/2004; (MB) *MB-CPA*, *supra* note 143, ss 1, 6-35.9; *Consumer Protection Regulation*, Man Reg 227/2006, ss 4.1-19; (NB) *Cost of Credit Disclosure Act*, SNB 2002, c C-28.3 [NB-CCDPLA]; *General*, NB Reg 2010-104; (NL) *NL-CPBPA*, *supra* note 124, ss 45-71; *Cost of Consumer Credit Disclosure Regulations*, NLR 74/10; (NS) *NS-CPA*, *supra* note 135, ss 17-18; *Consumer Protection Act Regulations*, NS Reg 160/2000 as amended by NS Reg 72/2018; (NT) *Cost of Credit Disclosure Act*, SNWT 2011, c 23, ss 6-11; *Cost of Credit Disclosure Regulations*, NWT Reg 014-12; (NU) *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, Part 1; *Consumer Protection Regulations*, RRNWT 1990, c C-16, ss 6-8; (ON) *Consumer Protection Act*, 2002, SO 2002, c 30, Schedule A, ss 66-81 [ON-CPA]; *General Regulation*, O Reg 17/05, ss 55-69, 85; (PEI) *Consumer Protection Act*, RSPEI 1988, c-C-19; *Cost of Borrowing Disclosure Regulations*, PEI Reg EC1987-16; (QC) *QC-CPA*, *supra* note 82, ss 66-150 and *Regulation respecting the application of the Consumer Protection Act*, CQLR c-P-40.1, r 3, 26-86 [QC-Consumer Protection Regulation]; (SK) *Cost of Credit Disclosure Act*, 2002, SS 2002, c-C-41.01, s 3; *Cost of Credit Disclosure Regulations*, 2006, RRS c-C-41.01, Reg 1, s 5; (YT) *Consumers Protection Act*, RSY 2002, c 40; *Regulations Respecting the Protection of Consumers*, YOIC 1972/400, ss 2-8.

155. See Appendix A for citations to statutory provisions.

156. *NS-CPA*, *supra* note 135, s 23; *ON-CPA*, *supra* note 154, Schedule A, s 68.

credit agreement upon first use of the card. Second, provincial legislation regulates the card issuer's disclosure requirements. In most provinces, disclosure of prescribed information is required either when the individual applies for a credit card or in an initial disclosure statement provided to the consumer. Finally, all provinces with credit card legislation provide that a card holder is not liable for a debt incurred through the unauthorized use of a lost or stolen credit card after the credit card issuer has been given notice of the loss or theft. Most provinces limit the maximum total liability before the credit card issuer receives notice to \$50 or a lesser amount set by the credit agreement, except Nova Scotia and Prince Edward Island who appear to leave the consumer's liability to the credit card issuer's discretion.¹⁵⁷

Although the effectiveness of cost of credit disclosure requirements has been questioned and labelled "ineffective and largely a waste of money,"¹⁵⁸ a recent study has confirmed that for highly educated consumers, disclosure regulations and the introduction of plain-language contracts have achieved the desired outcome that consumers have a "fairly complete understanding" of the credit agreements they enter into and are "aware of the risks they are taking."¹⁵⁹

Despite these positive findings, the Financial Consumer Agency of Canada recently confirmed that the results of the research undertaken to date reveal that "many consumers lacked the basic financial knowledge needed to make sound decisions about their money."¹⁶⁰ Understanding the consequences of interest compounding, the necessity for credit life and disability insurance, the importance of comparison shopping and looking beyond the amount of the finance charge or the instalments are outside the

157. See e.g. *NB-CCDPLA*, *supra* note 154, s 46(2).

158. Anthony Duggan, "Law, Economics and Public Policy: Essays in Honour of Michael Trebilcock: VIII Consumer Law and Policy: Consumer Credit Redux" (2010) 60:2 UTLJ 687 at 699 citing Ronald Mann, *Charging Ahead: The Growth and Regulation of Payment Card Markets* (Cambridge: Cambridge University Press, 2006). See also Micheline Gleixner, "Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Thomson Reuters, 2014) at 598-600 [Gleixner, "Financial Literacy"]; Saul Schwartz, "The Canadian Task Force on Financial Literacy: Consulting Without Listening" (2011) 51:3 Can Bus LJ 338 at 352; Mary Anne Waldron, "Unanswered Questions about Canada's Financial Literacy Strategy: A Comment on the Report of the Federal Task Force Symposium: Financial Literacy for Canadians and Reactions to the Federal Task Force Report" (2011) 51:3 Can Bus LJ 361 at 373-374.

159. Stephanie Ben-Ishai, Saul Schwartz & Nancy Werk, "Private Lines of Credit for Law Students and Medical Students: A Canadian Perspective" (2017) 32:2 BFLR 343 at 360.

160. Financial Consumer Agency of Canada, "Financial literacy background," online: *FCAC* <www.fcac-acfc.gc.ca> [<https://perma.cc/AQ3W-VUH5>] (last modified 16 April 2019). See also Chantelle Bramley, "Addressing Indebtedness in Canada: An Evaluation of the Final Report by the Taskforce on Financial Literacy" (2012) 27:4 BFLR 711.

grasp or interest of many vulnerable consumers.¹⁶¹ Moreover, “literature on behavioural economics suggests that consumers tend to underestimate risks such as unemployment and be overoptimistic about their repayment abilities.”¹⁶²

Aggravating their plight, consumers are also faced with disparate, complex and at times conflicting information relating to financial consumer protection and are thus unable to protect their interests when initially choosing a financial service or when they realize the negative consequences of their financial choices. One simply has to compare the provincial cost of credit disclosure requirements prescribing the disclosure of the annual percentage rate when communicating cost of borrowing with the criminal interest rate provisions prescribing a sixty per cent effective annual rate. According to a recent study on high-cost credit in Canada, “[m]ost lenders cap rates at 46.9% Annual Percentage Rate (APR) the equivalent of 60% Effective Annual Rate (EAR) set in the federal Criminal Code.”¹⁶³ Regardless, most financial consumers do not understand either.

The fact remains, therefore, that for many Canadians struggling with financial literacy, cost of credit disclosure requirements are insufficient to enable them to make proper financial decisions and fails to prevent irresponsible and financially dangerous use of high credit products as well as consumer abuse and predatory lending practices. Given the foregoing, cost of credit disclosure legislation remains largely ineffective for consumers who need the most protection. Iain Ramsay’s conclusion in 2006 remains true to this day: “Canada has in general not attempted to use disclosure law as a method of addressing potential overindebtedness.”¹⁶⁴ Furthermore, existing credit disclosure provisions will not remedy consumer exploitation and increased regulatory intervention in the marketplace is thus justified to protect financial consumers.¹⁶⁵

161. Ramsay, “Overindebtedness,” *supra* note 11 at 39; Duggan, *supra* note 158 at 702.

162. Ramsay, “Overindebtedness,” *supra* note 11 at 39. See also Bramley, *supra* note 160 at 716-717; Waldron, “A Brief History,” *supra* note 32 at 318.

163. Denise Barrett Consulting, *Consumers’ Experience with Higher Cost Credit*, (Toronto: Consumers Council of Canada, 2018) at 4, 216, online (pdf): CCC <<https://cccshop.consumerscouncil.com/ca/EPUBViewer?PID=139982&GUID=8a5b086f-cb87-4ff3-9c77-d71b5c235989>> [<https://perma.cc/22D6-7527>] [Barrett, *Higher Cost Credit*].

164. Ramsay, “Overindebtedness,” *supra* note 11 at 38.

165. Robert R Kerton & Idris Ademuyiwas, “Financial Consumer Protection in Canada: Triumphs and Tribulations” in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection*, (Singapore: Springer, 2018) at 105-107; Waldron, “A Brief History,” *supra* note 32 at 320.

4. *Fair trade practices legislation*¹⁶⁶

Following disclosure requirements and relief for unconscionable credit transactions, many provinces enacted relatively quickly legislation that protected consumers from unfair or deceptive business practices before, during or after a consumer transaction.¹⁶⁷ Although initially enacted as separate statutes, most provinces have now incorporated them in their general consumer protection legislation.¹⁶⁸

Explaining the objectives of fair trade practices legislation, the Alberta Government indicates that the *Consumer Protection Act* “[e]nhances consumer protection through remedies, enforcement tools and tougher penalties intended to discourage unfair practices in the marketplace. The Act simplifies procedures for business, providing clearer standards to ensure a more level playing field.”¹⁶⁹ Uniquely and interestingly, the Alberta statute’s preamble further clarifies the policy objectives targeted by this type of legislation:

WHEREAS all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed;

166. See generally: Halsbury’s Laws of Canada (online), *Commercial Law II (Consumer Protection)*, “Contracts: Unfair Practices and Consumer Contracts: Prohibited Practices General” (I.2(1)) at HCP-2 “By suppliers of consumer products and services” (2020 Reissue).

167. (AB) *The Unfair Trade Practices Act*, SA 1975, c 33; (BC) *Trade Practices Act*, SBC 1974, c 96; (MB) *The Trade Practices Inquiry Act*, SM 1935, c 53; (NL) *The Trade Practices Act*, SNL 1978, c 10; (NS) *Consumer Services Act*, RSNS 1989, c 94; (ON) *The Business Practices Act, 1974*, SO 1974, c 131; *Business Practices Act*, SO 1980, c 55; (PEI) *Business Practices Act*, SPEI 1977, c 31; *Conduct of Creditors Regulations*, PEI Reg EC1983-578; (SK) *The Consumer Protection Act*, SS 1996 c C-30.1. See also Ronald I Cohen & Jacob S Ziegel, *The Political and Constitutional Basis for a New Trade Practices Act* (Ottawa: Department of Consumer and Corporate Affairs, Bureau of Competition Policy, 1976).

168. (AB) *Fair Trading Act*, RSA 2000, c F-2, Part 9 (name and chapter number changed to *Consumer Protection Act*, *supra* note 144 [AB-CPA] by SA 2017, c 18, s 1(2), effective 15 December 2017); *Consumer Transaction Cancellation and Recovery Notice Regulation*, Alta Reg 287/2006. (BC) *BC-BPCPA*, *supra* note 124, Part 2, Division I; (MB) *The Business Practices Act*, SM 1990–1991 c 6; (NB) Unfair practices provisions are found throughout various legislation applicable to specific industries, products or services; (NL) *NL-CPBPA*, *supra* note 124, s 7, 9-10; (NS) generally *Consumer Services Act*, *supra* note 167; *NS-CPA*, *supra* note 135, s 33; No regulation adopted to date specifically on unfair practices; (NU) *NU-CPA*, *supra* note 124, ss 72.1–72.5 added by SNu 2017, c 18, s 3; (ON) *ON-CPA*, *supra* note 154, Schedule A, ss 14-19; (PEI) *Business Practices Act*, RSPEI 1988, c B-7, s 2; *Conduct of Creditors Regulations*, *supra* note 167; *QC-CPA*, *supra* note 82, ss 219-222, 229; (SK) *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, ss 6-9. See generally: Halsbury’s Laws of Canada, *supra* note 146.

169. Alberta Government, *Consumer Protection Act*, online: <open.alberta.ca/dataset/c26p3> [https://perma.cc/9M49-KFLK]. See also *AB-CPA*, *supra* note 144, modified by SA 2017, c 18 and SA 2018, c 11.

WHEREAS businesses thrive when a balanced marketplace is promoted and when consumers have confidence that they will be treated fairly and ethically by members of an industry;

WHEREAS businesses that comply with legal rules should not be disadvantaged by competing against those that do not; and

WHEREAS the Government of Alberta is committed to protecting consumers and businesses from unfair practices to support a prosperous and vibrant economy.¹⁷⁰

Generally, an unfair or deceptive practice takes the form of a claim, representation or advertisement that would likely mislead or deceive a consumer or be unconscionable and take advantage of a person's inability to protect their interests during negotiations. Although terminology varies from province to province, consumer protection legislation applicable to consumer credit transactions expressly prohibits certain practices by suppliers of consumer products and providers of financial services and governs practices within the consumer credit industry. Indeed, many distinct unfair practices, usually more than twenty, are specifically enumerated in the provincial statutes and these lists are generally non-exhaustive. In many provincial statutes, the list of unfair practices is classified in two categories: false, misleading or deceptive practices, or unconscionable practices.¹⁷¹ Another categorization distinguishes practices pertaining to the content of the contract of sale of goods and services from other practices relating to the process that resulted in the contract.¹⁷²

Recent reforms not yet in force to the *Alberta Consumer Protection Act* further prohibit unilateral changes to a "substantive term" unless the consumer consents or the change is permitted in the consumer contract and notice is given to the consumer as prescribed by the Act.¹⁷³ In the latter event, the consumer retains the right to "cancel the ongoing consumer transaction by providing the supplier with a written notice of cancellation" without any penalties.

Many provincial statutes further provide that an unfair practice may occur whether or not it resulted in a consumer transaction. For example, the *Ontario Consumer Protection Act, 2002* provides simply that it is an unfair practice for a person to make a false, misleading, deceptive or an unconscionable representation and as a result any agreement may be

170. *AB-CPA*, *supra* note 144, Preamble.

171. See in-depth analysis of unfair practices legislation in Edward P Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977) 15:2 *Osgoode Hall LJ* 327 at 345-356.

172. *Union des consommateurs*, *supra* note 133 at 40.

173. *AB-CPA*, *supra* note 144, ss 6.1-6.2 modified by SA 2017, c 18 (not in force).

rescinded and the consumer entitled to a remedy.¹⁷⁴ Unlike the earlier *Business Practices Act*, the new provisions no longer require that the consumer be induced to enter into the agreement by the misrepresentation.¹⁷⁵ Confirmed by the Ontario Court of Appeal, “a claim under the *Consumer Protection Act* based on an agreement entered into following an unfair practice does not require any reliance on or even knowledge of the unfair practice.”¹⁷⁶ This is in contrast to several provinces that still require either that the consumer was induced to enter into the contract by the unfair practice or that damages were caused by the unfair practice.

Several provinces grant the consumer the right to rescind an agreement, or the courts the power to set aside agreements whether written, oral or implied, when a supplier or creditor has engaged in an unfair practice.¹⁷⁷ However, the right to rescission or to damages is dependent in some jurisdictions upon notice being provided to the supplier within a certain time frame. When a supplier has engaged in an unfair practice, a consumer may be entitled to various remedies including damages, the recovery of the amount paid by the consumer which exceeds the value of the goods or services received, and even exemplary or punitive damages.

In addition, some provincial statutes grant the Court the power to make a declaratory or an injunctive order and to impose a criminal sanction against the supplier. Both these private and public enforcement provisions are “designed to achieve a combination of sanctions and procedures calculated to maximize the objectives of deterrence, compensation and efficiency.”¹⁷⁸ The effectiveness of these consumer protection provisions were, however, quickly disputed. William Neilson’s research on the public administrative remedies in provincial trade practices legislation revealed, in 1981, the “prevailing failure to administer the trade practices statutes in an accessible, comprehensive and regular fashion. [...] Accountability has taken on a very muted and sporadic meaning.”¹⁷⁹ According to Jacob Ziegel, private enforcement cases are also limited given two main obstacles consumers must surmount to benefit from the legislative remedies enacted

174. *ON-CPA*, *supra* note 154, Part III, ss 14-18.

175. Thomas R Lipton, “Consumer Protection Act 2002: Case Law Updates” (2018) 61:1 Can Bus LJ 109 at 118.

176. *Ramdath v George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at paras 39, 86-87.

177. See Appendix B for citations to statutory provisions. See also Belobaba, *supra* note 171 at 356-374; Union des consommateurs, *supra* note 133 at 42-43; Ziegel, “Consumer Insolvencies,” *supra* note 34 at 387.

178. William AW Neilson, “Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation” (1982) 19:2 Osgoode Hall LJ 153 at 155.

179. *Ibid* at 164-165.

to protect them.¹⁸⁰ Not only must an aggrieved consumer prove that the creditor made a “representation,” but also they must personally finance the litigation costs involved in the process.

Although a recent conviction in Ontario against a contracting company has “resulted in one of the largest fines and longest jail terms imposed under the *Consumer Protection Act*,”¹⁸¹ the Province’s website lists only seven conviction notices for the last 27 months. In comparison, there are 387 records on the Consumer Beware List of businesses that have either been convicted or have not responded to the ministry about a consumer complaint.¹⁸² Given the number of complaints, the actual enforcement measures seem quite inconsequential and raise the issue of whether consumer protection measures have ever been effectively enforced.

5. *Payday loans legislation*

The emergence of new forms of consumer credit such as payday loans has recently prompted renewed lobbying efforts aimed at provincial governments to combat predatory lending and better protect financial consumers. Although their presence in the United States can be traced back to the 1980s, the payday loan industry emerged in Canada in the early to mid-1990s.¹⁸³ Less than twenty years later, payday lenders became the most visible and important service provider in the alternative consumer credit market offering small short-term unsecured loans. Provided that the borrower has an identity card, a bank account and a source of income, payday lenders will make the loan without checking the consumer’s credit report nor the borrower’s outstanding indebtedness and even promote this “flexibility” to potential consumers and “guarantee” approval.¹⁸⁴ Many

180. Ziegel, “Consumer Insolvencies,” *supra* note 34 at 387.

181. Ontario, Ministry of Government and Consumer Services, “Toronto Contracting Company and Owner Each Convicted for 11 Counts of Engaging in an Unfair Practice” (9 August 2019), online: *Ontario Newsroom* <news.ontario.ca/mgs/en/2019/08/toronto-contracting-company-and-owner-each-convicted-for-11-counts-of-engaging-in-an-unfair-practice.html> [<https://perma.cc/3H49-SES8>]. The contracting company was fined a total of \$1.125 million and its director was sentenced to 731 days in jail.

182. Ontario, “Consumer Beware List,” online: *Ontario* <<https://www.consumerbewarelist.mgs.gov.on.ca/en/cbl/search>> [<https://perma.cc/MY24-FQMU>] (last consulted 21 December 2019).

183. *Re The Cash Store Financial Services Inc*, 2009 MBCA 1 at para 3 [*Re The Cash Store*].

184. Ben-Ishai, “Regulating Payday Lenders,” *supra* note 106 at 331; ACORN Canada, *A Conflict of Interest: How Canada’s Largest Banks Support Predatory Lending*, (March 2007) at 4, online: *ACORN Canada* <acorncanada.org/resource/conflict-interest-how-canadas-largest-banks-support-predatory-lending> [<https://perma.cc/3AEB-MWKX>]; Brian Dijkema & Rhys McKendry, *Banking at the Margins, Finding Ways to Build an Enabling Small-Dollar Credit Market* (Hamilton, ON: Cardus, February 2016) at 35, online (pdf): *Cardus* <www.cardus.ca/research/work-economics/reports/banking-on-the-margins/> [<https://perma.cc/J36P-P55Q>]; Denise Barrett Consulting, *Consumer Experiences with Online Payday Loans* (Toronto: Consumers Council of Canada, July 2015) at 35, online (pdf): *CCFA* <canadiancfa.com/wp-content/uploads/2016/10/consumers-council-canada>

lenders do, however, evaluate to some extent the borrower's ability to repay based on the value of the loan relative to the client's expected future income in order to determine the associated risk with the loan.¹⁸⁵

Since payday loans are intended primarily for individuals unable to access other forms of credit, the industry is often criticized and described as predatory, but is also considered by many as a form of microlending filling a gap in the consumer credit market to alleviate short term financial distress.¹⁸⁶ Jacob Ziegel explains, however, that "borrowing costs are too high and may often leave the borrowers worse off than they were before the loan."¹⁸⁷ Indeed, a Manitoba study estimated in 2007 that a \$250 payday loan with a twelve-day maturity would require an average annual rate of 778% instead of regular lines of credit and credit card with interest rates of ten to thirty-six per cent.¹⁸⁸ Moreover, the annual rates charged by payday lenders increased by forty-two and one half per cent between 2002 and 2007. An ACORN Canada report further indicated that same year that payday lenders were charging interest rates between 380 and 900%, thus violating section 347 of the *Criminal Code*, which sets the criminal interest rate at sixty per cent.¹⁸⁹

In addition to the high costs involved, the critical issue with payday loans is the short-term nature of the loan. In order to limit their risk, lenders usually structure the repayment period according to the consumer's next inflow of funds such as a paycheque and require a pre-authorized debit

online-loans_2015-study.pdf> [https://perma.cc/QK4G-2LV4] [Barrett, *Online Payday Loans*]; Consumer Measures Committee, *Stakeholder Consultation Document on a Proposed Consumer Protection Framework for the Alternative Consumer Credit Market* (14 December 2004) at 8 [CMC, *Stakeholder Consultation*].

185. Barrett, *Higher Cost Credit*, *supra* note 163 at 50; Dijkema & McKendry, *supra* note 184 at 35.

186. Freya Kodar, "Conceptions of Borrowers and Lenders in the Canadian Payday Loan Regulatory Process: The Evidence from Manitoba and Nova Scotia" (2011) 34:2 Dal LJ 443; Ben-Ishai, "Regulating Payday Lenders," *supra* note 106 at 325-330; Ruth E Berry & Karen A Duncan, "The Importance of Payday Loans in Canadian Consumer Insolvency" (Ottawa: Office of the Superintendent of Bankruptcy, October 2007) at 3, online (pdf): OSB <www.startegis.ca/eic/site/bsf-osb.nsf/vwapj/Payday_EN.pdf/\$FILE/Payday_EN.pdf> [https://perma.cc/LQ34-E3F6]; Jerry Buckland, *Payday Lending Literature Review* (3 May 2013) at 14, online (pdf): *Manitoba Public Utilities Board* <www.pub.gov.mb.ca/payday_loan/buckland_payday_literature_review_may%2013_13.pdf> [https://perma.cc/4MYE-MDAK]; Janis P Sarra, "At What Cost? Access to Consumer Credit in a Post-Financial Crisis Canada" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2011* (Toronto: Thomson Reuters, 2012) 409 at 419. For an in-depth description of these two types of customer segments see: Sabrina Bond, *Filling the Gap: Canada's Payday Lenders* (Ottawa: Conference Board of Canada, 2016) at 27-31, online (pdf): CCFCA <https://canadiancfa.com/wp-content/uploads/2016/11/cboc-filling-the-gap_final-nov-2016.pdf> [https://perma.cc/3NZF-LXG2].

187. Ziegel, "Consumer Insolvencies," *supra* note 34 at 368.

188. J Buckland et al, *Serving or Exploiting People Facing a Short-term Credit Crunch: A Study of Consumer Aspects of Payday Lending in Manitoba*, Report for the November 2007 Public Utilities Board Hearing to Cap Payday Loan Fees (15 September 2007) at 8-9.

189. *Criminal Code*, *supra* note 51, s 347; ACORN Canada, *supra* note 184 at 4.

or a post-dated cheque for the total loan amount including fees.¹⁹⁰ It is imperative to understand, however, that the consumers targeted by this type of loan often do not have the necessary surplus in their budget to repay the loan since, if they did, they would never have resorted to it in the first place. More importantly, a recent study has confirmed that the majority of these loans are used for recurring or necessary expenses¹⁹¹ which signifies that the consumer is most likely already financially distressed or living paycheque to paycheque. As a result, the nature of a payday loan and the two-week repayment period represents a short period of time to recover the amount needed.

Repayment of the payday loan along with additional costs not only delays the consumer's burden of illiquidity to the next paycheque but also increases the consumer's overall indebtedness. Additional loans are therefore required to stay financially afloat or may even be required to repay the initial loan and thus continues to add to a borrower's financial hardship. "For consumers who are never able to get completely ahead of the deficit left by a loan payment in their cash-flow cycle, the result can be a crippling cycle of debt that lasts until the individual receives a large-enough influx of cash such as a tax return."¹⁹²

The obvious potential for profits explains why payday loan companies encourage their customers to extend the term of the loan or to take out another loan to repay the first, rather than encouraging borrowers to pay their debts. According to a recent study on payday loans, "the business model of the payday loan industry requires repeat borrows, not one-time customers" and, prior to recent legislative reforms prohibiting the practice, loans were regularly rolled over into new loans (on average 15

190. Dijkema & McKendry, *supra* note 184 at 35; Canada, "Payday Loans" (modified 12 November 2019), online: *Canada* <www.canada.ca/en/financial-consumer-agency/services/loans/payday-loans.html> [https://perma.cc/28JZ-TDH8].

191. Financial Consumer Agency of Canada, "Payday Loans: Market Trends" (2016) at 1, online: *FCAC* <www.canada.ca/en/financial-consumer-agency/programs/research/payday-loans-market-trends.html> [https://perma.cc/6S2Y-EFJG] [FCAC, *Market Trends*]. See also Manitoba Public Utilities Board, *Report on 2016 Payday Loans Review* (17 June 2016) at 38, online (pdf): <www.pubmanitoba.ca/v1/payday_loan/2016_payday_loans_review_report.pdf> [https://perma.cc/7KL5-SVW5]; Jerry Buckland & Brenda Spotton Visano, "Introduction" in Buckland, Robinson & Visano, *Payday Lending in Canada*, *supra* note 18 at 2 [Buckland & Visano, "Introduction"]; Jerry Buckland, "A Socio-economic Examination of Payday Loan Clients: Why and How People Use Payday Loans," in Buckland, Robinson & Visano, *Payday Lending in Canada*, *supra* note 18 at 75 [Buckland, "A Socio-economic Examination"].

192. Dijkema & McKendry, *supra* note 184 at 35. See also Ben-Ishai, "Regulating Payday Lenders," *supra* note 106 at 327 citing Carmen Butler & Niloufar Park, "Mayday Payday: Can Corporate Social Responsibility Save Payday Lenders?" (2005) 3:1 Rutgers JL & Urban Policy 119 at 122; Manitoba Public Utilities Board, *supra* note 191 at 61; Buckland & Visano, "Introduction," *supra* note 191 at 11.

times as reported by Ernst & Young in 2004).¹⁹³ According to the Nova Scotia Utility and Review Board's analysis of 2017 statistics,¹⁹⁴ repeat loans represented fifty-six per cent of total payday loan borrowing in the Province. In addition, almost fifty per cent of borrowers had five or more payday loans in one year and thirty-two per cent had eight or more.

There are several factors that can make a person opt for this type of credit. "Borrowers find payday loans attractive because of the accessibility of the payday loan outlets, the privacy of the transactions, the absence of credit checks, and non-requirement of security for repayment of the loan."¹⁹⁵ For financial consumers "concerned about their ability to manage the more open-ended commitment associated with credit card cash advances," payday loans provide a highly structured short-term loan.¹⁹⁶ Payday lenders seem to be "non-judgmental" and friendlier, especially with the proactive offer of services in the language of the dominant ethnic group in the neighborhood, and more accessible both in terms of hours of operation and location.¹⁹⁷ For example, in many Canadian cities, banks tend to close their branches in low-income or rural neighborhoods, while payday lenders take the opportunity to move into these areas.¹⁹⁸

In 2008, there were approximately 1,450 payday lenders in Canada, with an estimated turnover of \$2 billion, most of them in low-income neighborhoods.¹⁹⁹ It was contemplated at that time that the payday loan industry could double in size when it would reach maturity.²⁰⁰ Although the use of payday loans by consumers has more than doubled in Canada between 2009 and 2016 to more than four per cent of Canadian households

193. Chris Robinson, "A Business Analysis of The Payday Loan Industry," in Buckland, Robinson & Visano, *Payday Lending in Canada*, *supra* note 18 at 95; ACORN Canada, *supra* note 184 at 4.

194. *NSUARB*, *supra* note 135 at para 102.

195. Ziegel, "Consumer Insolvencies," *supra* note 34 at 367; Buckland, *Hard Choices*, *supra* note 15 at 100-117; Margaret Craig-Bourdi, "High-Interest Loans: Why Canadian Borrowers Are Still Taking on the Steep Commitment" (13 August 2018) online: *CPA* <www.cpacanada.ca/en/news/canada/2018-08-13-high-interest-loans-why-canadian-borrowers-are-still-taking-on-the-steep-commitment> [<https://perma.cc/8YFS-V34F>]. See also Buckland, "A Socio-economic Examination," *supra* note 191 at 75-76.

196. Ramsay, "Payday Loans," *supra* note 9 at 389.

197. Ben-Ishai, "Regulating Payday Lenders," *supra* note 106 at 330.

198. ACORN Canada, *supra* note 184 at 2. In 2004, it was reported that that more than 700 bank branches were closed in Canada between 2001 and 2003, most in low-income neighbourhoods; Buckland, *Hard Choices*, *supra* note 15 at 152.

199. Finn Poschmann, *An Assessment of Payday Lending: Markets and Regulatory Responses* (October 2016) at 14, online (pdf): *Atlantic Provinces Economic Council*, <www.apec-econ.ca/files/documents/Payday%20Lending%20Report.pdf> [<https://perma.cc/6EE9-YJJG>]; Ziegel, "Consumer Insolvencies," *supra* note 34 at 367; Buckland, *Hard Choices*, *supra* note 15 at 148-149; Buckland & Visano, "Introduction," *supra* note 191 at 3-4. For in-depth analysis of payday loan industry see Robinson, *supra* note 193 at 83-125.

200. *Re The Cash Store*, *supra* note 183 at para 3.

or two million Canadians each year,²⁰¹ the number of lenders has not increased significantly. The number of payday lenders peaked in 2011 with 1,778 lenders but recent provincial regulatory reforms beginning in 2009 has transformed the industry which has consolidated and returned to previous levels with approximately 1,400 lenders.²⁰² Store front payday lenders are now found in all provinces except Québec where, as previously explained in Part III, section 1 on pawnbrokers, relatively low interest rate restrictions discouraged the industry from developing in that province.²⁰³

Amidst calls for the outright prohibition of payday loans, the federal, provincial and territorial governments began in 2000 to address the exploitation of vulnerable customers and the charging of exorbitant rates and fees by payday lenders. However, instead of banning payday loans, governments tailored their response to legalize the industry, which was threatened as a result of numerous class actions brought against payday loan companies in Canada claiming that section 347 of the *Criminal Code* has been violated.²⁰⁴ Notwithstanding the accuracy of these allegations there had been few prosecutions and these were essentially focused on organized crime or “the most egregious of violations.”²⁰⁵ According to the federal Department of Justice, the criminal interest rate was a means to target loan sharking and was “not intended to act as a consumer protection tool.”²⁰⁶

Considering the regulation of payday loans “a consumer-protection issue,” Parliament authorized the provinces in 2007 to regulate the payday lending industry and to set their own limits on the cost of payday loans.²⁰⁷

201. FCAC, *Market Trends*, *supra* note 191 at 1-2.

202. Poschmann, *supra* note 199 at 13-18; Bond, *supra* note 186 at 5-8.

203. For further details, see *supra*, notes 105 and 106.

204. Nathan Irving, “The Consumer Protection Amendment Act (Payday Loans)” (2001) 34:3 *Man LJ* 159 at 160-163.

205. Consumer Measures Committee, ACCM Working Group, *Consultation Paper on Framework Options for Addressing Concerns with the Alternative Consumer Credit Market* (2002) at 4, online (pdf): *FedDev Ontario* <[www.feddevontario.gc.ca/eic/site/cmc-cmc.nsf/vwapj/CMC_credit_e.pdf/\\$FILE/CMC_credit_e.pdf](http://www.feddevontario.gc.ca/eic/site/cmc-cmc.nsf/vwapj/CMC_credit_e.pdf/$FILE/CMC_credit_e.pdf)> [https://perma.cc/G5RS-W73H]: “Section 347 is not well suited to enforcement within the ACCM, despite many ACCM credit products being sold at arguably criminal interest rates. Enforcement difficulties include a lack of victims willing to aid prosecutions, a low level of harm done in relation to each individual ACCM loan, costly evidentiary requirements, and the uncommon requirement for specific Attorney General consent for actions (taken by some prosecutors to mean that this section is to be applied only in special circumstances).” See also CMC, *Stakeholder Consultation*, *supra* note 184 at 2; Mary Anne Waldron, “What is to be Done with Section 347?” (2003) 38:3 *Can Bus LJ* 367 at 368 [Waldron, “What is to be Done?”]; *Tracy v Instaloes Financial Solutions Centres*, 2009 BCCA 110 at para 4.

206. Barrett, *Higher Cost Credit*, *supra* note 163 at 218. See also CMC, *Stakeholder Consultation*, *supra* note 184 at 2.

207. Buckland, *Hard Choices*, *supra* note 15 at 50-51; *Criminal Code*, *supra* note 51, s 347.1; *Order Designating Alberta for the Purposes of the Criminal Interest Rate Provisions of the Criminal*

Since then, almost every province in Canada has decided to regulate and tighten rules governing the payday loan industry and, in particular, loans for \$1,500 or less with a term of 62 days or less as defined in the *Criminal Code*.²⁰⁸

With the exception of Québec, which regulates all high-cost credit generally, all provinces have enacted legislative schemes designed to protect borrowers of payday loans by requiring payday lenders to be licensed and by regulating the payday lending industry.²⁰⁹ As detailed in Appendix C, legislation in most provinces prescribes the contents of a payday loan agreement ensuring disclosure of all relevant information in clear and comprehensible terms including loan principal, duration in days, maturity, total cost of credit and annual percentage rate, a statement that the loan is a high-cost loan and the details of the fees, commissions, penalties, interest, charges and other amounts required in respect of the loan. Likewise, specific information must be posted prominently showing the total cost of credit and all other prescribed information. Legislation also

Code, SOR/2010-21; *Order Designating British Columbia for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2009-278; *Order Designating Manitoba for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2008-212; *Order Designating New Brunswick for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2017-40; *Order Designating Nova Scotia for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2009-177; *Order Designating Ontario for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2009-277; *Order Designating Prince Edward Island for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2014-277; *Order Designating Saskatchewan for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2011-204. See in-depth analysis of the transition to provincial regulation in Olena Kobzar, “Perils of Governance through Networks: The Case of Regulating Payday Lending in Canada” (2012) 34:1 *Law & Policy* 32. See also critiques of this decision: Waldron, “A Brief History,” *supra* note 32 at 315; Waldron, “What is to be Done,” *supra* note 205; Jacob Ziegel, “Does Section 347 Deserve a Second Chance? A Comment” (2003) 38:3 *Can Bus LJ* 394; *Garland v Consumers’ Gas Co.*, [1998] 3 SCR 112 at 121, 165 DLR (4th) 385.

208. *Criminal Code*, *supra* note 51, s 347.1(2).

209. (AB) *An Act to End Predatory Lending*, SA 2016, c E-9.5, (CIF May 27, 2016) [*Predatory Lending Act*]; *AB-CPA*, *supra* note 144, ss 124.1–124.91, as amended by *Predatory Lending Act*, s 8; *Payday Loans Regulation*, Alta Reg 157/2009; (BC) *BC-BPCPA*, *supra* note 124, Part 6.1; *Payday Loans Regulation*, BC Reg 57/2009; (MB) *MB-CPA*, *supra* note 143, Part XVIII; *Payday Loans Regulation*, Man Reg 99/2007; (NB) *NB-CCDPLA*, *supra* note 154; *Payday Lending Regulation*, NB Reg 2017-23 (CIF 1 January 2018); (NL) *NL-CPBPA*, *supra* note 124, ss 83.1–83.11 as amended by *An Act to Amend the Consumer Protection and Business Practices Act*, SNL 2016, c 46 (CIF 1 April 2019); *Payday Loans Regulations*, NLR 10/19; *Payday Loans Licensing Regulations*, NLR 11/19; (NS) *NS-CPA*, *supra* note 135, ss 18A–18U; *Payday Lenders Regulations*, NS Reg 248/2009, s 9; (ON) *Payday Loans Act, 2008*, SO 2008, c 9 [*ON-PLA*]; *General Regulation*, O Reg 98/09 [*ON-General*]; (PEI) *Payday Loans Act*, SPEI 2009, c 83; *Payday Loans Act Regulations*, PEI Reg EC2013-67; (SK) *Payday Loans Act*, SS 2007, c P-4.3; *The Payday Loans Regulations*, RRS c P-4.3, Reg 1 [*The Payday Loans Regulations*]. See also (QC) *QC-CPA*, *supra* note 82, ss 66-117, 150, 321b, 322; *QC-Consumer Protection Regulation*, *supra* note 154, chapter 5 applicable to all money lenders in Québec. See generally: Halsbury’s Laws of Canada (online), *Commercial Law II (Consumer Protection)*, “Financing Protection: High-Cost Credit” (II.6) at HCP-39 “Definitions” (2020 Reissue).

provides for a “cooling off” period, meaning consumers are permitted to change their minds and cancel a payday loan within 1 to 2 days depending on the jurisdiction, without paying any charges.

Regulation of payday loans further enumerates acceptable debt collection practices and prohibited practices for lenders such as requesting or requiring any assignment of wages or other security for the payment of the loan and tied selling other products or services. If a payday lender fails to comply with a number of provisions on prohibited practices, the borrower is not liable to pay any amount that exceeds the principal of the payday loan.

In addition to the general maximum cap of \$1,500, provincial legislation also restricts the principal amount borrowed by the consumer and sets additional maximums on the total cost of borrowing that payday lenders can charge consumers with the amount varying with each province. Since 2015, the tendency has been to lower the maximum total cost of credit allowed, which currently stands, in Alberta, British Columbia, New Brunswick and Ontario, at \$15 per \$100 advanced under the payday loan including all charges and fees.²¹⁰ Prior to these reforms, limits placed on borrowing costs have ranged from \$17 to \$31 for every \$100. Although this lower price cap may seem reasonable when represented in a dollar amount, the calculation of the APR for such loans at the lowest rate in Canada is at least eighty-eight per cent for a loan for the maximum term of 62 days and almost 392% for a standard two-week loan.²¹¹

A few recent legislative reforms include further restrictions on the allowable amount of a payday loan. As a result, the maximum amount of a payday loan in British Columbia, Newfoundland and Labrador, Ontario and Saskatchewan is fifty per cent of the borrower’s net pay while it is only thirty per cent in Manitoba and New Brunswick.²¹² In addition, new provisions enacted in most provinces prohibit rollovers or concurrent loans

210. *AB-CPA*, *supra* note 144, s 124.61; (BC) *Payday Loans Regulation*, *supra* note 209, s 17 as amended by BC Reg 126/2018 (effective 1 September 2018); (NB) *Payday Lending Regulation*, *supra* note 209, s 3; (ON) *ON-General*, *supra* note 209, s 18(1) as amended by O Reg 489/17 (15% after 1 January 2018).

211. Financial and Consumer Services Commission, “Unlicensed Online Payday Lenders are Operating in New Brunswick” (26 November 2018), online: *FCNB* <www2.gnb.ca/content/gnb/en/news/news_release.2018.11.1289.html> [<https://perma.cc/3EN5-72B9>]; Consumer Protection BC, “Calculate the payday loan APR” (2020), online: *Consumer Protection BC* <<https://www.consumerprotectionbc.ca/get-keep-licence/payday-loans/calculate-the-payday-loan-apr/>> [<https://perma.cc/B2AU-RR6G>].

212. (BC) *BC-BPCPA*, *supra* note 124, ss 112.02, 112.08; *Payday Loans Regulation*, BC Reg 231/2016, s 18; (MB) *MB-CPA*, *supra* note 143, s 151.1; *Payday Loans Regulation*, *supra* note 209, s 15.2; (NL) *Payday Loans Regulations*, *supra* note 209, s 3(1)(g); (ON) *ON-PLA*, *supra* note 209; *ON-General*, *supra* note 209, s 16.2; (SK) *The Payday Loans Regulations*, *supra* note 209, s 15.

by a single lender. Undoubtedly improving consumer protection, these new consumer protection measures nevertheless contain glaring loopholes: borrowers may still be granted several succeeding loans by a single lender or can have many concurrent loans from multiple lenders. Despite the harm caused to vulnerable consumers and a favourable recommendation from the Utility and Review Board, Nova Scotia has refused to amend current regulation since enforcing restrictions on repeat or concurrent loans from multiple lenders would require loan-tracking databases which would not be “feasible because of privacy implications and cost.”²¹³

Rather than tracking loans and restricting the availability of credit, four provinces have recently enacted new provisions to reduce the financial hardship caused by these recurring high-cost loans. Payday lenders must now allow a borrower who has taken out two or more loans in a 62-day period to repay any subsequent loans over a longer period of at least 42 days and no more than 62 days regardless of any other term stated in the payday loan agreement.²¹⁴ This prescribed instalment plan allows the borrower to repay the loan over a longer period time and numerous pay periods thus reducing the financial burden of repaying the debt especially on a fixed income.

Although these new provisions represent good news for consumers, they also represent significant financial constraints on lenders in the payday loan industry. According to a research report prepared for the Atlantic Provinces Economic Council, the combined effect of the lower cost and longer borrowing time “will increase the quantity of financial capital required to fund a given loan volume, and raise operating costs per loan issued. This will decrease the number of loans that are issued, and loans issued will become more costly to provide.”²¹⁵

As a result, many provinces such as Alberta and Ontario have seen a noticeable reduction in the number of licensed lenders in the province as well as a consolidation and corporatization of existing lenders with Money Mart capturing approximately fifty per cent of the entire payday lending market.²¹⁶ As noted by the Nova Scotia Utility and Review Board,

213. *NSUARB*, supra note 135 at paras 99-106, 122. See also the lack of consensus of the Payday Lending Panel in Ontario on the issue: Ontario, *Strengthening Ontario's Payday Loans Act: Payday Lending Panel Findings and Recommendations Report* (May 2014) at 26-27, online (pdf): www.ontariocanada.com/registry/showAttachment.do?postingId=17182&attachmentId=26292 [https://perma.cc/Q273-UZU9] [Ontario, 2014 *Payday Loans Report*].

214. *AB-CPA*, supra note 144, s 124.3; (BC) *Payday Loans Regulation*, supra note 209, s 23; (NL) *Payday Loans Regulations*, supra note 209, s 5(2); (ON) *ON-PLA*, supra note 209, s 26; *ON-General*, supra note 209, s 25.1.

215. Poschmann, supra note 199 at 3.

216. Brian Dijkema, *Banking on the Margins, The Changing Face of Payday Lending in Canada*

these lenders have either left the payday loan industry altogether thereby reducing the number of storefront outlets, or have developed “new short term credit products like longer term lines of credit and installment loans,” which are excluded from payday loan regulation and therefore the object of fewer regulatory constraints.²¹⁷ To regulate these new high-cost credit products, some provinces have enacted new legislation specifically regulating these new types of lenders, as will be discussed in Part III, section 6. In comparison, New Brunswick has simply prohibited payday lenders from extending credit other than payday loans.²¹⁸

Another consequence of increasingly stringent provincial regulation is that these legislative reforms “will deter compliant payday lenders that wish to participate in the regulated market, and create an environment where unregulated and unlicensed lenders will enter to fill the void.”²¹⁹ Several reports have indeed noted the growth of online illegal lenders in Canada and globally and the increased access to online and mobile payday loans.²²⁰

Comparing compliance levels between licensed and illegal lenders, a study prepared by the Consumers Council of Canada concluded that while “[l]icensed lenders show a high level of compliance with regulations,” “[u]nlicensed lenders show virtually no compliance with regulations.”²²¹ This is exemplified by the warning of the New Brunswick Financial and Consumer Services Commission to financial consumers of the risks involved in borrowing from unlicensed online payday lenders.²²² These

(Hamilton, ON: Cardus, June 2019) at 11-12, online: *Cardus* <www.cardus.ca/research/work-economics/reports/the-changing-face-of-payday-lending-in-canada/> [<https://perma.cc/4AFF-3HZ6>]; Robinson, *supra* note 193 at 112-113. See also Ian Bickis, “Alberta Payday Loan Regulations Has Lenders Starting to Feel Pinch,” *CBC News* (14 May 2017), online: *CBC* <www.cbc.ca/news/canada/calgary/alberta-payday-lenders-suffering-bill-15-1.4114628> [perma.cc/ZX7B-2Q9E]; Reid Southwick, “Alberta payday loan crackdown shrinks industry,” *CBC News* (16 January 2018), online: *CBC* <<https://www.cbc.ca/news/canada/calgary/alberta-payday-loan-crackdown-1.4488925>> [perma.cc/B9WR-EQCD]. See contra: Manitoba Public Utilities Board, *supra* note 191 at 35.

217. *NSUARB*, *supra* note 135 at paras 80-81; Dijkema, *supra* note 216 at 12-13.

218. *NB-CCDPLA*, *supra* note 154, s 37.381.

219. *NSUARB*, *supra* note 135 at para 77. See also Poschmann, *supra* note 199 at 30; Barrett, *Online Payday Loans*, *supra* note 184 at 38; Katrine Dilay & Byron Williams, “Payday Lending Regulations” in Buckland, Robinson & Visano, *Payday Lending in Canada*, *supra* note 18 at 206.

220. See Bond, *supra* note 186 at 24-25; Ontario, *2014 Payday Loans Report*, *supra* note 213 at 7, 9-14; Buckland & Visano, “Introduction,” *supra* note 191 at 17-21; Robinson, *supra* note 193 at 99-100.

221. Barrett, *Online Payday Loans*, *supra* note 184 at 6.

222. Financial and Consumer Services Commission, *supra* note 211. According to the FCNB, the following businesses are not licensed in New Brunswick and some are not licensed in any Canadian province: truepaydayloan.ca, cash2gonow.com, cashbuddy500.com, cashflow500.ca, cashflow500payday.com, creditmontreal500.com, fastmoneyloans.ca, nationalpaydayloan.ca, paydayking500.com, pretsohben.com, rapidpaydayloans.net, royalfinances.ca, solutions500.com, speedyloans.ca.

illegal lenders are not only charging criminal interest rates but are indulging in abusive and illegal practices such as collection practices involving threats and contacting debtors at their place of employment or up to 50 times a day.²²³ In addition, despite regulatory prohibitions, many unlicensed online lenders structure loans to automatically renew²²⁴ and it has been reported that illegal lenders often ask for fees upfront or direct access to a consumer's bank account, including "account numbers, online passwords and answers to security questions."²²⁵

Although "[m]ost, if not all, [...] provinces that have regulated the payday loan industry have included provisions in their legislation with respect to online lenders,"²²⁶ the enforcement initiatives against illegal online lenders are difficult, given that online lenders are often difficult to identify and located outside the authority's jurisdiction.²²⁷ It has been recommended that

[r]egulators should explore criminal charges against lenders who behave criminally and have been identified through complaints procedures. Lenders who request personal banking information are of particular concern, as well as those that claim to be compliant with provincial legislation when they are not. They pose a risk not only to would be borrower but also to the banking and systems of payments.²²⁸

Notwithstanding the existence of the criminal interest rate since 1980 as well as various provincial sanctions for violations of their consumer credit regulations,²²⁹ the question remains whether provincial authorities have the appetite and resources to enforce their regulations and prosecute non-compliant licenced lenders as well as the increasing number of illegal lenders in Canada. What is clear, however, is the imperative necessity for public enforcement action to protect financial consumers. For example, active investigations by the provincial authority, Consumer Protection BC, have uncovered illegal practices relating to aggressive and deceptive sales of credit insurance, lack of disclosure, misleading representations and

223. *Ibid.*

224. Bond, *supra* note 186 at 25-26.

225. Barrett, *Online Payday Loans*, *supra* note 184 at 6, 35.

226. *NSUARB*, *supra* note 135 at para 43.

227. Barrett, *Online Payday Loans*, *supra* note 184 at 47-48; Dilay & Williams, *supra* note 219 at 206.

228. *Ibid* at 48.

229. See e.g. (AB) *Predatory Lending Act*, *supra* note 209, s 6, which prescribes a fine of no less than \$300,000, or 3 times the amount obtained by the defendant as a result of the offence, or imprisonment for a term of not more than 2 years; (NB) *NB-CCDPLA*, *supra* note 154, s 51.6(1) whereby a person is "liable on conviction, for each offence, if an individual, to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, and if a person other than an individual, to a fine of not more than \$250,000."

repayment restrictions; and have resulted in consumer refunds totalling close to \$900,000.²³⁰

6. *Other high-cost credit products legislation*

As previously mentioned, the consumer credit industry has continued to innovate to avoid stringent new regulatory constraints enacted in recent payday legislation. The emergence and growth of unregulated financial services providers offering various credit products such as unsecured lines of credit, instalment loans, title loans, subprime vehicle loans, pawnbroker loans and rent-to-own sales all but confirm that additional regulation governing these high-cost credit products is long overdue.²³¹

Although rent-to-own stores have been operated in Canada since the 1960s, they have not been regulated given the relatively low numbers of consumers of these types of financial services.²³² These transactions involve the sale of a good to a consumer without a down payment or credit check and conclude with the transfer of ownership to the consumer upon the final instalment in a long-term payment plan.²³³ A recent study elucidates the high cost nature of these products:

rent-to-own consumers who acquire merchandise through the completion of all their periodic payments typically pay 2.0 to 3.4 times the cost of purchasing the same merchandise at conventional retailers. This reflects two factors. First, consumers typically pay 40 to 100 per cent more through periodic payments than if they purchased the item at the outset. Second, rent-to-own “buy it today” prices are also typically higher than prices at conventional retailers—from 20 per cent higher for refrigerators to 150 per cent higher for laptop computers.²³⁴

230. Consumer Protection BC, “Consumer Protection BC Uncovered Illegal Practices Relating to Aggressive and Deceptive Sales of Credit” (6 December 2018), online: *Consumer Protection BC* <www.consumerprotectionbc.ca/news/bc-payday-lending-regulator-follows-data-trail-to-uncover-widespread-issues-in-sector-returns-nearly-900000-to-borrowers/> [perma.cc/9BHA-STZX].

Another example of public enforcement is found at: *Ontario (Director; Ministry of Consumer and Business Services Act) v Cash Store Financial Services Inc*, 2014 ONSC 980.

231. Ontario, *2014 Payday Loans Report*, *supra* note 213 at 7. See also Joe Fantauzzi, *Predatory Lending: A Survey of High Interest Alternative Financial Service Users* (Toronto: Canadian Centre for Policy Alternatives Ontario Office and ACORN Canada, 2016), online: *CCPA* <www.policyalternatives.ca/publications/reports/predatory-lending/> [perma.cc/NEG8-PYKW].

232. Gail E Henderson & Lauren L Malatesta, “Protecting Low Income Consumers: The Regulation of Rent-To-Own Stores” (2019) 61:3 *Can Bus LJ* 354 at 358–359, 363. See also Denise Barrett Consulting, “Consumer Experiences with Rent-to-Own” (Toronto: Consumers Council of Canada, 2016) at 10, online: *CCC* <www.consumerscouncil.com/research-reports/> [perma.cc/7NV7-FTL8] [Barrett, *Rent-to-Own*].

233. Barrett, *Rent-to-Own* *supra* note 232 at 5.

234. *Ibid* at 6.

While initial costs and financial charges often by themselves exceed the criminal interest rate of 60%, the total cost to consumers of the transactions is often unknown given the hidden cost reflected in the increased price of the good sold in comparison to similar goods on the market. Other concerns with these agreements are the immediate repossession rights of the creditor upon default of the debtor, violation of privacy rights and aggressive collection tactics.²³⁵

In the alternative financial services market, legitimate lenders complying with payday lending regulations are compelled to offer more profitable products to answer to consumer demand for credit. “According to credit reporting agencies, instalment loans are the fastest-growing type of credit in Canada.”²³⁶ A recent study of these higher-cost credit products has also confirmed that the interest charged on these loans are usually set just below the criminal interest rate with some financial providers lending above the legal limits.²³⁷

The increased use of consumer credit and the widening range of high-cost credit products, such as title loans secured by previously acquired personal property, are raising new policy concerns about financial consumer protection. Additional measures are therefore undoubtedly required considering the potential exploitation of vulnerable consumers and the unavailability of immediate short-term loans from traditional financial institutions.²³⁸ Despite recent legislation governing payday lenders, “[o]nce a product is beyond the scope of the payday loan legislation, protections in the legislation are not available to consumers.”²³⁹ As a result, new forms of consumer credit legislation regulating other high-cost credit products are being enacted across the country.

Similar to the licensing requirements for payday lenders, several provinces such as New Brunswick, Nova Scotia, Québec and Saskatchewan have also enacted licensing regimes for other types of money lenders.²⁴⁰ While legislation in New Brunswick and Nova Scotia

235. Henderson & Malatesta, *supra* note 232 at 362 citing Momentum, “High-Cost Alternative Financial Services: Issues and Impact” (June 2017) at 3-4, online (pdf): *Momentum* <momentum.org/wp-content/uploads/2018/02/Part-1-High-Cost-Alternative-Financial-Services_1.pdf> [perma.cc/5VRP-VALE] [Momentum “Issues and Impact”]; Barrett, *Rent-to-Own*, *supra* note 232 at 19, 57-58.

236. Barrett, *Higher Cost Credit*, *supra* note 163 at 3; Robinson, *supra* note 193 at 102-103.

237. *Ibid* at 4.

238. Momentum “Issues and Impact,” *supra* note 235; Fantauzzi, *supra* note 231 at 5-6.

239. Ontario, *2014 Payday Loans Report*, *supra* note 213 at 15.

240. (NB) *NB-CCDPLA*, *supra* note 154, s 6; (NS) *NS-CPA*, *supra* note 135, s 11(1); (QC) *QC-CPA*, *supra* note 82, s 321; (SK) *Trust and Loan Corporations Act*, SS 1997, c T-22.2, s 17(1). See also Momentum, Brief to Senate Standing Committee on Banking, Trade and Commerce, regarding Bill S-237, “High-Cost Alternative Financial Services: Policy Options” (September 2017), online

covers lenders as well as sellers who want to extend credit or provide financing to consumers in these provinces, the regulatory framework in Saskatchewan limits licensing requirements to lenders of money, credit grantors of revolving credit or purchasers of various types of securities. In the remaining provinces and territories, the compliance of other money lenders to existing provincial legislation is not supervised by a general licensing regime and specific legislation is therefore required.

To better protect financial consumers turning to high-cost credit lenders, Alberta, Manitoba, Québec and British Columbia have recently enacted specific legislation amending their consumer protection statutes to establish new regimes for high-cost credit which include new licensing requirements for high-cost lenders.²⁴¹ High-cost financial services are defined in Manitoba and Alberta as a credit agreement that provides for a rate of 32% or more, including the interest rate and all mandatory fees and costs involved with the high-cost credit agreement.²⁴² The British Columbia statute is not in force and regulations defining “high-cost credit product” have not yet been adopted.

The government of Alberta confirms on their website that its wide-ranging statute applies to fixed high-cost credit products, also referred to as ‘instalment’ lending, and can include instalment loans, mortgage loans, car loans, vehicle title loans, rent-to-own products, leases and pawn loans.²⁴³ Open high-cost credit products, or ‘revolving’ lending, such as lines of credit, revolving loans, home equity lines of credit, credit cards and retail cards are also regulated. In comparison, Manitoba restricted the new provisions in its consumer protection statute to various types of unsecured loans with a term not exceeding 2 years and a maximum amount of \$5,000 as well as loans secured by personal property which were not purchased with the funds advanced.

(pdf): *Canada Senate* <sencanada.ca/content/sen/committee/421/BANC/Briefs/BANC_S-237_Momentum_e.pdf> [perma.cc/88BW-STKD] [Momentum, “Policy Options”].

241. (AB) *A Better Deal for Consumers and Businesses Act*, SA 2017, c 18; *High-Cost Credit Regulation*, Alta Reg 132/2018 (CIF 1 January 2019) [*AB-High-Cost Credit Regulation*]; (BC) *Business Practices and Consumer Protection Amendment Act, 2019*, SBC 2019, c 22 (Royal Assent on 16 May 2019, not in force); (MB) *The Consumer Protection Amendment Act (High-Cost Credit Products)*, SM 2014, c 12 (CIF 1 September 2016); (QC) *An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs*, SQ 2017, c 24 (CIF 1 August 2019). See also Dilay & Williams, *supra* note 219 at 207-208.

242. (AB) *AB-CPA*, *supra* note 144, s 124.01(a); (MB) *High-Cost Credit Products Regulation*, Man Reg 7/2016, s 2.

243. Alberta, “High-cost credit business licence” (2019), online: *Alberta* <<https://www.alberta.ca/high-cost-credit-business-licence.aspx>> [perma.cc/L3MU-Q9QV].

Furthermore, high-cost credit legislation in Manitoba does not apply to regulated payday loans, mortgages, credit cards, margin loans or credit extended by banks or credit unions; whereas public utilities, life insurance companies, credit unions, municipalities and certain other financial institutions are exempt in Alberta.²⁴⁴ In British Columbia, savings institutions are exempt as well as other prescribed classes of high-cost credit grantors.²⁴⁵ Likewise, in Québec, financial services cooperatives and federally regulated financial institutions are exempt from new high-cost consumer protection measures since they must already “adhere to sound and prudent management practices or sound commercial practices in consumer credit matters” pursuant to their respective regulatory frameworks.²⁴⁶

In contrast to the other common law jurisdictions, Québec’s regulations provide that the new high-cost credit regime is triggered by a floating rate when a lender charges a rate which is twenty-two per cent higher than the official discount rate of the Bank of Canada at the time the parties enter into the credit agreement.²⁴⁷ Significantly lower, it will capture a larger subset of lenders including many credit card issuers, all of whom are now considered lenders requiring a permit under provincial legislation.

Most interestingly, 2017 legislative reform in Québec, in force since 1 August 2019, requires a merchant, including “any person doing business or extending credit in the course of his business,” to complete an assessment of a consumer’s capacity to repay the credit requested before entering into a credit contract with the consumer or before granting a credit limit increase.²⁴⁸ If the credit grantor fails to carry out the assessment as prescribed, the right to the credit charges is forfeited and must be refunded to the consumer. Moreover, before entering into a high-cost credit agreement, a credit grantor must provide the consumer with a written copy of the assessment of the consumer’s debt ratio and capacity to repay the credit. Finally, a new provision clarifies that a “consumer who enters into a high-cost credit contract while his debt ratio exceeds the ratio determined by regulation is presumed to have contracted an excessive, harsh or unconscionable obligation within the meaning of section 8” of the *Consumer Protection Act*, granting the Court the power to nullify a

244. (AB) *AB-High-Cost Credit Regulation*, *supra* note 241, s 13; (MB) *MB-CPA*, *supra* note 143, s 237-238.

245. *BC-BPCPA*, *supra* note 124, s 112.32.

246. *QC-CPA*, *supra* note 82, 103.2.

247. (QC) *Consumer Protection Regulation*, *supra* note 154, s 61.0.3.

248. *QC-CPA*, *supra* note 82, ss 1, 103.2–103-5; *QC-Consumer Protection Regulation*, *supra* note 154, Division II.1, Assessment of Consumer’s Capacity to Repay Credit or Perform Obligations (CIF 1 August 2019).

contract to reduce a consumer's obligations. High-cost lenders will be obligated to refute such a presumption in the event a debtor's obligations pursuant to a high-cost credit agreement are contested in court.

Although Ontario has recently completed a consultation with stakeholders on high-cost alternative financial services,²⁴⁹ no recommendations nor legislative reforms have resulted from the consultation to date. Nonetheless, stronger responsible lending requirements are also envisioned in Ontario. Reforms enacted in 2017 but not yet in force will permit the adoption of regulations "prohibiting lenders from entering into a credit agreement with a borrower if the amount of the credit to be extended or money to be lent under the agreement exceeds the prescribed amount."²⁵⁰ A lender will also be required to provide to the borrower, before entering into the agreement, a copy of the lender's assessment of the factors prescribed. As explained in a recent Ontario government consultation paper, "if too much money is lent to a consumer, repaying the loan may be unaffordable, regardless of the cost of borrowing" and despite any rollbacks in the cost of credit.²⁵¹ These types of responsible lending requirements ensure that vulnerable financial consumers do not overextend themselves with a high-cost loan leading to further indebtedness and usually to an inevitable bankruptcy.

Recent provincial regulatory frameworks further protect consumers by providing a cooling-off period and the right to cancel a credit agreement within the prescribed time or to pay back a loan early without a fee or penalty.²⁵² Specific disclosure requirements include in-store and online disclosures as well as mandatory forms and content of the credit agreement. These requirements may create additional administrative obstacles for a national lender, given the relatively harmonized previous cost of credit disclosure requirements throughout the country.²⁵³ A "statement

249. Ontario, Ministry of Government and Consumer Services, *Strengthening Protection for Consumers of Alternative Financial Services—Phase One* (Summer 2017) [Ontario, *Strengthening Protection*]. See also British Columbia, Ministry of Public Safety and Solicitor General, *High-Cost Alternative Financial Services Stakeholder Consultation* (September 2016), online (pdf): *British Columbia* <forms.gov.bc.ca/app/uploads/sites/291/2016/09/high-cost-alt-fin-serv-consult.pdf> [perma.cc/P5B4-XYAZ].

250. *ON-CPA*, *supra* note 154, Schedule A, s 123(8) as amended by *Putting Consumers First Act (Consumer Protection Statute Law Amendment)*, 2017, SO 2017, c 5, Schedule 2, s 20(3) (not in force).

251. Ontario, *Strengthening Protection*, *supra* note 249 at 5.

252. (AB) *AB-CPA*, *supra* note 144, s 68; *High-Cost Credit Regulation*, *supra* note 241, s 14(1); *AB-CCDR*, *supra* note 154; (BC) *BC-BPCPA*, *supra* note 124, ss 112.20, 112.25; (MB) *MB-CPA*, *supra* note 143, s 252-253; (QC) *QC-CPA*, *supra* note 82, s 73; *QC-Consumer Protection Regulation*, *supra* note 154, ss 31.2, 33, 38-39.

253. (AB) *High-Cost Credit Regulation*, *supra* note 241, ss 14, 16; (BC) *BC-BPCPA*, *supra* note 124, s 112.21; (MB) *MB-CPA*, *supra* note 143, s 249; *High-Cost Credit Products Regulation*, *supra* note 242, ss 9-11; (QC) *QC-CPA*, *supra* note 82, s 103.4; *QC-Consumer Protection Regulation*, *supra* note

that the high-cost credit product is high-cost credit” must be posted prominently in Manitoba and be included in the credit agreements in British Columbia, and in Québec if the consumer’s debt ratio is above forty-five per cent.²⁵⁴ Although not found in all four provinces, some regulations include prohibitions against various enticements to enter into a high-cost agreement, assignment of wages, early payment collection and direct access to a borrower’s bank account.²⁵⁵

Lastly, Alberta’s *High-Cost Credit Regulation* requires a high-cost credit business operator to provide information on the total value of all high-cost credit agreements, the number of agreements, the number of repeat agreements, the average size and term as well as the total value of agreements that have been defaulted by borrowers and that have been written off.²⁵⁶ Information such as this will provide valuable statistics with which to assess the advantages and disadvantages of these types of products in the upcoming years and should be requested in every province to enlighten future reforms.

These new provincial legislative developments are positive developments for financial consumers in those provinces. Considering it took more than ten years before the last province enacted payday loans legislation, expectations for a national regulatory framework for high-cost credit products must be tempered and adjusted to the realities of provincial legislative reform. The hope remains, however, that the trend to improve financial consumer protection will not only spread into all other jurisdictions, but also that all high-cost lenders in addition to payday lenders will be regulated and licensed across the country.²⁵⁷

Conclusion

The preceding critical review of provincial legislation relating to consumer credit highlights the extent of provincial regulation on consumer credit and the importance it has played in the past and will continue to play in the future with respect to the protection of financial consumers. Provinces and territories demonstrably stepped in when the federal government

154, s 61.0.5.

254. (BC) *BC-BPCPA*, *supra* note 124, s 112.21(2)(d); (MB) *MB-CPA*, *supra* note 143; (QC) *QC-CPA*, *supra* note 82, s 103.4; *Consumer Protection Regulation*, *supra* note 154, ss 61.0.5–61.0.6.

255. (AB) *AB-CPA*, *supra* note 144, s 53; *High-Cost Credit Regulation* *supra* note 241, s 24(a), 24(l); (BC) *BC-BPCPA*, *supra* note 124, ss 112.22–112.23, 112.26, 112.28 (MB) *High-Cost Credit Products Regulation*, *supra* note 242, s 15(e).

256. (AB) *High-Cost Credit Regulation*, *supra* note 241, s 21. See also Nova Scotia and British Columbia requirements to provide annual data to regulators: (BC) *Payday Loans Regulation*, *supra* note 209, ss 4(2)(b), 4(3); (NS) *Payday Lenders Regulations*, *supra* note 209, s 5; Dilay & Williams, *supra* note 219 at 194-195.

257. Momentum, “Policy Options,” *supra* note 240.

clearly abdicated its responsibility to regulate consumer credit in Canada. Notwithstanding the vast arsenal of provincial consumer protection measures, the preceding analysis reveals a clear lack of uniformity and confirms that some consumers are better protected than others despite the federal government's recognition that "the fundamental interests and needs of consumers do not vary from jurisdiction to jurisdiction."²⁵⁸

It is beyond the scope of this paper to identify all gaps and deficiencies, and determine all best practices, within the provincial regulatory landscape. Further research is certainly warranted to address ongoing issues and shortcomings in the current legislative framework discussed herein. Comprehensive and detailed analyses of each type of consumer credit legislation is therefore recommended to continue to put pressure on policymakers and to advance proposals for reform so as to better protect financial consumers from unfair, deceptive, predatory and illegal lending. Some fundamental issues, however, transverse the variety of provincial legislative enactments and merit specific consideration in future research and reforms.

1. *Focus on consumers instead of lenders*

A historical perspective on evolving provincial legislation provides insight into the motivations of policymakers responsible for the regulation of consumer credit in Canada. Although the objective typically relates to consumer protection, public policy on consumer credit generally assumes that restricting access to high-cost credit will create more harm than protection for consumers and thus the continued availability of these products and services, even at extortionate rates, remains an ongoing concern.²⁵⁹ As such, the legal constraints on the industry and the financial consequences on the overall profitability of the industry remain at the forefront of considerations when evaluating legislative reform. Most research, government initiatives and legislative reforms have primarily focused on lenders, their practices, their products and services as well as their industry and its governance.

To complement these industry-driven consumer protection measures and to encourage consumers' responsibility for their own financial well-being, recent financial literacy initiatives and regulatory emphasis on transparency and disclosure requirements strive to empower consumers for self-protection.²⁶⁰ However, new research conducted by the Financial

258. Canada, *Reforming Canada's Financial Services Sector* (1999), *supra* note 80 at 66; Dilay & Williams, *supra* note 219 at 188.

259. *Ibid* at 185-187.

260. Kerton & Ademuyiwas, *supra* note 165 at 102-103; Waldron, "A Brief History," *supra* note 32

Consumer Agency of Canada indicates that despite the concerted efforts of governments in Canada, these consumer protection measures do not seem to be achieving anticipated results since “[m]any payday loan users were unaware of the high costs of payday loans compared to their alternatives.”²⁶¹ These findings are reminiscent of the Royal Commission on Prices report which concluded almost 70 years ago in 1949 that “[t]here is little doubt that the consumer is not aware of the interest cost equivalent of the alternative credit services offered to him.”²⁶²

As previously explained, dependency on alternative financial services is expensive and, while not leading to insolvency for all borrowers, these loans do not help to improve a credit record nor promote financial stability. The regular exclusion of vulnerable consumers from mainstream financial institutions is a subject for which the current data are not sufficient to allow us to draw specific conclusions. Further research is therefore essential to address the needs of financial consumers²⁶³ and to “identify determinants of over-indebtedness,” financial exclusion, poverty and the recent growth in consumer insolvencies in Canada.²⁶⁴

It has recently been suggested that as a society, we should rethink credit as a social provision for low income or financially distressed individuals.²⁶⁵ Since many consumers rely on high-cost credit for some of their basic needs, causes of these persistent economic shortfalls and financial exclusion from mainstream financial services providers must not only be regarded as an economic problem but a social one as well.²⁶⁶ Additional and different questions must therefore be raised to determine optimum and sustainable solutions. Why are consumers using these products and in what circumstances? What are the economic and social consequences on individuals, their families and their communities? Are current alternative high-cost financial services appropriate or even

at 320.

261. FCAC, *Market Trends*, *supra* note 191 at 1.

262. Royal Commission on Prices, *Report*, *supra* note 42 at 306.

263. Ontario, *2014 Payday Loans Report*, *supra* note 213 at 25.

264. Barrett, *Higher Cost Credit*, *supra* note 163 at 100; Buckland & Visano, “Introduction,” *supra* note 191 at 37; Office of the Superintendent of Bankruptcy Canada, “Annual Consumer Insolvency Rates by Province and Economic Region,” online: OSB <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html> [perma.cc/D2DP-BVB2]. J Douglas Hoyes, “Yes, We Have A Payday Loan Crisis” (updated for 2018), online (blog): Hoyes <www.hoyes.com/blog/yes-we-have-a-payday-loan-crisis/> [perma.cc/DVA9-M9VT].

265. Abbye Atkinson, “Rethinking Credit as Social Provision” (2019) 71:5 *Stan L Rev* 1093.

266. *Ibid* at 1161; Buckland, *Hard Choices*, *supra* note 15 at 163; Manitoba Public Utilities Board, *supra* note 191 at 39; Jerry Buckland, Chris Robinson & Brenda Spotton Visano, “Conclusion” in Buckland, Robinson & Visano, *Payday Lending in Canada*, *supra* note 18 at 231 [Buckland, Robinson & Visano, “Conclusion”].

necessary since they reinforce inequality, indebtedness and poverty?²⁶⁷ Are there alternative innovative solutions in either or both the public and the private sector?²⁶⁸

A Canadian study on payday loans, building upon Jerry Buckland's previous research on financial exclusion, has recently examined several of these questions. Following an "in-depth and inter-disciplinary analysis of payday lending in Canada," the authors recommend that, given the unethical practices of the industry and the exploitation of repeat borrowers, payday loans should be simply banned as they are in Québec given the cost of borrowing restrictions in the Province.²⁶⁹ Proposed alternatives are increasing access to other financial services offered by banks and credit unions such as savings accounts, small credit products and overdraft protection.²⁷⁰ These recommendations are certainly worthy of further consideration by policymakers.

2. *Enforcement and licensing issues*

The historical overview of provincial legislation relating to consumer credit further reveals a troubling tendency of provincial governments to lean on the judicial process to enforce their own regulations. Remedies and damages are provided in most statutes but are only available upon the consumer's insistence to the Court that the act must be applied and enforced. Such passive enforcement of public statutes requires, however, that consumers bring the matter before the courts at their own expense to ensure that credit lenders comply with consumer protection provisions. Such an endeavour "requires a financial and educational status which many borrowers in the criminal market simply do not have."²⁷¹ Reliance upon the judicial system must be re-evaluated; giving voice to concerns about the effectiveness of remedies for financial consumers, access to justice issues, and the substantive, and not only symbolic, implementation of provincial legislation.²⁷²

Mary Anne Waldron previously concluded that "the rights of the most vulnerable of our society can often times only be protected by the criminal law or active governmental enforcement of consumer protection regulations."²⁷³ With illegal lenders flooding the consumer credit market

267. See Buckland, *Hard Choices*, *supra* note 15 at 199-200.

268. See e.g. Visano, *supra* note 18 at chapter 6.

269. Buckland, Robinson & Visano, "Conclusion," *supra* note 266 at 223-224, 233.

270. *Ibid* at 232-233.

271. Waldron, "What is to be Done," *supra* note 205 at 379; Ziegel, "Consumer Credit Regulation," *supra* note 2 at 492.

272. Belobaba, *supra* note 171 at 382.

273. Waldron, "What is to be Done," *supra* note 205 at 379.

and their total lack of compliance with consumer protection provisions, these remarks are all the more relevant today. The question remains whether existing regulatory agencies lack the legislative mandate or simply the appropriate resources to implement and enforce existing consumer protection legislation.

Moreover, current administrative enforcement is generally focused on addressing consumer complaints rather than acting upon the government's own initiative to investigate allegations of unfair, deceptive, or abusive practices in the industry. Following its research on best practices in financial consumer protection in Canada, the Financial Consumer Agency of Canada confirmed that in "some provincial-territorial jurisdictions, the regulator does not resolve individual complaints" but that "[c]omplaints received are used as a main monitoring tool to inform enforcement activities."²⁷⁴ Proactive investigations are conducted in some provinces predicated on the complaints received considering criteria such as:

- the number of individuals affected
- the vulnerability of the consumer
- an assessment of harm to the consumer or to the general public and to public confidence
- the seriousness of the breach, the history of the business and criminality.²⁷⁵

As such, administrative enforcement mechanisms relying on a complaint system are "only useful if people (1) know about the service and the regulations [...] (2) know about the complaint mechanism" and are not discouraged by the length, complexity and effort involved in the process.²⁷⁶ In Ontario, it was recommended that access to compensation for borrowers for harm resulting from statutory violations should be facilitated and that "[c]larifying and improving these processes could help consumers assert their consumer rights and manage their financial obligations and ensure that their basic needs are met."²⁷⁷

Emphasis should therefore be placed on reviewing the effectiveness and efficiency of existing provincial regulatory agencies and determining

274. FCAC, *Report on Best Practices in Financial Consumer Protection*, (31 May 2017, published on 14 May 2018) at 12-14, online (pdf): FCAC <www.canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/best-practices-financial-consumer-protection.pdf> [perma.cc/H928-VY7P].

275. *Ibid.* at 13.

276. Buckland, *Hard Choices*, *supra* note 15 at 50, 165; Ontario, *2014 Payday Loans Report*, *supra* note 213 at 24.

277. *Ibid.*

the proper role of governments in the implementation and enforcement of their statutes. Among other things, protecting consumers involves putting in place measures to prevent or, at the very least, minimize unfair, deceptive, and abusive practices. For an outright prevention of consumer exploitation, measures must also be in place to protect consumers prior to transactions, not only after they have suffered harm caused by marketplace abuses.²⁷⁸

3. *Responsible lending*

Given the clear inequality of bargaining power and the resulting “imbalance between debtor and creditor responsibilities,”²⁷⁹ new regulatory measures are recommended as international standards and being developed to ensure that creditors cease their irresponsible lending practices and become responsible for the losses incurred by their actions. According to the *G20 High-Level Principles on Financial Consumer Protection*, financial services providers should work in the best interest of their customers and “assess the related financial capabilities, situation and needs of their customers before agreeing to provide them with a product, advice or service.”²⁸⁰ Likewise, the *Good Practices for Financial Consumer Protection* of the World Bank further recommends that criteria of suitability and affordability of the credit products or services be assessed prior to a credit transaction.²⁸¹

These components of responsible lending practices should also be extended to include an evaluation of the consumer’s ability to pay without undue hardship, in the sense that the increased indebtedness “does not cause undue economic hardship to a credit consumer” and “does not deprive him of the ability to support himself and his family.”²⁸² As explained by Therese Wilson,

to focus on responsible borrowing, as opposed to lending, ignores the structural causes of over-indebtedness where consumers lack choice and must accept inappropriate, high-cost credit products in order to meet their

278. Kerton & Ademuyiwas, *supra* note 165 at 95.

279. Ziegel, “Consumer Insolvencies,” *supra* note 34 at 385; Ziegel, “Consumer Credit Regulation,” *supra* note 2 at 490.

280. OECD, *G20 High-Level Principles on Financial Consumer Protection*, (2011) at 7 online: OECD <<https://www.oecd.org/daf/fin/financial-markets/48892010.pdf>> [<https://perma.cc/CNG8-TK6P>].

281. The World Bank, *Good Practices for Financial Consumer Protection* (Washington: The World Bank, 2012) at 68 online (pdf): <<http://documents.worldbank.org/curated/en/583191468246041829/Good-practices-for-financial-consumer-protection>> [<https://perma.cc/392D-8S77>]: “Affordability looks at whether a consumer can afford additional debt obligations once the monthly income net of financial and living expenses (including rent or mortgage payments) is considered.”

282. Cuming, *supra* note 1 at 72.

credit needs. It also ignores theories of behavioural bias, which hold that consumers will display overoptimism and overconfidence when entering into credit agreements.²⁸³

Legislative intervention is also justified as follows by Jacob Ziegel:

There are other reasons as well that justify legislative intervention. Overindebtedness and irresponsible lending practices create externalities (social and financial costs) that affect the debtor's family, the debtor's other creditors, and the community at large. It may also jeopardize a country's financial stability as may be seen from the current subprime mortgage credit crisis. It is these externalities that preclude the creditor from arguing that it should be able to take even large credit risks so long as it is also willing to absorb any losses. The answer to this reasoning is that if the lender is acting irresponsibly, it is not in fact internalizing all the losses.²⁸⁴

In Canada, Québec and Ontario have recently enacted limited responsible lending provisions requiring the lender not only to assess a borrower's debt-ratio and ability to pay but to inform the potential client of the results. Legal consequences are prescribed encouraging a lender to consider the consumer's financial circumstances and impact of increasing their level of indebtedness. At the federal level, a new Financial Consumer Protection Framework enacted by Parliament in 2018 but not yet in force includes a new suitability test requiring a bank to "establish and implement policies and procedures to ensure that the products or services in Canada that it offers or sells to a natural person other than for business purposes are appropriate for the person having regard to their circumstances, including their financial needs."²⁸⁵ Although these are promising developments, more stringent responsible lending requirements are essential, along with the necessary research demonstrating their effectiveness and impact on financial consumers.

In comparison to other countries, responsible lending measures can take various legislative forms and should include economic incentives to lend responsibly.²⁸⁶ Upon entering into a credit agreement, a lender could be required to assess not only the consumer's ability to pay but the suitability of the credit products considering the consumer's financial capacity and

283. Therese Wilson, "The Responsible Lending Response" in Therese Wilson, ed, *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Aldershot/GB: Ashgate Publishing, 2013) at 126. See also Ramsay, "Overindebtedness," *supra* note 11 at 40.

284. Ziegel, "Consumer Insolvencies," *supra* note 34 at 372.

285. *Budget Implementation Act, 2018, No. 2*, LC 2018, c 27, ss 316-319, s 329 adding *Bank Act*, *supra* note 151, s 627.06 (not in force yet).

286. Micheline Gleixner, "Financial Literacy," *supra* note 158 at 615-637.

indebtedness as well as the object of the loan. Other responsible lending provisions exert pressure upon the lender to exercise caution with high risk debtors, since additional losses may be incurred should the consumer's overindebtedness led to insolvency. Finally, an emphasis on corporate social responsibility through responsible lending requirements should stimulate financial innovation; producing new products and services designed to facilitate the repayment of loans, rather than the exploitation of the gradual increase of a consumer's total indebtedness.

"The question is no longer whether lenders and credit grantors should be held responsible but how that principle can best be given legislative expression."²⁸⁷ As with initial disclosure of cost requirements in the 1960s, lenders have and will undoubtedly continue to contest and raise issues with implementation but eventually will accept the new consumer protection standard, adapt and innovate to the benefit of financial consumers.²⁸⁸

4. *Recommended regulatory response*

As described in this article, financial consumers in Canada face a "plethora of 'service-specific' acts" which, with the inclusion of federal legislation, results in a variety of different standards of consumer protection.²⁸⁹ This increasingly complex financial services legislative framework creates unnecessary confusion and misinterpretation of existing regulations especially for the most vulnerable consumers excluded from traditional federally regulated financial institutions.²⁹⁰ "In Canada consumers must also pay for any burden from lost scale economies or duplicate compliance in competing provincial jurisdictions. All of these developments point to the need to abandon the old 'line of service' approach to regulation to achieve something more general."²⁹¹

The absence of a national uniform high-cost credit regulatory framework further represents a significant obstacle to inter financial institution collaboration required to address the issues of financial exclusion, including access to credit and to mainstream banking services.²⁹²

287. Ziegel, "Consumer Insolvencies," *supra* note 34 at 394.

288. Ontario, *Final Report 1965*, *supra* note 2 at paras 235-282. See e.g. Canadian Bankers Association, *Canada's Financial Consumer Protection Framework: Consultation Paper* (28 February 2014) at 9-10, online (pdf): CBA <www.cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/sub_20140227_consumerprotection_en.pdf> [<https://perma.cc/P62E-E3QT>].

289. Kerton & Ademuyiwas, *supra* note 165 at 110.

290. *Ibid* at 110; Kerton, *supra* note 147 at 247.

291. Kerton, *supra* note 147 at 259-260.

292. Buckland, Robinson & Visano, "Conclusion," *supra* note 266 at 232; Jerry Buckland, *Summary of "Affordable Credit Options for Vulnerable Consumers,"* for the Alternative Consumer Credit Market Working Group, Consumer Measures Committee (October 2009) at 7, online (pdf): *Canada* <[https://www.feddevontario.gc.ca/eic/site/cmc-cmc.nsf/vwapj/ACCMBucklandReport.pdf/\\$FILE/](https://www.feddevontario.gc.ca/eic/site/cmc-cmc.nsf/vwapj/ACCMBucklandReport.pdf/$FILE/)

A recent study on the payday lending industry explains the problem and offers a recommendation:

Restricting, reforming, or allowing fringe banks through state intervention are insufficient to address bank exclusion. A critical component to the solution to payday lending is that mainstream [financial institutions] identify the need, learn from current providers (i.e., the payday lenders), and put in place products that meet this need. This is not happening through the “market mechanism” so it is justifiable that the federal government steps in to engage with mainstream [financial institutions] to generate this outcome.²⁹³

In addition, it is important to note that the financial marketplace for consumers is evolving in response to technological advances as well as the increasing complexity of products and services including internet-based services and transactions.²⁹⁴ Considering that funds are moving through the Canadian economy at a faster pace than ever before, across provincial and national boundaries, and that digital financial services are international²⁹⁵ with new illegal lenders operating outside provincial and even national jurisdictions, a new regulatory framework must be instituted in Canada.

Reform at the federal level is already underway. In addition to federal cost of credit disclosure and transparency regulations applicable to all federally regulated financial institutions, the federal government has gradually reformed, during the last 30 years, the regulatory framework of the financial services industry in Canada. These reforms were undertaken in response to the consolidation and concentration of the financial services sector and its evolution towards larger domestic conglomerates expanding their services and products on a national level.²⁹⁶ Harmonizing and consolidating all consumer related provisions in the *Bank Act*, Parliament will further strengthen consumer protection when the newly enacted Financial Consumer Protection Framework comes into force.

Although provincial legislation still applies exclusively to provincially incorporated institutions, statistics confirm the tendency of financial institutions to migrate towards a federal incorporation. Some provinces

ACCMBucklandReport.pdf> [https://perma.cc/SHF8-CF9N]; Puri & Nichol, *supra* note 15 at 459-460.

293. Buckland & Visano, *supra* note 191 at 36-37.

294. Canada, Department of Finance, *Supporting a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future: A Consultation Document for the Review of the Federal Financial Sector Framework*, (26 August 2016) at 26, online (pdf): Canada <www.canada.ca/content/dam/fin/migration/activity/consult/ssge-sefc-eng.pdf> [https://perma.cc/786E-54TN] [Canada, *Consultation Document* 2016]; Brean, *supra* note 11 at 150.

295. Kerton & Ademuyiwas, *supra* note 165 at 117.

296. Canada, *Consultation Document* 2016, *supra* note 294 at 23.

have ceased to incorporate trust companies and the framework has been implemented allowing credit unions to be federally regulated.²⁹⁷ In fact, at the start of the new millennium, over ninety per cent of assets in the trust and loan, insurance and banking sectors were held by federally regulated financial institutions in Canada.²⁹⁸ With the exception of credit unions, the remaining provincial lenders are essentially companies operating in the alternative financial services market. Recent studies indicate, however, that many, if not most, high-cost credit lenders, including payday lenders, have corporatized and consolidated, as a natural progression of the industry and in response to new regulations.²⁹⁹ Licensing and supervision on a national level, especially with modern information technology in the digital era, should, therefore, no longer represent issues of concern for public enforcement.

Given the foregoing, provincial legislation is becoming less relevant and less likely to better protect financial consumers. The framework which has been in place since Confederation is no longer appropriate, and recent regulatory reforms might be a precursor to a single federal financial services act to implement a unified and national approach to the regulation of Canadian financial institutions large or small in the near future. As recommended by the Consumers Council of Canada: “[t]he code needs to be comprehensive across the entire financial sector and all financial products at federal, provincial and local levels and cover similar products in the same fashion.”³⁰⁰

Despite provincial jurisdiction over provincial companies and “Property and Civil Rights in the Province,” the Canadian Constitution clearly assigned Parliament the power to regulate “Banking” as well as “Interest” including consumer credit.³⁰¹ Federal and provincial legislation have both recognized that interest represents the entire cost of a loan and relates accordingly to all loan transactions, including vendor’s credit.³⁰²

297. *Ibid* at 10, 31. On 1 July 2016, Caisse populaire acadienne ltée of New Brunswick became the first federal credit union.

298. Canada, *Reforming Canada’s Financial Services Sector* (1999), *supra* note 80 at 65-66.

299. Manitoba Public Utilities Board, *supra* note 191 at 34-35; Buckland & Visano, *supra* note 191 at 17.

300. Consumers Council of Canada, *Submission to Finance Canada re: Canada’s Financial Consumer Protection Framework* (28 February 2014) at 7, online (pdf): Canada <<https://www.canada.ca/content/dam/fin/migration/consultresp/fcpf-cpcpsf/082-fcpf-cpcpsf.pdf>> [<https://perma.cc/F9VG-EAEK>].

301. *Constitution Act, 1867*, *supra* note 20, ss 91(19), 92(11), 92(13).

302. For an in-depth analysis of the federal constitutional jurisdiction over consumer credit see Gleixner, “Reconsidering Legislative Competence,” *supra* note 67 at 248-264. See also Jacob Ziegel, “Pass the buck: Ottawa has paramount jurisdiction over interest rate regulation,” *Financial Post* (10 November 2006) online <<https://www.law.utoronto.ca/news/article-ziegel-pass-buck>> [<https://perma.>

As a result, consumer credit legislation should be considered a matter within Parliament's jurisdiction, as it was for more than a hundred years. Consumer credit must no longer be viewed as a consumer protection issue but rather a finance issue including the financial stability of Canadians on both a microeconomic and a macroeconomic level.³⁰³ As recommended by the Royal Commission on Banking and Finance in 1964, a comprehensive consumer protection legislation under federal jurisdiction should therefore be prioritized.³⁰⁴

The financial consumer protection framework in Canada needs to be geared towards having a comprehensive financial consumer code which adopts basic principles such as commitment to consumers' interests; facilitating access to financial services; ensuring significant levels of transparency; responsible business conduct; and practices by financial institutions and providing efficient avenues for redress.³⁰⁵

A national and centralized legislative framework would impose greater uniformity, offer greater protection for financial consumers, provide clear directives to the consumer credit industry and eliminate the unnecessary administrative duplication of public services as well as internal trade barriers, thereby fostering economic growth and prosperity for the industry and the country. Under the purview of the Financial Consumer Agency of Canada, the consolidation of provincial and federal initiatives regarding financial literacy, and enforcement of universal standards, rules and regulations, would further improve the effectiveness and efficiency of public resources.³⁰⁶

Acting in the best interest of all Canadian financial consumers, the federal government should therefore not shy away from its responsibility to enact a truly national comprehensive financial consumer protection regime governing all types of consumer credit offered by all types of financial services providers whether they are federally or provincially regulated.

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303. Buckland, *Hard Choices*, *supra* note 15 at 169.

304. Royal Commission on Banking and Finance, *supra* note 2 at 382.

305. Kerton & Ademuyiwas, *supra* note 165 at 95. See also Ontario, *Final Report 1965*, *supra* note 2 at para 287; Ziegel, "Consumer Credit Regulation," *supra* note 2 at 490; Dilay & Williams, *supra* note 219 at 188.

306. Kerton, *supra* note 147 at 259-260. Ziegel, "Consumer Insolvencies," *supra* note 34 at 390.

Appendix A
Provincial Cost of Credit Disclosure Legislation

| Province | Title of Legislation and Regulations | Calculation of APR and Cost of Borrowing | Disclosure of charges and fees | Right to prepay | Cancellation of Optional Services | Notice of Changes | Credit Cards |
|---------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|------------------------------------------------------------------------------------------|-----------------|-----------------------------------|-----------------------------|-------------------------------|
| Alberta | <i>Consumer Protection Act</i> , RSA 2000, c C-26.3; <i>Cost of Credit Disclosure Regulation</i> , Alta Reg 198/1999. | Reg. ss 21-29 | ss 58-65, 74-85; Reg. ss 3-8, 11-14, 17-20 | s 68 | s 67 | s 78; Reg. s 9 | ss 86-89; Reg. ss 15-16 |
| British Columbia | <i>Business Practices and Consumer Protection Act</i> , SBC 2004, c 2; <i>Disclosure of the Cost of Consumer Credit Regulation</i> , BC Reg 273/2004. | Reg. Part 1 | ss 57-70, 81-93; Reg. Part 5 | s 74 | s 73 | ss 85-86 | ss 94-99 |
| Manitoba | <i>The Consumer Protection Act</i> , CCSM, c C200, s 136.1; <i>Consumer Protection Regulation</i> , Man Reg 227/2006. | ss 1, 6; Reg. ss 4.1-8, 11-12, 16, 19 | ss 7-11, 13-15, 25, 34.2-34.7, 35.1, 35.3; Reg. ss 9-10, 13, 17-18 | ss 18-20 | ss 23-24 | ss 34.4-34.5 | ss 35.4-35.9; Reg. ss 14-15 |
| New Brunswick | <i>Cost of Credit Disclosure Act</i> , SNB 2002, c C-28.3; <i>General</i> , NB Reg 2010-104. | ss 1, 51; Reg. ss 10-17 | ss 16-20, 23, 28-32, 37, 38-42, 47-49; Reg. ss 15-17, 20, 27-31 | s 23 | s 22 | ss 33-35, 50; Reg. s 19 | ss 43-46 |
| Newfoundland and Labrador | <i>Consumer Protection and Business Practices Act</i> , SNL 2009, c C-31.1; <i>Cost of Consumer Credit Disclosure Regulations</i> , NLR 74/10. | Reg. ss 2-5, 7, 10 | ss 46-49, 57-60, 65-74; Reg. ss 9, 11-12, 14-16 | s 52 | s 51 | ss 61-63 | ss 71-74; Reg. s 17 |
| Nova Scotia | <i>Consumer Protection Act</i> , RSNS 1989, c 92; <i>Consumer Protection Act Regulations</i> , NS Reg 160/2000 as amended by NS Reg 72/2018. | s 2; Reg. s 11 | ss 17-18 | s 19 | | Reg. ss 18-19 | |
| Northwest Territories | <i>Cost of Credit Disclosure Act</i> , SNWT 2011, c 23; <i>Cost of Credit Disclosure Regulations</i> , NWT Reg 014-2012. | ss 1, 3; Reg. ss 1, 4, 20-26 | ss 6-11, 16, 20-23, 27-31; Reg. ss 3, 5-14, 17-18 | s 14 | s 13 | ss 24-25 | ss 32-35; Reg. ss 15-16 |
| Nunavut | <i>Consumer Protection Act</i> , RSNWT (Nu) 1988, c C-17; <i>Consumer Protection Regulations</i> , RRNWT 1990, c C-16. | ss 11-12; Reg. ss 6-8 | ss 5-10, 13-17, 37-38 | s 39 | | s 18 | ss 13-16 |
| Ontario | <i>Consumer Protection Act</i> , SO 2002, c 30, Sch A; <i>General Regulation</i> , O Reg 17/05. | Reg. s 55 | Reg. ss 56, 61, 63-64, 68 | s 76 | s 73 | ss 80-81; Reg. ss 65-66, 69 | ss 68, 99; Reg. ss 58, 62, 85 |
| Prince Edward Island | <i>Cost of Borrowing Disclosure Regulations</i> , PEI Reg EC16/87; <i>Conduct of Creditors Regulations</i> , PEI Reg EC578-83. | ss 1; Reg. EC16/87, ss 2-4 | ss 15-16, 20; Reg. EC16/87, ss 6-9; Reg. EC578-83, ss 3-4 | s 18 | | s 16 | s 17 |
| Québec | <i>Consumer Protection Act</i> , CQLR, c P-40.1; <i>Regulation respecting the application of the Consumer Protection Act</i> , c P-40.1, r 3. | ss 66-70, 91-92, 119; Reg. ss 51-61, 72 | ss 71, 80-81, 94, 100.1, 115, 125-126, 134, 150, 246; Reg. ss 26-29, 33-42, 65-67, 80-86 | s 93 | | s 129; Reg. s 64.1 | ss 120-124, 128 |
| Saskatchewan | <i>Cost of Credit Disclosure Act</i> , 2002, SS 2002, c C-41.01; <i>Cost of Credit Disclosure Regulations</i> , 2006, RRS c C-41.01, Reg 1. | Reg. ss 11-21 | ss 7-12, 21-25, 29-35, 38-44 | s 17 | s 16 | ss 26-27 | ss 35.1-37.2 |
| Yukon | <i>Consumers Protection Act</i> , RSY 2002, c 40; <i>Regulations Respecting the Protection of Consumers</i> , YCO 1972/400. | Reg. ss 2-8 | ss 4-27 | ss 28-29 | | | s 12, 24 |

Appendix B
Unfair practices remedies legislation

| Province | Title of Legislation and Regulations | Power to rescind/reopen/set aside agreement | Administrative order/penalty | Compensation to consumer | Right of action against supplier | Penalty for offences |
|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|------------------------------|--------------------------|------------------------------------------------------------|----------------------|
| Alberta | <i>Consumer Protection Act</i> , RSA 2000, c C-26.3; <i>Consumer Transaction Cancellation and Recovery Notice Regulation</i> , Alta Reg 287-2006. | s 7 | ss 157-158.5 | ss 159.1, 168 | Consumer, ss 7.1-7.4, 142.1; Reg ss 1-2 Director, s 159 | ss 161-164 |
| British Columbia | <i>Business Practices and Consumer Protection Act</i> , SBC 2004, c 2. | | ss 164-168 | s 192 | Consumer, s 171 Director or other person, s 172 | s 190 |
| Manitoba | <i>The Business Practices Act</i> , SM 1990-1991 c 6. | | | | | |
| Newfoundland and Labrador | <i>Consumer Protection and Business Practices Act</i> , SNL 2009, c C-31.1. | s 10(2) | s 102 | | Consumer, s 10 Director, ss 103-104 | s 109 |
| Nunavut | <i>Consumer Protection Act</i> , RSNWT (Nu) 1988, c C-17. | s 72.5(2) | | | Consumer, s 72.5 | s 111 |
| Ontario | <i>Consumer Protection Act</i> , SO 2002, c 30, Sch A. | Right to rescind, s 18 | ss 109-112 | s 117 | Consumer, s 18(8) | s 116 |
| Prince Edward Island | <i>Business Practices Act</i> , RSP/PEI 1988, c B-7; <i>Conduct of Creditors Regulations</i> , PEI Reg EC578-83. | Reg ss 6-9 | Reg ss 2-4 | | | |
| Québec | <i>Consumer Protection Act</i> , CQLR, c P-40.1. | s 272 | ss 315-316 | | Consumer, s 272 Director or advocacy group, s 316 | ss 277-280 |
| Saskatchewan | <i>Consumer Protection and Business Practices Act</i> , SS 2014, c C-30.2. | s 93 | ss 81-82; Reg, ss 11-21 | s 93 | Consumer, s 91 Director, s 92 | ss 108-110 |

Appendix C
Provincial Regulation of Payday Lenders

| Province | Alberta | British Columbia | Manitoba | New Brunswick | Newfoundland and Labrador | Nova Scotia | Ontario | Prince Edward Island | Saskatchewan |
|---------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| Title of Legislation and Regulations | <i>Consumer Protection Act</i> , RSA 2000, c C-26.3; <i>Payday Loans Regulation</i> , Alta Reg 157/2009; <i>Disclosure Requirements</i> , Alta Reg 198/1999 | <i>Business Practices and Consumer Protection Act</i> , SBC 2004, c 2; <i>Payday Loans Regulation</i> , BC Reg 57/2009. | <i>The Consumer Protection Act</i> , CCSM, c C200, s 136.1; <i>Payday Loans Regulation</i> , Man Reg 99/2007. | <i>Cost of Credit Disclosure Act</i> , SNB 2002, c C-28.3; <i>Payday Lending Regulation</i> , NB Reg 2017-23; <i>General Regulation</i> , NB Reg 2010-104. | <i>Consumer Protection and Business Practices Act</i> , SNL 2009, c C-31.1; <i>Payday Loans Regulations</i> , Nfld Reg 10/19; <i>Payday Loans Licensing Regulations</i> , Nfld Reg 11/19. | <i>Consumer Protection Act</i> , RSNS 1989, c 92; <i>Payday Lenders Regulations</i> , NS Reg 248/2009. | <i>Payday Loans Act</i> , 2008, SO 2008, c 9; <i>General Regulation</i> , O Reg 98/09; <i>General</i> , O Reg 17/05. | <i>Payday Loans Act</i> , SPEI 2009, c 83; <i>Payday Loans Act</i> , PEI Reg EC67/13. | <i>Payday Loans Act</i> , SSS 2007, c P-4.3; <i>Payday Loan Regulations</i> , RRS c P-4.3. |
| Price Cap | 15% of principal amount including fees for all mandatory and optional services, s 124.61 | \$15 per \$100, s 112.03; Reg, s 17 | 17% of principal amount, s 147(1); reg, s 13.1(1) | \$15 per \$100, s 37.31; Reg, s 3 | \$21 per \$100, s 83.3; Reg 10/19, s 7(1) | \$19 per \$100 including insurance fees as per 2018 NSUARB 2.15 at paras 82-83, s 18J | \$15 per \$100, s 23 | \$25 per \$100; Reg, s 24 | 23% of principal amount, s 23; Reg, s 14 |
| APR Disclosure | s 76.1; Reg 198/1999, ss 6, 8 | Yes, s 112.06(2)(k) | Yes, s 13(2); reg s 14 | Yes, ss 30(2), 37.28(2)(b) | Yes, s 83.6 | Yes, s 181 | Yes; Reg 98/09, ss 14(3), 15(2), 18; Reg 17/05, s 55 | No | Yes but it is called the "annualized borrowing rate," Reg, s 10 |
| Borrowing Limit | \$1,500 | 50% of borrower's net pay, ss 112.02, 112.08(1)(c);d); Reg, s 18 | 30% of borrower's net pay or full amount of loan s 151(1); Reg s 15.2 | 30% of borrower's net pay, s 37.36; Reg, s 4 | 50% of borrower's net pay, Reg 10/19, s 3(1)(g) | \$1500, s 18N(e) | \$50% of borrower's net income, Reg s 16.2 | \$1,500, s 30 | 50% of borrower's net pay, s 30; Reg, s 15 |
| Cancellation Period | Two business days, s 124.4(1) | Next business day or anytime, if borrower not notified of cancellation rights or lender contravenes statute or regulation, s 112.05 | 48 hours or anytime if notified of cancellation rights, s 14.4 | 48 hours excluding Sundays and holidays or anytime if not notified of cancellation rights, s 37.29(2), (3) | Two business days, s 83.5 | Next business day or 48 hours for Internet payday loan or anytime if not notified of cancellation rights, s 18Q | Two business days, s 30 | Two business days, s 28; Reg, s 19(2) | Next business day or anytime if not notified of cancellation rights, s 22 |
| Maximum NSF Fee | One-time \$25 fee, s 124.61(3)(b) | One-time \$20 fee, s 112.02; Reg, s 17(2)(b) | Maximum \$20, Reg, s 15.5 | \$20 per dishonoured cheque or pre-authorized debit, s 37.31; Reg, s 5(1)(b) | One-time \$20 fee, s 83.3; Reg 10/19, s 7(2) | "reasonable charges" reflecting costs incurred, s 33(1)(b) | "reasonable charges" reflecting costs incurred, s 33(1)(b) | "reasonable changes," s 31 | One-time \$50 fee, s 23; Reg, s 14(2)(b) |

Provincial Regulation of Payday Lenders (cont'd)

| Province | Alberta | British Columbia | Manitoba | New Brunswick | Newfoundland and Labrador | Nova Scotia | Ontario | Prince Edward Island | Saskatchewan |
|--------------------------------------------------------|---------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| Default Charges and Maximum Interest on arrears | 2.5% per month, not to be compounded, s 124.6(3) | 30% per annum on the outstanding principal balance, s 112.04; Reg. s 17(2)(a) | 2.5% of amount in default, calculated monthly and not compounded and s 153(1); Reg. ss 15.4, 15.5 | 2.5% per month of amount in default, s 37.37; Reg. s 5(1)(a) | 2.5% of amount in default, calculated monthly and not compounded, s 5(3); Reg 10/19, s 7(2) | Maximum penalty is \$40 per payday loan and 60% maximum interest rate 2011, Reg. s 201, NSUARB 64 at para 68 | Reasonable charges in respect of legal costs or NSF fees, s 33 | No default charges except legal costs to collect and NSF fees, s 31 60% maximum interest rate chargeable | 30% per annum on the outstanding principal balance, s 23; Reg. s 14(2)(a) |
| Content of Agreement and Posted Warnings | ss 124.41–124.5, 124.8 | s 112.06; Reg. ss 13–14 | ss 7-13, 148; reg. s 14, 16 | ss 37.28, 37.3 | s 83.6, Reg 10/19, ss 8–9 | ss 181, 180; Reg. ss 8, 9 | ss 29, 37; Reg. ss 14, 18, 20 | s 35; Reg. ss 14, 19 | ss 18-21; Reg. ss 11–13 |
| Fixed selling Prohibition | s 124.2(1)(x) | ss 4(3)(b), c), 6 | s 13(1) | s 17 | Reg 10/19, ss 3(0)(d), e), 4 | s 20; Reg. s 9A | ss 26, 53 | Reg. s 15 | |
| Concurrent or Rollover Loans | No rollover or replacement loans except with costs limited to interest, s 124.2(1)(y) | No rollover or replacement loans except with costs limited to interest, s 112.08(1)(a) | Yes, but only permitted if replacement loan but additional amount to 5% of principal amount of new loan, s 154(1); Reg. s 13.1 | No rollover or replacement loans except with costs limited to interest, s 37.34 | No concurrent loans, Reg 10/19, s 3(1)(b) | No, s 18N(c), (h) | No rollovers nor concurrent, s 35; Reg. s 34 | No, s 33 | No concurrent loans, s 28; Reg. s 16 No rollover or replacement loans except with costs limited to prescribed interest on arrears, Reg. s 16 |
| Cooling-off Period after a Payday Loan | | | 7 days, if not cost limited to 5% of the principal amount, s 13.1(3) | | None | None, 24 hours recommended by NSUARB 64 at para 93 | 7 days, s 35(1)(a) | 7 days, s 33 | None |
| Extension of contract or Repeat Loans | Mandatory Installment Plan with term of 42 to 62 days, s 124.3; Reg. ss 10.2–10.3 | Automatic extended payment plan for third or subsequent loan in a 62-day period, Reg. s 23 | s 152(1) | No extension, but 2.5% penalty may be charged every 30-day period, Reg. s 5(2) | Payment plan for third or subsequent loans, Reg 10/19, s 5(2) | Yes, may be negotiated but not recommended in 2015 NSUARB 64 at para 94, s 18C | Extended payment plan for third or subsequent loans but cost of borrowing must be disclosed, s 26; Reg. s 25.1 | Not allowed, s 34 | Yes, but costs limited to prescribed interest on arrears, Reg. s 16 |
| Collection practices | s 124.2(1)(k)–(o), (2) | ss 113–128 | Reg. s 18.3 | S 62(1)(k); VP; NIB Reg 2010-104, s 9 | Reg 10/19, s 3(1)(q)–(aa) | s 18L; <i>Consumer Credit Act</i> , RSNs 1989, c 91 18A, 18C, 18HA–18HAC; Reg. ss 8A, 8C | Reg. s 26, 32–33 | Reg. s 34 | s 32; <i>The Collection Agents Act</i> , RSS 1979, c C-15 |
| Online Lend | s 124.11, Reg. s 4(3) | Reg. s 7(2) | ss 137, 163; reg. ss 14.0.1, 14.3(2), 16.1, 18.1 | S 37.12 | ss 83.2, 83.6(6), Reg 11/19, s 3(3) | ss 18A, 18C, 18HA–18HAC; Reg. ss 8A, 8C | Reg. ss 4(5), 5, 14(4), 19, 22 | Reg. ss 4(5), 5, 14(4), 19, 22 | s 1, definition of “payday lender” and “carrying on |

Provincial Regulation of Payday Lenders (cont'd)

| Province | Alberta | British Columbia | Manitoba | New Brunswick | Newfoundland and Labrador | Nova Scotia | Ontario | Prince Edward Island | Saskatchewan |
|-------------|-----------------------|------------------|------------------------------------------------|---------------|-------------------------------------|-----------------------------------------|---------|--------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| Online Lend | s 124.11, Reg. s 4(3) | Reg. s 7(2) | ss 137, 163; reg. ss 140.1, 143(2), 16.1, 18.1 | S 37.12 | ss 83.2, 83.6(6), Reg 11/19, s 3(3) | ss 18A, 18C, 18HA-18HAC; Reg. ss 8A, 8C | | Reg. ss 4(5), 5, 14(4), 19, 22 | s.1, definition of "payday lender" and "carrying on business in Saskatchewan" may be broad enough to include online lenders; Reg. s. 13(3) |

