

Access of LILA and NINA debtors to the legal insolvency system in Canada:

Semi-empirical study and critical analysis

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INTRODUCTION

A) Background and key issues

For many years, the vulnerability of some insolvent people, such as debtors with low income or assets and no income and assets, referred to by the English acronyms LILA and NINA,¹ has challenged national and international authorities.²

Financial crises and the consumer society model have certainly accentuated the financial difficulties for low-income individuals by depriving some people of moral and economic well-being.

From a legal perspective, often of comparative law, the authors question the access to the legal insolvency system and the possibility of offering a new, simplified and low-cost bankruptcy procedure to Canadian LILA and NINA debtors.³

At present, the question of access for LILA and NINA debtors amounts to addressing the reconciliation and tensions between social policies and the economic objectives of personal insolvency law, its structure, its financing and the respective roles of the government, creditors and professionals authorized to administer bankruptcy.⁴

Our study aims to assess, to some extent, with the limitations inherent to any semi-empirical study, the access and treatment of debtors with low income and assets or no income and assets, i.e., without surplus income, to the insolvency system in Canada.

To do this, our research began with an analysis of the legal, economic and social literature concerning consumer proposals and bankruptcy proceedings with summary administration for consumers. Since the last amendments of the BIA in 2009, the conditions for submitting a consumer proposal improved significantly. The summary bankruptcy procedure offers a simplified and relatively quick way to rehabilitate an indebted and unlucky debtor.

¹ Low Income Low Asset, No Income No Asset.

² Office of the Superintendent of Bankruptcy (hereinafter OSB) Canada, *2019-20 Business Plan of the Office of the Superintendent of Bankruptcy*, 2019, online (pdf): <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/2019-20-OSB-Business-Plan-EN.pdf/\\$file/2019-20-OSB-Business-Plan-EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/2019-20-OSB-Business-Plan-EN.pdf/$file/2019-20-OSB-Business-Plan-EN.pdf)>; The World Bank Working Group, “Report on the Treatment of the Insolvency of Natural Persons” (2014) No ACS6818, online (pdf) : *World Bank* <openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>.

³ See generally Saul Schwartz & Stephanie Ben-Ishai, “Establishing the Need for a Low-Cost Canadian Debt Relief Procedure” (2020) 29 Intl Insolv Rev 25 [Schwartz & Ben-Ishai, “Debt Relief Procedure”]; Stephanie Ben-Ishai & Saul Schwartz, “Bankruptcy for the Poor” (2007) 45:3 Osgoode Hall LJ 471 [Ben-Ishai & Schwartz, “Bankruptcy”]; Stephanie Ben-Ishai, Saul Schwartz & Thomas GW Telfer, “A Retrospective on the Canadian Consumer Bankruptcy System: 40 Years after the Tasse Report” (2011) 50 Can Bus LJ 236 at 256–257 [Ben-Ishai, Schwartz & Telfer]; See also Iain Ramsay, “The new poor person’s bankruptcy: Comparative perspectives” (2020) 29:1 Intl Insolv Rev 4 [Ramsay, “The new poor”]; Iain Ramsay, “Towards an international paradigm of personal insolvency law: a critical view” (2017) 17:1 QUT L Rev 15 [Ramsay, “Towards an international paradigm”].

⁴ Ramsay, “The new poor”, *supra* note 3.

Bankruptcy cases with summary administration represent a large annual volume of cases of Canadian debtors,⁵ some of those without surplus income.⁶ It is therefore important to know the profiles of debtors without surplus income: are they all debtors necessarily designated as LILA or NINA?

The specificity of this unprecedented research in Quebec and, at least on this scale, in Canada lies above all in its empirical aspect. In fact, in order to better understand the access of poor debtors to the legal bankruptcy system, it seemed important to us to survey insolvency professionals, by questioning them about their professional practices. Similarly, our observations will relate to the practice of advisors working in family economics cooperative associations (associations communautaires d'économie familiale, hereinafter referred to as "ACEF") based mainly in Quebec and, one, in Ontario.

For the purposes of this study, we have chosen not to interview credit counselors. We justify this decision with two major reasons: too much diversity has been observed in the practices of the counselling agencies established mainly outside the province of Quebec; and in the absence of regulation, we fear that we would face a lack of transparency as to the nature and cost of the services offered to consumers with excessive debt. Our study drew on the current and existing legal literature on credit counselling in Canada, which we found sufficient to conduct our current research.

B) General research question and specific questions

Our general research question relates to the practical access of LILA and NINA debtors to the insolvency system in Canada. As part of our analysis, we will answer other, more specific questions namely concerning:

- 1- The definition of debtors with low income and assets and those with no income and assets (LILA and NINA);
- 2- The assessment criteria for the financial situation of the debtors under study;
- 3- The content of the information sent to debtors about insolvency proceedings (bankruptcy or consumer proposal), the alternative options (such as debt consolidation, arrangements, *status quo*, voluntary deposit) and their legal effects;
- 4- The criteria and tools used by trustees and budget advisors to propose insolvency proceedings to debtors (bankruptcy or consumer proposal) or an alternative solution;
- 5- The affordability of the cost of bankruptcy proceedings for LILA and NINA debtors;
- 6- The ability to pay of the debtors under study, the conclusion of agreements and the use of section 156.4 of the BIA;
- 7- The uniform treatment of LILA and NINA debtors by the trustees across Canada;
- 8- Access to the Bankruptcy Assistance Program (hereinafter referred to as "BAP") for LILA and NINA debtors.

⁵ Table communicated by the OSB entitled BKHQRA-3748 part 3 18Sep2020 : 60,773 bankruptcy files with summary administration in 2019.

⁶ Table communicated by the OSB entitled BKHQRA-3748 Final 04Sep2020 : 20,299 LILA and NINA summary administration files in 2019.

C) Methodology: a multi-methods and multi-data approach

1) Collection of empirical data from insolvency professionals and budget advisors

a) Licensed insolvency trustees

From the specific questions mentioned, , we interviewed 20 licensed insolvency trustees (**T20**), with proven experience in personal insolvency, particularly in cases without surplus income.

We conducted semi-structured interviews, lasting an average of 1 hour 35 minutes, with:

- 8 trustees in Quebec, including 1 trustee from the control sample;
- 5 trustees in Ontario, including 1 trustee from the control sample;
- 2 trustees in British Columbia;
- 2 trustees in Manitoba and Saskatchewan;
- 2 trustees in Alberta;
- 1 trustee in the Atlantic provinces.

These semi-structured interviews were carried out using a questionnaire that was not communicated in advance to the participants in order to encourage discussion, and not to induce answers or give them time for preparation or possible consultation.

The trustees were invited over email to participate in this study, and selected according to four main criteria:⁷

- Geographic;
- Depending on the number of annual personal insolvency cases;⁸
- Depending on the experience of the trustee interviewed in this field;⁹
- Depending on the business model¹⁰ : independent practice or with others.

We proceeded with open questions aimed at evaluating the practices of these professionals in their workplace and in connection therewith.¹¹ The first interviews were carried out with

⁷ See Schedule 1. Interviews were conducted in person, by zoom and with audio recording. Some excerpts from the interviews have been crossed out to protect the anonymity of the respondents by simply eliminating the nominative information or any reference allowing the identification of the trustee or their gender.

⁸ See Schedule 1. No percentage has been determined. Trustees simply had to demonstrate having a practice focusing mainly on insolvency.

⁹ No number of years of experience has been set.

¹⁰ See Schedule 1. Ensuring some diversity in the practices of trustees.

¹¹ Following the filing of a formal request, this empirical approach was validated with the ethics office of Université Laval, which exempted the research from authorization since the professionals were assessed at their workplace, in the normal course of their work and the questions were related to their work. This research complied with the rules of practice regarding requests for information, collection and confidentiality of data, using the participants consent forms, in particular, made available by the ethics office of Université Laval.

two trustees, thus forming a control sample in order to validate the relevance of the questions formulated from the designed questionnaire.

b) ACEFs

The ACEFs of Quebec were also invited, over email, to participate in this study. Interviews were carried out with 6 budget advisors (**ACEF 6**); (1 in Ottawa, Ontario and 5 in Quebec: different regions). In addition, we also spoke with 2 coordinators working in two ACEFs located in Quebec.

Since 1966, community organizations called family economics cooperative associations (ACEFs)¹² have had the mission of educating,¹³ informing and advising indebted individuals or families and people struggling with financial difficulties in order to help them achieve financial autonomy. These not-for-profit organizations, which are members of the Union des consommateurs,¹⁴ provide free counselling services, for example on budgeting and saving issues. Furthermore, they intervene with high school students for educational purposes as well as with community organizations involved in the health field.

The interviews carried out provided us with some answers about the debtors' access to legal information concerning alternative solutions and insolvency proceedings. Moreover, these interviews also made it possible to collect data from the ACEFs concerning the conditions for processing consultation requests and budget monitoring for people with low income. Finally, we gathered some information on the financial education programs run by the community organizations interviewed (workshops in high schools and with other social workers).

This collection of data from Canadian trustees and budget advisors (ACEFs) was carried out until recurrence and redundancy in ideas were observed and no new evidence was reported.¹⁵ The data was subjected to thematic content analysis¹⁶ using audio recordings and written transcripts in verbatim form. The data was thus compiled with an analytical grid developed using a deductive approach, from several themes supported by our theoretical research framework.

¹² “Nos membres”, online : *Union des consommateurs* <uniondesconsommateurs.ca/a-propos/groupe-membres/> [Union des consommateurs, “Nos membres”]; See for example “ACEF de Québec”, online : <acefdequebec.com/>.

¹³ This term which is often used in financial education literature could be debated since some authors are not clearly in favour of a widespread idea which would consist in considering that poor people should be educated in the sense that they are individually responsible for their own situation of financial precariousness; this would make abstraction of the other causes explaining their excessive debt such as the easy access to credit with high-interest rates and payday loans commonly offered in Canada. This term will be used in this report without political or moral connotations and is intended to convey the idea that one of the ways to promote better budget management is through learning or acquiring good reflexes such as those provided by the ACEFs.

¹⁴ Union des consommateurs, “Nos membres”, *supra* note 12.

¹⁵ Alain Blanchet & Anne Gotman, *L'enquête et ses méthodes*, Armand Colin, 2005 at 54.

¹⁶ Blanchet & Gotman, *supra* note 15 at 94; Pierre Paillé & Alex Mucchielli, *L'analyse qualitative en sciences humaines et sociales*, Armand Colin, 2016 at 161.

2) Collection of indirect data from the OSB

Additionally, at our request, the OSB sent us data relating to personal insolvency cases that were filed during the past 5 years in the Canadian provinces. Such data allowed us to illustrate some of our empirical observations in order to better understand specific sub-themes such as the causes of insolvency or the users of the Bankruptcy Assistance Program.¹⁷ It also shed light, for example, on the number of summary administration files concerning LILA and NINA, on the type of debts as well as on the number of payment arrangements or the discharge rates of trustees and bankrupts.

As a result, in the present study, in the analysis section, the empirical data will be, if necessary, cross-referenced with the indirect data provided by the OSB. This multi-methods and multi-data analysis will provide a more comprehensive view of access to the insolvency system for debtors with low income and assets, which will also be the subject of subsequent publications.

D) Research plan

We will first present the data collected during the interviews as well as the results that emerge from this empirical component (Parts I and II).

In order to understand the access conditions of LILA and NINA debtors to insolvency proceedings, it is necessary to first paint a portrait of those debtors. Using socio-demographic analysis, data from the OSB and on the basis of our empirical results, we will highlight the possible identification criteria, emerging profiles, forms of poverty and, above all, the structural and behavioural causes of insolvency affecting people with excessive debt. We will then address the issue of consumer access to legal insolvency proceedings. Our research will show that professionals allow access to LILA and NINA debtors by offering them a range of options in a flexible framework, particularly in terms of cost. We will also examine the Bankruptcy Assistance Program of the OSB and its use by debtors, including LILA and NINA (Part III).

Finally, we will consider the advisability and relevance of implementing a debt relief procedure in Canada similar to that of the United Kingdom and New Zealand. We will see, with the help of the current literature, the impact of those relief measures on debtors with low income and revenues or with no assets and the administration conditions of such bankruptcy proceedings (Part IV).

¹⁷ Information from the Office of the Superintendent of Bankruptcy has been emailed to us, most of it in file form, some of which are cited in this report.

I- DATA PRESENTATION FROM INTERVIEWS WITH TRUSTEES

1.1. Contact with the debtor and meeting with a trustee

The objective of the first contact with the trustee, an advisor or a receptionist is to welcome and reassure people wishing to receive advice concerning their financial situation. A first financial and personal summary assessment (debts, income, employment, family circumstances, assets) makes it possible to gather the useful information for a subsequent appointment. References come from varied sources: former clients, advertising, public and community organizations, professionals (e.g., ACEF advisors, lawyers, non-profit credit counselling agencies).

Debtors often take a long time to consult a trustee. They first attempt to restore their financial situation on their own with the help of their financial institution or of a community organizations, such as the ACEF advisors (T1, T5, T6, T8, T13, T14).

Individuals take a long time to visit a trustee because of their crippling financial and moral suffering as well as the fact that they are often deeply uneasy or ashamed (T1, T5, T8). Indeed, some trustees have observed that: *“The same fear, the same shame. Often people take six months to two years to make the decision to consult with us.”* [translation] (T1, T6). According to trustees, the debtors’ consultation process is often motivated by a need for appeasement (T11), because they feel anxious, have insomnia (T1, T8), are *“overwhelmed by events”* [translation] (T13) and *“most of the time in panic”* [translation] (T4). By consulting a trustee, debtors seek relief from their psychological suffering related to a feeling of financial distress. In this sense, a trustee said:

“Our work mission, the reason we exist as trustees, is to allow people to regain their peace of mind by giving them sound advice. [...]” [translation] (T1)

People are insolvent, but can also face many problems at once, not only financial. For example, one trustee expressed it simply like this:

“People first come to see us. They know they’re in financial trouble. But sometimes, is that ... do they need help from other organizations? Or do they need to be referred to a lawyer or ... so, really, it depends on the situation. A lot of times people come to you and have all kinds of other issues. The financial problem is not the only problem.” [translation] (T3)

One or more interviews, in person, by phone or through videoconferencing (widespread practice because of the pandemic), may be necessary for the assessment in order to sort the debtor’s documents and become acquainted with elements of a financial nature including income, assets and debts (T4, T5, T6, T8, T10, T11, T12, T13, T14).

“So everybody seems to think the assessment is just a five-minute event, but actually, it spans over three or four meetings to assess the person.” (T12)

1.2.Criteria and tools taken into consideration to define or qualify a LILA or NINA debtor

In their day-to-day practice, trustees do not need to define a LILA or NINA debtor in relation to other debtors. They do not seem to care nor do they treat debtors differently because of low income or lack of seizable assets (T3, T4, T10, T12, T13, T14, T16). The acronyms LILA and NINA seem to be used more by academics or professional associations than by trustees in the context of their practice (T2, T3, T7, T14, T18) :

“LILA and NINA are not clearly defined” [translation] (T3)

“[...] in real life, LILA/NINA ... for us a client is a client” [translation] (T4)

“[...], it doesn't matter to me if you're a low-income person or not because I don't know what low income means” (T10)

“So I don't distinguish between a regular debtor, a LILA, and a NINA. To me, they're all debtors. So we would take people on and help them regardless of high income, low income, no income.” (T16)

“In fact, in practice, the LILA or NINA file doesn't exist. A file is a file [...] the word LILA and NINA, it's an [academic] invention. But there is not a trustee who will look at a file: 'Is it a LILA or a NINA file?’” [translation] (T3)

Low income and assets are not a distinguishing criteria when evaluating a case (T1, T3, T7, T18, T19, T20):

“But a trustee or an advisor will look at the debtor before them and then find a solution for them or recommend a solution for their financial difficulties. Whether it's a LILA or a NINA file doesn't matter at all.” [translation] (T3)

“I must tell you that for us, none of the things that we do, low income is a criterion.” [translation] (T1)

The main criteria mentioned by professionals, very often through examples of concrete cases, can be listed, in no order of preference, as follows:

- Income of the debtor and of the family unit;
- Assets (nature, amount and seizability of property: car, house, TFSA, RRSP, REE, life insurance);
- Resources available;
- Debts (dischargeable or guaranteed and their amount. Loan, line of credit, credit card, student loan, fines, deductions from social assistance benefits or employment insurance for fraud, guarantees, co-endorsers);
- Employment situation (fixed, temporary or seasonal, self-employed, retired, unemployed);
- Obligations;

- Budget;
- Non-discretionary expenses (support payments, daycare, medical expenses, work-related expenses);
- Fixed expenses (rent, bills);
- Family situation (number of people in the family unit, spouse’s income).

Certain criteria are added during this assessment, such as the following:

- Mentioned by 9 trustees: physical or mental health, addictions (T1, T4, T7, T8, T9, T13, T15, T18, T20);
- Mentioned by 7 trustees: reviewable transactions (T1, T2, T6, T13, T15, T16, T17);
- Mentioned by 5 trustees: the classes of creditors (some are more aggressive) (T1, T3, T4, T6, T10);
- Mentioned by 4 trustees: the age of the debtor (seniors with guaranteed income supplement) (T6, T7, T8, T17);
- Mentioned by 3 trustees: the cost of living depending on geographic location (T10, T12, T16);
- Mentioned by 3 trustees: second or third bankruptcy (T2, T13, T18);
- Mentioned by 2 trustees: low education level (T4 and T8).

To assess the financial situation of the debtor, trustees have many supporting documents such as bank statements, pay stubs, notices of tax assessment to assess the financial situation of the debtor. They have several tools such as a budget grid, software to enter the personal and accounting information of the debtor and to calculate surplus income.

Moreover, all respondents use the OSB Directive 11R2-2020¹⁸ which calculates the debtor’s surplus income. Some trustees noticed its uniform application, across Canada, regardless of the cost of living (T4, T10, T12, T16, T17): “*same grid in Vancouver as in Quebec*” [translation] (T4).

The calculation of surplus income is one criterion, among others, such as the cost of living or an applicable income limit, to identify a LILA or NINA debtor. It seems to cover several situations:

“So defining low income, like I said, I think it’s relative to where they live, how much their income is, the cost of living, how many people in the household. Not even to go into the surplus income, which is a separate issue that we’re not discussing. But it’s relative to their situation and their cost of living.” (T16)

“For LILA cases, the test, the simple test of not having surplus income is not enough. We still have to assign an income cap. And then, in my opinion, maybe the income cap should correspond to the income cap of a debtor who is entitled to certain additional deductions in their tax return. [...] In my opinion, the income cap should be around \$30,000 for an individual [...] I find that it’s not a criterion. I find that an individual should have no surplus income and then a gross income of at least \$30,000. I think that a self-employed person should not fall under a LILA criterion.” [translation] (T3)

¹⁸ Office of the Superintendent of Bankruptcy Canada, *Surplus Income*, Directive No. 11R2-2020, December 16, 2020, online : <www.ic.gc.ca/eic/site/bsf-osb.nsf/fra/br03249.html> [OSB, *Surplus Income*].

Indeed, according to some trustees (T1, T2, T3, T4, T5, T6, T7, T8, T10, T13, T14, T15, T17, T18), some debtors do not report all their income, or their spouse's income, or resources from parents or relatives helping them. Others have assets like RRSPs or life insurance that they do not want to liquidate.

"[...] we have to disclose on the form 65 that the spouse refused to decline [sic] income, and as a result, we've used the formula and the surplus corrective to cut the guideline in half. So that's sort of one class of people that have low income that is maybe not low income from a poverty perspective because they're not actually feeling any stress because the other family members have income.

In other situations, we do get a lot of people that have come in that are low income that is not only below surplus income guidelines, but having trouble meeting their day-to-day living needs." (T15)

However, in the opinion of certain trustees (T1, T3, T20), it is only once the administration of the file is completed that it would be possible to identify them:

"You would assume that this is someone who doesn't have a lot of income, this is someone who's at the bottom of the grid, who doesn't have surplus income. [...] The software allows you to do things, but to extract lists, to sort by file, it doesn't allow me to do that." [translation] (T1)

Therefore, most of the trustees interviewed carried out a manual collection in their computer system by searching for summary administration files without surplus income. According to their statements, it is not a collection easily permitted by their computer system (T1, T2, T3, T5, T7, T14, T19, T20) :

"Here we don't keep statistics on the files with surplus income or without surplus income. [...] Because [...] the calculation of surplus income will happen in different forms. Well, there is the person who has income below the threshold, so at that point, that is easily resolved there. But there is the person who has income above the threshold, but given their non-discretionary charges, well, they will not have surplus income. [...]" [translation] (T14)

The outlines between the concepts of LILA and NINA debtors, that of precariousness and that of poverty are difficult for trustees to assess due to the diversity and complexity of situations:

"But when you drop to the bottom of surplus income, it's rare that you have people swimming in money there. They're low-income people. Well. So it's certain that those people, it's quite rare that they will have significant assets, considerable RRSPs, TFSAs, houses. Well, you're going to have people on social assistance, or unemployed, people... [...] Well, what I'm saying is that in the 50% below the surplus income, there, we have all the range from zero income to modest income. So where do we put the line? I'm not able to give it to you exactly [...]" [translation] (T4)

“[...] the reality is very different for someone who earns 2,400 dollars a month, 2,300 dollars a month, for example, who lives alone, but really alone [...], in the suburbs of Montreal, who needs a vehicle to get around—there is an astronomical cost to having a vehicle, to travel to go to Montreal because there is not necessarily efficient public transport—versus someone who earns maybe 1,500 per month, who lives with their parents or with roommates, who does not need a vehicle. Their financial capacities are astronomical at 1,500 versus someone who earns 2,400. So we made a system of guidelines which is very relative.” [translation] (T6)

Some professionals (T1, T3, T4, T6, T8) report several of difficult situations on the human level:

“There are also human factors that are taken into consideration [...] is she going to make herself sick because she is so stressed because of the debts? [...] when you do a debtor interview, it’s this human factor that will also play a role in the recommendation. So it’s not just a mathematical assessment. Here are the revenues and here are the expenses. Here is how much I’m able to pay. There are other factors. Is the person in front of me pregnant and going to have a baby in three months? If so, that’s one more expense! So that’s a bunch of factors.” [translation] (T3)

For the vast majority of trustees (T1, T3, T4, T6, T7, T8, T10, T11, T12, T13, T14, T16, T19), LILA or NINA debtors may correspond to specific socio-economic profiles such as:

- **Social assistance or employment insurance recipients;**
- **Self-employed workers;**
- **Seasonal workers;**
- **Students;**
- **and retirees and pensioners.**

On this topic, trustees (T4, T6, T7, T8, T10, T11, T12, T14) mention the phenomenon of excessive debt within the elderly category, rather recent, and some have explained it in these terms:

“Seniors, that’s it. It’s a category that we haven’t seen since ... but this is really, I think in terms of statistics, this is really what increases the most, seniors. Poor retirement planning. [...] But then, oops, they’re sick, or something happens. Then they’re no longer able to have their side jobs. That means that it becomes ... their budget is more difficult to manage. It’s because of an illness, bad planning [...] They were, in the past, I think it was people who saved more, who had less... I think that access to credit was more limited. The 65-year-olds, 20 years ago, were those who had known the war, more concern for saving.” [translation] (T8)

The multiple causes of debtor insolvency may namely comprise a **debt problem** due to loss or low income (T1, T2, T3, T4, T5, T6, T7, T8, T9, T10, T13, T14, T16, T17, T19, T20).

The trustees also mentioned a problem related to **budget education (T2, T8, T4, T5), access to credit (T1, T2, T4, T6, T7, T8, T10, T13, T16, T14), loss of employment (T2, T6, T8, T17), separation (T10, T13), physical or mental illness (T1, T3, T4, T6, T8, T10, T13, T14, T17), addiction problems (T5, T14, T19, T20) or the death of a loved one (T13, T17):**

“Often, people who have little income, few assets, they still have \$20,000 in credit cards. They had credit cards, imagine five or six credit cards at \$3,000 each. Then they still have 15,000 or 20,000 in credit cards. Even if they have little income and few assets.” [translation] (T1)

“[...] they don’t come all the time because they don’t have income, often because they also have problems with alcohol, drugs or gambling. So there are all kinds of reasons why someone isn’t going to make a payment. [...] Because there are some people who have a hard time not borrowing if I can explain it that way. Then those people will go and get new loans with payday loans. Then they have to make those payments, or they take all the money out of their bank account.” [translation] (T5)

“It’s people, either out of innocence or bad luck, or because the bank told them that they were able to pay ‘if Visa granted me that it’s because I can pay it back,’ or they lost a job [...] Those are situations where, we talked about the death of a spouse and then suddenly the whole family budget crumbled, the whole family structure too. Even if we eliminate debts, the issue is not the payment of debts. There is just not enough income for the minimum cost of living.” [translation] (T6)

“[...] if we’re talking about people who don’t have a lot of assets, not a lot of income, we’re necessarily talking about mental health problems. [...] From psychological problems, psychological distress. [...]” [translation] (T13)

1.3.About the debt threshold taken into consideration to file a consumer proposal or bankruptcy

The interviewed trustees mostly agreed that the **legal threshold of \$1,000 of debt is not realistic, or at least applicable on its own**, to be retained as a decisive criterion for filing a consumer proposal or bankruptcy case:

“I don’t know if there’s a real threshold, but I think a lot of times, it a combination of what their ability to pay is versus what their debts are. Certainly, if they only have \$1,000 worth of debts, it doesn’t necessarily make sense for them to do a bankruptcy or a proposal.” (T19)

The trustees will check the debtor’s capacity to pay in relation to the amount of debt, the number of creditors and the amount of income. This criterion seems decisive. This assessment is done on a case-by-case basis, without a pre-established threshold, and the amount of debt is not the only criterion considered (T1, T4, T6, T9, T11, T14, T15, T16, T17, T18, T19, T20).

Nevertheless, in practice, an estimate as to the level of dischargeable debt that would allow the filing of bankruptcy proceedings or of a consumer proposal would be between **\$5,000 and \$6,000 (T1, T2, T3, T5, T7, T9, T11, T12, T13, T15, T17, T20)** rather than **\$5,000 and \$10,000**.

Below the estimated thresholds, the trustees would rather nudge the debtors towards alternative solutions such as an arrangement with the creditors or a voluntary deposit procedure. They could also refer them to the services of another professional such as a lawyer, social worker, financial institution, community organization, ACEF, or non-profit credit counsellor.

Below the estimated thresholds, more than half of the trustees have filed for bankruptcy in rare cases, for emergency, “humanitarian” reasons or to stop the aggressive harassment from creditors (T3, T4, T5, T6, T7, T8, T10, T12, T13, T14, T15, T20).

“[...] there could be special circumstances, an elderly person who has cancer, who’s going to die, who just wants to clean up their record so as not to leave any worries for their children and only has \$4,000 in debt. Are we going to take the file? Yes, of course! But again, it depends on the circumstances [...]” [translation] (T3)

“single mother, no more electricity, no more income... Hydro-Québec requires the \$4,000 or \$5,000 due to provide electricity again. I will take the file [...] it is for humanitarian reasons that make me ... but then I make sure the affidavit is signed [...] For small amounts of debt. The person can no longer survive because they can no longer feed their family.” [translation] (T8)

The interviews indicate that **only dischargeable debts will be taken into consideration by the trustee when deciding to file a bankruptcy or consumer proposal**. The trustees provided several examples of non-dischargeable debts: fines or repayments of student loans (if the end of studies date is less than 7 years) or overpayments of employment insurance or social assistance, in the case of fraud or false allegations (T2, T4, T5, T6, T7, T8, T11, T14, T15), paid under, for example, Ontario or Quebec social programs. For this type of non-dischargeable debt, alternative solutions to bankruptcy or consumer proposal can be considered by the aforementioned trustees.

All the trustees interviewed said they do not refuse insolvency cases because of debts below the estimated thresholds. The trustees rather seek an alternative solution with the debtor, the most appropriate with respect to their financial situation (T1, T2, T3, T4, T5, T6, T7, T8, T9, T10, T11, T12, T13, T14, T15, T16, T17, T18, T19, T20). The rare grounds for refusing to assess and take on a case, as expressed by the trustees, would be because of the disrespectful, rude, aggressive, dangerous, dishonest or fraudulent behaviour of the debtor (T6, T7, T8, T10, T13, T14, T15, T18).

1.4. Criteria and factors for alternative solutions

1.4.1. The criteria to guide the debtor towards an alternative solution

A **low level of debt** is a factor that encourages trustees to consider an alternative solution to solve the debt issues of debtors with low income and assets. This low level of debt appears to be less than **\$5,000/6,000**. However, the majority of trustees did not wish to set a threshold since the alternative solutions are always presented to the debtors during the assessment.

The interviews also highlighted the “unique nature of each situation,” the trustees assess the debtor’s situation “according to the circumstances” (T3, T4, T14, T16, T17), according to the will of the debtor (T18, T19), which would explain the absence of a threshold for a certain number of trustees (T4, T9, T10, T11, T12, T14, T15, T16, T18, T19). During the interviews, it was made clear that the final decision rests with the debtor, whether it be on alternative or insolvency proceedings. Some trustees insisted on this point (T11, T12, T16, T18, T19).

1.4.2. Criteria to determine the debtor's capacity to pay when choosing an alternative procedure

Many factors are taken into consideration by the trustees to determine the debtor’s capacity to pay and to better guide the debtor towards an alternative solution, namely: the amount and nature of the debts, the number of creditors, the income, the employment situation and its possible development, difficulties in making or managing a budget, assets, family circumstances.

In the case of debtors with low income and assets, the trustees would also examine the possibility of reaching an **agreement with their creditors**. Such agreement would reduce the amount of debt instead of considering a consumer proposal or bankruptcy (T2, T4, T5, T6, T7, T8, T9, T11, T12, T14, T15, T20). For certain debts such as electricity supply, the trustees would refer the debtor to ACEF advisors because of a possible agreement with Hydro-Québec (T2, T13). The trustee could also suggest that the debtor contact them to schedule a budget consultation (T1, T2, T3, T4, T5, T8, T13).

Some trustees have referred debtors to the services of a not-for-profit credit counselling agency. However, some trustees have expressed reluctance due to the lack of professional regulations for those advisors and the possible confusion among the public between the work of trustees and that of credit counselors.

“[...] what happens with credit counselling, since it’s ... some of those organizations, it’s a business, there’s really a lot of pressure on their people on the front line to sign people in debt management plans.” [translation] (T7)

Two factors favour **voluntary deposit** procedure: stability and amount of income. However, it has several drawbacks and is not particularly suitable for LILA and NINA debtors: the amount of gross income reported resulting in little income for the debtor to live on, the length of the procedure, the total amount of debt to be paid (no possible reduction), the administrative steps to be taken alone in court.

“[...] sometimes they don't work either. Sometimes they're on employment insurance or social assistance. Those people cannot put themselves on voluntary deposit. You have to work to be on the voluntary deposit. It's a garnishment of wages. [...] It's a recipe from the past, voluntary deposit. We talk about it, there are people who are referred to voluntary deposit. Often, they're people with low income, but a salary with low debt.” [translation] (T4).

Debt consolidation is also a possible path presented by trustees. However, debtors who consult them have already often used this option or are not eligible because their borrowing capacity is limited, especially debtors with low income and assets (T2, T4, T6, T11, T15). These LILA and NINA debtors are said to have various debts relating to: credit cards, bank loans, payday loans, fines, student loans or social assistance or employment insurance overpayment reimbursements.

The *status quo* appears to be an option often used by debtors with low income and assets as they have assets exempt from execution and are consequently “judgment proof” (T1, T2, T3, T4, T5, T6, T7, T8, T10, T11, T12, T13, T15, T16, T17, T20).

The aforementioned trustees explain to those debtors how to protect themselves against harassment from creditors by sending a letter to stop the telephone calls (based on the protective provisions of consumer law applicable in some provinces). The change of telephone number or bank account or even waiting for the statute of limitations of certain debts are also described as possible solutions.

« I do explain, especially to no-income debtors, the fact that they're judgement-proof [...] So if that individual is a pensioner or on disability that have no income whatsoever, I do explain the fact that if you can't make the payments to your creditors, there's really nothing much that the creditors can do to you, other than calling you and harassing you. They can take you to court and obtain a default judgement, but they can garnish the income that is not there. » (T20)

But, sometimes, for some of those debtors with low income and assets who are “weakened,” “undereducated,” with mental health problems, *status quo* would no longer be an option. They would experience this situation badly, which would motivate them to want to file for bankruptcy and sometimes to consult another trustee.

“So often, for the debtor, it's really ... this is what prompts them to file for bankruptcy. A case, let's say ... a NINA or LILA debtor, it's going to be the fact that they are harassed by collection agencies or by creditors. Not paying off the debt is not necessarily a factor. That's it. It's the discomfort that comes with.” [translation] (T3).

In any event, the trustees interviewed do not make a decision for the debtors as the final decision should rest with the debtors. It is up to them to ultimately choose between the options offered: alternative solutions or insolvency proceedings.

1.5.Criteria for suggesting a consumer proposal

The option of submitting a consumer proposal is motivated by many criteria taken into account by the trustee. Some are predominant:

- the financial capacity of the debtor and more specifically, the existence of a budget surplus (T3, T4, T5, T7, T12, T13, T18, T19, T20);
- the prospects for an increase in income or a development in the employment situation (T2, T3, T7, T8, T10, T14);
- possible help from relatives or close friends (T6, T7, T11, T12, T13, T16, T20);
- the realizable net assets, the dividend for creditors (T6, T10, T18, T19, T20);
- the nature and amount of debts, the number and classes of creditors (T6, T10, T18, T19, T20);
- and, the existence of previous bankruptcies (T2, T9, T11, T13, T15, T20).

Other factors are also taken into account by the trustee when assessing the feasibility of a consumer proposal such as the debtor's age and health condition (T3, T4, T11, T13, T18).

Cognitive, cultural and social factors (T1, T2, T3, T4, T5, T6, T7, T10, T11, T12, T14, T17, T18, T19) could also explain the filing of a consumer proposal instead of bankruptcy due to the stigma associated with bankruptcy and the perception of a greater negative impact on the rating credit.

"[...], but there are those for whom just the stigma of having filed for bankruptcy and having the word "bankruptcy," even if it probably doesn't change anything at the level of the credit rating, recognition, nothing, some prefer to make consumer proposals. It's just a matter of pride or stigma. Or sometimes it's cultural. [...] In Quebec, we see that there's a greater acceptance of bankruptcy. Looks like it's more understood. It's less frowned upon. But in terms of, in Ontario, it's really different. People are reluctant to, to the word bankruptcy." [translation] (T3)

According to the trustees, in some cases, these elements would lead some debtors to favour the consumer proposal even if their financial situation is not suitable for this option (T3, T4, T7, T10, T11, T18).

"The honour not to have gone bankrupt," the "pride" in honouring your commitments or the "willingness to pay your debts" are some of the expressions used (T1, T5, T6, T14, T17, T18, T19) by debtors with low income and assets, especially among insolvent seniors (T5, T2, T3, T6).

Incidentally, the consumer proposal for LILA and NINA debtors does not appear to be the most common solution, as their payment capacity is limited (T11, T16, T18, T20). However, finding a person who can help them to make the payments could make it possible to consider the filing of a consumer proposal in the case of people with low income and assets (T6, T11, T12, T13, T16, T20).

“So, someone with almost no income, ‘my boy is going to be able to help me’” [translation]
(T6)

Regarding the cost of the consumer proposal for a LILA and NINA debtor, a majority of trustees estimate an average amount between \$100 and \$150 per month, for 60 months.

1.6. Cost of bankruptcy and LILA and NINA debtors’ ability to pay

Payments made by debtors, including the proceeds of the assets, for a first summary bankruptcy without surplus income, lasting 9 months, would be between \$1,600 and \$2,025 (according to the trustees interviewed), i.e., an average cost estimated at **\$1,776** (calculated from 20 answers).

When the debtors find themselves in a very precarious situation, all the trustees interviewed said they were flexible in reducing the amount of the payments, including the proceeds of the assets. They are also willing to extend the payment period (to 12, 18 or 21 months). This reduction in the cost of a first bankruptcy for extremely precarious LILA and NINA debtors would range between \$600 and \$1,800 and could amount to an average amount of \$1,034 (calculated from 17 given answers).

A majority of trustees, in rare cases, said they did not claim any money in cases involving LILA and NINA debtors or only received a minimal amount to cover expenses and administration costs.

“[...] If somebody has no income. And you know, we all have these cases where somebody comes in, they’re terminally ill, they’ve got debt, no assets, very, very limited income—as an example, on assistance or whatever, receiving help from family, or whatever—you know, like any other profession, you make a decision on whether you look after that person and do it on—I guess they call it a pro-bono basis.” (T18)

“Our advisors and trustees are free to take a case, provided that the costs of the superintendent are covered. So you have the case registration fees. So we saw ... it doesn’t happen that often, but we saw cases being taken for \$50 a month for a period of 18 months. Or \$25 for a given period. Just to cover the costs.” [translation] (T3)

In an isolated and spontaneous manner, one trustee¹⁹ questioned the cost of bankruptcy and, more precisely, the payments made by the debtor in the context of a fee-based summary administration with dividends to be paid to creditors.

¹⁹ Reference intentionally omitted in order to avoid any possible identification and to preserve anonymity throughout the study.

His unique position is as follows: since the payments come from sums of money paid post-bankruptcy by the bankrupt debtor, and in the hypothesis that sums of money could be obtained during the realization of an asset, the amount of the payments should therefore be reimbursed to the debtor by the liquidator.

For all interviewed trustees, the **inability to pay the fees and expenses of the trustee does not appear to be a reason for refusing to take** on or to process a case concerning a LILA or NINA debtor.

“Then one thing I learned is that you never know who’s going to pay you and who’s not going to pay you. [...] I can tell you that I have never turned down a case where someone really wanted to proceed with an insolvency process.” [translation] (T3)

“[...] we’re very flexible. We try to figure out what deal works for the person according to their situation. We try to give them access to the system. The only time we’re unable to help people is where they strictly refuse to comply with their duties as a bankrupt, right from the get-go, say that they’re not going to disclose their income to us, right, or they’re not going to complete the forms.” (T12)

Benevolence, empathy (T1, T2, T3, T5, T6, T8, T9, T10, T12, T13, T16, T17, T18, T20), the desire to benefit from a good reputation or positive image with the public (T1, T10, T15, T16, T19) could also explain why trustees do not refuse to deal with the cases of LILA and NINA debtors.

“Like, number one is, it’s giving back to the community a little bit, right? But secondly, just from a pure marketing perspective, you help someone, a big part of our intake is from people telling their friends and family how we’ve treated them.” (T15)

“We’re legal officers of the court, we have to use our professional judgment a little, we have to use our experience and then we use all the tools we have at our disposal. [...] This is not a monetary issue; it’s a question of what is best for the debtor.” [translation] (T13)

All the trustees stated that LILA and NINA debtors generally make the agreed payments during the bankruptcy process.

“And if I am taking that file on, I understand that I’m taking the risk, I may not get paid, but I’ve decided, you need my help, you are the honest but unfortunate debtor, so if I don’t get paid, I don’t get paid. And if I’m doing 6,000 files a year and I don’t get paid in 200 of them, that’s just the cost of doing business. It’s just the way it is. Because there’ll be some other files that I ended up making more money on than I thought I was going to make, so it all works out.” (T10)

In the rare cases where debtors are unwilling or unable to make payments, the majority of trustees try reach an arrangement with the debtor, like reducing payments or opting for an alternative solution. Some trustees will redirect the debtor to the Bankruptcy Assistance Program However, this happens very rarely.

1.7. Payment arrangements by the debtor and opposition to discharge

Trustees usually ask debtors to sign a payment arrangement for all bankruptcy cases, including those without surplus income, with summary administration.

However, payment agreements under section 156.1 of the BIA are not systematic. Seven trustees said they do not use this type of agreement (**T1, T2, T8, T10, T11, T13, T14**) while seven other trustees use it, either frequently or when needed (**T6, T9, T12, T15, T16, T18, T20**). Six trustees said they infrequently, rarely, or even very rarely use it (**T3, T4, T5, T7, T17, T19**).

It is not a systematic practice to pay part of the fees with the GST credit in a summary bankruptcy case without surplus income. The majority of trustees interviewed do not take GST cheques from debtors due to the additional workload and associated administrative costs (**T1, T4, T7, T8, T9, T10, T11, T12, T14, T15, T17, T18, T20**). The \$1,800 limit also forces them to reimburse the debtor in case of overpayment, which may explain the lack of attractiveness of this practice.

Moreover, the vast majority of trustees do not systematically oppose the discharge of LILA and NINA debtors in the event of default by the debtors. They would assess their general behaviour before objecting, e.g., failure to report income and expenses or not attending both counselling sessions. The cost/benefit ratio could also dissuade them from opposing the discharge of LILA and NINA debtors.

1.8. Bankruptcy Assistance Program (BAP)

The majority of trustees do not take on cases from the Bankruptcy Assistance Program of the OSB (**T1, T3, T5, T6, T7, T8, T10, T11, T12, T13, T15**). Some trustees have done so in the context of their practice, but very rarely (**T4, T7, T9, T14, T16, T17, T20**). Such cases concern debtors with low income and assets.

The majority of trustees are not or no longer enrolled in the Bankruptcy Assistance Program (**T1, T3, T5, T6, T7, T8, T10, T11, T12, T13, T15, T20**). All operating rules of the BAP do not seem to be known precisely by a majority of trustees. Some trustees have not shown interest in the Bankruptcy Assistance Program (**T10, T15**) or believe it to be unnecessary, unknown (**T4, T6, T12, T17**), mysterious, or unsuitable for debtors with low income and assets (**S7, S11, S13, S14, S15**).

“I’m not a fan of that program because I think it’s not good for debtors. Because the way it’s presented is, well, if you can’t pay, we’ll find a trustee to help you. Okay, so what actually happens? I would be very interested to do a study of bankruptcy assistance programs or bankruptcy access program files. Because I suspect—I don’t know this—but I suspect there’s actually money in those files. There’s tax returns. There’s GST or HST refunds. You know, who knows what else. So it would not surprise me if there is a couple of thousand dollars in those files. So why did that person need to go through that program? If there was going to be a tax refund or GST or something, is it possible that a trustee says, okay, I won’t charge you anything, but I’m going to keep your file open longer. I’m going to collect GST and HST longer. [...] So the answer on the bankruptcy access program is,

yeah, I think in some cases, it's worse for the debtor than better. So we are not a participant. We will help you if you need help and we don't worry as much about the cost.” (T10)

“I think, with the debtor assistance program, within the community, is that if there's no cost associated with something, people don't see value in it. I realize that's an incredibly broad statement and subject to great debate. But when there's a cost associated, even if it's a small amount, someone recognizes that time as valuable.” (T19)

II- DATA PRESENTATION FROM INTERVIEWS WITH ACEF ADVISORS

2.1 Approaching ACEF advisors and trigger factors

Difficulties for a person to repay their debts, pressure exerted by their creditors, a change in their employment or family situation, a loan application (Desjardins Mutual Assistance Fund) are all factors that may trigger a consultation with the ACEFs.

Most of the time, advisors act in a context of emergency to help, intervene with and provide information to people with financial issues, often with low income as well. They offer services such as consultation and budget monitoring, intervention with creditors and workshops on various topics, e.g., credit or budgeting.

The financial issues of people using their services can be explained by several reasons, sometimes combined, such as: low income, poor financial management, overuse of credit, loss of employment, separation, divorce or illness.²⁰

Referrals come mostly from public organizations, e.g., CLSC or community groups, professionals from the medical, social or legal profession (doctor, lawyer, probation officer, judge and trustee) and friends or family of the debtor. Advisors sometimes refer people to the professional services of trustees. They provide a list with the names and contact details of trustees close to their residence (**ACEF 2, 3, 4, 5 et 6**). Some advisors know those trustees (**ACEF 2, 5, 6**). Consumers may also seek the services of advisors after having experienced one or two bankruptcies (**ACEF 3, 6**).

Regarding the provision of services, some advisors also mentioned the insufficient financial resources of the ACEFs and the lack of advisors as well as the annual increase in new cases (**ACEF 3, ACEF 4**):

“Even if tomorrow morning you were to give us \$3 million to advertise, the problem is, we don't have the manpower to meet the demand. So we're very limited” [translation] (ACEF 4)

²⁰ See Rapport d'activités 2019, ACEF 6.

2.2 Identification of people with low income and assets or no income and assets

Advisors do not seem to use established and specific criteria to define a person with low income and assets.

They gather an overall portrait of the person's financial situation using a socio-economic identification sheet (marital status, citizenship, education, number of people in the household and dependent children, occupation, employment status) as well as a budget grid which namely includes income, resources, debts (nature and amount), class of creditors, fixed and variable expenses, assets and type of housing. They establish an emergency or medium-term budget, depending on the reason for the consultation and the specific situation of each person.

Advisors do not refer to the surplus income calculation grid of the OSB²¹ and most of them do not know about the Bankruptcy Assistance Program for people who cannot afford the administration costs of bankruptcy

2.3 Presentation of legal and general information during consultations, follow-ups, interventions and workshops

Advisors carry out education work, in particular with LILA and NINA people, by providing oral legal information and other more general information mainly concerning debt, credit and consumer habits (ACEF 2, 3, 4):

“The only thing is that we have to do provide concrete scenarios with them so that they can understand how much it takes per month and then for how long so they can... because we want to help them evaluate: are they going to make it?” [translation] (ACEF 2)

People using free counselling services are often stressed, experience one or more problems which may be related to unpaid bills, pressure from creditors, a change impacting their budget such as separation or loss of employment.

Follow-ups with the ACEFs, representing a minority in comparison to the other proposed activities, initiate a medium-term forecasting process for budgetary control and useful financial education, especially for people with addiction, gambling or mental health issues.

Various **workshops** on topics such as budgeting, consumer habits, debt, housing and retirement are offered to a diverse clientele: young people, general public and seniors. Those workshops are also addressed to community organizations, high schools, CEGEPS and even businesses (ACEF 3, 5).

Advisors' interventions with creditors, such as the CRA, Revenu Québec, Hydro-Ottawa and Hydro-Québec (dedicated line²²), allow them to negotiate agreements to reduce and reschedule debts for low-income consumers (ACEF 3, 5, 6).

²¹ OSB, *Surplus Income*, *supra* note 18.

²² “Help center for low-income households” (March 22, 2021), online : *Hydro-Québec* <www.hydroquebec.com/residential/customer-space/payment/low-income-households.html>.

ACEF advisors are often social workers, benefiting from in-house training and development activities offered internally and by other organizations such as Prosper Canada or the Union des consommateurs. Presentations have also been reportedly made by professionals (ACEF 3, 5, 6).²³ ACEF advisors do not have a recognized and regulated professional designation.²⁴

The ACEFs promote a financial education program of the Fédération des Caisses Desjardins called “Personal Finance: I’m in Charge,” which comprises several modules such as budgeting, credit, responsible consumption, protection of the rights of consumers and tenants and labour market (ACEF 1, 3, 5, 6). The program targets young people aged 16 to 24, to community organizations, high schools and CEGEPS.²⁵

“This program is the chance to be able to work on this awareness. Because precisely on taking charge of financial autonomy for low-income people, well, it’s not just a question of knowledge and information, it’s a question of attitude and skills in relation to all that.” [translation] (ACEF 4)

2.4 Criteria and determining factors for the presentation of different legal solutions

Even though advisors claim that they have not established a debt level, as part of their practice, they refer to a minimum debt amount of \$5,000 when presenting the legal options regarding bankruptcy and consumer proposals (ACEF 1, 2, 3, 4, 5). The first solution generally offered to people consulting them is to get them to take an interest in their budget for the purpose of rearrangement; of “cutting” certain expenses in order to generate a surplus.

The most common debts of people consulting them are: use of credit cards, bank and personal loans, utility bills, rental debts and tax debts.

Advisors verify if the debts are dischargeable. Very often, they have non-dischargeable debts; e.g., reimbursement of social assistance or employment insurance overpayments resulting from false statements or fraudulent behaviour, fines, arrears on support payments or student loans (date of graduation under 7 years). The reimbursement of overpayments, often through withholdings, can have a significant financial impact on the budget of a person receiving social assistance or employment insurance:

“Unfortunately, there are some people who have to pay back, that have started working, they didn’t tell. [...] Reimbursement of employment insurance. They had overpayments that they were not entitled to. There are some who are going to have a lot of debt on social

²³ Rapport d’activités, ACEF 6.

²⁴ “Charte d’intervention en consultation budgétaire” (2006), online (pdf) : *Centre d’intervention budgétaire et sociale de la Mauricie* <cibes-mauricie.ca/wp-content/uploads/2017/06/charte-intervention.pdf> (some ACEFs have an intervention charter, call themselves consultants, do not give advice).

²⁵ See “Personal Finance, I’m in Charge” brochure, online (pdf) : <www.acefgp.ca/pdf/depliant%20mes%20finances%20mes%20choix.pdf>; See also “Personal Finance, I’m in Charge” An educational program, online : *Desjardins* <www.desjardins.com/ressources/pdf/f05-q30040-brochure-finances-choix.pdf>; “Personal Finance, I’m in Charge” brochure, online (pdf) : <www.acefrsq.com/int/PDF/1701960_depMFMC_influenceurs_FR_HR.pdf>.

assistance. So their cheque is already going to be cut because they're going to have debts that were not eligible. There have been frauds or things like that. [...] The cheque is reduced when it's already not very high. [...], But the biggest impact, I would tell you, is when people have to pay back social assistance. And if in addition the reimbursement is for a fraud, it can go up to \$224 per month that they have to reimburse on a cheque for 700, let's admit it, if they have no constraint, 700 something. There's not much left."
[translation] (ACEF 5)

The **voluntary deposit** procedure is suggested as a solution for repaying debts when the debtor demonstrates financial capacity over a long period, no significant variability in income and a low total amount of debts.

The **voluntary deposit** procedure is not the first solution proposed by ACEF advisors because it has several disadvantages. If the person has a high income, the voluntary deposit would be too expensive since the payments would be calculated as a percentage of their earnings (ACEF 1, 3, 5, 6). If the person receives social assistance, the voluntary deposit procedure would not be appropriate either because a seizable portion of income is needed to be able to claim it (ACEF 1, 6). The debtor is not assisted by a professional when dealing with the court:

"In fact, as a budget advisor, I want collaboration with the ministère de la Justice, the registries of the voluntary deposit at the courthouse, because very often, when we have a question, we call the general line, and people have information, but they don't do legal advice, so we talk about our clients' situation, but they're not able to guide us."
[translation] (ACEF 1)

In Ontario, the voluntary deposit procedure is not provided for in the legislation. Credit counselling agencies, operating in the form of NPOs, offer debt repayment plans to low-income debtors in exchange for compensation and/or fees, which are unregulated.

Many factors guide the advisors in their choice to suggest a **bankruptcy procedure** to the consumer: the inability of the debtors to repay all their debts, a sufficiently large number of debts, the absence of a budget surplus, the erasable nature of the debts, the absence of available assets, harassment from creditors, the cost of the proceedings and an already tarnished credit rating. The **consumer proposal** may be proposed because of the following: repayment capacity, the existence of assets to be protected, income stability, family support, the debtor's desire not to go bankrupt and to preserve access to credit.

The consequences of bankruptcy such as the negative impact on credit rating, difficulties in accessing traditional credit, housing and employment, as well as being able to take out insurance, could influence people, in particular those with low income and assets. Perceptions of the debtor such as the opinion of others, the fear that bankruptcy proceedings will become public knowledge, or the stigma associated with bankruptcy also have an impact on consumers' choice (ACEF 2, 4, 5):

"There are clients who don't want to go bankrupt because they're afraid of damaging their credit report. [...] Plus, all your debts are going to be rated R9, even the one you pay religiously, so sometimes bankruptcy makes you lose the chance to get credit. [...] And

here are the nuances between not going bankrupt and going bankrupt in your own case, given the type of debt you have, how it weighs on you too. Because there are some who go bankrupt just because they can't sleep anymore. There's the reverse: there are people for whom going bankrupt, it's taboo, you don't do that, it's not in their culture.” [translation] (ACEF 4)

“The impact on the credit report. The impact with respect to housing also. Then certain jobs. Because sometimes you don't know the jobs that people have. I tell them: ‘Look, if you go bankrupt, if you work in certain types of jobs like for example a bank, a caisse, it can be harmful. Your car insurance can cost you more.’ We explain that now, insurance companies will verify that. Because they're more at risk.” [translation] (ACEF 5)

Advisors take into consideration the cost of bankruptcy for debtors with low income and assets. The majority of advisors estimate it to be between \$1,350 and \$1,800, or even \$2,000, for 9 months (ACEF 1, 2, 3, 4, 5, 6).

Advisors often seem to suggest that people with low income and assets maintain the **status quo**: wait for the statute of limitations of their debts instead of paying for bankruptcy. The unseizable nature of their property would thus keep them safe from legal proceedings:

“For a low-income person, in 85 to 90% of cases it's the status quo that's advised [...] Yes, I always put it on the table because 90% of the time, it's worth it [...] for a low-income person. I tell them, ‘one option that you have by the way is to continue as you were, that's to say you do nothing. But here, let's talk about the impacts of doing nothing, the price to pay. It doesn't cost you anything financially, but let's see the price to pay. Well, I said, ‘first, do you have any liens? No, I don't, I just have debts’ or ‘my car is paid off, it's some old \$500 junk. Can they seize it? No, they don't have a lien on it. So, you have no seizable lien. So that's it. Now in terms of income, what's your source of income again? Social assistance.’ It's protected by law, like any old age pension, government pension, it's protected from your creditors. So why would you pay to go bankrupt and protect yourself from your creditors when, de facto, you already are under Canadian law. You pay for nothing as of now.” [translation] (ACEF 4)

Bankruptcy seems to be chosen in special cases when the person with low income and assets can no longer bear the financial burden of their debts, and because of the constant harassment from creditors. Bankruptcy is, however, viewed as a last resort by ACEF advisors (ACEF 1, 2, 3, 4, 5, 6):

“Often, what's bankruptcy and what's consumer proposal will not be clear straight away. I mean, we're going to try... I would tell you that 84% of our recommendations is budgetary readjustment. People have to, before even going into bankruptcy or a consumer proposal, people have to try to readjust their budget. Or: can we increase income? Can we cut spending? Are there things we can do? Because even if we put a solution like negotiation with creditors, debt consolidation, bankruptcy, if the person is not able to put it in their budget, it will not work. Proposed solution: bankruptcy and consumer proposal, the two together, it's 3%.” [translation] (ACEF 5)

III- ACCESS OF LILA AND NINA DEBTORS TO THE INSOLVENCY SYSTEM

3.1 Multiple identification criteria for LILA and NINA debtors

There is no specific definition for LILA and NINA debtors in the *Bankruptcy and Insolvency Act*, its General Rules or the OSB Directives.²⁶ This appears to a concept used by academics or by the associations of insolvency professionals.

There are many socio-economic factors involved in identifying the low income and assets or lack of assets of insolvent debtors, without, however, defining them as LILA or NINA debtors. These components help the trustees assess, in particular, the financial capacity of the debtor in order to present the different legal options. The trustees use another indicator of low income when calculating surplus income.

Indeed, **surplus income** is calculated using the OSB standards which use the low income cut-offs before tax for urban areas of 500,000 inhabitants and more, adjusted to the consumer price index²⁷.

Usually, LILA and NINA debtors fall into this category of debtors who do not have to pay surplus income to the estate of a summary administration bankruptcy.²⁸ In the absence of surplus income, the amount of voluntary payments made by a LILA or NINA debtor will be determined according to an estimate from the trustee which namely takes into account the financial capacity of the debtor and the proceeds of realizable assets not exempt from execution.²⁹ As for the fees and disbursements³⁰ of the trustee, they will be deducted from the voluntary payments made monthly by the debtors within the context of the summary bankruptcy procedure.

²⁶ Office of the Superintendent of Bankruptcy Canada, *Bankruptcy Assistance Program*, Directive No. 20, September 18, 2009, online : <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02138.html> (section 3 states: “The purpose of this Directive is to set out the framework of a program that will permit a debtor who has insufficient funds to cover the cost of an administration of a bankruptcy to have access to the bankruptcy system. This Directive sets out the procedure and criteria for eligibility.” At section 14, a person not required to make surplus income payments may be part of the BAP’s eligibility criteria, in accordance with Directive No. 11R2, *Surplus income*) [OSB, *Assistance Program*].

²⁷ OSB, *Surplus Income*, *supra* note 18, Appendix A.

²⁸ *Bankruptcy and Insolvency Law*, RCS (1985) c. B-3, s 49(6) (assets not exceeding \$15,000) [*BIA*]; *Bankruptcy and Insolvency General Rules*, CRC, c 368, s 130 [*General Rules*].

²⁹ Office of the Superintendent of Bankruptcy Canada, *Realization of Estate Assets*, Directive No. 25, August 14, 2009, online (pdf) : <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Directive-25-2015-12-02.pdf/\\$file/Directive-25-2015-12-02.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Directive-25-2015-12-02.pdf/$file/Directive-25-2015-12-02.pdf)>.

³⁰ *General Rules*, *supra* note 28, ss 123(3), 128(1)–(2), 131 (1)–(2) (the trustee is entitled to 100% of the first \$975 of receipts. He then collects 35% of the receipts between \$975 and \$2,000, or 35% of \$1,025, then 50% for the portion of receipts above \$2,000. For the amount of disbursements : \$170 (two individual counselling sessions at \$85) \$75 (registration fees for the official receiver), \$75 (costs in court in case of opposition), \$100 (administrative disbursements); *BIA*, *supra* note 28, s 156; *General Rules*, *supra* note 28, s 147(1) (Superintendent’s levy : up to \$200).

The **low income cut-offs**,³¹ used by the OSB Directive on the calculation of surplus income, has many limitations. First, the calculation of surplus income is carried out in a standardized manner across Canada, without distinction between provinces or cities.³² It does not take into account the basic necessities of the consumer as does the Market Basket Measure (MBM),³³ the official poverty line in Canada since 2019. Second, the LICOs are a “static” measure.³⁴ It only measures one aspect of the poverty phenomenon.³⁵ It does not pinpoint the beginning and the end of an episode of low income for an individual, i.e., the transitory or persistent poverty forms, different from one province to another,³⁶ which seems essential to understand the meaning of LILA and NINA.

Persistent low-income situations mainly concern single mothers, the elderly, new entrants and those with less education as well as those with disabilities.³⁷

According to the literature, persistent poverty is explained by two main reasons. Studies show that family stability, work and the education level of the primary income earner are decisive factors contributing to persistent poverty.³⁸

³¹ Statistics Canada, *Low income cut-offs*, last modified November 27, 2015, online : <www150.statcan.gc.ca/n1/pub/75f0002m/2012002/lico-sfr-eng.htm>.

³² Guy Fréchet, Aline Lechaume & Frédéric Savard, “La pauvreté, les inégalités et l’exclusion sociale : état de situation 2018” (2018) Centre d’étude sur la pauvreté et l’exclusion, Québec at 8; Ruth Rose, “Mesures de la pauvreté” (2005) Département des sciences économiques, UQAM at 2; Paul Makkdissi & Yves Groleau, “Que pouvons-nous apprendre des profils de pauvreté canadiens ?” (2002) 78:2 *L’actualité économique* 257 at para 17.

³³ *Budget Implementation Act, 2019, No. 1*, SC 2019, c.29, s. 315; Statistics Canada, *Table 11-10-0066-01 Market Basket Measure (MBM) thresholds for the reference family by Market Basket Measure region, component and base year*, online : <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110006601&request_locale=en>; Statistics Canada, *Low Income Lines: What they are and how they are created*, Catalogue no. 75F0002M, Ottawa, Industry Canada, July 8, 2016, at 5, online (pdf) : <www150.statcan.gc.ca/n1/en/pub/75f0002m/75f0002m2016002-eng.pdf?st=CXC5qtn5>.

³⁴ Frédéric Savard, “La persistance du faible revenu au Québec” (2015) Centre d’étude sur la pauvreté et l’exclusion (CEPE) Québec, at 2, online (pdf) : <www.mtess.gouv.qc.ca/publications/pdf/CEPE_Persistance_faible_revenu.pdf>.

³⁵ Statistics Canada, *Low Income in Canada: a Multi-line and Multi-index Perspective*, by Brian Murphy, Claude Dionne & Xuelin Zhang, Catalogue no. 75F0002M, Ottawa, March 2012, online : <www150.statcan.gc.ca/n1/en/pub/75f0002m/75f0002m2012001-eng.pdf?st=E5eISOD_> [Statistics Canada, *Low Income*].

³⁶ Savard, *supra* note 34 at 9, 11.

³⁷ Statistics Canada, *Table 11-10-0025-01 Low income persistence of tax filers in Canada*, online : <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110002501&request_locale=en>; Statistics Canada, *Low-Income Dynamics and Determinants under Different Thresholds: New Findings for Canada in 2000 and Beyond*, by Zhe (Jerry) Ren & Kuan Xu, Catalogue no. 75F0002M, Ottawa, February 2011 [Statistics Canada, *Dynamics and Determinants*].

³⁸ Statistics Canada, *The Ins and Outs of Poverty in Advanced Economies: Poverty Dynamics in Canada, Germany, Great Britain, and the United States*, by Rob Valetta, Catalogue no. 75F0002MIF, Ottawa, January 2005 [Statistics Canada, *The Ins and Outs of Poverty*] (this author uses the disposable household income [income after tax and transfers] equivalent to 50% of the median value for each year in each of the four countries studied as a measure. The concept of “poverty that relies on permanent income” is calculated on a 6-year basis: it is referred to as chronic poverty. This analysis covers six years during the 1990s); Ross Finnie & Arthur Sweetman, “Poverty dynamics: empirical evidence for Canada” (2003) 36:2 *Canadian Journal of Economics* 291; Statistics Canada, *Dynamics and Determinants*, *supra* note 37; Institut de la statistique du

Single-parent families and single people are thus more at risk of experiencing a situation of persistent poverty.³⁹ Cognitive indicators such as feelings of deprivation can also add to the complex phenomenon of poverty.⁴⁰

The results of the interviews with trustees and ACEFs correspond to the profiles identified by the Institut de la Statistique du Québec. Indeed, LILA and NINA debtors, the most vulnerable, have different profiles: self-employed and seasonal workers, social assistance or employment insurance recipients, retirees and pensioners, students and people without income.⁴¹

- **Remarks:** Should those people included in this sub-category of LILA and NINA experiencing so-called persistent poverty benefit from a special bankruptcy regime and to what extent will it guarantee them better rehabilitation? The legal answer does not necessarily lie in a change of the insolvency proceedings. Rather, it stems from a political will to adopt social measures to better support those groups at risk.

3.2 Structural and behavioural causes of insolvency for LILA and NINA debtors

3.2.1 Excessive debt: situational overview, definition and possible legal framework measures

Over the past decade, all Canadian households have accumulated significant debt in relation to their income.⁴² The problem of personal debt, measured by the average household debt, conceals wide disparities among the Canadian population.⁴³ The use of credit is greatly facilitated by financial institutions; Canadian credit card volume in circulation stood at \$ 76.2 million in January 2021⁴⁴.

Québec, *Entrer et sortir d'un épisode de faible revenu*, by Stéphane Crespo, Portrait social du Québec, 2010 [Institut de la statistique du Québec, *Entrer et sortir*]; (specifically Tableau 8.8 Résumé des études concernant l'influence de certaines variables sur la dynamique du faible revenu at 202–203).

³⁹ Finnie & Sweetman, *supra* note 38 (using longitudinal data as income threshold: 50% of median after-tax income adjusted to the family size).

⁴⁰ Bernard Rainville, “Le surendettement, fracture individuelle et sociale” (2006) at 19–21, online (pdf) : *Centre d'intervention budgétaire et sociale de la Mauricie* <cibes-mauricie.ca/outils-et-publications/recherches/fracture-individuelle/>.

⁴¹ Institut de la statistique du Québec, *Les profils de revenu des personnes à faible revenu*, by Stéphane Crespo, December 2013, at 7, online (pdf) : <bdso.gouv.qc.ca/docs-ken/multimedia/PB01614FR_ProfilRevenuPersonne2013H000F00.pdf>.

⁴² Financial Consumer Agency of Canada, *Canadian and their Money: Key Findings from the 2019 Canadian Financial Capability Survey*, Ottawa, 2019, online (pdf) : <www.canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/canadian-financial-capability-survey-2019.pdf>; Gino Cateau, Tom Roberts & Jie Zhou, “Indebted Households and Potential Vulnerabilities for the Canadian Financial System: a microdata analysis” (2015) *Financial System Review* 55, online (pdf) : *Bank of Canada* <www.bankofcanada.ca/wp-content/uploads/2015/12/fsr-december2015-cateau.pdf>.

⁴³ Julia Posca & Simon Tremblay-Pepin, “À qui profite l'endettement des ménages” (2011), online (pdf) : *Institut de recherche et d'information socio-économique* <cdn.iris-recherche.qc.ca/uploads/publication/file/Dette-web1.pdf>.

⁴⁴ “Fast facts – Credit Cards: Statistics and Facts” (March 4, 2021), online : *Canadian Bankers Association* <cba.ca/credit-cards?l=en-us>.

Debt, insufficient income and lack of savings describe the reality of vulnerable Canadian households, especially in the case of an unforeseen event such as divorce, loss of employment or illness.

Diversified credit with high interest rates (cards and lines of credit) contribute to the indebtedness of Canadians.⁴⁵ The 2019 Canadian Financial Capability Survey⁴⁶ shows that nearly three quarters of Canadians (73.2%) have had an unpaid debt or taken out a payday loan in the past 12 months. The use of payday loans, with very high rates, by non-property owners, single-parent families, those without a high school diploma, to cover daily expenses are signs of financial distress and persistent poverty.⁴⁷

The near disappearance of domestic savings,⁴⁸ easy and diversified credit have allowed a new way of life for individuals based on the frequent purchase of consumer goods.

Excessive debt is a progressive indebtedness process experienced by an individual and characterized by an inappropriate and costly use of credit available as a substitute for resources and income to meet basic and leisure needs.

Before granting a loan of any kind, the lender should be bound by a positive obligation to conduct a credit check, on pain of automatic forfeiture of interest, costs and penalties, which would not require prior legal action or insolvency proceedings.⁴⁹ A Canadian national credit register of credits, limiting their number and prescribing a credit limit per household, would encourage the prevention and control of personal debt and credit checks of consumers by the lender.⁵⁰

The Financial Consumer Agency of Canada could monitor closely the data held by Equifax or TransUnion, thus protecting consumers against the risk of insolvency as well as theft, loss, disclosure and misleading content of personal information of individuals relating to credit.

⁴⁵ Posca & Tremblay-Pepin, *supra* note 43 at 4.

⁴⁶ Financial Consumer Agency of Canada, *supra* note 42.

⁴⁷ Statistics Canada, *Debt and financial distress among Canadian families*, by Georges Marshall, Catalogue no. 75006X, Ottawa, June 2019, at 7-8, online (pdf): <www150.statcan.gc.ca/n1/en/pub/75-006-x/2019001/article/00010-eng.pdf?st=yorXk2ma>.

⁴⁸ *Ibid* (even if the COVID-19 pandemic has demonstrated the opposite, i.e., an increase in the net household savings rate, excess savings would result from government transfers that effectively supported the loss of income and the decrease in spending by Canadian households during the COVID-19 crisis).

⁴⁹ See Nicolas Éréséo & Jérôme Lasserre Capdeville, “Chronique de droit du crédit aux consommateurs (Juillet 2018 - Juillet 2019)” (2020), online: *Actu-juridique* <www.actu-juridique.fr/affaires/bancaire-credit/chronique-de-droit-du-credit-aux-consommateursjuillet-2018-juillet-2019/>; See also Thibault de Ravel d’Esclapon, “L’obligation de renseignement du prêteur” (2017), online: *Actu-juridique* <www.actu-juridique.fr/affaires/bancaire-credit/lobligation-de-renseignement-du-preteur/> (articles L312-4, L312-6 and L341-1 of the Code de consommation have the advantage of requiring the lender to verify the creditworthiness of any borrower before granting a mortgage or any other type of credit, and also to verify the current loans under penalty of partial or total forfeiture of interest).

⁵⁰ Frédérique Julienne, & Delphine Lahet, “La directive européenne sur les contrats de crédit aux consommateurs : quelles opportunités pour les consommateurs européens et les opérations transfrontières ?” (2010) 24:2 RIDE 185, online : <www.cairn.info/revue-internationale-de-droit-economique-2010-2-page-185.htm#no87>.

The interviews conducted with the trustees and in particular with the ACEF advisors demonstrated the perceived negative impact of bankruptcy proceedings on access to credit, housing, employment or insurance for LILA and NINA debtors. It is often these factors that prompt them to choose an insolvency procedure (**T1, T2, T4, T6, T7, T8, T10, T13, T16, T14 and ACEF 1, ACEF 2, ACEF 3, ACEF 5**).

3.2.2 Insolvent consumer profiles, causes of consumer insolvency, types of debts and reported income

In Canada, in 2019, the number of consumer proposals rose to 82,769 cases. As for personal bankruptcy cases, the number was 54,409, for a total number of 137,178 insolvency cases filed by Canadian consumers,⁵¹ representing 60% of proposals and 40% of bankruptcies. In 2019, the insolvency rate was the highest since 2011; 4.6 in 1,000 Canadian adults started insolvency proceedings.⁵² Among the cases processed in 2019, 44,852 cases were filed in Ontario (14,577 bankruptcies and 30,275 proposals), 42,865 in Quebec (20,038 bankruptcies and 22,827 proposals), 16,675 in Alberta (5,589 bankruptcies and 7,087 proposals) and 11,221 in British Columbia (4,134 bankruptcies and 7,087 proposals).⁵³ In addition, other data from the OSB⁵⁴ allows us to specify the number of LILA and NINA cases. In fact, 20,001 bankruptcy cases (summary and ordinary) filed in 2019 concern LILA debtors and 360 concern NINA cases.

Other statistics give us indications on the profile of the insolvent consumer. In 2019, the average debtor was 47 years old at the time of filing an insolvency case, married or in a common-law relationship (38%) or single (37%), predominantly male, although female in some provinces such as the Northwest Territories, Prince Edward Island, Nova Scotia, Newfoundland and Labrador.⁵⁵ Single people were more likely to file an insolvency case in Quebec (44.41%) and Ontario (36.83%).⁵⁶

⁵¹ Office of the Superintendent of Bankruptcy Canada, *Insolvency Statistics in Canada — 2019*, online (pdf) : <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Annual-insolvency-statistics-2019-EN.pdf/\\$file/Annual-insolvency-statistics-2019-EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Annual-insolvency-statistics-2019-EN.pdf/$file/Annual-insolvency-statistics-2019-EN.pdf)> [OSB, *2019 Statistics*].

⁵² Office of the Superintendent of Bankruptcy Canada, *Canadian Consumer Debtor Profile – 2019*, last modified September 8, 2020, online : <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04358.html> [OSB, *Profile*]; Office of the Superintendent of Bankruptcy Canada, *Insolvency Statistics in Canada — October 2020*, last modified November 26, 2020, online : <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Insolvency-Statistics-Oct-2020-EN.pdf/\\$FILE/Insolvency-Statistics-Oct-2020-EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Insolvency-Statistics-Oct-2020-EN.pdf/$FILE/Insolvency-Statistics-Oct-2020-EN.pdf)> Office of the Superintendent of Bankruptcy Canada, *Ten-Year Insolvency Trends in Canada 2007-2016*, online (pdf) : <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/10year-Insolvency-Trends-Report-EN.pdf/\\$file/10year-Insolvency-Trends-Report-EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/10year-Insolvency-Trends-Report-EN.pdf/$file/10year-Insolvency-Trends-Report-EN.pdf)>; Statistics Canada, *Annual Consumer Insolvency Rates by Province and Economic Region*, last modified May 24, 2019, online : <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>.

⁵³ OSB, *2019 Statistics*, *supra* note 52.

⁵⁴ Tables RAF and RAN 2019 of the file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

⁵⁵ OSB, *Profile*, *supra* note 52.

⁵⁶ *Ibid.*

Still according to OSB data, in 2019,⁵⁷ 22% of debtors had previously filed for bankruptcy. Of these repeat debtors, 87% had filed only one bankruptcy. Among the highest recidivism rates in 2019, the province of Quebec had 25.81%, Newfoundland and Labrador 22.92%, Nova Scotia 23.48% and Ontario 21.44%; in contrast, the Northwest Territories reported the lowest recidivism rate: 5.56%.

In 2019, the median monthly household income of debtors was \$2,717, while the median monthly expenses were \$2,780, for a net monthly deficit of \$63.⁵⁸ Debtors under 35 were the ones with the least debt, but with the highest incidence of student loans. In addition, 60% of those debtors were single and only 12% owned a house.⁵⁹

Debtors in the 35 to 50 age group had accumulated the most debt, with a median value of \$61,549. Debtors aged 50-65 most often: incurred tax debts, cited medical reasons for their financial difficulties, and had the highest rate of divorce or separation.⁶⁰ Debtors in this age group had the highest median credit card debt at \$18,700. This group had the lowest median income and the lowest median expenses.⁶¹

According to our empirical analysis, which is corroborated by the existing literature,⁶² the filing of an insolvency case involves the conjunction of several economic factors, four of which would be identifiable:

- 1- High debt compared to net income;
- 2- A lack of savings or available reserve;
- 3- A trigger (e.g., loss of employment, disease, divorce, financial crisis);
- 4- The absence or insufficiency of a social safety net (employment insurance or social or medical assistance programs).

According to very recent data from the OSB,⁶³ among the number of Canadian summary bankruptcy cases without surplus income, 12 possible causes⁶⁴ can be identified, in the following order:

- 1- Poor financial management;
- 2- Loss of income;
- 3- Medical reasons;

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See especially the main studies of Jean Braucher, “Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?” (2004) 44 Santa Clara L Rev 1065; Janis Sarra, “At What Cost? Access to Consumer Credit in a Post-Financial Crisis Canada” (2011) Ann Rev Insolv L 409 [Sarra, “At What Cost?”]; Janis Sarra, “Economic rehabilitation: Understanding the growth in consumer proposals under Canadian insolvency legislation” (2009) Banking Fin L Rev 24 at 383–452 [Sarra, “Economic rehabilitation”].

⁶³ The cause is the one mentioned in question 14 of the Form 79 completed and signed by the trustee and the debtor, sent by the trustee electronically to the official receiver.

⁶⁴ Table RDDF 2019 of the file sent by email on September 28, 2020, by the OSB, entitled : BKHQRA 3748 Parti 2 18sep2020.

- 4- Termination of relationship;
- 5- Entrepreneurial failure;
- 6- Tax debts;
- 7- External financial support;
- 8- Legal issues;
- 9- Student debts;
- 10- Moving/relocation costs;
- 11- Gambling addiction;
- 12- Other addictions.

A study conducted by Professor Janis Sarra⁶⁵ listed the causes⁶⁶ of bankruptcy as follows: insufficient income (30.5%), unemployment (18.8%) and excessive debt (12.4%). For consumer proposals, insufficient income accounted for 40.7% of insolvency cases, unemployment 15.8% and excessive debt 13.8%.

According to other studies, online approval makes it easier to obtain credit applications, and the automation and streamlining of consumer credit approval processes, through the creation of credit reporting agencies, seem to promote excessive debts for individuals.⁶⁷ The rise in consumer debt in Canada is believed to be partly caused by the growth of alternative markets for financial services, namely payday loans.⁶⁸

Consequently, bankruptcy proceedings reveal behavioural problems with respect to the use of credit, as well as structural difficulties such as insufficient income which may or may not be linked to loss of employment and exogenous causes, such as illness, grief or divorce. In the context of repeated bankruptcies, the same reasons were mentioned by the bankrupts with one difference; health problems were more predominant than employment problems.⁶⁹

⁶⁵ Sarra, “At What Cost?” *supra* note 62 at 2; For older studies see especially Saul Schwartz, “The Empirical Dimensions of Consumer Bankruptcy: Results From a Survey of Canadian Bankrupts” (1999) 37 Osgoode Hall LJ 83; Iain Ramsay, “Individual Bankruptcy: Preliminary Findings of Socio-Legal Analysis” (1999) 37 Osgoode Hall LJ 15

⁶⁶ Other studies on the subject : Sarra, “Economic rehabilitation”, *supra* note 62; See also Thomas GW Telfer, “Repeat Bankruptcies and the Integrity of the Canadian Bankruptcy Process” (2014) 55 Can Community LJ 231 [Telfer, “Repeat Bankruptcies”].

⁶⁷ Micheline Gleixner & Michael J Bray, “La gestion des risques des créanciers et la réhabilitation des débiteurs surendettés : objectifs contradictoires ou complémentaires ?” (2013) Office of the Superintendent of Bankruptcy Canada, at 101, 5–6, 43, online (pdf) : <[www.umoncton.ca/sites/prof.prod.umoncton.ca/files/users/user166/Rapport%20Gleixner-Bray%20\(mars%202013\).pdf](http://www.umoncton.ca/sites/prof.prod.umoncton.ca/files/users/user166/Rapport%20Gleixner-Bray%20(mars%202013).pdf)>.

⁶⁸ Karen A Duncan & Ruth E Berry, “The Importance of Payday Loans in Canadian Consumer Insolvency” (2007) presented to the Office of the Superintendent of Bankruptcy Canada, at 7, 17–1, online: <strategis.ic.gc.ca/eic/site/bsfosb.nsf/fra/demande.html?Open&id=632E1CB48620BAA28525750F007FF460&p=1>.

⁶⁹ Telfer, “Repeat Bankruptcies”, *supra* note 66 at 17, table 15.

3.3. Access to insolvency proceedings for LILA and NINA debtors: a flexible framework with various options

It would be useful to conduct an empirical study based on the experience of LILA and NINA debtors before considering any reform, even limited, of the Canadian summary bankruptcy system. However, the interviews carried out, corroborated by data from the OSB, provide us with precise answers on the access of LILA and NINA debtors to the legal insolvency system, both regarding the treatment of their case by the trustees as well as their discharge.

3.3.1 Access to legal information, professional advice services and proceedings

The results of the interviews on the broad theme of access show that current resources are made available to LILA and NINA debtors by the trustees and ACEF advisors. Information concerning insolvency and alternative proceedings is presented, without restriction, to LILA or NINA debtors seeking the professional services of trustees.

a) Diversity of options, treatment and the debtor's freedom of choice

The trustees, as well as the ACEF advisors,⁷⁰ present numerous options among the alternatives and the existing insolvency proceedings to the debtors according to the many criteria and factors listed during the interviews.

The assessment standard⁷¹ imposes specific obligations on the trustee, regardless of who is the debtor using the services.⁷² The various trustees' offices interviewed (small, medium and large) seem, in fact, to accept all cases, without difference in treatment.

The trustees would present the advantages and disadvantages of each insolvency procedure to LILA and NINA debtors. These categories of individuals thus have the same information as other insolvent debtors.

Indeed, in the case of a small debt, they would rather nudge the debtors towards alternative solutions such as an arrangement with the creditors, a consolidation of debts, a voluntary deposit or *status quo* (see analysis below). Thus, according to the interviews, the level of debt does not seem to be the decisive criterion. However, trustees take into consideration a certain amount of dischargeable debt when recommending filing for insolvency proceedings.

⁷⁰ See the section on the presentation of data concerning the ACEFs, in particular 2.3. and 2.4.

⁷¹ Office of the Superintendent of Bankruptcy Canada, *Assessment of an Individual Debtor*, Directive No. 6R3, April 30, 2010, online : <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02402.html> [OSB, *Assessment of an Individual Debtor*].

⁷² See especially in the context of bankruptcy with summary administration : *BIA*, *supra* note 28, s 156; *General Rules*, *supra* note 28, ss 123(3), 128(1)–(2) et 131 (1)–(2).

That being said, the rare grounds for refusing to assess and take upon a case would be justified by the disrespectful, rude, aggressive, dangerous, dishonest or fraudulent behaviour of the debtor.

The ACEF advisors are equally dedicated to assisting indebted people and disseminating specific legal information, namely, to help them regain control of a faltering budget, regardless of their income or debt.

The interviews also revealed that LILA and NINA debtors are free to consult the professional of their choice, under the same conditions as those offered for other insolvent debtors. Moreover, once the assessment has been carried out, the trustees repeatedly asserted that the final decision rests with the debtor as to the choice of the procedure (in particular **(T11, T12, T16, T18, T19)**).

b) The roles of the trustee

Trustees take on several roles⁷³ in the context of the various missions carried out in connection with insolvency proceedings. They may be the representative of the debtor as assignee, administrator of the property of others, representative of the body of creditors or of specific creditors (receiver) and legal officer,⁷⁴ as trustees reminded us during the interviews (**T13, T20**). They also perform the duties of administrator of the property of others in accordance with the legal and regulatory framework of the *Bankruptcy and Insolvency Act*. They are also subject to rules of professional ethics and conduct which purpose is to ensure their integrity and impartiality.⁷⁵

Starting from the debtor's assessment phase, trustees have duties and responsibilities.⁷⁶ For example, the trustee is required to disseminate a series of steps to accomplish as well as advice with regard to budgetary and financial matters while redirecting the debtor, as needed, to other non-budgetary counselling services.⁷⁷

Trustees play an essential role in the summary administration of bankruptcies and have been able to develop budgetary and financial skills with vulnerable people over the years. Some trustees work on a daily basis with people with low income and assets (namely **T3, T5, T8, T9, T10, T11, T13, T17**). The various structures of trustees' offices have also developed know-how to assist people with low income (namely **T1, T4, T5, T7, T8, T10, T11, T13, T14, T17**).

⁷³ J Auger & A Bohémier, "Le statut du syndic" (2003) 37 RJT 59; *Mercure v A. Marquette & Fils Inc.*, 1975 CanLII 195 (SCC), [1977] 1 SCR 547; *Lefebvre (Syndic de)*; *Tremblay (Syndic de)*, 2004 SCC 63, [2004] 3 SCR 326 at para 34–40.

⁷⁴ *In re Eagle River International Ltd.*, AZ-50069772, [2000] R.J.Q. 392 (C.A.); *L'Heureux (Syndic de)*, 1999 CanLII 13791 (QC CA); Auger & Bohémier, *supra* note 73 at 98–101.

⁷⁵ *BIA*, *supra* note 28, ss 13,5, 15,1, 16(4); Office of the Superintendent of Bankruptcy Canada, *Code of ethics for trustees*, s 36, 39, online (pdf) : <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/code_f.pdf/\\$file/code_f.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/code_f.pdf/$file/code_f.pdf)>; See also *Ionian Financial Group Inc. v Richter & Associés inc.*, 2005 CanLII 3175 (QC CS) at para 5–8.

⁷⁶ OSB, *Assessment of an Individual Debtor*, *supra* note 71.

⁷⁷ *Ibid* at points 6 and ss.

c) *Status quo* and another alternative

In the case of LILA and NINA debtors, *status quo* is frequently favoured. Some provincial provisions restricting incessant calls and telephone or bank account changes may halt the zeal of creditors for at time (**ACEF 4, 5 and T1, T2, T3, T4, T5, T6, T7, T8, T10, T11, T12, T13, T15, T16, T17, T20**). Thus, debtors with low income and assets sometimes choose to file for bankruptcy to escape the never-ending collection requests.

In such case, a new alternative procedure—unlike a new simplified debt relief regime—could be considered, as was advocated by the Personal Insolvency Task Force in 2002.⁷⁸ The members of this group recommended putting an end to the pressure from the debtor’s creditors by providing for a simple stay of proceedings, without providing for the discharge of debts. This stay of proceedings could remain in effect until the debts are written off by the statute of limitations or until the debtor acquires property or surplus income.

3.3.2 Affordable cost within a flexible framework

The cost of bankruptcy seems to be one of the parameters taken into consideration in the decision-making process of the debtor (**ACEF 1, 3, 4, 5**). However, during interviews with the ACEFs, cost did not appear to be a major obstacle when presenting options or when the debtors had to choose one of these options.

According to the advisors, it is rather the consequences of bankruptcy such as the perceived negative impact on the credit rating (**all ACEFs**), social stigma (**ACEF 2, 4, 5**) and possible restrictions with regard to housing, employment or when taking out an insurance policy (**all ACEFs**) which influence low-income people not to consider filing for bankruptcy. Interviews with trustees also revealed criteria of a cognitive, cultural or social nature for those debtors (**T1, T2, T3, T4, T5, T6, T7, T10, T11, T12, T14, T17, T18 , T19**).

All the interviews showed great flexibility on the part of the trustees in handling and processing LILA and NINA debtors’ files, something that had also been underlined in the aforementioned studies.⁷⁹ All trustees tend to reduce monthly payments when debtors are in dire financial circumstances. Some trustees also allow an extension of the payment period. Nonetheless, it is clear from the interviews that the presupposed inability to pay the fees and disbursements of the trustee is not a reason for refusing to take on a case concerning a LILA or NINA debtor.

⁷⁸ Office of the Superintendent of Bankruptcy Canada, Personal Insolvency Task Force, *Final Report*, Ottawa, August 2002 at 120 [*Task Force*].

⁷⁹ Schwartz & Ben-Ishai, “Debt Relief Procedure”, *supra* note 3 at para 26, 28; Ben-Ishai & Schwartz, “Bankruptcy”, *supra* note 3 at para 4, 10–11; Saul Schwartz & Stephanie Ben-Ishai, “New evidence for establishing a debt relief program for low-income Canadians” [unpublished] at para 7–8.

From the reduced amounts communicated by 17 trustees, it can be argued that the average amount of voluntary payments, including the proceeds of the assets, for a bankruptcy concerning LILA and NINA debtors who find themselves in great precariousness, would correspond to a sum of **\$1,034**.

3.3.3 Payment agreements under section 156.1 BIA

It appears from the interviews that the use of section 156.1 BIA by trustees is not systematic for summary bankruptcy cases without surplus income.

Such statements are consistent with the data provided by the OSB⁸⁰ indicating that in 2019, in Quebec, 233 agreements were concluded for 2,858 9-month summary bankruptcy files, concerning LILA debtors.⁸¹ Here are the figures, reproduced from the OSB file, for all the other provinces:

Provinces	LILA agreements under section 156.1 BIA for 2019	Number of summary bankruptcies - LILA- 9 months
Quebec	233	2,858
Ontario	815	6,954
British Columbia	215	1,528
Atlantic Provinces	514	2,401
Saskatchewan	49	316
Manitoba	65	521
Alberta	78	1,610
Canada	1,969	16,188

In total, in 2019, **1,969** agreements were concluded in Canada for **16,188** 9-month summary bankruptcy files involving LILA debtors, or about 12%.

As for NINA debtors,⁸² in 2019, 10 agreements were concluded in Quebec for 215 summary bankruptcy files. This province has the largest number of NINA cases. Here are the figures for the other provinces:

Provinces	NINA agreements under section 156.1 BIA for 2019	Number of summary bankruptcies- NINA- 9 months
Quebec	10	215
Ontario	1	31

⁸⁰ Data from Table RAF 2019, file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

⁸¹ Defined by the OSB as debtors with less than \$ 100 in surplus income and no assets exempt from execution according to Forms 65 and 79.

⁸² Defined by the OSB as debtors with no income and no assets according to Forms 65 and 79; Data from Table RAN 2019, file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

Atlantic Provinces	2	17
Alberta	0	4
British Columbia	0	1
Saskatchewan	0	0
Manitoba	0	13
Canada	13	281

In total, in 2019, 13 agreements were concluded in Canada for 281 9-month summary bankruptcy files concerning NINA debtors, or about 5%.

Such figures could show that the summary bankruptcy proceedings of 9 months for LILA and NINA debtors do not result in significant payment difficulties requiring an additional agreement to be signed during the 8th month. Payments, tax or GST refunds or receipt amounts would apparently be high enough to meet the amount initially agreed.

3.3.4 Payment of fees and discharge of LILA and NINA debtors

All trustees interviewed indicated that they did not refuse debtors' cases on the basis of their projected financial capacity to pay fees or to make monthly payments. The trustees, in very large majority, declared that they would adapt to the financial capacity of the debtors (T1, T2, T3, T4, T6, T8, T9, T10, T11, T12, T13, T14, T15, T16, T17, T18, T20). **The 20 trustees interviewed also mentioned that they are generally paid by LILA and NINA debtors.**

Trustees do not automatically oppose discharge from the first defaults of debtors. They verify, before anything else, if other failures on the part of the debtor could be identified such as failures to file income and expenditure reports as well as the non-fulfillment of other obligations to which the bankrupt debtor is bound, such as his attendance at both counselling sessions.

OSB data reveals discharge rates for trustees and LILA debtors in 2019 between **93.53%** and **83.28%**, depending on the province, for consumer bankruptcy cases filed.⁸³ When it comes to NINA consumer bankruptcy files,⁸⁴ the figures are less reliable due to their low number of NINA files by province. However, it could be noted that in the provinces with the highest number of cases, such as Quebec (283), Ontario (38) and the Atlantic Provinces (17), the discharge rates for trustees and NINA debtors correspond, in the respective order of the aforementioned provinces, to the following figures: **76.33%**, **81.58%** and **100%**.

⁸³ Table RAF 2019 of the file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

⁸⁴ Table RAN 2019 of the file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

3.3.5 Limited use of the OSB Bankruptcy Assistance Program

According to information provided by the OSB,⁸⁵ the Bankruptcy Assistance Program was created in 1993 and there are currently 113 registered trustees. Trustees participate in the BAP on a voluntary basis. Files are assigned to the trustees on a rotating basis, in accordance with Directive No. 20, section 6.⁸⁶

Interviews with 20 trustees show marginal use of the Bankruptcy Assistance Program. The declarations of the trustees coincide with the figures provided by the OSB.⁸⁷ In fact, in 2019, there were **72 cases processed by the BAP program concerning LILA cases** (compared to 84 LILA cases, in 2018). In 2019, there was **only 1 NINA file** processed by the BAP program (2 files, in 2018). The residual number (73) of BAP files⁸⁸ relating to LILA and NINA cases is an additional indicator that those debtors have access to the insolvency system outside of the BAP.

The BAP is hardly used by trustees and debtors, as evidenced by the very low number of annual LILA and NINA files. No information, publicity or awareness campaign reached the budget advisors interviewed, who are yet directly working with debtors with low income and assets.

IV- FOREIGN DEBT RELIEF PROGRAMS

Foreign programs in the United Kingdom and New Zealand have undergone assessments to measure their effectiveness and impact on users. Those results give us the opportunity to revisit the advisability of importing a simpler and standardized procedure for debtors with low income and assets into the Canadian insolvency system. Each program has certain limitations and weaknesses which are currently underlined in the existing literature (4.1.). As a result, the relevance of importing them into the Canadian insolvency system can be questioned (4.2.).

4.1 Foreign debt relief procedures

4.1.1 New Zealand's No Asset Program (NAP)⁸⁹

a) Legal framework

⁸⁵ Email sent to us by the OSB dated December 17, 2020.

⁸⁶ OSB, *Assistance Program*, *supra* note 26.

⁸⁷ Tables RAF and RAN 2019 of the file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

⁸⁸ Tables RAF and RAN 2019, file sent by email on September 4, 2020, by the OSB, entitled : BKHQRA 3748 Final 04sep2020.

⁸⁹ New-Zealand, Ministry of Economic Development, *Evaluation of the No Asset Procedure*, 2011, online (pdf) : <www.mbie.govt.nz/dmsdocument/2278-evaluation-no-asset-procedure-final-report-pdf>.

In effect since December 2007,⁹⁰ the No Asset Program (NAP) allows debtors with assets below NZD 5,000 and unsecured debts between NZD 1,000 and NZD 50,000 to be released from their debts after 12 months.⁹¹ More specifically⁹², support payment debts, fraudulent debts, fines and student loans are excluded from the discharge process.⁹³ The agency responsible for administering this program, the New Zealand Insolvency and Trustee Service (NZITS), may reject the application in accordance with the thresholds for assets and debts or if the debtor fails the means test.⁹⁴ A public register keeps the names of the debtors using the program for five years.

There is no obligation to consult an insolvency practitioner or advisor to file the application.⁹⁵ In practice, budget advisors help debtors in this debt discharge process.

Recently, some shortcomings of the NAP have been highlighted by the New Zealand Ministry of Economy which evaluates the program and its use by debtors.⁹⁶ A number of applications were rejected by the state agency because they exceeded the threshold for eligible debts.⁹⁷ It should be remembered that debtors can also file their application online on their own, which can present a challenge.

For some creditors, the NAP seems too short in comparison to bankruptcy in New Zealand,⁹⁸ which would not make it easy for bankrupt debtors to change their budgeting. In addition, no measures are mandatory before discharge such as budget sessions.

One of the objectives of this new procedure was to provide a cost-effective alternative to the state administration of bankruptcy, which incidentally, would not appear to be a current concern in Canada. Despite potential savings, it should be noted that other government organizations as well as the private sector have borne unanticipated financial costs in relation to the NAP.⁹⁹ Creditors must also write off debts.¹⁰⁰ The program is said to have exacerbated the problems associated with excessive debt, thus creating an increase in “reckless” lending.¹⁰¹ It does not appear to solve the difficulties associated with budgetary and financial ignorance of the debtors targeted by the program.¹⁰² The NAP appears to provide short-term relief for debtors.¹⁰³

⁹⁰*Insolvency Act 2006* (NZ) No 55, namely ss 361–377B, online : <www.legislation.govt.nz/act/public/2006/0055/latest/DLM385299.html> [*Insolvency Act 2006* (NZ)].

⁹¹ *Ibid*, ss 363, 377.

⁹² *Ibid*, ss 369, 377–377 A.

⁹³ *Ibid*, ss 369 (2) c).

⁹⁴ *Ibid*, ss 363-364.

⁹⁵ New Zealand Insolvency and Trustee Service (ITS), *Comparison Tool*, online : <www.insolvency.govt.nz/personal-debt/personal-insolvency-options/comparison-tool/>.

⁹⁶ New-Zealand, *supra* note 89, s 5.4; Trish Keeper, “New Zealand’s No Asset Procedure: A Fresh Start at No Cost?” (2014) 3 QUT Law Review 79.

⁹⁷ *Ibid*.

⁹⁸ See Keeper, *supra* note 97 (bankruptcy’s duration is 3 years in NZ).

⁹⁹ New-Zealand, *supra* note 89, s 5.4.

¹⁰⁰ *Ibid*.

¹⁰¹ Lorraine Charlton, “The Frontline Interview” (2016/17) 43 Quarterly Account 25.

¹⁰² Keeper, *supra* note 97.

¹⁰³ Ramsay, “Towards an international paradigm”, *supra* note 3 at 33.

4.1.2 The English and Welsh Debt Relief Order (DRO)¹⁰⁴

England and Wales, taking inspiration from New Zealand, enacted the Debt Relief Order (DRO) in 2007. This online, low-cost (£90) administrative procedure intended for individuals with unsecured debts of less than £20,000 and assets of less than £1,000, allows them to be discharged after a 12-month moratorium. Their monthly disposable income must be less than £50, an amount determined by a threshold based on the debtor's household budget calculated using a standard financial statement (Common Financial).¹⁰⁵ Of the £90 fee paid to apply for the procedure, £10 is given to an intermediary.

Accredited debt counselling agencies, in addition to verifying eligibility, deal with negotiating with creditors to write off debts or make token payments. Those licensed intermediaries are supervised by the state insolvency service.¹⁰⁶ However, this model seems to require lengthy and costly verification to select eligible debtors. The fees for organizations like StepChange Debt Charity are supposedly higher (£300)¹⁰⁷ and do not cover the fixed costs for processing.¹⁰⁸ Certain debts are excluded from the discharge such as court fines, support payments and student loans.

Access for LILA debtors is paradoxically limited due to the small number of accredited intermediaries. This problem of equal access to the debt relief procedure for LILA debtors seems to be reinforced by multiple notable drawbacks such as the complexity of the online payment system for fees by the debtors,¹⁰⁹ the lack of, for example, stay of proceedings brought by creditors and¹¹⁰ the existence of legal problems of interpretation regarding the eligibility rules of the DRO.¹¹¹

¹⁰⁴ Iain Ramsay, "Bankruptcy Light? "The English Debt Relief Order, Bankruptcy Simplification and Legal Change" (2018) 27 Norton Journal of Bankruptcy Law and Practice 5, online : <papers.ssrn.com/sol3/papers.cfm?abstract_id=3208381> [Ramsay, "Bankruptcy Light?"]; Ramsay, "The new poor", *supra* note 3; "Closing the gap: gender and the changing demographics of insolvency" (2016), online : *R3 Insolvency & Restructuring* <www.r3.org.uk/press-policy-and-research/policy-research/personal-insolvency/>; Angela Littwin, "Low-income, low-asset debtors in the U.S. bankruptcy system" (2020) 29 Intl Insolv Rev 116.

¹⁰⁵ Ramsay, "Bankruptcy Light?", *supra* note 105.

¹⁰⁶ *Ibid.*

¹⁰⁷ Peter Wyman, "Independent Review of the Funding of Debt Advice in England, Wales, Scotland and Northern Ireland" (2018) at 26 at para 86, online (pdf) : *Money Advice Service* <www.moneyadviceplus.org.uk/wp-content/uploads/2018/02/Peter_Wyman_Review_of_Debt_Advice_Funding_2018.pdf>.

¹⁰⁸ StepChange, "Response by StepChange Debt Charity to the Insolvency Service Consultation Paper: Insolvency Proceedings: Debt relief orders and the bankruptcy petition limit" (2014), online (pdf) : <www.stepchange.org/Portals/0/documents/media/reports/StepChange%20Debt%20Charity%20response%20to%20the%20Insolvency%20Service%20consultation%20____.pdf> (indicating a shortfall of £890,000 in the annual costs of processing DROs at 7).

¹⁰⁹ *Ibid* at 8.

¹¹⁰ « Indebted Lives : The complexities of life in debt » (2013) at 3, 5, 7, online (pdf) : *Money Advice Service* <mascdn.azureedge.net/cms/cs-indebted-lives-the-complexities-of-life-in-debt_november-2013.pdf>.

¹¹¹ *Ibid.*

4.2. The idea of a free or low-cost Canadian program

In Canada, a first experiment of administrative procedures for people with low income conducted by the Federal Insolvency Trustee Agency (FITA), created in 1972 and abolished in 1979, was met with much criticism and ended in failure.¹¹²

The Task Force, created in 2000 to review the provisions of the BIA, identified possible legislative changes and recommended appropriate mechanisms for low-income debtors. It was able to initiate a reflection, although time and budget constraints as well as dissenting opinions were reported.¹¹³

The notion of free bankruptcy proceedings should be supported by empirical research focusing on this specific question, among trustees and debtors with low income and assets, before the implementation of any exception regime.

Existing literature on the relief program in New Zealand suggests that free services do not really exist because of the indirect costs borne by government and creditors. The DRO program seems to have the same limitations. The fees would be costly for accredited organizations.

Therefore, this raises several questions: what would be the foreseeable minimum cost (including the fees for services of accredited professionals)? Who would be the stakeholders responsible for the cost of the new insolvency system? What will be the profiles and the number of potential users of this new program? What would be the objectives of this new program?

CONCLUSION:

The acronyms LILA and NINA are not clearly defined. However, multiple criteria and factors could help identify possible characteristics for a definition of poor people. The absence of surplus income is one possible dividing line, among others, and the low income measure alone does not measure the poverty status of the LILA and NINA debtors.

¹¹² Ben-Ishai & Schwartz, “Bankruptcy”, *supra* note 3 at 30; Iain Ramsay, “Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy” (2000) 74 Am Bankr Inst LJ; *Task Force*, *supra* note 78 at 13; But see the opinion of professors Ramsay & Ziegel in favour of a study on the issue of debt of low-income individuals; Janis P Sarra & Danielle Sarra, “Assessing Insolvent Consumer Debtors, Challenges and Strategies for Empirical Research” (2009), at 9, online : <commons.allard.ubc.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1312&context=fac_pubs>.

¹¹³ *Task Force*, *supra* note 78 at 9; Ben-Ishai & Schwartz, “Bankruptcy”, *supra* note 3 at 32.

In any case, the complexity of defining LILA and NINA debtors has not affected their access to the insolvency system. The empirical component has shown that the access of LILA and NINA debtors to legal insolvency proceedings is not hindered by trustees.

The surveyed trustees have not only shown flexibility in reducing monthly payments, but also a willingness to advocate an open attitude towards LILA and NINA debtors. Interviews also reveal that trustees first try to find alternative solutions and bankruptcy is described in an appropriate manner.

The limited use of both the Bankruptcy Assistance Program and the agreement provided for in section 156.1 of the BIA, as well as the high discharge rates of LILA and NINA debtors, also confirm the research hypothesis that insolvency proceedings are accessible to them from a financial standpoint.

Resorting to a new simplified bankruptcy procedure for the poorest does not seem appropriate. It would not solve the structural and behavioural problems at the very source of excessive debt. The New Zealand and English experiences have also shown the limitations of a “virtually free” regime. The Canadian Bankruptcy Assistance Program could eventually be distributed more widely, particularly to community organizations.

Other legislative means could also be implemented, such as the creation of a national credit register and the monitoring by the Financial Consumer Agency of Canada of the proper keeping of credit files and the non-disclosure of the debtors’ data in the context of access to housing, employment or when taking out insurance.

Behavioural economics¹¹⁴ should also be included in this open reflection about ways of dealing with and preventing personal insolvency, because it can partly explain the reasons that lead consumers to resort to excessive and expensive borrowing.

¹¹⁴ Jason J Kilborn, “Behavioural Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions” (2005) 22 Emory Bankr Dev J 13.

ANNEXE 1

INTERVIEWED TRUSTEES	GEOGRAPHIC LOCATION	NUMBER OF TRUSTEES/ ADVISORS	YEARS OF EXPERIENCE	CONSUMER PROPOSAL (%)	PERSONAL BANKRUPTCY (%)	COMMERCIAL BANKRUPTCY (%)
T1 July, 2020	Province of Quebec: Quebec City	40 trustees	25 years	60	40	
T2 August, 2020	Province of Quebec: Montreal	6 trustees 17 advisors	35 years	49	50	1
T3 August, 2020	Eastern Ontario and Province of Quebec	Eastern Ontario: 5 trustees 5 advisors Province of Quebec: 14 trustees 15-20 advisors	25 years	56	40	4
T4 August, 2020	Province of Quebec: Lévis, Quebec City and Trois-Rivières	9 trustees 2 advisors	19 years	30-35	40	30-35
T5 August, 2020	Ontario	8 trustees 9 advisors	20 years	60	39	1
T6 August, 2020	Province of Quebec: Greater Montreal	5 trustees 12 advisors	20 years	65	35	Less than 1
T7 August, 2020	Ontario	65-70 trustees 110 advisors	20 years	65	30	5-7
T8 September 2020	Province of Quebec: Greater Montreal	1 trustee	30 years	50	25	25
T9 September 2020	Manitoba: Winnipeg and Saskatchewan: Prince Albert	1 trustee 2 advisors	13 years	65-70	25	5
T10	Ontario	21 trustees	25 years	70	30	

September, 2020		20 advisors				
T11 September 2020	Province of Quebec: Saguenay-Lac-St-Jean	3 trustees 3 advisors	28 years	10-15	80	Less than 10
T12 September, 2020	British Columbia	8 trustees 20 advisors	12 years	60-70	30-40	
T13 September, 2020	Province of Quebec: Laval	1 trustee 2 advisors	15 years	60	40	
T14 September, 2020	Province of Quebec: Quebec City	2 trustees 2 advisors	20 years	44	36	20
T5 September, 2020	New Brunswick, Prince Edward Island, Nova Scotia	4 trustees 3 advisors	31 years	70	22.5	7.5
T16 September, 2020	Ontario: Toronto	3 trustees 10 advisors	13 years	57	38	5
T17 October, 2020	Alberta	12 trustees 15 advisors	29 years	60	38	2
T18 October, 2020	Manitoba	4 trustees 4 advisors	25 years	32-42	48-58	20
T19 October, 2020	Alberta	10 trustees 10 advisors	21 years	65	35	
T17 October, 2020	British Columbia	40 trustees 4 advisors	21 years	50	50	

RESPONDENTS	GEOGRAPHIC LOCATION**	NUMBER OF PEOPLE WHO RECEIVED SERVICES*	NUMBER OF PEOPLE WHO ATTENDED WORKSHOPS*	NUMBER OF PEOPLE WHO ATTENDED BUDGET CONSULTATIONS*
ACEF 1 June, 2020	Province of Quebec: Montreal	2,500 calls	500 people	300 people
ACEF 2 June, 2020	Province of Quebec: Montreal	300 people	200 people	80 people
ACEF 3 June, 2020	Province of Quebec	800 people	2000 people	300 people
ACEF 4 July, 2020	Ontario: Ottawa	1200 people	350 people	1000 people
ACEF 5 August, 2020	Province of Quebec	150 people	1,000 people	200 people
ACEF 6 October, 2020	Province of Quebec	150 people	1,500 people	150 people

*Indicative figures ** Inaccurate geographic area to avoid possible identification.