STRENGTHENING FINANCIAL CONSUMER PROTECTION IN CANADA: THE EVOLUTIONARY PATH TOWARDS A NATIONAL CONSUMER CREDIT CODE

by

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Dalhousie University is located in Mi'kma'ki, the ancestral and unceded territory of the Mi'kmaq. We are all Treaty people.

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ABSTRACT

With the exponential growth and greater accessibility of consumer credit, households in Canada are experiencing increasing levels of indebtedness and financial distress. Despite the permeation of credit in our everyday lives, vulnerable financial consumers are often victims of predatory and abusive lending practices of the consumer credit industry, leading to overindebtedness and even bankruptcy. To encourage and inspire legislative reform to better protect financial consumers and modernize the regulatory framework, this dissertation critically analyzes the evolution of consumer credit regulation in its historical, social and economic context.

The research reveals a rich history of consumer credit federal statutes since Confederation. Despite their questionable effectiveness to protect financial consumers, statutes regulating pawnbroking, money-lending, small loans, consumer loan companies and banks framed the evolution of the consumer credit industry until the 1960s. Future reforms were tempered by the restrictive constitutional interpretation given by the Supreme Court of Canada to the federal jurisdiction over interest in 1963, which created uncertainty in Parliament's authority to regulate the industry and resulted in the gradual abandonment of federal consumer credit regulation. Filling this void, provinces progressively enacted a vast array of provincial consumer protection legislation to regulate the consumer credit industry and protect vulnerable consumers. Federal legislation was limited thereafter to the enactment of a criminal interest rate and the regulatory framework of federally regulated financial institutions and the consumer credit products and services they offered. The research further revealed gradual regulatory reforms of the financial services industry and the recent strengthening of federal consumer protection provisions and the mandates of federal consumer protection authorities.

The thesis confirms that the consumer credit regulatory framework in Canada remains an ineffective and fragmented patchwork of statutes and regulations divided among 3 levels of governments in 13 jurisdictions. With Parliament's refusal to legislate to the full limit of its power in relation to consumer credit, the thesis further confirms the federal constitutional jurisdiction to regulate this growing industry and proposes a new comprehensive national legal framework regulating the entire consumer credit industry as well as enhanced consumer protection provisions to better protection financial consumers and prevent consumer overindebtedness.

LIST OF ABBREVIATIONS USED

ADRBO	ADR Chambers Banking Ombuds Office
APR	Annual Percentage Rate
BCE	Before the Common Era
BIA	*Bankruptcy and Insolvency Act*
CMHC	Canadian Mortgage and Housing Corporation
CSA	Canadian Securities Administrators
EAR	Effective Annual Rate
ECB	External Complaint Body
FAIR Canada	Canadian Foundation for the Advancement of Investor Rights
FCAC	Financial Consumer Agency of Canada
FCPF	Financial Consumer Protection Framework
FRFI	Federally Regulated Financial Institutions
HELOC	Home Equity Line of Credit
OECD	Organisation for Economic Co-operation and Development
OSB	Office of the Superintendent of Bankruptcy
OSBI	Ombudsman for Banking Services and Investments
OSFI	Office of the Superintendent of Financial Institutions

STATEMENT

This dissertation is the original and independent work of the author, Micheline Gleixner.

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The author has retained copyright to these works. See Appendix D: Partial Copyright Assignments.

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CHAPTER 1: Introduction

1.1 Introduction

Although the notion of consumer overindebtedness is recent, the utilization of credit, the financial distress of individuals and the abuse of consumer vulnerabilities by lenders are part of a global phenomenon with a long history. For centuries, individuals have been borrowing money to meet their basic needs or realize personal goals, only to find themselves unable to repay the advances that have been extended to them and at the mercy of lenders. Beginning as a mechanism of last resort to sustain oneself and one's family in a time of crisis, recourse to credit has become, in our modern society focused on immediate consumption, a universal means of paying for expenses.

Reflected most predominantly by the American drive to consume, the world has seen a cultural shift over the last eight decades towards increased consumption supported by consumer credit, which has led inevitably to the overindebtedness of consumers. Two factors brought about this change: first, the culture of consumerism that feeds the demand for easy, accessible and flexible credit and, second, the resulting exponential increase in consumer lending by a growing financial services sector. The increased popularity of consumer credit and the disconcerting ease with which it is obtained have directly led to a corresponding hike in the rate of consumer insolvencies, particularly since the late 1980s.

This new access to credit has been defined as a democratization of consumer credit.[1] While promoting the well-being of individual consumers and conducive to the growth of national economies, this democratization nevertheless contributed to personal overindebtedness and insolvency. For many consumers, indebtedness gradually evolved into financial hardship with its consequent social and economic difficulties. Consumers overwhelmed by their crushing debt often find themselves excluded from both the credit market and economic

[1] The exponential growth of consumer credit has been framed as the "democratisation" of consumer credit in Johanna Niemi-Kiesiläinen, Iain Ramsay & William C Whitford, "Introduction" in Johanna Niemi-Kiesiläinen, Iain Ramsay & William C Whitford, eds, *Consumer Bankruptcy in Global Perspective* (Oxford: Hart Pub, 2003) 1 at 2.

and social life in general. The "rapidly rising tide of debt distress" among consumers has become an international phenomenon, affecting developed and developing countries alike, hampering the productive capacity of consumers and posing serious economic problems.[2] INSOL International further corroborates the severity of the problem in its second report on consumer debt recommending that consumer insolvency laws should aim to reduce and avoid consumer insolvencies and the social and psychological implications thereof.[3]

Along with increased accessibility to consumer credit, the rise in consumer overindebtedness and insolvencies around the world is threatening not only individual financial and social well-being but also national and international economies. With the unrelenting growth of the consumer credit industry, it is not surprising that in 1964, the Royal Commission of Banking and Finance highlighted the importance of consumer credit for the financial and economic stability and growth of the country:

> Since consumers account for about two-thirds of national expenditure, the personal sector merits particular attention in any discussion of national sources and uses of funds. The rate of asset accumulation by households and the ways in which they hold their assets and incur liabilities have - like those of business - important implications for the rate, stability and composition of growth of the rest of the economy as well as for the welfare of the households themselves.[4]

The relevance of consumer credit to the Canadian economy is further confirmed by statistics of the Bank of Canada, which indicated in 2012 that "[h]ousehold spending

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[2] Insolvency and Creditor/Debtor Regimes Task Force, *Report on the Treatment of the Insolvency of Natural Persons* (Washington, DC: The World Bank, 2014) at para 392.

[3] International Association of Restructuring, Insolvency & Bankruptcy Professionals, *Consumer Debt Report II: Report of Findings and Recommendations* (London: INSOL International, 2011).

[4] Canada, Royal Commission on Banking and Finance, *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 14 [*Report of the Royal Commission on Banking and Finance, 1964*]. See also Joseph Spooner, *Bankruptcy: The Case for Relief in an Economy of Debt* (Cambridge, UK: Cambridge University Press, 2019) at 2–4, 37–64; Poonam Puri & Andrew Nichols, "Developments in Financial Services Regulation: A Comparative Perspective" (2014) 55 Can Bus LJ 454 at 460; SO Kjellberg, "The Economics of Consumer Credit" in William J Hambly, ed, *Readings in credits and collections in Canada*, 4th ed (Toronto: Ryerson Press, 1969) 11 at 27–30; Emilio S Binavince & H Scott Fairley, "Banking and the Constitution: Untested Limits of Federal Jurisdiction" (1986) 65:1 Can Bar Rev 328 at 333: "The issuing of currency and the raising of revenue by public debt or taxation, coupled with the regulation of credit, debt management and interest rates through the Bank of Canada, influence employment, expenditures, prices and output in modern society."

accounts for close to 65 per cent of total spending in Canada and is, therefore, a very important driver of the economy".[5]

The consumer is therefore viewed as a vehicle of economic growth and governments have encouraged and facilitated consumer spending along with increasing indebtedness to achieve economic stability and growth.[6] This reality has been confirmed by the global impact of the Global Financial Crisis followed by the Canadian recession of 2008-2009 which revealed the vulnerability of modern economies resting upon the regulation of the credit industry[7] and subprime consumer lending in particular. Canada has been relatively protected given our financial regulatory framework and the resulting stability of the country's banking system, but we remain nonetheless vulnerable since the regulation of the consumer credit industry by both the federal and provincial governments in Canada has up to now been sparse, inefficient, sporadic and fragmented.[8]

Canadian consumer debtors have benefitted from historically low interest rates, which have fuelled household overindebtedness, but these economic circumstances were temporary,

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[5] Bank of Canada, *Household Spending and Debt*, Backgrounders (Ottawa: Bank of Canada, 2012) at 1. See also Anson TY Ho et al, "Home Equity Extraction and Household Spending in Canada" (September 2019), online: <bankofcanada.ca/2019/09/staff-analytical-note-2019-27/> [perma.cc/YN48-LCU3]; Canada, Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living, *Report on Consumer Credit* (Ottawa: 1967) at 61–63 [*Report of Special Joint Committee on Consumer Credit, 1967*]; Iain Ramsay, "Overindebtedness and Regulation of Consumer Credit" in Thierry Bourgoignie, ed, *Regards croisés sur les enjeux contemporains du droit de la consommation* (Cowansville, QC: Yvon Blais, 2006) 35 at 35 [Ramsay, 2006].

[6] *Consumer Debt Report II: Report of Findings and Recommendations*, *supra* note 3 at 1.

[7] See also Esteban Uribe, *Consumer Protection in Canada and the European Union: A Comparison* (Ottawa: The Public Interest Advocacy Centre, 2009) at 9: "The principal lesson that may be gleaned from the crisis that engulfed the credit sector in 2008 is that there is a direct causal link between a governmental failure to enact and enforce appropriate regulatory measures and subsequent marketplace conduct destroying market sustainability." See also Paul Calem, Julapa Jagtiani & William W Lang, "Regulating consumer credit" (2016) 84:1 J Econ & Bus 1 at 1, referring to Atif Mian & Amir Sufi, *House of Debt* (Chicago: University of Chicago Press, 2014) emphasizing the role of household debt and associated impacts on consumer wealth and spending as a cause of the Great Recession.

[8] Christopher S Axworthy, "Recent Developments in Consumer Law in Canada" (April 1980) 29 Intl & Comp LQ 346 at 372: "There is a great deal of merit in enacting a code-like statute encompassing wide-ranging provisions covering, as far as possible, the whole area under review. This the *Consumer Credit Act* [UK] has achieved, while the position in Canada is one of fragmentation and incompleteness, which, though recognised, has not yet been rectified." See also Ronald CC Cuming, *Perspectives on the Harmonization of Law in Canada* (Toronto: University of Toronto Press, 1985) at 4.

and consumer debtors remain extremely vulnerable to higher interest rates or other financial shocks.[9]

The Bank of Canada confirmed in 2012 that "[n]o matter how one looks at it, household debt in Canada is at a record high. Debt at this level can make certain households, the economy and the financial system more vulnerable to shocks, such as a surge in unemployment, falling incomes and house prices, and rising interest rates."[10] Indeed, interest rates began to rise in 2022 to curb inflation. The Bank of Canada has recently raised its key interest rate to 5%, marking the 10th rate hike since March 2022.[11] With unprecedented indebtedness, rising borrowing costs, inflation and the ongoing threat of a recession, Canadian financial consumers are more vulnerable than ever.

The consequences of failing to honour contractual financial obligations, for individuals in particular, but also for other stakeholders in the economic community, have therefore become pressing issues, in addition to having significant impacts on bankruptcy and insolvency law. Moreover, as recent events demonstrate, consumer insolvencies were instrumental in past crises and will continue to contribute to future financial and economic crises. The call for reform and a regulatory response to the rise of consumer lending can also be heard from international experts and organizations. According to Vijay Tata, Chief Counsel at the World Bank,

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[9] Kristelle Audet, "Riskier Lending Practices Can't Support Growth in Consumer Credit Forever" (12 August 2015) The Conference Board of Canada (blog), online: *Conference Board* <conferenceboard.ca/economics/hot_eco_topics/default/15-08-12/riskier_lending_practices_can_t_support_growth_in_consumer_credit_forever.aspx>.

[10] Bank of Canada, *supra* note 5 at 3. See also new measures implemented by the federal government on October 3, 2016 to reduce consumer mortgagors' vulnerability to these financial shocks: Department of Finance Canada, News Release, "Minister Morneau Announces Preventative Measures for a Healthy, Competitive and Stable Housing Market" (3 October 2016), online: *Finance* <canada.ca/en/department-finance/news/2016/10/minister-morneau-announces-preventative-measures-healthy-competitive-stable-housing-market.html>.

[11] "Bank of Canada raises policy rate 25 basis points, continues quantitative tightening," (12 July 2023), online: *Bank of Canada* <bankofcanada.ca/2023/07/fad-press-release-2023-07-12/>; Jenna Benchetrit, "Bank of Canada raises its key interest rate to 5%," (12 July 2023), online: <cbc.ca/news/business/bank-of-canada-july-meeting-1.6904330>. See also James Marple, Rannella Billy-Ochieng' & Ksenia Bushmeneva, "Tip of the Iceberg: Rising Debt Service Costs Are Only Starting to Be Felt by Canadian Households," (19 December 2022), online: *TD Economics* <economics.td.com/domains/economics.td.com/documents/reports/kb/Rising_Canadian_Debt_Service_Costs.pdf>.

> one of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual overindebtedness.[12]

At its root, personal insolvency is an individual economic problem, but dealing with excessive household debt quickly becomes political when a debt crisis develops. Consumer debt has played a key role historically not only in nations' financial recovery but also in numerous social and political upheavals. Recently, whether as a result of current economic conditions or the democratization of credit, the level of consumer exposure to debt has become a principal ingredient of global financial stability. Echoing the cries from past financial and economic crises, the scope of contemporary problems has been clearly outlined by Sheila Blair, Chairman of the Federal Deposit Insurance Corporation:

> There can no longer be any doubt about the link between protecting consumers from abusive products and practices and the safety and soundness of the financial system. Products and practices that strip individual and family wealth undermine the foundation of the economy. As the current crisis demonstrates, increasingly complex financial products combined with frequently opaque marketing and disclosure practices result in problems not just for consumers, but for institutions and investors as well.[13]

Given the foregoing, we can no longer ignore the international consensus that prevention of overindebtedness and financial hardship is essential to curb the mounting rise of consumer insolvency and that financial consumer protection frameworks must be reformed and strengthened. Prevention of consumer insolvency must therefore be prioritized and attention brought to new measures, legislative, regulatory or otherwise, intended to ensure both responsible borrowing and responsible lending. The objective of this dissertation is

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[12] Susan Block-Lieb, "Rapporteur's Synopsis of the World Bank Insolvency and Creditor/Debtor Regimes Task Force Meetings on Best Practices in the Insolvency of Natural Persons" (11 January 2011) at para 17, online: International Insolvency Institute <iiiglobal.org/component/jdownloads/finish/352/6012.html>.

[13] Sheila C Blair, Chairman of the Federal Deposit Insurance Corporation, on Modernizing Bank Supervision and Regulations before the US Senate Committee on Banking, Housing and Urban Affairs on 19 March 2009 as quoted in Susan L Rutledge, "Consumer Protection and Financial Literacy-Lessons from Nine Country Studies*"* (1 June 2010), World Bank Policy Research Working Paper 5326 at 8, online: SSRN <ssrn.com/abstract=1619168>.

therefore to review and critically analyze past and current consumer credit regulations to contextualize future reforms and hopefully minimize these individual and collective risks, as is further explained in Chapter 2.

In this introductory chapter, definitions are provided of key terms as well as the economic and social contextualization of consumer credit in Canada.

1.2 Definitions

Consumer credit was generally defined in 1967 as "credit advanced to individuals to finance their expenditures on goods and services as consumers."[14] A more detailed and workable definition is proposed given the absence of any other authoritative definition of the term in Canada.[15]

Consumer credit can be defined by its use, its form, its user and its origin. First, consumer credit represents a debt incurred by an individual for the purpose of purchasing goods or

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[14] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 5 at 25.

[15] See, however: *Encyclopaedia Britannica*, (accessed 12 September 2016), sub verbo "consumer credit" online at <britannica.com/topic/consumer-credit>:

> Consumer credit, short- and intermediate-term loans used to finance the purchase of commodities or services for personal consumption or to refinance debts incurred for such purposes. The loans may be supplied by lenders in the form of cash loans or by sellers in the form of sales credit.
>
> Consumer credit in industrialized countries has grown rapidly as more and more people earn regular income in the form of fixed wages and salaries and as mass markets for durable consumer goods have become established.
>
> Consumer loans fall into two broad categories: instalment loans, repaid in two or more payments; and non-instalment loans, repaid in a lump sum. Instalment loans include (1) automobile loans, (2) loans for other consumer goods, (3) home repair and modernization loans, (4) personal loans, and (5) credit card purchases. The most common non-instalment loans are single-payment loans by financial institutions, retail-store charge accounts, and service credit extended by doctors, hospitals, and utility companies.

In the United Kingdom, see UK, Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Parliament Papers, Cmnd 4596) (London: Her Majesty's Stationery Office, 1971): "The broad definition of consumer credit used throughout this Report embraces both money that is lent and borrowed as money, without being specifically tied to the purchase of any particular goods and services, and also any part of the purchase price of specific goods and services that is not paid on the spot but deferred for later settlement." See also John Downes & Jordan Goodman, *Dictionary of finance and investment terms* (Hauppauge, NY: Barron's Educational Series, 2014) sub verbo "consumer credit"; *Investopedia*, online: Investopedia <investopedia.com/terms/c/consumercredit.asp>, sub verbo "consumer credit".

services primarily for personal, family, or household purposes or to refinance debts incurred for such purposes. Commercial and investment loans and mortgages are excluded from this category of credit given the equity usually resulting from those investments. Second, although increased diversification is surely guaranteed, various types of consumer credit currently exist, such as credit cards, lines of credit, personal loans, student loans, equity lines of credit, retail instalment credit, cheque cashing, loan brokering, tax rebate discounting, rent-to-own agreements, payday loans and other unsecured personal loans.[16]

Third, consumer credit can be defined by the type of borrower such as found in the former *Consumer Credit Transactions Act* of Alberta, "consumer" means "(i) a person who purchases goods or services under a time sale agreement or a continuous deferred payment plan, (ii) a borrower of funds under a loan agreement, or (iii) a person who purchases goods or services or obtains money by the use of a credit card, and includes a person not referred to in subclauses (i) to (iii) who enters into a credit agreement with a credit grantor".[17] At its simplest, a consumer can be defined "as an individual who acquires goods or services for personal or family use or consumption"[18] and refers to both potential and existing customers.[19]

Finally, the loans may be supplied by lenders such as banks, mortgage, trust and loan companies, cooperative credit institutions and insurance companies in the form of cash loans, by sellers in the form of sales credit or by professionals and other services or utility companies in the form of service credit extended to consumers. In other words, consumer credit is any type of credit given to a consumer by any type of lender for any purpose with the exceptions of the initial loan for the purchase of real property or any loans for investment and commercial purposes.

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[16] Bank of Canada, "Household Credit" (15 November 2019) at n 1, online: *Bank of Canada* <credit.bankofcanada.ca/householdcredit> [perma.cc/39DA-4G5W]; 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 241.

[17] *Consumer Credit Transactions Act,* SA 1985, c C-22.5, s 1 as repealed by *Fair Trading Act*, SA 1998, c F-1.05, s 197.

[18] Jacob Ziegel, "Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card" (2011) 50 Can Bus LJ 259 at 269 [Ziegel, 2011].

[19] World Bank Group, *Good Practices for Financial Consumer Protection* (Washington, DC: World Bank, 2017) at 4.

Adopting an analogous definition, some scholars have excluded all lending secured by real property from their research on consumer credit since it does not generally lead to overindebtedness given the equity which builds over time and the presence of property which can be sold in the event of financial hardship.[20] Concurring with these valid arguments, this dissertation also excludes initial mortgage transactions. However, with the increased access to home equity lines of credit and their convenience for consumers, these new financial products reduce a consumer's equity and can therefore lead to overindebtedness by the forced sale of the real property. Furthermore, home equity lines of credit are usually requested and drawn upon to consume other goods and services. As a result, these products have been included within the focus of this dissertation.

In addition to the distributive goal of providing affordable and accessible credit, Iain Ramsay summarized the objectives of consumer credit regulation as follows: "Contemporary regulation of consumer credit is intended to make credit markets more competitive, to promote confidence in the use of consumer credit, to ensure fairness throughout the contract and to prevent and treat overindebtedness."[21] The goals of consumer credit regulation have also been characterized as in two broad and overlapping categories: "(1) improving consumer welfare by expanding household access to credit or protecting consumers from unsuitable credit products or unfair and deceptive practices and (2) protecting the safety of financial institutions".[22] To better understand the concept of consumer welfare, the Financial Consumer Agency of Canada defines a consumer's financial well-being as "the extent to which you can comfortably meet all of your current financial commitments and needs while also having the financial resilience to continue doing so in the future."[23]

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[20] See e.g. Kjellberg, *supra* note 4 at 14; Sarah Elizabeth Brown, *Consumer Credit and Over-Indebtedness: The Parliamentary Response: Past, Present and Future* (PhD, University of Leeds School of Law, 2006) [unpublished] at 6–7.

[21] Iain Ramsay, "Regulation of Consumer Credit" in Geraint Howells et al, eds, *Handbook of Research on International Consumer Law* (Cheltenham, UK: Edward Elgar Publishing, 2010) 340 at 370.

[22] Calem, Jagtiani & Lang, *supra* note 7 at 2.

[23] Financial Consumer Agency of Canada, "Review of Financial Literacy Research in Canada: An Environmental Scan and Gap Analysis," (26 November 2020), online: <canada.ca/en/financial-consumer-agency/programs/research/review-financial-literacy-research.html> at 7 [FCAC, 2020]. See

Considering these objectives, consumer credit law is an "immensely varied subject"[24] and addresses the rights and responsibilities of the parties involved, the form and content of the credit agreements as well as their validity and enforceability. It further encompasses consumer protections against harsh and unconscionable credit transactions, "improvident or destructive collection measures",[25] deceptive or fraudulent credit advertising as well as negligent or abusive lending practices, in addition to regulation primarily aimed at ensuring the safety and soundness of financial institutions. Given the relative soundness of the Canadian financial and banking system, the recent focus placed upon its regulatory framework and supervision as well as the complexity of the regulatory framework involved to protect the safety of financial institutions, the thesis question focuses on the initial objective of consumer credit regulation and addresses market conduct regulations rather than the prudential framework of the consumer credit industry.

1.3 Background and Rationale: Consumer Credit in Context

1.3.1 Economic Context and Rise of Consumer Credit[26]

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also Financial Consumer Agency of Canada, "Financial well-being in Canada: Survey Results" (2019), online: <canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/financial-well-being-survey-results.pdf>; Consumer Financial Protection Bureau, "Financial well-being: The goal of financial education" (2015), online: <files.consumerfinance.gov/f/201501_cfpb_report_financial-well-being.pdf>.

[24] *Ibid*. See also Paul B Rasor, "Biblical Roots of Modern Consumer Credit Law" (1993) 10:1 JL & Religion 157 at 157: "Modern consumer credit law is a large and complex body of law. Underneath the complexity, however, is a simple goal: to ensure that consumers are treated fairly and to prevent, or at least to redress, overreaching and abuse by creditors. To this extent, modern consumer law can be said to reflect a felt sense of societal responsibility to a particularly vulnerable group."

[25] Ronald C C Cuming, "Canada" in Royston Miles Goode, ed, *Consumer Credit* (Leyden/Boston: AW Sijthoff International Publishing, 1978) 186 at 210 [Cuming, 1978].

[26] This section draws liberally on the author's previous publications and report on consumer bankruptcy and consumer credit, including Micheal J Bray & Micheline Gleixner, "Differing Climates of Bankruptcy: A Question of Latitude?" in Janis Sarra, ed, *Ann Rev Insolv L 2011* (Toronto: Carswell, 2012) 281 [Bray & Gleixner, 2012]; Micheline Gleixner & Micheal J Bray, "Canadian Consumer Insolvency: The Implementation of Emerging International Best Practices" in Janis Sarra, ed, *Ann Rev Insolv L 2012* (Toronto: Carswell, 2013) 399 [Gleixner & Bray, 2013 Article]; Micheline Gleixner, "Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency" in Janis Sarra, ed, *Ann Rev Insolv L 2013* (Toronto: Carswell, 2014) 587 [Gleixner, 2014]; Micheline Gleixner & Micheal J Bray, *La gestion des risques des créanciers et la réhabilitation des débiteurs surendettés: objectifs*

The availability of credit was one of the first economic signs of early civilization and an essential economic engine of its evolution.[27] Although credit has been a survival mechanism since the earliest human civilizations, the overindebtedness of individuals has come to symbolize financial problems in numerous cyclical economic crises. The extremely harsh treatment reserved for insolvent people—personal slavery of the debtor and the debtor's family or the death penalty—stems as much from the duty to respect contractual obligations as from creditors' social, economic and political domination. Credit, therefore, is closely tied to power, both literally as a means of financing those in power and as the foundation for the definition and organization of social divisions. To alleviate the suffering of insolvent individuals, authorities have often been obliged to temporarily recognize the rights of debtors by lightening their debt load, which inevitably opened the door to their individual and collective economic recovery.

As a result, governments and other previous governing regimes have repeatedly, for the greater good of their respective societies, intentionally interfered with contractual obligations entered into by willing individuals. For example, the omnipresence of credit and resulting insolvencies led to their regulation by the Babylonian dynasties dating back to about the second half of the 18th century BCE ("before the common era"). The *Code of Hammurabi* regulated all aspects of credit from interest rate ceilings and enforcement measures to general relief for debtors following droughts or inundations.[28] Although the Code recognized the family's collective responsibility and possible enslavement for nonpayment of debt, this type of slavery or serfdom was limited to three years.

While the use of credit and the correlated debt have often represented signs of economic growth for a society, failure to resolve the problems that lead to debt crises quite often proved to be a catalyst for the fall of these civilizations. A notable example is the repeated

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contradictoires ou complémentaires? (report submitted to the Office of the Superintendent of Bankruptcy and Industry Canada, 2013) [unpublished] [Gleixner & Bray, 2013 Report].

[27] Rosa-Maria Gelpi & François Julien-Labruyère, *Histoire du crédit à la consommation: doctrines et pratiques* (Paris: La Découverte, 1994) at 20.

[28] *Ibid* at 25–26. See also Michael Kawaja, *The Regulation of the Consumer Finance Industry: a Case Study of Rate Ceilings and Loan Limits in New York State* (New York: Graduate School of Business, Columbia University; distributed by Columbia University Press, 1971) at 19; Sidney Homer & Richard Sylla, *A History of Interest Rates*, 4th ed (Hoboken, NJ: Wiley, 2005) ch 2.

demands of indebted Romans for their emancipation, their debt relief and the mitigation of social inequalities and economic policies, contributing to the fall of the Roman Empire.[29] The distress of indebted peasants later gave rise to an ideological countercurrent prohibiting usury, a prohibition that intensified with its adoption by Christianity and extended to the moral and legal tenets of all of Europe through the Catholic Church and the monarchs who conformed to its religious tenets. The term usury was first used to describe the lending of money for profit or any loan at interest, contrary to its modern definition which now limits usury to exorbitant, unconscionable or illegal interest rates. "With the expansion of trade in the 13th century, […] the demand for credit increased, necessitating a modification in the definition of the term."[30]

Contrary to past civilizations, usury, as initially defined, was condemned in both the Old and New Testaments and theologians inspired by Plato and Aristotle continued to oppose the granting of credit despite the fact that the practice had started to grow as commerce became more developed in the Middle Ages.[31] During this period, individuals in difficulty relied on family, friends or other personal contacts to provide the necessities to sustain them or to supplement their income.[32]

It is not surprising given this negative connotation, that early European laws, influenced by the dominant religious values, imposed imprisonment of debtors in France and England in the 14th and 15th centuries. The aversion to usury professed by the Catholic Church was somewhat tempered in England and the British colonies by the Protestant Reformation. Usury legislation, initially enacted in England in the 16th century and later applied to its

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[29] Michael Hudson, *The Lost Tradition of Biblical Debt Cancellations* (New York: Henry George School of Social Science, 1993) at 50, online: <michael-hudson.com/wp-content/uploads/2010/03/HudsonLostTradition.pdf>; Gelpi & Julien-Labruyère, *supra* note 27 at 36. See also Caroline Gau-Cabée, "Enchaîné, affranchi, protégé, triomphant: Endettement des particuliers et contrat sur fond de crise : étude diachronique" [2012] Janvier/mars RTD civ 33 at 38–39; David Graeber, *Debt: The First 5,000 Years* (New York: Melville House Publishing, 2011) at 232.

[30] *Encyclopaedia Britannica*, (accessed 29 April 2024), sub verbo "usury", online: <britannica.com/money/usury>.

[31] Gelpi & Julien-Labruyère, *supra* note 27 at 30–33; Jacob S Ziegel, "Consumer Insolvencies, Consumer Credit, and Responsible Lending" in Janis P Sarra, ed, *Ann Rev Insolv L 2009* (Toronto: Carswell, 2010) 343 at 343 [Ziegel, 2010].

[32] Binavince & Fairley, *supra* note 4 at 336.

colonies, defined usury as any amount in excess of the permitted legal interest rate.[33] Unlike continental Europe, these regions saw credit become popular during the Industrial Revolution, evolving from the pledge loan to instalment sales and eventually to consumer credit.

Given the negative connotations associated with usury and the personal use of credit, consumer credit was initially limited and scarce in Canada at Confederation in 1867. It was nonetheless customary in rural communities that general store managers provide credit during difficult times or simply on a regular basis during the off season of one's job or trade.[34] According to Douglas McCalla's research on consumers during the colonization of Upper Canada,

> stores and markets are central to a very different narrative of Canadian settlement. In this account, ordinary fishing, lumbering, farming and aboriginal men and women throughout British North America required credit from merchants to buy 'goods, seeds, and animal feed,' 'equipment and provisions,' without which they could not survive. Needing supplies, families were deeply vulnerable to a commercial system based on unequal exchange, which entrapped them in a 'network of dependency' and on 'a treadmill of debt'.[35]

In addition, pawnshops have enabled individuals to liquidate their assets or provided them with access to short-term credit. Although general usury laws were abolished in 1854 in the United Kingdom, "controls remained on the price of pawns, described as 'the poor man's bank'".[36]

In Canada, although lending was the quintessence of the financial services industry upon Confederation, it was generally limited to commercial lending, given the historically limited use and accessibility of consumer credit. Similar to its American counterpart, consumer lending was virtually non-existent via traditional financial institutions and

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[33] See *infra* ch 3, note 9.
[34] Douglas McCalla, *Consumers in the Bush, Shopping in Rural Upper Canada* (Montreal: McGill-Queen's University Press, 2015) at 23.
[35] *Ibid* at 9.
[36] Iain Ramsay, "To Heap Distress Upon Distress? Comparative Reflections on Interest Rate Ceilings" (2010) 60:2 UTLJ 707 at 715 [Ramsay, 2010].

therefore relegated to personal contacts, pawnshops or loan sharks. With the increasing demand for consumer credit, alternative sources were thus created and continue to evolve to this day. Given the financial difficulties experienced by individuals at the turn of the century and the lack of federal initiatives to facilitate and encourage consumer lending, the pressing need for consumer and small commercial loans resulted in the creation of the first caisse populaire in Quebec in 1900, followed by other cooperative credit institutions in the rest of the country as well as provincial mortgage, trust and loan companies.

Except for the brief period of retrenchment following the financial panic of 1857 caused by the declining international economy and over-expansion of the domestic economy, the rapid evolution of the United States from an agrarian to a commercial manufacturing economy favoured the use of credit. The broadening of financial services provided by newly created banks and other types of lenders and the depersonalization of business and credit[37], generated new types of consumer credit products that progressively entered the market. With the rapid rise of industrialization, use of electricity and urban concentration, the use of merchant-specific credit for the purchase of groceries and household items became increasingly standard.[38] Between 1900 and 1913, Canada's permanent labour force grew by 45%, with urban growth doubling rural growth, and wages rose by 43% during the first decade.[39] With the majority of residents settling in urban centres, making high wages but also absorbing the higher cost of living, the Board of Inquiry into Cost of Living in Canada concluded, in 1915, that the "distribution of the resulting prosperity has not been uniform" thereby increasing the need for consumer credit.[40] In addition, contrary to their ancestors and most rural households, city dwellers were no longer self supporting and became "entirely dependant [on] 'money-income' for the primary essentials of

[37] Thomas GW Telfer, *Reconstructing Bankruptcy Law in Canada: 1867 to 1919, From an Evil to a Commercial Necessity*, (PhD, University of Toronto, 1999) at 14.
[38] For example, the central role of credit offered by food retailers to working-class families in Montreal before World War II: Sylvie Taschereau & Yvan Rousseau, "The Hidden Face of Consumption: Extending Credit to the Urban Masses in Montreal (1920s–40s)" (2019) 100:4 Can Historical Rev 509.
[39] Canada, Board of Inquiry into Cost of Living in Canada, *Report of the Board* (Ottawa, Canada: 1915) at 1053, 1055, 1064 [*Report of the Board of Inquiry into Cost of Living, 1915*].
[40] *Ibid* at 1064.

existence".[41] This new economic reality dawning in rural centres created, in turn, a need for consumer credit in times of financial hardship.

The burgeoning of consumer credit markets in the latter half of the 20th century was led by the United States, where there was more openness post-independence to lending than in England or France. In the 1920s, the merchants making the most noticeable use of credit, or time payment as it was then termed, were manufacturers of automobiles, furniture and home appliances. This was viewed by some as a democratization of access to consumer goods by allowing widespread purchase of items formerly reserved for those with liquid assets.[42] The increased retail volume led to greater profits and consequently incentives to augment credit.

The trauma of economic collapse resulting from the Great Depression of 1929 profoundly affected the Western World, until the increased industrial output required to fuel the combat requirements in the Second World War changed the economic focus. The postwar economy in the United States after a brief transitional period was catalyzed by a rebound in consumer demand after fifteen years of austerity. The reorientation of much of the war-engendered industrial capacity from a military to civilian direction encouraged expansion of the credit market to move inventory and sell services. Rising incomes made credit granting a reasonable risk for discretionary purchases because growing surpluses remaining after provision of necessities caused expenditures on consumer goods to increase substantially. Consumer debt in the United States had risen from $30 billion in 1945 to $569 billion by 1974.[43] Responding to the collateral damage of consumer overindebtedness, the 1978 *Bankruptcy Code*[44] was enacted in part to address the huge increase in personal bankruptcies.[45]

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[41] Canada, Royal Commission on Prices, *Minutes of Proceedings and Evidence, No 35* (Ottawa: King's Printer, 1948) at 1909 (30 November 1948) (AP Reid, Vice-President and General Manager, Household Finance Corporation of Canada) [*Minutes of Proceedings and Evidence, No 35, 1948*].

[42] Amity Shales, *The Forgotten Man* (New York: HarperCollins, 2007) at 38–39.

[43] David A Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2003) at 136.

[44] *Bankruptcy Reform Act of 1978,* Pub L 95-598, 92 Stat 2549.

[45] Janis Sarra, "Book Review of *Debt's Dominion, A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2001) by David A. Skeel", (2003) 41 Osgoode Hall LJ 734 at paras 4–6.

Similarly, spawned by the Industrial Revolution in the 19th century and rising levels of income and employment, a new culture of consumerism thrived in Canada following World War II and created an unabating demand for consumer products and services.[46] Corresponding consumer spending catalyzed in turn the development and growth of a new consumer credit industry.[47] "Total consumer credit jumped from $388 million in 1945 to $1,231 million five years later and continued to grow rapidly through succeeding years."[48] Increasing competition in the Canadian financial sector, the deregulation of mortgage and consumer lending by the banks in 1954 and 1967[49] and the progressive regulatory reforms of the credit industry since the 1980s have continued to fuel a new culture of credit, consumption and consumer indebtedness that has steadily taken root in Canada.

Until the 1980s, most, if not all, economically developed societies strictly regulated consumer credit markets.[50] However, during the three decades preceding the Global Financial Crisis, legislative reforms in many countries not only increased domestic competition but removed some restrictions on foreign banks and non-bank lenders.[51] In addition, many jurisdictions abolished usury and small loan interest rate ceilings. This deregulation allowed lenders to offer more credit on lucrative terms in a variety of forms to a greater number of consumers.

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[46] Ben-Ishai, Schwartz & Telfer, *supra* note 16 at 240–41; *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 5 at 10; Jacob S Ziegel, "Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint" (1968) 68:3 Colum L Rev 488 at 488 [Ziegel, 1968]; *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 4 at 203; *Final Report of the Select Committee of the Ontario Legislature on Consumer Credit*, Sessional Paper (No 85) (Toronto, Ontario: 1965) at 56–59 [Ontario*, Final Report on Consumer Credit, 1965*]. See also Robert P Shay, "Major Developments in the Market for Consumer Credit Since the End of World War II" (May 1996) J Finance 371.

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

[48] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 4 at 203.

[49] *Bank Act*, SC 1953-54, c 48, s 75(2); *National Housing Act, 1954*, SC 1953-54, c 23; *Bank Act*, SC 1965-67, c 87, s 91.

[50] Johanna Niemi-Kiesilainen, "Symposium: Consumer Bankruptcies in a Comparative Context Consumer Bankruptcy in Comparison: Do we Cure a Market Failure or a Social Problem?" (1999) 37 Osgoode Hall LJ 473-503 at 480.

[51] Toronto-Dominion (TD) Economics, "Canadian Household Debt: A Cause for Concern, Special Report," (20 October 2010), online: TD Economics <td.com/document/PDF/economics/special/td-economics-special-dp1010-household-di3.pdf> at 2–3.

Following the American trend of consumerism and indebtedness, the "phenomenal growth of consumer credit [in Canada] has been accompanied by equally dramatic changes in the structure of the market and in the development of new forms of consumer credit".[52] Considering the proven profitability of consumer lending, it is therefore not surprising that once the consumer credit industry was established, traditional financial institutions wanted a part of the consumer credit market and convinced the Canadian Parliament to eliminate the restrictions inhibiting their participation.

Consequently, the financial services industry has continued to evolve substantially during the last decades, with the five Canadian federally regulated chartered banks currently dominating the financial services industry.[53] In 1990, less than 50% of total household credit, including residential mortgage credit, originated from chartered banks with non-banks such as trust and mortgage loan companies, credit unions and caisses populaires, life insurance, and non-depository credit intermediaries and other institutions (e.g. automobile leasing and sales financing companies) accounting for the rest.[54] During the last 30 years, chartered banks have increased their market share to 74% in 2020 of total household credit in Canada.

In addition, since 1990, chartered banks have continued to increase their market share of non-mortgage loans from 64% in 1990 to 70% in 2020, with their share of the market peaking in 2013 at 75%.[55] The recent drop in their market share of the consumer credit industry can be attributed, in part, to the expansion of non-financial corporations offering

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

[53] The conglomeration of consumer lending within chartered banks is confirmed by Statistics Canada, *Table 36-10-0639-01 Credit liabilities of households (x 1,000,000)* (last modified 2023-08-09) online: Statistics Canada <doi.org/10.25318/3610063901-eng>.

[54] *Ibid*.

[55] *Ibid*. The distinction between "non-mortgage loans" and "consumer credit" is that "the measure of household consumer credit includes only the financing related to current consumption, whereas financing for financial and capital investment expenditures is included in a separate category for non-mortgage loans other than consumer credit": Statistics Canada, *Guide to the Monthly Credit Aggregates, Latest Developments in the Canadian Economic Accounts*, Catalogue No 13-605-X (Ottawa, Statistics Canda: December 18, 2020) at 5, online: Statistics Canada <www150.statcan.gc.ca/n1/pub/13-605-x/2020001/article/00004-eng.htm>. The new combined aggregate measures of credit of the Bank of Canada and Statistics Canada available for the years since 1990 no longer provide the categories of lenders specifically for consumer credit.

payday or other high cost loans as well as credit unions and caisses populaires. Not only has the market structure changed, but also, more importantly, the volume of credit granted has increased exponentially.

New forms of credit offered by the banking industry included credits cards with innumerable types of incentives as well as home-equity lines of credit ("HELOCs"). Additional competition in the form of alternative financial services specializing in short-term loans at high interest rates also developed during the 1990s and the industry now includes "pawnshops, cheque-cashing firms, payday loan firms, rent-to-owns and income tax preparation services that advance funds".[56] Moreover, technological advancements not only enabled the industry to innovate and to develop new marketing strategies but increased its own internal efficiency to manage risk with standardized credit scoring and automation of credit approvals. However, along with this new freedom and significant profits, came aggressive and deceptive marketing as well as negligent and predatory practices thereby precipitating the rise in consumer insolvencies.

1.3.2 Social Context, Impact of Rising Debt and Consumer Financial Distress

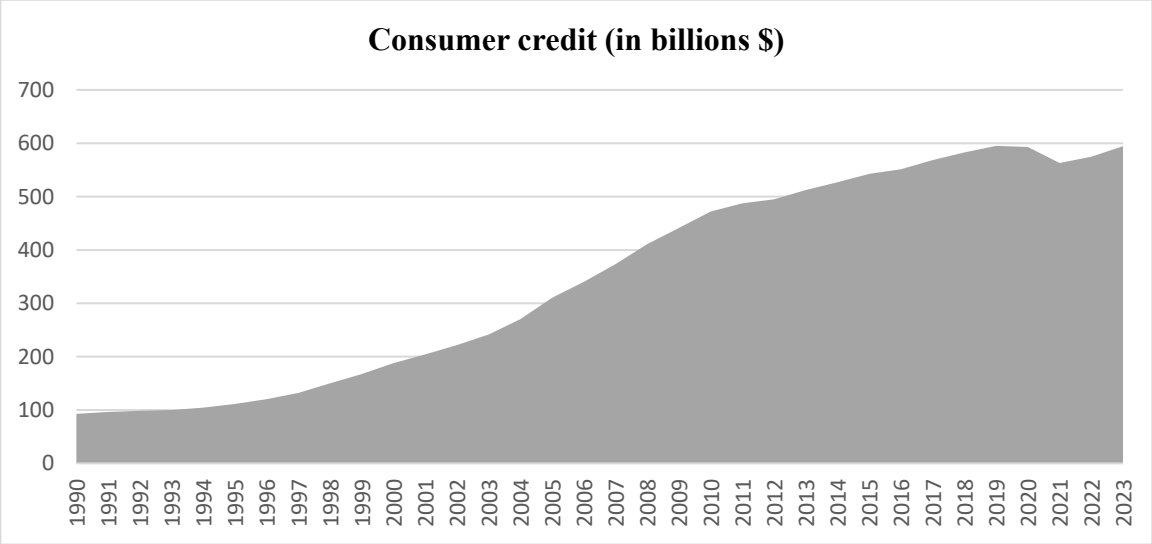
Since 1969, consistent and sustained statistics recorded by the Bank of Canada have clearly established the resulting expansion of consumer credit in Canada.[57] Already totalling 9.7 billion dollars in 1969, consumer credit increased 322% between 1969 and 1979. Fuelled by the global financial liberalization and deregulation of financial services during

[56] Ruth Berry & Karen Duncan, "The Importance of Pay Day Loans in Canadian Consumer Insolvency" (2007) at 3, online: OSB <ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02026.html>.

[57] Statistics Canada, *Table 10-10-0118-01, Credit measures, Bank of Canada (x 1,000,000)* ((last modified 2023-08-09), unadjusted, <doi.org/10.25318/1010011801-eng>; Statistics Canada, *Table 38-10-0238-01, Household sector credit market summary table, seasonally adjusted estimates* [(last modified 2023-08-09) online: Statistics Canada <doi.org/10.25318/3810023801-eng>.

the 1980s,[58] consumer credit in Canada, as calculated by Statistics Canada, further increased by almost 600% during the last 30 years as represented in Figure 1.[59]

Figure 1: Consumer credit in Canada, 1990-2023[60]



In 2023, total indebtedness in Canada for all forms of consumer credit, including credit cards, amounted to $594 billion.[61] "As households became accustomed to using their credit cards for everyday purchases and the product space evolved as competitors refined rewards systems and included additional perks, the outstanding balance carried on credit cards grew from $13.2 billion in January 2000 to a high of $90.6 billion in February 2020, an average annual growth of 20.7%."[62] According to Equifax Canada, "[i]ncreased usage and reliance on credit cards was a key driver in the overall growth of non-mortgage debt in the fourth

[58] Donald JS Brean, "Financial Liberalization in Canada: Historical, Institutional and Economic Perspectives" in Albert Berry & Gustavo Indart, eds, *Critical Issues in International Financial Reform* (New Brunswick, NJ: Transaction Publishers, 2003) 125 at 135: "[B]y 1980 Canada had entered – or had been forced into – a new era of finance. Finance was being liberalized. The forces of change shaping industry and commerce – advances in technology, transportation, communications, international economic integration, financial sophistication—were likewise shaping the Canadian financial sector and the regulations that govern it." See also Ramsay, 2006, *supra* note 5 at 35.

[59] *Table 38-10-0238-01, Household sector credit market summary table, seasonally adjusted estimates*, *supra* note 57.

[60] *Ibid*.

[61] *Ibid*.

[62] Michael Daoust & Matthew Hoffarth, *Trends in household non-mortgage loans: The evolution of Canadian household debt before and during COVID-19* (Ottawa: Statistics Canada, 2021) at 17.

quarter" of 2022 and consumer credit card balance "crossed the $100 billion for the first time."[63]

Statistics further reveal that during the last thirty years not only has the number of indebted consumers significantly increased but also their level of indebtedness. Total Canadian household credit market debt, which combines mortgage, consumer credit and other non-mortgage debt, increased from $361 billion in 1990 to reach $1.5 trillion twenty years later in 2010.[64] "Household credit has ballooned to unprecedented levels in Canada", soaring to $2-trillion in 2016 and again to $2.84-trillion in the first quarter of 2023 with mortgages making up almost three quarters of this debt.[65] "On a per capita basis, households owed $71,560 in debt" in 2023.[66]

According to the Bank of Canada, the most recent expansion of household debt is the result of higher house prices, financial innovation, income growth and low interest rates.[67] This rise in household indebtedness is represented in Figure 2, along with its three components: mortgages, consumer credit and non-mortgage loans, which is essentially comprised of financial and capital investments expenditures as well as loans made to unincorporated businesses.[68]

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[63] Equifax, "Economic Headwinds Impacting Debt Levels and Credit Payment Behaviour, Q4 2022 – Equifax Canada Market Pulse Quarterly Credit Trends," (March 2023), online: *Equifax* <assets.equifax.com/assets/canada/english/consumer-trends-report-q4-2022-en.pdf> at 2.

[64] *Table 36-10-0639-01 Credit liabilities of households (x 1,000,000)*, *supra* note 53.

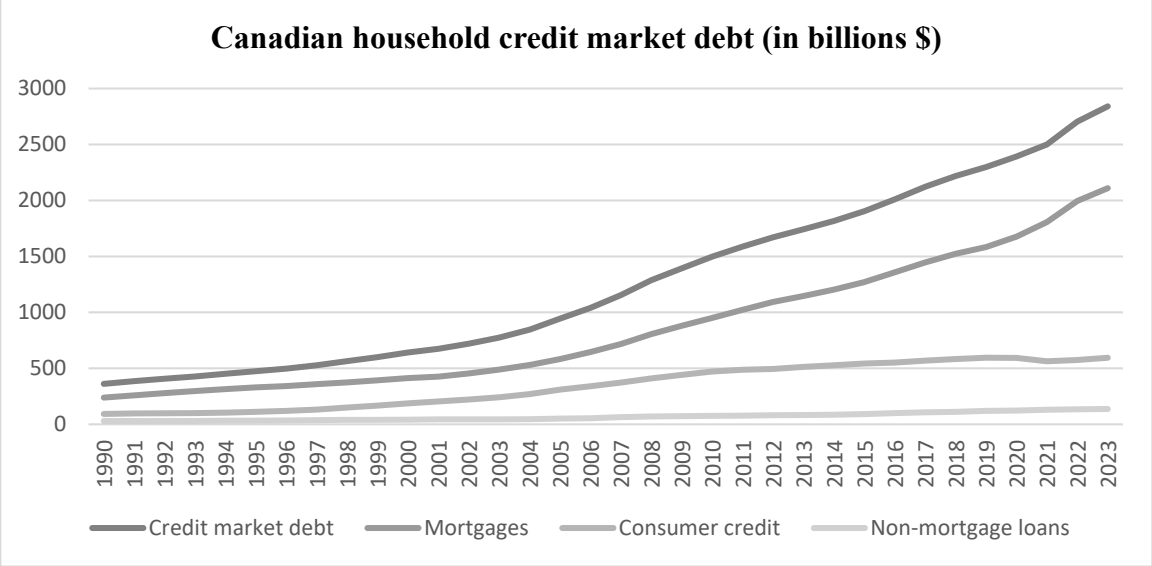
[65] Livio Di Matteo, "Household Debt and Government Debt in Canada," (2017), online: *Fraser Institute* <fraserinstitute.org/sites/default/files/household-debt-and-government-debt.pdf> at 1; Chris Fournier, "Late payments set to rise on Canadians' $599-billion of credit card, non-mortgage debt, Equifax predicts", Financial Post (3 July 2108), online: *Financial Post* <business.financialpost.com/personal-finance/debt/equifax-says-canadian-delinquencies-will-probably-rise-this-year>; Sean Kilpatrick, "Canadians owe $1.85 for every dollar of disposable income: StatsCan," (14 June 2023), online: *The Canadian Press* <cp24.com/news/canadians-owe-1-85-for-every-dollar-of-disposable-income-statscan-1.6440641?cache=>. See also *Table 36-10-0639-01 Credit liabilities of households (x 1,000,000)*, *supra* note 53.

[66] Statistics Canada, "National balance sheet and financial flow accounts, first quarter 2023," (2023), online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/daily-quotidien/230614/dq230614a-eng.pdf?st=YtdNh0YC> at 5.

[67] Allan Crawford & Umar Faruqui, "What Explains Trends in Household Debt in Canada?" (Winter 2011–2012) Bank Can Rev 3 at 3, 13.

[68] Statistics Canada, *Guide to the Monthly Credit Aggregates*, Catalogue No 13-605-X (Ottawa: Minister of Industry, 2020) at 5, 7. Statistics Canada's category of non-mortgage loans includes loans made to unincorporated businesses since these "cannot be reliably separated from those assets and liabilities of individuals and households".

Figure 2: Credit liabilities of Canadian households, 1990-2023[69]



Canadians' level of indebtedness can also be represented by the statistics on household credit market debt as a proportion of household disposable income. Rising from 50% in the mid-1980s, this debt-to-income ratio doubled in the 1990s and has risen to its highest level yet to 184.5% in 2023.[70] The good news is that Canadian households have also increased their assets. According to Statistics Canada, their debt to assets ratios have remained relatively stable since 1990 despite some fluctuations, varying between 14.13% and 19.49% (during the Canadian recession of 2008-2009), and currently standing at 15.43%

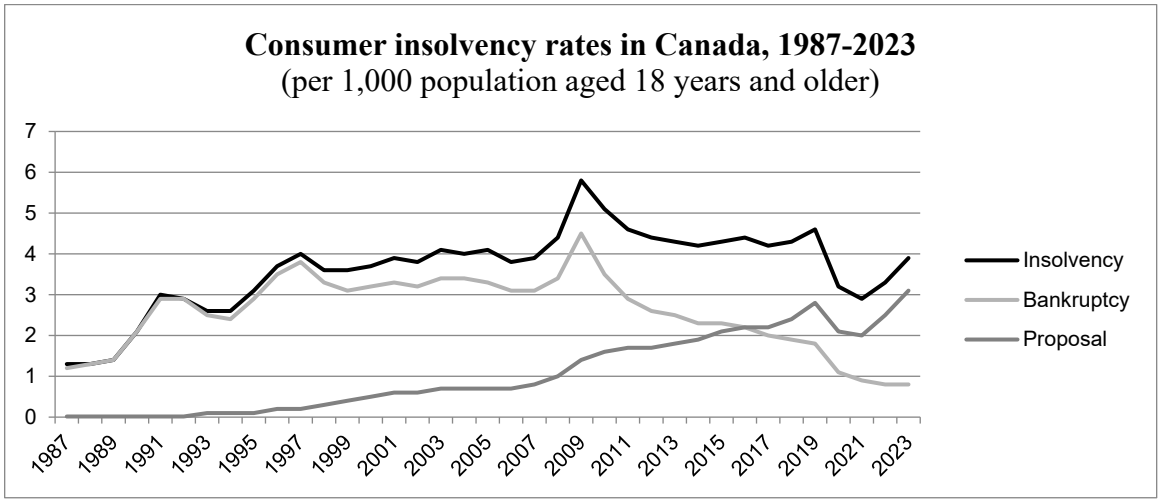
[69] Statistics Canada, *Table 38-10-0238-01, Household sector credit market summary table, seasonally adjusted estimates* (1st quarter of each year) (last modified 2023-08-09), online: Statistics Canada <doi.org/10.25318/3810023801-eng>. See also Statistics Canada, *Understanding household credit measures, a joint study by the Bank of Canada and Statistics Canada*, Catalogue No 13-605-X (Ottawa: Minister of Industry, 2018) at 5: An important distinction between these recent statistics and the previous Bank of Canada statistics (*Table 10-10-0118-01, Credit measures, Bank of Canada (x 1,000,000)*, *supra* note 57) is that the Bank of Canada distinguished residential mortgages from non-residential mortgages based on the intended use of the property whereas Statistics Canada classifies the mortgages based on the status of the debtor, i.e. a corporation vs a consumer.

[70] Statistics Canada, "Household sector credit market summary table, seasonally adjusted estimates," (14 June 2023), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3810023801>; *Canadian Household Debt: A Cause for Concern, Special Report*, *supra* note 51 at 1. See also Sharanjit Uppal & Sébastien LaRochelle-Côté, "Changes in debt and assets of Canadian families, 1999 to 2012" (2015), online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/75-006-x/2015001/article/14167-eng.pdf?st=s0nMjhDD> at 1–2. See also Office of the Superintendent of Financial Institutions, *Residential Mortgage Underwriting Practices and Procedures Guideline (B-20)* (modified 12 January 2023), online: OSFI <osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/b20-nfo.aspx>.

in 2023.[71] The bad news is that the "amount of debt held by Canadian households has been rising for about 30 years, not just in absolute terms but also relative to the size of the economy", thereby increasing the Canada's economic vulnerability to economic fluctuations, downturns and the next recession, as previously discussed in this chapter.[72]

Although consumer credit accounts for only 20% of all household debt in 2023, it poses nonetheless the greatest risk to consumers because it is often unsecured debt or secured by depreciating assets. Contrary to mortgages which generally aim to build equity and long-term wealth, consumer credit, by definition, simply increases a consumer's indebtedness and risk of insolvency. In Canada, insolvency and bankruptcy statistics further confirm the financial vulnerability of consumers.

Figure 3: Bankruptcy and insolvency rates in Canada, 1987-2023[73]



[71] Statistics Canada, "Financial indicators of households and non-profit institutions serving households, national balance sheet accounts (Table: 38-10-0235-01)," (14 June 2023), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3810023501>; George Marshall, *Debt and financial distress among Canadian families*, Insights on Canada Society (Ottawa: Statistics Canada, 2019) at 1.

[72] Stephen S Poloz, "Canada's Economy and Household Debt: How Big Is the Problem?" (1 May 2018), online: *Bank of Canada* <bankofcanada.ca/2018/05/canada-economy-household-debt-how-big-the-problem/>.

[73] OSB, "Annual Consumer Insolvency Rates by Province and Economic Region" (last visited 13 December 2023), online: *Canada* <ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/statistics-and-research/annual-consumer-insolvency-rates-province-and-economic-region>.

This chart clearly indicates the long-term growth of consumer insolvencies and bankruptcies in Canada.[74] Although there was a spike in the number of insolvencies during the Canadian recession of 2008-2009, there was clearly a continual increase in consumer insolvency rates from 1987 until the COVID-19 pandemic. In 2020, consumers were protected from the full effects of the pandemic and their indebtedness by federal and provincial income supports as well as private sector initiatives such as mortgage and credit deferrals and other debt relief programs.[75] However, consumers have been facing new financial headwinds since the end of those programs. With the effects of "surging inflation and interest rates, falling equity values and home prices, and higher consumer debt balances", consumer insolvencies are once again on the rise and rates will likely surpass their pre-pandemic peak.[76] Indeed, Stephanie Ben-Ishai predicted, in 2020, "a significant surge in the need for debt relief and bankruptcy filings […] for the near future."[77] Recent statistics from the Office of the Superintendent of Bankruptcy ("OSB") confirmed in 2022 that consumer insolvencies increased by 11.9% since 2021 and that the "total number of insolvencies in May 2023 was 30.9% higher than the total number of insolvencies in May 2022."[78] Over 100 000 consumer insolvencies were reported by the OSB in 2022 alone.[79]

According to Canadian statistics, it is not only the exponential increase of the actual number of consumer insolvencies that is the subject of concern but also the corresponding

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[74] OSB, *Insolvency Statistics in Canada —2015* (Table 2: Insolvencies Filed by Consumers) (last visited 2016-08-14), online: *OSB* <ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br03537.html>.

[75] Stephanie Ben-Ishai, "Consumer Bankruptcy in the Wake of COVID-19: The Calm before the Storm - Westlaw Edge Canada" (2020) 57 Osgoode Hall LJ 637 [Ben-Ishai, 2020]; Kevin Akrong & Gail E Henderson, "COVID-19 and the Regulation of Alternative Financial Services" (2021) 46:2 Queen's LJ 357.

[76] Ksenia Bushmeneva, "High, Low, or About Right?" (16 February 2022), online: *TD Economics* <economics.td.com/domains/economics.td.com/documents/reports/kb/Update_On_Canadian_Consumer_and_Business_Insolvencies.pdf> at 3.

[77] Ben-Ishai, 2020, *supra* note 75 at 638.

[78] Office of the Superintendent of Bankruptcy, "Insolvency Statistics in Canada—May 2023 (Highlights)," (28 June 2023), online: *OSB* <ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/statistics-and-research/insolvency-statistics-canada-may-2023-highlights>; Office of the Superintendent of Bankruptcy, "Insolvency Statistics in Canada—2022 (Table 2)," (7 April 2023), online: *OSB* <ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/statistics-and-research/insolvency-statistics-canada-2022-table-2>.

[79] OSB, "Historic Insolvency Statistics in Canada - Annual (from 1987)" (last consulted 13 December 2023), online: *OSB* <open.canada.ca/data/en/dataset/ed4d48f3-750f-4eeb-93f9-cb62be138264>.

increases in the absolute size and value of net liabilities of consumer bankruptcies.[80] These recent statistics seem to confirm Jacob Zeigel's observation in 1970 that "[p]erhaps the moral is that there is not always a pot of gold at the end of the consumer credit rainbow".[81]

Modern bankruptcy laws effectively legalize what the law originally attempted to sanction in the past, that is, the nonpayment of debt. Although recent amendments in most countries have streamlined the processing of consumer bankruptcy files, they have not attacked the root problem of overindebtedness, which eventually leads to financial hardship and insolvency. The result: the volume of consumer bankruptcies is not diminishing.

Consequently, now that rehabilitation of insolvent individuals has become a legal reality in most developed countries, it is time to protect consumers before they become burdened with the problem of overindebtedness. James Callon, Canada's former Superintendent of Bankruptcy, warned in 2012 that simply "tinkering with technical provisions within national insolvency laws will not produce a lasting solution"; instead, other solutions should be explored and might be necessary prerequisites "to curbing the culture of reckless overconsumption that has fuelled the extraordinary rise in consumer insolvency in jurisdictions like Canada in recent decades".[82]

With the increased accessibility by lenders and credit grantors and correlating use by consumers, consumer credit has become a vital component of the financial services industry in Canada and around the world. However, as warned by Jacob Ziegel, consumer greed and overconfidence as well as "the attraction of consumer credit to consumers in allowing them to pay for goods and services over a period of time, and its attraction to lenders and credit grantors as a major profit centre, both easily lend themselves to abuse".[83]

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[80] OSB, *An Overview of Canadian Insolvency Statistics up to 2006* (Ottawa: Industry Canada, 2007) at 27: "The average value of liabilities per consumer file tripled between 1987 and 2006."

[81] Jacob S Ziegel, "Recent Legislative and Judicial Trends in Consumer Credit in Canada" (1970) 8 Alta L Rev 59 at 74 [Ziegel, 1970].

[82] Jason Callon, "Panel on Reform and Re-evaluation of Consumer Bankruptcy for the New Economy" (delivered at the International Association of Restructuring, Insolvency & Bankruptcy Professionals, Miami Conference, 19-22 May 2012) as reviewed by Jason Kilborn in *INSOL World*, Third Quarter 2012, Conference Edition at 12.

[83] Ziegel, 2010, *supra* note 31 at 394.

Although negligent and abusive practices of lenders may be partly to blame, many consumers of financial services have little education or experience to enable them to evaluate and compare products increasing in complexity and variety or to undertake negotiations with service providers. Accordingly, Canada has, since 2001 and until the recent reforms, prioritized consumer protection through financial literacy despite numerous calls to modernize and strengthen the regulation of financial institutions. It is, however, abundantly clear that measures implemented up to now have not ceased the relentless rise in consumer insolvency. Recent statistics studied by the Canadian Task Force on Financial Literacy indicate that the problem is perhaps far worse than anticipated. Considering that in 2010, 49.8% of adult Canadians struggled with simple tasks involving math and numbers and 42% of adult Canadians struggled with reading, it is unlikely that recent measures to improve the financial literacy of a majority of indebted Canadians are effective.[84]

Unfortunately, as the Bank of Canada's former governor, Stephen Poloz explained, the continued growth in Canadian consumer debt and the high debt levels can increase Canadian households' vulnerability to an adverse shock or to downside risks facing the Canadian economy such as inflation, rising interest rates and other economics impacts caused by recent armed conflicts around the world.[85]

On an individual level, sudden financial shocks, such as loss of income, inflation, illness, family breakdown or a rise in interest rates, represent potential vulnerabilities to a consumer's ability to service his or her household debt. Along with the financial distress caused by overindebtedness, the social impact of consumer credit has long been recognized: "Overindebtedness creates social costs such as lower productivity, family

[84] Canada, Task Force on Financial Literacy, *Canadians and Their Money: Building a brighter financial future* (Ottawa: Ministry of Finance, 2010) online: <financialliteracyincanada.com/report/report-toc-eng.html>.
[85] *Canada's Economy and Household Debt: How Big Is the Problem?*, *supra* note 72 at 2.

problems, health problems and potential financial exclusion. These costs are not reflected in the price of credit."[86]

Moreover, given the newly discovered profitability of the industry, many modern lending practices specifically target vulnerable consumers, especially low-income, uneducated or financially distressed debtors marginalized by mainstream financial institutions.[87] Financial exclusion from traditional financial services stems from various factors either individually or in combination. Lack of access, either knowledge-based, cost-based or geographically-based, constitutes a major obstacle for some consumers while rejection, either actual or anticipated, resulting from the absence of credit, a poor credit rating, or an existing high level of indebtedness, represents another barrier to affordable credit-enhancing consumer loans.[88]

In the event fallouts trigger an economic downturn, possibly resulting from a sharp rise in interest rates or a decline in employment rates or real estate prices, the elevated level of household indebtedness also represents a significant vulnerability for the Canadian financial system and economy.[89] According to a study conducted by the C.D. Howe Institute, "[t]he rise in Canadian household debt has caused concerns about both possible risks to financial stability and the sustainability of household finances. This, in turn, has sparked a debate over whether there is a need for reforms aimed at limiting the terms (and

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[86] Ramsay, 2006, *supra* note 5 at 37; Study Committee on Bankruptcy and Insolvency Legislation, *Report of the Study Committee on Bankruptcy and Insolvency Legislation (Tassé Report)* (Ottawa, Canada: Information Canada, 1970) at paras 2.1.16–17; Ben-Ishai, Schwartz & Telfer, *supra* note 16 at 242.

[87] Ben-Ishai, Schwartz & Telfer, *supra* note 16 at 243; *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 5 at 10, 17–18; Jerry Buckland, *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada* (Toronto: University of Toronto Press, 2012) at 152 [Buckland, 2012].

[88] For further details see Brenda Spotton Visano, "Mainstream Financial Institution Alternatives to the Payday Loans" in Jerry Buckland, Chris Robinson & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context: A Mature Industry with Chronic Challenges* (New York: Palgrave MacMillan, 2018) 147 at 149–58.

[89] Bank of Canada, "Financial System Review —2019" (2019) at 6, online: <bankofcanada.ca/2019/05/financial-system-review-2019/> [perma.cc/NG6M-8W8J]; Gino Cateau, Tom Roberts & Jie Zhou, "Indebted Households and Potential Vulnerabilities for the Canadian Financial System: A Microdata Analysis" in Bank of Canada, *Financial System Review* (December 2015) 49 at 49, online: <bankofcanada.ca/wp-content/uploads/2015/12/fsr-december2015.pdf> [perma.cc/3592-MVHU]; Buckland, 2012, *supra* note 87 at 11; Puri & Nichols, *supra* note 4 at 460. See also *Household Debt and Government Debt in Canada*, *supra* note 65.

amount) of consumer borrowing."[90] Of concern to lawmakers, should be the International Monetary Fund's recent analysis that of the 38 mostly advanced economies in the world, Canada was the one at the highest risk of mortgage defaults because of high levels of household debt and greater exposure to higher mortgage payments with the raising of interest rates by central banks to contain inflation following the COVID-19 pandemic.[91]

It is not surprising therefore that Jacob Ziegel has been promoting the need not only to help consumers who become insolvent but also to prevent consumers from becoming over-indebted in the first place for over 50 years.[92] Although an important contributing factor is the high rate of financial illiteracy, we cannot ignore the impact of lender irresponsibility. Indeed, given the financial distress caused not only on microeconomic and macroeconomic levels but with unprecedented international repercussions, free-market ideology can no longer trump the regulation of consumer credit and the protection of consumers.

Unlike former civilizations that were unable to resolve the causes of personal overindebtedness, contemporary society should now confront one of the fundamental problems at the source of economic crises, credit—not its existence, but rather its irresponsible lending by creditors and reckless use by consumers. The misuse of consumer credit and the overindebtedness of consumers must be reined in and new regulation is required to protect consumers and responsibilize credit lenders for their negligent, abusive or predatory lending practices.[93] These are the issues this dissertation intends to address by

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[90] James MacGee, *Commentary No 346: The Rise in Consumer Credit and Bankruptcy: Cause for Concern?* (Toronto, ON: C.D. Howe Institute, 2012) at 2. See also Canada, Parliamentary Budget Officer, *Household Indebtedness and Financial Vulnerability* (Ottawa: Office of the Parliamentary Budget Officer, 2016) at 2: "Based on PBO's projection, the financial vulnerability of the average household would rise to levels beyond historical experience."

[91] Nina Biljanovska, "How Falling Home Prices Could Strain Financial Markets as Interest Rates Rise," (31 May 2023), online: *International Monetary Fund* <imf.org/en/Blogs/Articles/2023/05/31/how-falling-home-prices-could-strain-financial-markets-as-interest-rates-rise?utm_medium=email&utm_source=govdelivery>.

[92] Ziegel, 1973, *supra* note 52 at 480–81; Ziegel, 1970, *supra* note 81 at 67; Jacob S Ziegel, "The Legal Regulation of Consumer Credit in Canada" (1966) 31:2 Sask B Rev 103 at 113 [Ziegel, 1966].

[93] Richard H Bowes, "Annual Percentage Rate Disclosure in Canadian Cost of Credit Disclosure Laws" (1998) 29 Can Bus LJ 183 at 186; Bradley Crawford, "Does Canada Need a Payments Code" (1982–1983) 7 Can Bus LJ 44 at 60 [Crawford, 1982]; Puri & Nichols, *supra* note 4 at 460. See also Bray & Gleixner, 2012, *supra* note 26; Gleixner & Bray, 2013 Article, *supra* note 26; Gleixner, 2014, *supra* note 26.

studying and providing a critical historical analysis of Canada's consumer credit regulatory framework since Confederation. The objective is to compel and contextualize further research and debate leading hopefully to legal reform to better protect financial consumers.

1.4 Research Questions and Hypotheses

Following their comprehensive review of Canada's legal framework regulating the financial services industry, scholars have noted that "[w]hile the country earns well deserved international recognition for leadership in prudential matters, Canada exhibits a major weakness in consumer protection with poor rules for market conduct."[94] With rising debt and consumer financial distress and the individual and collective risks previously discussed, a higher standard of financial consumer protection is therefore required to better protect vulnerable consumers and increase consumer welfare.

In order to recommend a new legal framework to strengthen financial consumer protection in Canada, this dissertation aims to answer three research questions. The first objective of this thesis is to evaluate whether the current consumer credit regulatory framework fails to achieve its consumer protection objective, as hypothesized. In the affirmative, the thesis will determine whether a national regulatory scheme to regulate the consumer credit industry can and should be developed and enacted by Parliament. Third, the research aims to identify regulatory mechanisms required to reduce our collective vulnerabilities and protect individual consumers from abusive and negligent lending practices as well as from overindebtedness and insolvency.

Previous research undertaken by the author supports the working hypothesis that the current regulatory framework is fragmented, complicated, confusing and inefficient.[95] Unanswered questions persist as to why consumer credit legislation remains such a

[94] Robert R Kerton & Idris Ademuyiwa, "Financial Consumer Protection in Canada: Triumphs and Tribulations" in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection* (Singapore: Springer, 2018) 85 at 107.

[95] Bray & Gleixner, 2012, *supra* note 26; Gleixner & Bray, 2013 Article, *supra* note 26; Gleixner, 2014, *supra* note 26; Gleixner & Bray, 2013 Report, *supra* note 26.

fragmented area of law resulting from federal and provincial sporadic attempts to protect financial consumers. As a result, this legal disharmony curtails the consumer credit industry's adherence to the rules and regulations and promotes a lack of administrative and judicial enforcement, thereby reducing consumer protection. It is further postulated that financial consumers in Canada, hindered by inadequate financial literacy, are vulnerable to predatory lending practices and consequently fall unnecessarily victims to overindebtedness suffering financial distress.

To answer these questions and validate our hypotheses, the research undertaken aims to provide a critical history of the Canadian consumer credit regulatory framework to provoke and nourish recommendations for legal reform to strengthen financial consumer protection. To accomplish this, this dissertation chronicles and analyzes the evolution and the performance of federal and provincial consumer credit legislation and regulation since Confederation.

As discussed in the following subsections, the critical and historical analysis of legal, judicial, political and socio-economic developments in consumer credit law should provide the necessary context to contemplate and debate necessary reforms to the regulatory framework.[96] A contextual approach is used to investigate parliamentary and legislative intentions, areas of contention and legislative debates, demands and interests of consumer and industry advocates and impacts of past and present regulations. Official ideologies and statements, as well as the policy assumptions underpinning legal reform and case law, complete the contextual factors, thereby broadening the historical perspective of consumer credit reform in Canada. An analysis of contemporary legal developments is included to enable a better understanding of the current legal and political direction of the financial consumer regulatory framework governing consumer credit.

As noted by Iain Ramsay in 1991, such insights will undoubtedly illuminate the moral, political and social foundations of consumer credit regulation:

[96] Michael Salter & Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (New York: Pearson/Longman, 2007) at 138, 144.

> It may be instructive to trace, historically and comparatively, the development of consumer institutions and norms such as consumer credit and related norms of credit use. This may show the paths not taken, the sites of struggle, the different visions of the marketplace, the marginalization of such institutions as the cooperative movement, and so on. This work has the potential for critical bite both theoretically and practically.[97]

Based on this dissertation's research results, comprehensive reforms to Canada's consumer credit regulation framework are required to address these deficiencies and must include the streamlining, harmonization and enhancement of consumer credit regulation at the federal level to strengthen the legal framework and better protect consumers. It is further argued that potential solutions include new regulatory measures to increase responsible borrowing and lending as well as administrative and judicial enforcement of legislation protecting financial consumer rights and interests.

This dissertation weaves together the analytical and contextual observations on the evolutionary path of Canada's regulatory framework towards a national consumer credit code. The ambitious goal of the research undertaken is to reveal existing regulatory deficiencies and inadequacies, explore potential solutions and provide the contextual foundations as well as the political and moral exhortations justifying legislative reform.

1.5 Literature Review

As a first step in this endeavor, a critical analysis of published academic literature will provide a broad overview of research related to consumer credit law. Scholarly legal literature is mainly comprised of legal books and articles in law journals and each category of publications is reviewed separately.

Considering the constitutional divide between federal and provincial jurisdiction relating to consumer credit, which is analyzed in depth in Chapter 4, it comes as no surprise that legal research and the resulting law books are generally limited to a matter within a specific

[97] Iain Ramsay, "Consumer Law and the Search for Empowerment" (1991) 19 Can Bus LJ 397 at 410 [Ramsay, 1991].

constitutional jurisdiction. As a result, legal publications on banking, bills and promissory notes had an early start, given the specific federal jurisdiction over these matters provided by 91(15) and (18) of the *Constitution Act, 1867*.[98] Consumer credit is, however, largely ignored by these publications, given the relative scale of the consumer credit market compared to the commercial market and the importance placed on the regulation of banks rather than the issuance of credit. Consumer credit is but a side note.

Directly related to consumer credit is the federal constitutional power over interest.[99] Written by Mary Anne Waldron, *The Law of Interest in Canada* is the only scholarly publication to provide an in-depth analysis of this subject.[100] After noting that this area of research is "confusing and obscure" and "has received frequently incoherent legislative and judicial treatment", she provides a thorough analysis of the 14 sections of the *Interest Act*[101] as well as other references to interest rates in federal legislation such as section 347 of the *Criminal Code*[102]. The book also offers a brief overview of early federal money lending legislation in the introductory chapter.

Another federal matter related to consumer credit is insolvency and bankruptcy law[103]. Once the first general bankruptcy law in Canada was enacted in 1919[104], legal research in

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[98] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(15), (18), reprinted in RSC 1985, Appendix II, No 5. See e.g. Samuel Robinson Clarke, *A Treatise on the Law Relating to Bills, Notes, Cheques and I.O.U's* (Toronto: R. Carswell, 1875); Joseph James Gormully, *Banks and banking and the mercantile law of Canada* (Ottawa: Maclean, Roger & Co, 1887); Benjamin Russell, *A Commentary on the Bills of Exchange Act: Chapter 119 of the Revised Statutes of Canada, 1906, with References to English, Canadian and American Cases and the Opinions of Eminent Jurists*, 2nd ed (Calgary; Montréal: Burroughs & Co, 1921) (1st ed published in 1909); John James MacLaren, *Bills, Notes and Cheques. The Bills of Exchange Act, 1890, Canada, and the Acts Amending the Same. From Canadian, English and American Decisions, and References to Ancient and Modern French Law* (Toronto: Carswell, 1904) (6th edition published in 1940 by Frederick Read); John Delatre Falconbridge & Bradley Crawford, *Crawford and Falconbridge Banking and Bills of Exchange: a Treatise on the Law of Banks, Banking, Bills of exchange and the Payment System in Canada*, 8th ed (Toronto: Canada Law Book, 1986) (1st edition appearing in 1907 entitled *The Canadian Law of Banks and Banking: The Clearing House, Currency, Dominion Notes, Bills, Notes, Cheques and Other Negotiable Instruments*); LN Blythe, *Banking in Canada* (Plymouth: Macdonald and Evans, 1978); MH Ogilvie, *Banking: the law in Canada* (Toronto: Carswell, 1985); MH Ogilvie, *Bank and customer law in Canada* (Toronto: Irwin Law, 2007).

[99] *Constitution Act, 1867*, *supra* note 98, s 91(19).

[100] Waldron, 1992, *supra* note 47 at 11.

[101] *Interest Act*, RSC 1985, c I-15.

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

[103] *Constitution Act, 1867*, *supra* note 98, s 91(21).

[104] *Bankruptcy Act, 1919*, SC 1919, c 36.

this area bloomed. Academic interest rose along with the rise in consumer insolvencies and bankruptcies due to increased accessibility of consumer credit since the 1960s and the subsequent legislative reforms to the *Bankruptcy and Insolvency Act*[105] providing greater protection for consumers. Legal research focused on the consequences of consumer overindebtedness and the legal framework of the treatment of insolvent consumers.[106] Although pertaining to American consumer finance, Adam Levitin explains the relevance and importance of insolvency research for the analysis of consumer credit legislation:

> [f]rom the 1980s until 2010, consumer bankruptcy scholarship was the primary lens for examining consumer finance. The pioneering empirical work of Teressa Sullivan, Elizabeth Warren, and Jay Westbrook on consumer bankruptcy was so powerful not because it was bankruptcy scholarship but because it was a lens into the realities facing American consumers. Bankruptcy cases generated the data for examining consumer finances at a time when other data sources were quite limited, and this data told the story of families struggling to hang on to life in the middle class.[107]

Pursuant to the constitutional distribution of legislative powers, legal publications focusing on matters within provincial jurisdiction related to consumer credit are generally limited to the legal relationships between debtors and creditors and vendor credit such as sales financing. Given the legal tapestry of provincial legislation throughout Canada, summarizing and analyzing a specific topic was and remains a daunting challenge for most

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[105] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

[106] See e.g. John D Honsberger & Vern W DaRe, *Honsberger's Bankruptcy in Canada*, 5th ed (Toronto: Canada Law Book, Thomson Reuters, 2017) (1st ed appearing in 1922 entitled *The Law and Practice of Bankruptcy in Canada* by Lewis Duncan); SH Bradford, *Bradford and Greenberg's Canadian bankruptcy Act (annotated)* (Toronto: Burroughs & Co, 1951) (1st ed appearing in 1926 entitled *A consolidation of the Canadian Bankruptcy Act*); Lloyd Williams Houlden, *Lectures, Forms and Precedents on Creditors' Rights, Mechanics' Liens and Bankruptcy* (Toronto: Carswell, 1963); LW Houlden, GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell, 2009) Loose leaf edition (1st ed appearing in 1960 entitled *Bankruptcy Law of Canada*); Anthony J Duggan et al, *Canadian Bankruptcy and Insolvency Law Cases, Text and Materials* (Toronto: Emond Montgomery Publications, 2015) (1st ed appearing in 2003); Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law*, 1867-1919 (Toronto; Buffalo: University of Toronto Press, 2014); Stephanie Ben-Ishai, ed, *Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems* (Toronto: Irwin Law, 2019).

[107] Adam J Levitin, *Consumer Finance Law: Markets and Regulation* (New York: Wolters Kluwer Law & Business, 2018); Teresa A Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Washington, DC: BeardBooks, 1999); Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents are Going Broke*, 1st ed (New York: Basic Books, 2004). See also William H Manz, *Bankruptcy Reform: The Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (Buffalo: William S Hein & Co, 2006).

legal researchers. After noting the "rocky and difficult character of Canadian creditors' remedies", Charles Dunlop explains in the preface of his seminal book *Creditor-Debtor Law in Canada* that this area of law

> is a mixture of provincial, federal and Imperial statutes and rules of court, and a large body of English and Canadian cases. The area of enforcement of judgments is not easily isolated and studied because it spills over into many other fields, such as constitutional, administrative, commercial, tort and property law. The dearth of texts and articles on creditors' rights makes research in the field an even more daunting prospect.[108]

Notwithstanding these obstacles, many publications have analyzed the law of debtor-creditor relations, but most have focused on the regulatory framework of the debt enforcement or collection process and not the credit industry or the issuance of credit.[109] Moreover, many of these publications generally limit the breath of their analysis to a single province given the provincial constitutional jurisdiction over property and civil rights in the province.

In addition to limited federally regulated money lending services, early forms of consumer credit were provided by vendors offering instalment plans or sales financing. Initially restricted to commercial transactions, vendors quickly saw the potential in expanding their financial services to consumers. With the increase in consumer consumption and the accessibility of vendor credit, the commercial dealings between consumers and businesses and the issues and problems resulting from the extension of credit also became worthy of legal research and publication. Examples of books analyzing provincial legislation regulating sales financing, a specific subsection of the consumer credit industry, are

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[108] Charles Richard Bentley Dunlop, *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1981) at iii.

[109] See e.g. James Philemon Holcombe, *The Law of Debtor and Creditor in the United States and Canada* (New York: D. Appleton, 1848); David G Kilgour, *Cases and Materials on Creditors' Rights* (Toronto: University of Toronto Press, 1956) (referred to as the "first Canadian book in the field of creditors' rights"); Mark R MacGuigan, *Cases and Materials on Creditors' Rights* (Toronto: University of Toronto Press, 1962) (2nd ed published in 1967); MJ Trebilcock et al, *Debtor and Creditor: Cases, Notes, and Materials*, (Toronto: Toronto University Press, 1979) (3rd ed published in 1987); Dunlop, *supra* note 108 (2nd ed published in 1995); Laurence M Olivio & DeeAnn Gonsalves, *Debtor-Creditor Law and Procedure*, 6th ed (Toronto: Emond Montgomery, 2021) (1st ed published in 1999); Lyman R Robinson, *British Columbia debtor-creditor law and precedents*, looseleaf, (Scarborough, Ont: Carswell, 1993); Stanley J Kershman, *Credit Solutions: Kershman on Advising Secured and Unsecured Creditors* (Toronto: Thomson Carswell, 2007).

Benjamin Geva's book *Financing Consumer Sales and Product Defences*[110] and Michael Bridge and Francis Buckley's casebook *Sales and Sales Financing in Canada*.[111]

Along with the major publications related to consumer credit previously mentioned, a literature review on consumer credit regulation further reveals an impressive array of articles and essays on consumer credit. It is worth noting, however, that before the 1960s, very little legal research and content existed given the paucity of consumer credit regulation in Canada, reflecting the limited availability and consequent use of credit by consumers.[112]

As previously explained, during the 1960s and 1970s, the "phenomenal growth of consumer credit [was] accompanied by equally dramatic changes in the structure of the market and in the development of new forms of consumer credit."[113] Doubtless an inevitable corollary to the insatiable hunger for consumer credit, the ongoing transformation of the consumer credit industry to satisfy this need and to adapt to legislative reforms commenced during these early years. Concomitant with the rise in consumerism also came the increased governmental moral obligation to protect consumers from unscrupulous companies and corrupt or unfair practices. During this period, federal and provincial departments were established, consumer research was financed, and legislation was enacted to better protect consumers.[114] In 1976, the authors Michael Trebilcock and Arthur Shulman explained that

> the area of consumer credit has attracted more legislation than any other area of consumer protection. Western jurisdictions have accumulated a great deal of experience in judging the efficacy of different legislative approaches. It

[110] Benjamin Geva, *Financing Consumer Sales and Product Defences* (Toronto: Carswell, 1984).
[111] Michael Bridge & Francis Buckley, *Sales and Sales Financing in Canada* (Toronto: Carswell, 1981). See also John A Barron, *The Law of Conditional Sales*, 3rd ed (Toronto: Carswell, 1928) (first edition appearing in 1889); WJ Tremeear, *A Treatise on the Canadian Law of Conditional Sales of Chattels and of Chattel Liens* (Toronto: Canada Law Book, 1899); Royston Miles Goode & Jacob S Ziegel, *Hire-Purchase and Conditional Sale: a Comparative Survey of Commonwealth and American Law* (London, England: The British Institute of International and Comparative Law, 1965).
[112] See e.g. Kjellberg, *supra* note 4.
[113] Ziegel, 1973, *supra* note 52 at 479.
[114] Ziegel, 2011, *supra* note 18 at 259–61; Ziegel, 1968, *supra* note 46 at 488–89. See also "Note: Overview of Post-War Canadian Consumer Protection Legislation" in Jacob S Ziegel & Benjamin Geva, eds, *Commercial and Consumer Transactions: Cases, Text and Materials* (Toronto, Emond Montgomery Ltd: 1981) 18 at 18–21.

> is surely time to review and consolidate that experience, abandoning the intuitive method that has characterized public policy-making up to now.[115]

As a result, legal academic interest emerged and scholars such as Ronald Cuming[116], Michael Tribelcock, Mary Waldron and Jacob Ziegel were among those who offered thoughtful and detailed articles contributing to the analysis of the legal landscape regulating a flourishing industry and the consequent experiences of consumers. Their work and other scholarly contributions are referred to throughout this dissertation where relevant.

Notwithstanding the initial optimism and enthusiasm for consumer credit regulation, interest waned during the last decades of the 20th century "no doubt in part because of the dampening effect of the law and economics movement on government intervention and its advocacy."[117] The economic policies of conservative governments during the 1980s led by Margaret Thatcher in the United Kingdom, Ronald Reagan in the United States and Brian Mulroney in Canada inspired their governments' drives towards the implementation of free trade and market liberalization policies, the privatization of public services and the economic deregulation of key industries, including the financial services industry.[118] With these new political priorities, financial consumer protection became a "neglected area of policymaking in Canada."[119] American authors Richard Hynes and Eric Posner noted with regret that the "literature on the regulation of consumer credit is not as lively as it once was. Academic interest peaked in the 1970s and early 1980s, and with the exception of work on consumer bankruptcy tailed off in the 1990s. Yet consumer credit remains a significant topic of public policy and a source of interesting and difficult questions."[120]

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[115] Michael Trebilcock & Arthur Shulman, "The Pathology of Credit Breakdown" (1976) 22 McGill L J 415 at 466–67.

[116] Cuming, 1978, *supra* note 25 at 193–94; Ronald CC Cuming, "Consumer Credit Law" in GHL Fridman, ed, *Studies in Canadian Business Law* (Toronto: Butterworths, 1971) 87.

[117] Anthony Duggan, "Law, Economics and Public Policy: Essays in Honour of Michael Trebilcock: VIII Consumer Law and Policy: Consumer Credit Redux" (2010) 60:2 UTLJ 687 at 705 [Duggan, 2010].

[118] Ziegel, 2011, *supra* note 18 at 261.

[119] Iain Ramsay, "The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches" (2001) 35 Can Bus LJ 325 at 328 [Ramsay, 2001].

[120] Richard Hynes & Richard A Posner, "The Law and Economics of Consumer Finance" (2002) 4:1 AM L & Econ Review 168 at 169 cited by Duggan, 2010, *supra* note 117 at 690.

Notable exceptions to this penury of scholarship during the period leading up to the Global Financial Crisis were Canadian legal scholars Iain Ramsay,[121] Mary Anne Waldron[122] and Jacob Zeigel[123] who continued to identify and bring forward glaring deficiencies in consumer credit regulation in Canada. Iain Ramsay concluded dishearteningly in one of his articles published in 2001 that "there remain many [consumer credit] issues on which further empirical and theoretical research is necessary. Yet there seems little interest by academics in Canada in researching these issues." [124]

Nonetheless, the unwaning proliferation of financial services, the rise in credit cards in the 1980s, the emergence of the alternative consumer credit market during the 1990s and the ensuing rise in consumer insolvencies sparked a resurgence of scholarly interest in consumer credit and its consequences.[125] Moreover, reverberations of the Global Financial Crisis and the resulting plight of financial consumers sparked a renewed interest in the financial services industry and financial consumer protection. Anthony Duggan observed in 2010 that the resurgence of scholarly interest in consumer credit law since 2005 was "partly because recent market developments have given academics a range of interesting new issues to address and partly because the new generation of legal scholars is economically literate and has been able to draw successfully on developments in law and

[121] Ramsay, 2001, *supra* note 119; Iain Ramsay, "Of Payday Loans and Usury: Further Thoughts" (2003) 38:3 Can Bus LJ 386 [Ramsay, 2003]; Iain Ramsay, *Access to Credit in the Alternative Consumer Credit Market* (Toronto: prepared for Industry Canada and AG British Columbia, 2000) [Ramsay, 2000]; Ramsay, 1991, *supra* note 97; Iain Ramsay, "Consumer Credit Law, Distributive Justice and the Welfare State" (1995) 15 Oxford J Leg Stud 177 [Ramsay, 1995].

[122] Mary Anne Waldron, "What is to Be Done with Section 347?" (2003) 38 Can Bus LJ 367 [Waldron, 2003]; Mary Anne Waldron, "The Federal Interest Act: It Sure is Broke, But is It Worth Fixin'?" (1997) 29:2 Can Bus LJ 161 [Waldron, 1997]; Mary Anne Waldron, "Can Canadian Commercial Law Be Rehabilitated - A Question of Interest Symposium: Can Canadian Commercial Law be Rehabilitated" (1992) 20:3 Can Bus LJ 357 [Waldron, 1992].

[123] Jacob Ziegel, "Does Section 347 Deserve a Second Chance? A Comment" (2003) 38 Can Bus LJ 394 [Ziegel, 2003]; Jacob S Ziegel, "Revisiting Old Truth-in-Lending Battles: A Comment" (1998) 29 Can Bus LJ 243 [Ziegel, 1998]; Jacob S Ziegel, "Is Canadian Consumer Law Dead?" (1994–1995) 24:3 Can Bus LJ 417 [Ziegel, 1994]; Jacob S Ziegel, "Perspectives on the Deregulation and Reregulation of Canadian Financial Institutions" in Donald B King, ed, *Essays on Comparative Commercial and Consumer Law* (Littleton, Colo: FB Rothman, 1992) 47; Ziegel, 2010, *supra* note 31; Jacob S Ziegel, "Is Notional Severance the Right Solution for Section 347's Ills?" (2005) 42 Can Bus LJ 282 [Ziegel, 2005].

[124] Ramsay, 2001, *supra* note 119 at 400 cited in Duggan, 2010, *supra* note 117 at 690.

[125] Duggan, 2010, *supra* note 117 at 691.

economics, behavioural economics, and other new theoretical perspectives to enrich the debate over the case for regulation."[126]

In Canada, contemporary legal scholarship on consumer credit law has predominantly focused on two main subject matters and is cited where relevant throughout this dissertation. First of all, legal research related to consumer credit undertaken by bankruptcy scholars such as Jacob Ziegel,[127] Janis Sarra,[128] Stephanie Ben-Ishai[129] and Anna Lund[130] has principally revolved around the access to credit, the treatment of insolvent consumers and the reform of bankruptcy legislation. Secondly, increased accessibility to alternative financial services has correspondingly generated interest in the regulation of this once fringe industry and the role of non-bank financial institutions in the consumer credit market. Legal scholars such as Anthony Duggan[131], Iain Ramsay[132], Stephanie Ben-

[126] *Ibid* at 705.

[127] Ziegel, 2010, *supra* note 31; Ziegel, 2011, *supra* note 18.

[128] Janis P Sarra, "At What Cost? Access to Consumer Credit in a Post-Financial Crisis Canada" in Janis P Sarra, ed, *Ann Rev Insolv L 2011* (Toronto: Thomson Reuters, 2012) 409 at 411. In her study on access to consumer credit and its relationship to consumer insolvency in Canada, Janis Sarra noted that "There is extensive literature regarding access to consumer credit, much of it generated by the United States (US) and located in finance and economics literature, with a growing literature in law. There has been little comparable work in Canada. An under-explored question is the relationship between consumer insolvency and banking practices, including traditional domestic banks, foreign banks operating in Canada, credit unions and finance companies."

[129] Ben-Ishai, 2020, *supra* note 75; Stephanie Ben-Ishai, Saul Schwartz & Thomas G W Telfer, "A Retrospective on the Canadian Consumer Bankruptcy System: 40 Years after the Tasse Report II. Secured Transactions, Bankruptcy and Insolvency Law" (2011) 50 Can Bus LJ 236 [Ben-Ishai et al, 2011]; Stephanie Ben-Ishai, Saul Schwartz & Nancy Werk, "Private Lines of Credit for Law Students and Medical Students: A Canadian Perspective" (2017) 32 BFLR 343 [Ben-Ishai et al, 2017]; Stephanie Ben-Ishai, "Consumer Protection and 'Non-Banks': A Comparative Analysis" (2019) 54 Texas Int'l LJ 327 [Ben-Ishai, 2019]; Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2020) 57 Osgoode Hall LJ 637; Stephanie Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation" (2021) 72 UNBLJ 173 [Ben-Ishai et al, 2021]; Stephanie Ben-Ishai & Emily Han, "We Don't Talk About Section 347: An Analysis From a Commercial Perspective" (2022) 20 Ann Rev of Insolv L, 2022 CanLIIDocs 4298; Saul Schwartz & Stephanie Ben-Ishai, "Prevalence of High-Cost Loans among the Debts of Canadian Insolvency Filers" (2023) 49:1 Can Pub Pol'y 62.

[130] Anna Lund, "Engaging Canadians in Commercial Law Reform: Insights and Lessons from the 2014 Industry Canada Consultation on Insolvency Legislation" (2016) 58:2 Can Bus LJ 123; Anna Lund, "407 ETR, Moloney and the Contested Meaning of Rehabilitation in Canada's Personal Bankruptcy System" (2016) 79 Sask L Rev 265.

[131] Duggan, 2010, *supra* note 117; Tony Duggan, "Access to Credit in the Alternative Consumer Credit Market: An Australian Comparison Alternative Credit Market: Panel Discussion" (2001) 35 Can Bus LJ 402.

[132] Ramsay, 2001, *supra* note 119; Ramsay, 2003, *supra* note 121; Ramsay, 2006, *supra* note 5; Ramsay, 2010, *supra* note 36.

Ishai,[133] Poonam Puri[134] and Gail Henderson[135] have repeatedly concluded that legislative reform in this area is essential to better protect consumers.

A review of existing literature reveals, however, the absence of comprehensive legal research providing a complete overview of the legal framework regulating consumer credit in Canada, encompassing all forms of regulatory oversight of the consumer credit industry as well as the myriad forms of credit offered to consumers. Moreover, noticeably absent is an examination of the historical evolution and performance of this regulatory framework. The inherent complexity of Canada's constitutional framework and the progressive dichotomization between provincial and federal legislative competence relating to consumer credit regulation in Canada since the 1960s have most likely discouraged such a venture.

Instead, Canadian and international legal scholarship on the legal framework of the financial services industry has focused its attention since 2008 on the prudential supervision and the regulation of financial institutions relating to the overall safety and soundness of federally supervised institutions as well as the stability of the financial system. Steven Finlay affirmed in the preface of his book *Consumer Credit Fundamentals* that "[d]espite the widespread use of credit and almost daily coverage in the media, the literature relating to consumer credit issues is fragmented, and there is much ignorance about one of the world's largest industries."[136]

Moreover, financial consumer protection in the sense of preventing consumer overindebtedness is largely ignored in most of the legal publications on the Canadian financial services industry. In comparison to recent European and Australian directives, the Canadian story on responsible lending practices is embryonic at best. The absence, until quite recently, of any regulated responsible lending practices in Canada further confirms

[133] Ben-Ishai, 2019, *supra* note 129; Ben-Ishai et al, 2021, *supra* note 129; Ben-Ishai et al, 2017, *supra* note 129.
[134] Puri & Nichols, *supra* note 4.
[135] Gail E Henderson & Lauren L Malatesta, "Protecting Low Income Consumers: The Regulation of Rent-To-Own Stores" (2018–2019) 61:3 Can Bus LJ 354; Akrong & Henderson, *supra* note 75.
[136] Steven Finlay, *Consumer Credit Fundamentals*, 2nd ed (London: Palgrave Macmillan, 2009) at xv.

the scarcity of thoughtful and comprehensive research aiming to increase the protection of financial consumers. A literature review reveals only two authors briefly addressing this issue within the Canadian context of consumer credit regulation: Jacob Ziegel and the author, herself.[137] It is clear, however, that current standards and practices are insufficient to affect the rising number of consumer insolvencies and, thus, confirms the relevance and the importance of further research on this topic.

And unfortunately, consumers are paying the price. On the one hand, consumer credit legislation is limited and fragmented, providing a regulatory environment in which the industry has thrived, and financial services have expanded, thereby offering the consumer a variety of products. On the other hand, consumers are increasingly using consumer credit and are becoming excessively overindebted, resulting in ever-increasing insolvency rates. Instead of decreasing their lifestyle in the event of an unexpected shortfall, credit used to maintain a standard of living is often the reason a consumer becomes financially overwhelmed by debt and unable to recover.

The importance of research on consumer credit law was succinctly explained in 1966 by one of the leading experts in the field, Jacob Ziegel.

> The problems of consumer credit are complex and almost infinite in number. There are no simple solutions. Any modern legislation must reflect these verities as the inevitable price of a burgeoning consumer economy. Because the problems frequently change in character and importance the legislation must be kept under continuous review. There is a great dearth in Canada of reliable data on many basic aspects of consumer credit, and research is needed on these points as well as on the impact and efficacy of existing legislation. There is an equal need for frank and open-minded dialogues between those principally concerned with consumer credit - the credit grantor, the consumer, governments, and scholars from the various disciplines.[138]

Such is the challenge of this dissertation and the voids it proposes to fill. Finally, with the legal foundations solidly constructed of the current legal framework, this dissertation will

[137] Ziegel, 2010, *supra* note 31; Gleixner, 2014, *supra* note 26.
[138] Ziegel, 1966, *supra* note 92 at 116.

hopefully provide trajectories for future research to remedy the egregious deficiencies and failures of the current system exposed therein.

With the purpose of this dissertation study explained, the next subsection explores the research methodology applied to analyze the extensive historical documentation covering more than 150 years that guided the research hypothesis analysis leading to the development of new regulatory theories to better reform the consumer credit regulatory framework in Canada.

CHAPTER 2: Research Methodologies and Consumer Protection Theoretical Framework

2.1 Research Methodologies

As previously mentioned, the main purpose of this dissertation is to investigate the historical contextualization and evolution of the Canadian consumer credit regulatory framework in order to determine how to strengthen financial consumer protection. Consequently, multiple methodological approaches are employed to answer the research questions set out in this dissertation and to achieve the stated objectives.

A recent study of the transformation of legal research in Australia concluded in 2008 that fundamental research is "becoming more prevalent in current research agendas."[1] The Council of Australian Law Deans stated in its 2005 *Statement of the Nature of Legal Research* that fundamental research is "now a well-established part of Australian legal scholarship" and includes varied combinations of the following research methodologies: doctrinal, theoretical, critical/reformist, fundamental/contextual, empirical, historical, comparative, institutional, process-oriented, interdisciplinary.[2]

In Canada, the Consultative Group on Research and Education in Law defined "fundamental research" as "research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law."[3] This type of legal research "proceeds from the intellectual perspective that law is problematic rather than certain, that its causes and effects, rather than its formal rules, invite scrutiny."[4] Moreover, the importance of fundamental legal research was explained as follows:

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[1] Terry Hutchinson, "Developing Legal Research Skills: Expanding the Paradigm" (2008) 32 Melbourne UL Rev 1065 at 1068.

[2] Council of Australian Law Deans, "Statement on the Nature of Legal Research," (2005), online: <cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> at 2.

[3] Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Information Division of The Social Sciences and Humanities Research Council of Canada, 1983) at 66.

[4] *Ibid* at 69.

> We cannot afford to live with a legal system which has not been at least reconsidered, and perhaps dramatically reconstituted, in the light of changes in Canada's economy, demography, political culture, technology, international relations, social organization, physical environment and ethical sensibilities. Our conclusion: this country must begin to take all types of legal research – especially fundamental research "on" law – much more seriously.[5]

Considering the foregoing, the fundamental research undertaken for this dissertation will involve a combination of doctrinal, legal historical and contextual analysis to evaluate the past and current state of Canada's consumer credit regulatory framework and to determine the political, economic, social, moral and technological factors contributing to its evolution and performance. The definition, role, methodology and underlying assumptions of each of these research methodologies are explained in the following subsections.

2.1.1 Doctrinal Analysis

Doctrinal, or black-letter legal analysis as it is still commonly referred to, has long been considered "conventional legal research", "the definitive form of legal scholarship" and the "building blocks" of historical studies of law.[6] According to Terry Hutchinson, "[l]aw has had a research paradigm based predominantly in the doctrinal methodology. It has been based in liberal theory and positivism, and a framework of tracing common law precedent and legislative interpretation."[7] Doctrinal legal discourse is centred on key values of "consistency, certainty and predictability in the sense of settled doctrine, which allows individuals to plan their lives in a more rational way."[8]

Internally coherent, objective and logical, legal formalism ensures the independence and autonomy of the legal system from other areas of society.[9] Doctrinal analysis focuses on

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[5] *Ibid* at 71.
[6] *Ibid* at 66, 77; Douglas W Vick, "Interdisciplinary and the Discipline of Law" (2004) 31:2 JL & Soc'y 163 at n 86, citing WT Murphy & Simon Roberts, "Introduction" (1987) 50 Mod L Rev 677 at 677.
[7] Hutchinson, *supra* note 1 at 1084.
[8] Michael Salter & Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (New York: Pearson/Longman, 2007) at 55.
[9] *Ibid* at 54.

internal legal analysis and reasoning, thereby preserving the integrity of the judicial system, and the scientific methodology of doctrinal analysis ensures that research results can be replicated.[10] As explained by the Council of Australian Law Deans,

> it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognised parallel to 'discovery' in the physical sciences. Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials. The very notion of 'legal reasoning' is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system's simultaneous achievement of constancy and change, especially in the growth and development of the common law.[11]

Succinctly defined by Douglas Vick, black letter research, in its purest form,

> aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends upon the legal tradition and system within which the legal researcher operates.[12]

Traditional black-letter methods of doctrinal analysis therefore rely on theoretical assumptions, interpretative tools and critical techniques to identify, distinguish, systematize and evaluate cases, statutes and other primary sources of law, such as the principles of legal reasoning and analysis, the doctrine of precedent and rules of statutory and constitutional interpretation.[13]

The underlying and generally accepted assumptions begin with the assumption that "the character of legal scholarship is derived from law itself"[14] and include "a shared

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[10] *Ibid* at 55, 99–100.

[11] *Statement on the Nature of Legal Research*, *supra* note 2 at 3.

[12] Vick, *supra* note 6 at 178, cited in Salter & Mason, *supra* note 8 at 90.

[13] Salter & Mason, *supra* note 8 at 49, 64, 87–88, 95, 99, 190–91; Vick, *supra* note 6 at 165; Reza Banakar & Max Travers, "Law, Sociology and Method" in Reza Banakar & Max Travers, eds, *Theory and Method in Socio-Legal Research* (Oxford; Portland, Or: Hart Publishing Ltd, 2005) 1 at 7–10.

[14] Michael McConville & Wing Hong Chui, *Research Methods in Law*, 2nd ed (Edinburgh: Edinburgh University Press, 2017) at 4, citing EL Rubin, "Law and the Methodology of Law" (1997) Wis L Rev 525. See also David Ibbetson, *Historical Research in Law* (Oxford, UK: Oxford University Press, 2005) at 874.

understanding of what 'law' is and of its role in society; a theory of valid legal sources and their hierarchy; a methodology of law; an argumentation theory; a legitimation theory and a shared world view (common basic values and norms)".[15] As such, theoretical questions such as the degree of authority and meaning which a piece of legislation possesses can be analyzed pursuant to specific legislative and constitutional interpretative rules as well as any relevant common law rules, including desuetude.[16]

In their invaluable book entitled *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, Michael Salter and Julie Mason encapsulated the objective of law students adopting doctrinal methodology for their dissertations as follows:

> This approach to research aims to offer an authoritative exposition, fully supported by relevant citations, that describes how the specific rights and obligations of substantive legal doctrine have been assigned through judicial interpretations and reinterpretations of the meaning, scope and requirements of 'given' legal categories, general principles and specific rules. Black-letter analysis will describe, often in intricate technical detail, the technical meaning of the relevant rules and principles. This emphasis on providing a description and exposition, as distinct from an explanation or critique of the origins, policy values or social impact of the law in action, is considered a goal in itself.[17]

In addition, Richard Posner explained that doctrinal analysis "analyzes what the law is but often it also advocates changing some rule of law to make it conform better to the central trends, themes, or concepts that are revealed in the positive analysis."[18] Likewise, Douglas

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[15] Mark Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?" in Mark Van Hoecke & François Ost, eds, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing, 2011) 1 at 15.

[16] David Ibbetson, "Comparative legal history: A methodology" in Anthony Musson & Chantal Stebbings, eds, *Making Legal History* (Cambridge: Cambridge University Press, 2011) 131 at 135. See also Van Hoecke, *supra* note 15 at 14:

> it appears clear that the legal scholar is *wording a hypothesis as to the validity and the precise meaning of a legally relevant text* (relevant within the given legal system at the time of the research). In other words, interpretation is at the core of the whole activity of legal scholarship. Research questions in legal doctrine are, indeed, very often linked to the precise meaning and scope of legal concepts, legal rules, legal principles and/or legal constructions.

[17] Salter & Mason, *supra* note 8 at 50.

[18] Richard A Posner, "The Present Situation in Legal Scholarship Symposium on Legal Scholarship: Its Nature and Purposes" (1980–1981) 90 Yale LJ 1113 at 1115–16 [*The Present Situation in Legal Scholarship Symposium on Legal Scholarship*]; Vick, *supra* note 6 at 165.

Vick remarked that "[d]octrinal research involves not only the systematic reconstruction of existing rules but also the evaluation of existing or proposed rules against normative conceptions of justice."[19] Accordingly, the "analysis of the positive content of legal doctrine" also requires a critical assessment and evaluation of the authoritative value of primary and secondary sources such as doctrinal commentaries.[20]

Although normative analysis of legal rules is contemplated within doctrinal methodology, many legal scholars critique the limited nature of this conventional type of legal research which tends to "yield predictable answers to problems, especially when the law being investigated is our own."[21] Citing various authors, Douglas Vick imparted to his readers that "[d]octrinalism has been accused of being rigid, dogmatic, formalistic, and close-minded; of encouraging 'intellectual tunnel-vision' through an unhealthy preoccupation with technicalities; of placing 'an intellectual strait-jacket on understandings of law and society'; and of 'impoverish[ing] the questioning spirit of both law student and teacher'".[22]

Isolated from both the social sciences and the humanities, doctrinal analysis fails to capture the influence of political, social, cultural and economic factors within modern society affecting the emergence and operation of the law in practice.[23] Among a list of forty-two objections raised by critics of traditional doctrinal analysis, Michael Salter and Julie Mason warned that the "black-letter approach ignores the fact that most legislation is made for a particular purpose and therefore needs to be critically assessed not merely in terms of its supplementation of prior doctrinal sources but also in the light of its relative success or failure in realising specific policy goals."[24] They further explained that

> a proper understanding of the nature of the law […] requires an analysis not merely of the development of the rules of law, but also of the policy reasons which inform the process of reforming these rules, their implementation in courts throughout the country and the social and policy perspectives which influenced those who applied the rules. It is only with the aid of the

[19] Vick, *supra* note 6 at 179.
[20] Salter & Mason, *supra* note 8 at 99.
[21] Consultative Group on Research and Education in Law, *supra* note 3 at 66.
[22] Vick, *supra* note 6 at 181.
[23] Salter & Mason, *supra* note 8 at 113, 116, 209.
[24] *Ibid* at 116.

> 'external' perspective that we can make sense of the 'internal' developments.[25]

Indeed, a black-letter law analysis fails to consider the complexity of the legislative process, legal issues and legal reform.[26] According to Roger Cotterrell's comments, which have often been repeated: "[a]ll the centuries of purely doctrinal writing on law have produced less valuable knowledge about what law is, as a social phenomenon, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies."[27]

Moreover, a perspective resulting from a doctrinal analysis of legal history is "separate from a precise context", omits to consider "the process by which law is created" and how law changes and generally yields "predictable answers to problems."[28] This methodology has therefore been accused of conservatism and bias reflecting the interests of the dominant and influential members of society, that is "the landowner and businessman, of the rich rather than the poor, of men rather than women."[29] Based on Morton Horwitz's arguments, David Sugarman suggested that

> the failure of legal history to concern itself with economic, social and political desiderata has resulted in its advancing
>
> > a profoundly conservative interpretation of the role of law in … society. [Its] basic categories contain fundamentally conservative political preferences dressed up in the neutral garb of expert and objective legal history … The main thrust of lawyers' legal history, then, is to pervert the real function

[25] *Ibid* at 209, referring to Michael Lobban, "Introduction: The Tools and the Tasks of the Legal Historian" in Andrew Lewis & Michael Lobban, eds, *Law and History* (Oxford (UK): Oxford University Press, 2004) 1 at 26.

[26] Salter & Mason, *supra* note 8 at 116.

[27] McConville & Chui, *supra* note 14 at 5, citing R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Oxford University Press, 1995) 296. Also cited in A Bradney, "Law as a Parasitic Discipline" (1998) 25 JL & Soc'y 71 at 73.

[28] Adolfo Giuliani, "What is comparative legal history? Legal historiography and the revolt against formalism, 1930–60" in Olivier Moréteau, Aniceto Masferrer & Kjell Modéer, eds, *Comparative Legal History* (Cheltenham, UK: Edward Elgar Publishing, 2019) 30 at 46; Consultative Group on Research and Education in Law, *supra* note 3 at 66.

[29] Ibbetson, *supra* note 14 at 874. See also Banakar & Travers, *supra* note 13 at 10.

> of history by reducing it to the pathetic role of justifying the world as it is.[30]

Notwithstanding this justified criticism and the fact that doctrinal analysis is "no longer the only or even dominant paradigm of legal education",[31] legal scholars cannot ignore Mark Van Hoecke's conclusion that "[a]ll this may be correct, but as such it does not disqualify legal doctrine as a discipline in its own right, with its own, appropriate, methods."[32] Likewise, Douglas Vick also concluded that "[d]octrinalism remains the benchmark against which legal academics define themselves and their work, and the point of departure for those engaging in interdisciplinary legal research. In this sense, the traditional doctrinal approach to legal questions is the touchstone of the disciplinary identity of legal academics."[33]

Doctrinal analysis is therefore used throughout this dissertation to describe and analyze past and current legislation and regulations to improve our understanding of Canada's consumer credit regulatory framework. This methodology includes a positive analysis of research data to understand the past and current state of consumer credit regulation as well as a normative analysis in order to prescribe regulatory reform.[34]

Nevertheless, as Michael Salter and Julie Mason forewarned,

> for a dissertation to focus only on the promulgation, semantics and design of legal rules is to provide an incomplete, and therefore one-sided and potentially misleading, account of any topic. Such an approach ignores vital questions regarding how, and to what extent and in what circumstances, legal rules are implemented in practice, and the various ways in which

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[30] David Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of The Relationship Between Law and Economy from a Socio-Historical Perspective" in Bob Fryer et al, eds, *Law, state and society* (London: Croom Helm, 1981) 70 at 71, citing Morton J Horwitz, "Review: The Conservative Tradition in the Writing of America Legal History" (1973) 7 Am J Leg Hist 275 at 276. See also Ibbetson, *supra* note 14 at 874.

[31] Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, "Socio-legal theory and methods: introduction" in Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, eds, *Routledge Handbook of Socio-Legal Theory and Methods* (Abingdon, Oxon: Routledge, 2019) 3 at 3.

[32] Van Hoecke, *supra* note 15 at 3.

[33] Vick, *supra* note 6 at 188.

[34] Posner, *supra* note 18 at 1119; Banakar & Travers, *supra* note 13 at 7–10; Vick, *supra* note 6 at 179, referencing Rubin, *supra* note 14 at 525–27.

> individuals, groups and institutions use them as means to achieve specific ends.[35]

Given the above limitations to the methodological approach of doctrinal analysis, research methodologies for this dissertation also includes historical legal analysis accompanied by a law in context socio-legal approach. These two methodologies are explored in the following subsections.

2.1.2 Historical Analysis

Once dominating Western legal research, legal historical analysis remains one of many methodological approaches adopted in current legal scholarship.[36] Legal history is "one mode of critical analysis of law, understood as a project of engaged legal scholarship that overcomes the rhetorical juxtaposition of doctrinal and interdisciplinary analysis in the service of a comprehensive critique of state power through law in a modern liberal democracy."[37]

Historical legal analysis can essentially be divided into two approaches: internal and external. As succinctly summarized by Anne Fleming: "Internal approaches explain law's history through legal sources and focus on charting the progression of legal doctrine and the development of legal ideas and institutions."[38] The essentially doctrinal approach to historical research has been, however, criticized and called a "questionably useful task."[39]

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[35] Salter & Mason, *supra* note 8 at 126.

[36] David M Rabban, "Methodology in Legal History" in Anthony Musson & Chantal Stebbings, eds, *Making Legal History* (Cambridge: Cambridge University Press, 2011) 88 at 107.

[37] Markus D Dubber, "Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford (UK): Oxford University Press, 2018) 99 at 101.

[38] Anne Fleming, "Legal History as Economic History" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford (UK): Oxford University Press, 2018) 207 at 207.

[39] Graham Parker, "The Masochism of the Legal Historian" (1974) 24:2 UTLJ 279 at 284, citing Daniel J Boorstin, "The Humane Study of Law" (1948) 57:6 Yale LJ 960 at 964.

According to Graham Parker, "[t]o teach the lessons of history from this viewpoint is like trying to plant cut flowers."[40]

In comparison, external approaches to the historical analysis of law integrate an interdisciplinary approach into legal scholarship.[41] In fact, the "[s]ocio-legal history is not a new phenomenon - history is essentially a multi-disciplinary pursuit, and historians have traditionally shown a strong interest in the development of law in its political, social and economic contexts, and have explained legal change by reference to general social trends."[42]

> In one sense, few types of academic analysis can claim to be as interdisciplinary or contextual in their approach to scholarly research as those academic studies using historical methodologies. This is a 'discipline' that includes conferences, sub-fields and specialist journals that positively embrace, amongst others, economic, social, political, institutional, social policy, gender and cultural contexts, and the complex and changing relationship within and between each of these contexts. It is arguable, therefore, that at least certain types of historical methods and analytical techniques could be included within any approach to legal research and scholarship that, like sociolegal studies, emphasises the importance of distinctly interdisciplinary forms of contextual analysis.[43]

Historical legal analysis is, therefore, not "confined to explications of doctrinal and institutional evolution" as John McLaren explained: "Legal history […] extends to investigation of the cultural factors, social forces and values, ideological and intellectual

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[40] Parker, *supra* note 39 at 284, citing Boorstin, *supra* note 39 at 964. See also: Dubber, *supra* note 37 at 114: "It makes no sense to critique an aspect of law without appreciating its conception and operation, which includes a thorough and imaginative analysis of its doctrinal design and context."

[41] Lobban, *supra* note 25 at 28.

[42] DR Harris, "The Development of Socio-Legal Studies in the United Kingdom" (1983) 3:3 LS 315 at 331; Dag Michalsen, "Methodological perspectives in comparative legal history: an analytical approach" in Olivier Moréteau, Aniceto Masferrer & Kjell Modéer, eds, *Comparative Legal History* (Cheltenham: Edward Elgar Publishing, 2019) 96 at 97, 109; David J Bercuson, "Introduction" in David J Bercuson & Louis A Knafla, eds, *Law and Society in Canada in Historical Perspective* (Calgary: The University of Calgary, 1979) 1 at 1; Salter & Mason, *supra* note 8 at 197, 204; Catherine L Fisk, "Law & Society in Historical Legal Research" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford (UK): Oxford University Press, 2018) 479 at 482; Rabban, *supra* note 36 at 103; Michael Doupe & Michael Salter, "Concealing the Past?: Questioning Textbook Interpretations of the History of Equity and Trusts" (2000) 22 Liverpool L Rev 253 at 259; Parker, *supra* note 39 at 295, citing William Searle Holdsworth, *The Historians of Anglo-American Law* (New York: Columbia University Press, 1928) at 62.

[43] Salter & Mason, *supra* note 8 at 197.

impulses and political and economic realities on the development of law, legal institutions and attitudes towards law."[44] Such a comprehensive approach is also recommended by David Flaherty in his seminal article entitled "Writing Canadian Legal History".[45]

According to R.C.B. Risk, legal history is "a study of the legal processes, and this conception can be elaborated in three overlapping elements: the influences that have shaped law; the effect of law; and the structure, procedures and functions of legal institutions."[46] In 1982, a group of legal scholars explained in their report to the Social Sciences and Humanities Research Council of Canada that historical legal research was "concerned with tracing the history of a particular development within the law and possibly as well its relationship to the history of society."[47] Likewise, Sir William Holdsworth reminded us in 1924 of the importance of the "partnership between law and history which has enabled history to humanise law and law to correct history."[48] Indeed, deepening our historical understanding of the past places us in a more advantageous position to better interpret contemporary law, appreciate a change in the present and to try and learn from past mistakes.[49] In fact, "[o]ne of the main goals of legal history is to understand and explain legal change."[50]

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[44] John McLaren, "The Legal Historian, Masochist or Missionary? A Canadian's Reflections" (1994) 5 Leg Educ Rev 67 at 70; Salter & Mason, *supra* note 8 at 107.

[45] David H Flaherty, "Writing Canadian Legal History: An Introduction" in David H Flaherty, ed, *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1981) at 3–42.

[46] RCB Risk, "A Prospectus for Canadian Legal History" (1973) 1 Dal LJ 227 at 228.

[47] Consultative Group on Research and Education in Law, *supra* note 3 at 77.

[48] John Sankey, "The Historian and the Laywer: Their Aims and their Methods" (1936) 21:82 History 97 at 97–98, citing WS Holdworth, *The Influence of the Legal Profession on the Growth of the English Constitution*, Creighton Lecture, 1924.

[49] WH McDowell, *Historical Research: a Guide for Writers of Dissertations, Theses, Articles and Books* (London; New York: Longman, 2002) at 5; *Statement on the Nature of Legal Research*, *supra* note 2 at 3; Michalsen, *supra* note 42 at 100; Giuliani, *supra* note 28 at 59; Wilfrid Prest, "Legal History in Australian Law Schools: 1982 and 2005" (2006) 27:2 Adel L Rev 267 at 276; Salter & Mason, *supra* note 8 at 104.

[50] Daniel Klerman, "Statistical and Economic Approaches to Legal History" (2002) 4 U Ill L Rev 1167 at 1173–74.

The historical analysis of the law in practice[51] includes research on "the origin and evolution of the sources of law and the social-political context out of which laws and institutions emerged"[52] and the critical analysis of the emergence, evolution, implementation, operation and enforcement of governmental policies and regulations,[53] as well as "factors bringing about the tipping point"[54] and how they are "shaped by general and specific goals, ideas and events."[55]

Considered inappropriate pursuant to a strict black letter approach, the "critical analysis of the ideological values that underpin the policy element of legal doctrine"[56] are the foundation of historical research as explained by Douglas Vick: "if legal rules are viewed as instruments of social policy or expressions of public values, the societal effects of rules and their underlying values becomes a legitimate subject of inquiry by legal academics."[57] Historical analysis of the law further involves research on the legislative response to changes in society and the impact and outcome of lobbying efforts of stakeholders and other interest groups.[58]

According to Anne Fleming, external approaches to legal history contribute to the understanding of the influence of law on society and, in particular to "the interaction between law and the economic dimensions of society" such as the regulation of the production, sale, and consumption of goods and services.[59] Historical analysis of law demonstrates that laws are often adopted or modified to "meet changed perceptions of a social problem" or to reflect "economic conditions changing a set of social norms."[60]

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[51] Ibbetson, *supra* note 14 at 864; David Ibbetson, "What if Legal History a History of?" in Andrew Lewis & Michael Lobban, eds, *Law and History* (Oxford (UK): Oxford University Press, 2004) 33 at 33–34, cited in Salter & Mason, *supra* note 8 at 207.

[52] Giuliani, *supra* note 28 at 44–45.

[53] Dubber, *supra* note 37 at 115; Salter & Mason, *supra* note 8 at 197; Lobban, *supra* note 25 at 25–26; Harris, *supra* note 42 at 331; Bercuson, *supra* note 42 at 1–2; Parker, *supra* note 39 at 299, citing Holdsworth, *supra* note 42 at 139.

[54] Ibbetson, *supra* note 16 at 140.

[55] Salter & Mason, *supra* note 8 at 208.

[56] *Ibid* at 107.

[57] Vick, *supra* note 6 at 183.

[58] Klerman, *supra* note 50 at 1173–74; Ibbetson, *supra* note 16 at 140.

[59] Fleming, *supra* note 38 at 208, 216.

[60] Bercuson, *supra* note 42 at 2.

Socio-legal historical research further involves the investigation of the "complexities of the legal process and its effectiveness in securing social and economic change" and protecting consumers and other vulnerable populations.[61]

Although this historical analysis is not likely to provide inspiration for specific or detailed law reform, it is "valuable in suggesting caution (even a healthy scepticism) about what it is possible to achieve and the need for full and intelligent investigation of interests and options before launching statutory initiatives."[62] Justly regarded as the "handmaid of law reform",[63] historical analysis of law provides a broader perspective and the necessary contextualization to enrich our understanding and enlighten current stakeholders on future possibilities and prospects.[64] According to David Ibbetson, "it is only when we can make sense of [history] that we can confidently begin to reform."[65] Edward Purcell viewed the relevance of historical analysis to legal reform as follows: "legal history teaches the varying ways in which law and legal systems have operated in practice, the reasons they have changed over time, and the more likely directions and limits of their future development."[66] Of great relevance to the objectives of this dissertation, legal history can "help lawyers to avoid 'the parochialism of the present' under which new rules are viewed as a response to new conditions and problems, in ignorance of similar attempts in the past to regulate by law."[67]

An analysis of legal history involves the historical reconstruction of past events and evolutionary processes resulting in legal change[68] and begins with the discovery and

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[61] Harris, *supra* note 42 at 331.
[62] McLaren, *supra* note 44 at 83.
[63] Joshua Getzler, "Legal History as Doctrinal History" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford (UK): Oxford University Press, 2018) 171 at 189.
[64] Prest, *supra* note 49 at 276.
[65] Giuliani, *supra* note 28 at 68, citing David Ibbetson, *A Historical Introduction to the Law of Obligations* (New York: Oxford University Press, 1999) at vi. See also Rabban, *supra* note 36 at 103.
[66] Edward A Jr Purcell, "Paradoxes of Court-Centered Legal History: Some Values of Historical Understanding for a Practical Legal Education" (2014–2015) 64 J Leg Educ 229 at 231; Paul McHugh, "The politics of historiography and the taxonomies of the colonial past" in Anthony Musson & Chantal Stebbings, eds, *Making Legal History* (Cambridge: Cambridge University Press, 2011) 164 at 166.
[67] Harris, *supra* note 42 at 332; Salter & Mason, *supra* note 8 at 197.
[68] Salter & Mason, *supra* note 8 at 48, 197.

assessment of the accuracy, validity and reliability of information sources and research data.[69] This evaluation requires that primary sources be treated with a degree of skepticism and that when legal historians read secondary sources, they must "read them for the points of view they express, for the inferences drawn from linking facts, and be especially aware of them as products of their own time."[70] Similarly, Michael Lobban advised that historical legal research "involves an attempt to identify what actors in the legal system meant by the terms they used, what questions they were addressing, and how their ideas and statements were received and understood by their contemporaries."[71]

However, "[h]istorical research does not consist in the mere collection of 'facts', but rather in the interrelationship between factual evidence and the interpretation of this evidence by historians."[72] According to WH McDowell, the "goal is to produce a coherent and consistent account of historical events which will enhance our understanding of the past, whether through the discovery of new facts or the perceptive analysis of existing research data."[73]

As previously stated, the contextualization of past events requires a multidisciplinary approach and the analysis of research data that may be outside the field of expertise of legal historians. Legal historical analysis does not necessarily entail interdisciplinary and empirical research focusing on the external influences and their impact on the evolution of law. Devoting their technical skill to analyzing the evolution of legal doctrine, legal scholars often summarize or reference other studies of these external factors.[74]

Legal scholars must be cognizant of methodological difficulties associated with legal historical research. David Ibbetson, in his book entitled *Historical Research in Law*,

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[69] McDowell, *supra* note 49 at 5; Jane Frecknall-Hughes, "Re-examining King John and Magna Carta" in Anthony Musson & Chantal Stebbings, eds, *Making Legal History: Approaches and Methodology* (Cambridge: Cambridge University Press, 2011) 244 at 249.
[70] Frecknall-Hughes, *supra* note 69 at 249.
[71] Lobban, *supra* note 25 at 3.
[72] McDowell, *supra* note 49 at 4.
[73] *Ibid* at 11.
[74] Rabban, *supra* note 36 at 103.

cautions against the potential of personal bias distorting the researcher's interpretation or simply "selecting sources in order to support a predetermined thesis."[75] He also forewarns of other potential arbitrary conclusions:

> The adoption of a legal rule that appears to have favoured some particular group—industrialists, members of trades unions, landowners, slaves—in no way demonstrates that it was adopted in order to favour that group; nor, in the converse situation, can we show with any degree of certainty that some combination of legal rules did in fact have a particular effect on the social or economic framework in which it operated. One way through this thicket is consciously to fit the historical analysis into some explicitly theorized framework; alternatively, the historian can adopt a skeptical or agnostic standpoint and simply point to suggestive parallels without drawing any definite conclusions from them.[76]

With the objective to study the law regulating consumer credit from a historical perspective, the research undertaken will focus on the historical contextualization and reconstruction of the evolution of the Canadian consumer credit regulatory framework since Confederation. Studying the legal past enables us to better understand the evolution of consumer credit law by producing knowledge and information not only about legislative history, legal institutions and concepts but also an appreciation of the external forces and influences which shaped consumer credit regulation. The dissertation will therefore focus on the relationship between changes in legal frameworks and wider transformations and innovations in the consumer credit industry. Given our ultimate objective to propose and encourage regulatory reform, this contextual approach to legal history is of utmost importance to provide the required background and knowledge to effectively enact Canada's much-needed reforms to its consumer credit regulatory framework.

2.1.3 Law in Context Analysis

As stated very succinctly by the Honourable Rosalie Silberman Abella, former Justice of the Supreme Court of Canada, in a keynote address during the Annual Meeting of the Law and Society Association and the Canadian Law and Society Association, "law only matters

[75] Ibbetson, *supra* note 14 at 875.
[76] *Ibid*.

in context."[77] Phil Harris exposed the justification for integrating other disciplines, in particular sociology, economic and politics, in legal study and research as follows: "empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context."[78]

Since the 1970s, criticism of purely doctrinal or internal historical analysis has intensified and these traditional methodologies have lost their dominance. Present-day scholarship increasingly recognizes the importance that legal developments be placed "into their political and socio-economic context."[79] The interest in studying law in context or law in action can be rationalized by the government's increased use of regulatory frameworks as an instrument of social engineering pursuant to policy objectives.[80] With the expansion of the Canadian administrative and welfare state, "regulatory law is unabashedly public and instrumental. Law and policy merge; law is no longer to be regarded as a sphere separate from the state or as a binding set of principles emanating from natural justice whose origins are independent of the state. The joining of law and modern social science is rooted in this recognition."[81]

A contextual approach to legal research can therefore involve different types of research methods focusing either on the emergence or the impact of regulation. The "fruit of the antiformalist turn of the 1930–60 period",[82] this socio-legal approach "is generally more interested in the social, economic and political factors that shape law-making on the input side of the equation, and, on the output side, the various cultural, economic and political

[77] Rosalie Siblerman Abella, "The Arc of the Moral Universe Is Long, But…" (2019) 34:1 CJLS 1 at 1.
[78] Phil Harris, "Curriculum Development in Legal Studies" (1986) 20 Law Teacher 110 at 112, cited in Salter & Mason, *supra* note 8 at 122; Darren O'Donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls" in Laura Cahillane & Jennifer Schweppe, eds, *Legal research methods: principles and practicalities* (Dublin: Clarus Press, 2016) 107 at 109.
[79] Ibbetson, *supra* note 14 at 872. See also: Salter & Mason, *supra* note 8 at 211.
[80] Daniel Blocq & Maartje van der Woude, "Making Sense of the Law and Society Movement" (2018) 11:2 Erasmus L Rev 134 at 137, referencing Malcolm M Feeley, "Three Voices of Socio-Legal Studies, Social Science in the Law" (2001) 35:2 Isr L Rev 175 at 178; J Simon, "Law after Society" (1999) 24 Law & Soc Inquiry 143 at 145–46.
[81] Feeley, *supra* note 80 at 178.
[82] Giuliani, *supra* note 28 at 53.

consequences of the selective enforcement of different laws by officials, including the basis on which discretion is being exercised in practice."[83]

In order to gain a "broader perspective and a deeper understanding"[84] of the law, a contextual approach involves the input analysis of social, economic, gender and political factors leading to the development and enactment of regulations.[85] Such research projects generally aim to study the prevalent attitudes and social values at that point in time, the dynamics of federal and provincial politics, as well as the influence of parliamentary periods of consultations and lobbying efforts by stakeholders and pressure groups. Economic conditions and variables further exert an external force on the justification and legitimacy of policy underpinnings. The law in context approach, therefore, includes the historical contextualization of legal rules, processes and institutions taking into account these economic, social and political forces to evaluate the content and type of regulation as well as the stated objectives.[86] As stated by William L Twining, this research needs to "address the relationship between legal developments and wider changes within public policy, relating the function played by the former to the goals of the latter."[87]

In furtherance of public interest, output contextual methods view regulation as a social phenomenon and focus on "the socioeconomic dimensions and the social impact and consequences of legal and regulatory governance."[88] Research projects investigating the "practical impact of the law in action" include the assessment of "the effects of enacting specific measures upon the interests and conduct of different groups and institutions in

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[83] Salter & Mason, *supra* note 8 at 152, 165.

[84] William L Twining, "Reflections on 'Law in Context'" in William L Twining, ed, *Law in Context: Enlarging a Discipline* (Oxford; New York: Clarendon Press; Oxford University Press, 1997) 36 at 46.

[85] Salter & Mason, *supra* note 8 at 177.

[86] *Ibid* at 126; Twining, *supra* note 84 at 52, citing Paddy Hillyard & Joe Sim, "The Political Economy of Socio-Legal Research" in Philip A Thomas, ed, *Socio-legal studies* (Aldershot; Brookfield, USA: Dartmouth, 1997) 45 at 45; Alan Bradshaw, "Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods" in Philip A Thomas, ed, *Socio-legal studies* (Aldershot; Brookfield, USA: Dartmouth, 1997) 99 at 99.

[87] Salter & Mason, *supra* note 8 at 131.

[88] Peer Zumbansen, "Transnational Law as Socio-Legal Theory and Critique: Prospects for Law and Society in a Divided World" (2019) 67 Buff L Rev 909 at 919; O'Donovan, *supra* note 78 at 112; Salter & Mason, *supra* note 8 at 152, 210.

society, which requires researchers to identify winners and losers"[89] as well as whether regulation "was functioning efficiently and effectively."[90]

Contextual analysis of law including the enforcement of specific regulatory measures and their social and economic impacts yields further insights into consumer and lender behaviour, thereby "forcing the serious consideration of what policies the law pursued and should pursue as well as what the law ought to be."[91] Socio-legal historians agree that the "law is largely determined by economy" and debate on the role the law plays in shaping the economy given that "business and businessmen have always found ways of evading or transcending legalistic limitations… when the rewards were sufficient."[92] In their book on writing law dissertations, Michael Salter and Julie Mason particularized another variation of policy oriented legal research which intends to promote and advocate for legal reform:

> [T]he reform agenda will more often be that the operation of the present legal position is out of step with what a desirable policy should be attempting to bring about. Such proposals will, therefore, be supported by evidence that changes in social patterns, lifestyles, attitudes and economic circumstances now mean that the policy underlying a particular area of legal regulation has become outdated and anachronistic, even if it fully meets the aspirations of the black-letter model.[93]

In addition, the authors summarized various strengths and criticisms of sociolegal approaches to interdisciplinary research, most of which is conducted within "wider contexts of emergence, development and reform" than traditional doctrinal research.[94] Among these strengths are the following three advantages of law in context analysis:

> It allows a closer relationship between legal research and topical policy debates over the future direction of law reform, and hence an enhanced sense of 'relevance'.

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[89] Salter & Mason, *supra* note 8 at 130, citing Jo Shaw, "Socio-Legal Studies and the European Union" in Philip A Thomas, ed, *Socio-legal studies* (Aldershot; Brookfield, USA: Dartmouth, 1997) 310 at 312.
[90] Feeley, *supra* note 80 at 178.
[91] Twining, *supra* note 84 at 44, 46; Fleming, *supra* note 38 at 219.
[92] Sugarman, *supra* note 30 at 80–81, citing David S Landes, 'The Structure of the Enterprise in the Nineteenth Century: The Cases of Britain and Germany', *Comité International des Sciences Historiques, Rapports*, vol V (Los Angeles: Institute of Industrial Relations: 1960) at 122.
[93] Salter & Mason, *supra* note 8 at 162–63.
[94] *Ibid* at 177–78.

> This approach also allows dissertation students to draw connections between legal theory and wider social theories, which allow aspects of modern society as a whole to be studied in terms of how its characteristics, ideologies and interests permeate law in action.
>
> It broadens the perspectives from that of lawyers' (albeit of doubtful relevance to many legal practitioners) to include the lived experiences of any group in society whose actions or interests are affected by the operation of the legal system, whose interests and values help shape the emergence and enforcement of legal regulation.[95]

Relevant criticism of this approach raises the issues of lack of objectivity and expertise of the legal researcher.[96] Contrary to scientific methodological norms of neutrality and objectivity, socio-legal research is conducted within larger conceptual frameworks which are often "tied inextricably to specific liberal and radical political agendas."[97] Often leading to claims for legal reform, such agendas should not be excluded from valid academic research but do require a clear recognition and acknowledgement from the researcher of the underlining conceptual frameworks and any research hypotheses they are attempting to address. In this dissertation, research questions and hypotheses have been discussed at the beginning of this chapter and the theoretical framework which explains the existence and importance of the research problem under study is described subsequently in Section 2.2 of this chapter.

While the question of the expertise of the researcher is of upmost importance for any scholar adopting socio-legal methodologies, complex quantitative or qualitative research methods were not undertaken for this legal historical study of consumer credit. Another obstacle is whether the research is reasonably exhaustive and the "difficulty justifying how a single dissertation is expected to analyse the wider range of material at the required depth" to contextualize legal history with adequate comprehension of all relevant factors.[98]

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[95] *Ibid*.
[96] *Ibid* at 178–79.
[97] *Ibid* at 178.
[98] *Ibid*.

This dissertation addresses this criticism by predominantly relying upon previous social, political and economic studies of experts in their respective fields. From a methodological perspective, Cambridge University Press promotes its Law in Context series by explaining that a "contextual approach involves treating legal subjects broadly, using materials from other humanities and social sciences, and from any other discipline that helps to explain the operation in practice of the particular legal field or legal phenomena under investigation."[99] Observations, insights and conclusions from other Canadian researchers are therefore integrated into this dissertation.

A final pitfall of a contextual approach as identified by David O'Donovan is the "undervaluing of the internal perspective" and the doctrinal foundation of legal research.[100] With the dissertation aiming to provide a contextual historical analysis of consumer credit law, the value of a clear understanding of the law cannot be understated. As a result, the predominant research methodology throughout this dissertation is the doctrinal analysis of federal and provincial legislation regulating the consumer credit industry.

However, given the clear advantages of a contextual and historical analysis of the law, this dissertation, with the exception of Chapter 4 and part of Chapter 7, does not adopt a strict black-letter approach which generally excludes "the human-interest dimension" and "all political, moral and economic factors that are deemed to be 'extrinsic' to the distinctly legal aspects", or "all references to historical, political, social or cultural factors as forces shaping the operation of law as a social phenomenon."[101] On the contrary, combined with historical and socio-legal methodological approaches, the legal research undertaken for this thesis can specifically address, consider and critically analyze such external factors to further explain and contextualize the evolution of consumer credit regulation.

In Chapter 4, the analysis of Canadian constitutional law required a formalist and doctrinal approach to provide a legal opinion on the scope of federal legislative competence over

[99] Cambridge University Press, "Law in Context" (last visited July 10, 2023), online: *Cambridge* <cambridge.org/us/academic/subjects/law/law-general-interest/series/law-context>.
[100] O'Donovan, *supra* note 78 at 127.
[101] Salter & Mason, *supra* note 8 at 62, 81–82, 105–06.

consumer credit. A chronological legal analysis of appellate court decisions on the scope of federal and provincial heads of power involved "the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis."[102] The determination of the constitutional competence over consumer credit is essentially a legal question and therefore relied on an internal analysis of the law. It is acknowledged, however, that economic, moral and political factors do influence how governments exercise their constitutional competence over various matters.

In Chapters 3, 5 and 6, research on the legal history of consumer credit regulation required the identification and critical analysis of valid and binding legal sources, but contextualization was necessary to answer the overall objective of this dissertation. The rationale justifying the deployment of several research methodologies lies in the research questions and overall objective to renew a call for the reform of Canada's consumer credit regulatory framework, as explained by Salter and Mason:

> This may be required because, for example, the dissertation has revealed the existence of discrepancies, inconsistencies or ambiguities stemming from questionable judicial decisions or ill-drafted legislative interventions. Its findings may also indicate that existing doctrine has yet to fully adapt to challenges created by new technical or social developments, for which traditional legal tests, originally designed to deal with circumstances that no longer exist, have clearly become inadequate.[103]

2.1.4 Relevant Research Material

The foremost concern regarding the research methods used to collect relevant data was the magnitude and sheer volume of national and international research material simply due to the widespread use of consumer credit throughout the world and the number of countries attempting to regulate the industry. In order to effectively and efficiently identify, manage, consider and properly analyze relevant and reliable data, research material is therefore

[102] Posner, *supra* note 18 at 1113.
[103] Salter & Mason, *supra* note 8 at 104–05.

limited to primary and secondary Canadian sources. While a comparative analysis of foreign regulatory frameworks would lead to interesting, relevant and potentially influential results regarding legal reform of Canadian statutes, it remains outside the scope of this dissertation.

As previously mentioned, although interdisciplinary in nature, the methodological approaches chosen for this dissertation do not include socio-legal empirical or qualitative research methods. They rather focus on existing legal primary sources, that is "black-letter law", but also consider secondary sources such as relevant literature containing scientific and authoritative results of such socio-legal and contextual research. A critical analysis of relevant multidisciplinary research will contextualize and elicit various answers to the research questions and nourish the legal history emerging from the critical review and analysis of primary sources as well as secondary sources espousing these different perspectives and studying various external factors relevant to the consumer credit regulatory framework.

With regards to primary legal sources, relevant research material utilized to analyze doctrinal history consists chiefly of formal legal materials such as reported judicial decisions as well as constitutional, legislative and regulatory instruments.[104] Due to the volume of legislative statutes relating to consumer credit and, therefore the judicial interpretation of those regulatory measures, consideration of judicial decisions is limited to those referred to in secondary sources and existing literature studying specific questions, issues or topics pertaining to consumer credit. An exception is the pure doctrinal analysis of the federal constitutional power over consumer credit found in Chapter 4.

Pursuant to the methodological approaches adopted, the legal historical analysis of the Canadian consumer credit regulatory framework is a contextually formed interpretation of these primary sources, and therefore, the source material must go beyond positive legal sources. Throughout the dissertation, analysis is supplemented with authoritative official documents in the form of parliamentary instruments such as bills, reports and debates and

[104] Getzler, *supra* note 63 at 171, 173.

other government documents and statistics, including research published in submissions, working papers and reports for government, law reform and international agencies. Bill McDowell, in his guide to historical research, explains the relevance of official documents such as materials associated with federal Royal Commissions.

> The reports of Royal Commissions may provide a fruitful source of information for some history projects because they offer expert and informed advice on various matters which a government may wish to take into account in the framing of legislation. The reports of Royal Commissions and Select Committees are submitted to Parliament as command papers. Committees of inquiry may also be a useful source of information, particularly as these committees receive evidence from interested individuals and organizations.[105]

In his book *Historical Research in Law*, David Ibbetson states that parliamentary documents enable the researcher to ascertain the political, social, moral and economic issues being raised and discussed by parliamentarians including "the reasons and competing pressures influencing the form in which the statute was eventually passed" and "analyses of the way in which the statutes were applied and interpreted."[106]

With the adoption of a historical and contextual methodological approach, investigation of secondary sources further includes a review of academic literature and commentaries, newspaper articles, statistics and other documentation issued by interest groups and financial institutions.[107] Documents and submissions made to parliamentary committees or commissions from the financial services industry will provide insight into the underlying tensions between the economic imperatives of the industry and the public interest in protecting consumers.[108] Such secondary sources also provide insight into the evolution of prevailing values and attitudes to consumer credit as well as the impact of credit on the social and financial well-being of consumers and the commercial realities of credit providers. It is acknowledged that many of these secondary sources reflect a subjective, biased or jaundiced viewpoint based on personal, commercial or special interest. Inevitable

[105] McDowell, *supra* note 49 at 63.
[106] Ibbetson, *supra* note 14 at 877.
[107] Salter & Mason, *supra* note 8 at 129–30, 132, referencing Bradshaw, *supra* note 86 at 99.
[108] McLaren, *supra* note 44 at 95.

as they may be, these differing and diverse perspectives, comments and opinions must be considered and evaluated to identify, assess and understand the external contextual factors influencing the evolution and performance of the Canadian consumer credit regulatory framework.

For this dissertation, most sources, whether primary or secondary, were available on the Internet or in public and university libraries, but research in the federal archival collections provided additional information such as material collected by Royal Commissions and federal Cabinet documents. Finally, as required by the adopted contextual research methodologies, these resources are analyzed and evaluated using the conceptual and theoretical framework set out below.

2.2 Theoretical Framework of Consumer Protection Law

In legal doctrine, "a theory in law is a system of coherent, non contradictory assertions, views and concepts concerning some legal system or part of it, which are worded in such a way that it is possible to deduct from them testable hypotheses about the existence (validity) and interpretation of legal concepts, rules or principles."[109] In comparison, a theoretical framework determines how data is selected, used and interpreted according to specific norms and underlying value judgments.[110]

The research undertaken for this dissertation studies the evolution of consumer credit law in Canada through a theoretical lens of a "consumer" perspective that examines law primarily from the point of view of consumers and their well-being rather than simply from the perspective of the regulated, the legislator or policy makers.[111] Since World War II, consumer law emanates from a profound social change to a new understanding of the importance of the social and financial well-being of the individual consumer and has been widely recognized as a "separate branch of rules and principles."[112]

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[109] Van Hoecke, *supra* note 15 at 15.
[110] Banakar & Travers, *supra* note 13 at 20; Doupe & Salter, *supra* note 42 at 283.
[111] Feeley, *supra* note 80 at 184.
[112] Sinai Deutch, "Are Consumer Rights Human Rights?" (1994) 32 Osgoode Hall LJ 537 at para 1.

As the historical analysis in this dissertation demonstrates, consumer credit regulation has always been entrenched in a consumer protection policy framework which has governed its evolution. The impetus for change has often been the government's drive to regulate the consumer credit industry to further protect financial consumers. As a result, it seems not only appropriate but also highly relevant to research consumer credit law within a frame of analysis that considers the social, economic and historical contexts, the opposing values or ideals concerning consumer credit regulation, the interests favoured or disadvantaged by such regulation and the impact on consumers and the credit industry.

The public demand for consumer protection also has a long history. Consumer protection law is found in early forms of legislative instruments such as the *Magna Carta* of 1215 securing standard weights and measures for grain, wine, beer and cloth,[113] as well as public policy initiatives prohibiting fraud. As explained by Nicholas Sidor, "[i]n addition to defending the consumer, these policies support honest traders against unscrupulous competition; no market economy can operate effectively without such forms of regulation."[114]

Additional ancient and long-standing economic justification to protect the consumer is described as follows in Adam Smith's 1776 book entitled *The Wealth of Nations*:

> Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.[115]

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[113] Ernest James Amirault & Maurice Archer, *Canada's Consumer Law: A Survey of Consumer Protection Law in Canada* (Ashburn, ON: P & O Business Publication, 1979) at 1.7.

[114] Nicholas Roy Sidor, *Consumer Policy in the Canadian Federal State* (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 1984) at 1.

[115] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nation*s, 1776 (New York: Modem Library, 1937) at 625, cited by Michael J Trebilcock, "Taking Stock: Consumerism in the 1990s" (1991) 19 Can Bus LJ 412 at 436 [Trebilcock, 1991].

Embedded in modern civilization, a culture of consumerism along with the democratization of credit and the financialisation of society[116] has flourished during the last century and triggered a new surge of consumer protection measures. Considered the first *Consumer Bill of Rights*, President John F. Kennedy advocated for four basic consumer rights in 1962:

(1) The right to safety and protection against the marketing of hazardous goods;
(2) The right to be informed and protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and be given the facts needed to make an informed choice;
(3) The right to choose and have access to a variety of products and services at competitive prices;
(4) The right to be heard and be assured that consumer interests will be considered in the formulation of public policy and be treated fairly and expeditiously by public agencies.[117]

Newer regulatory instruments protecting these rights have been categorized as *social regulation*. "[T]reating consumer protection as one aspect of its duty to protect public health and safety", regulation of financial services aims to ensure the quality and safety of goods and services as well as their method of production.[118] "These policies are specifically designed to assist and protect the consumer, who frequently finds himself disadvantaged in a market dominated by large corporations, bewildered by extravagant advertising, products whose quality he cannot judge, and easy borrowing which may ultimately prove financially ruinous."[119] According to the Organisation for Economic Co-operation and Development ("OECD"), financial consumer protection "refers to the framework of laws, regulations and other measures generally designed to ensure fair and responsible treatment

[116] These concepts are described in the introductory chapter of this dissertation.
[117] John F Kennedy, "Special Message to the Congress on Protection the Consumer Interest," (15 March 1962), online: *The American Presidency Project* <presidency.ucsb.edu/node/237009>.
[118] Mark E Budnitz, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement" (2007–2008) 24 Ga St U L Rev 663 at 665; David T Scheffman & Elie Appelbaum, *Social Regulation in Markets for Consumer Goods and Services* (Toronto: University of Toronto Press, 1982) at Preface.
[119] Sidor, *supra* note 114 at 1.

of financial consumers in their purchase and use of financial products and services and their dealings with financial services providers."[120]

Providing a theoretical framework to this research into the historical evolution and performance of consumer credit legislation, a consumer rights perspective provides very different insights on the relationship between consumers and the marketplace by taking as "a given that consumers have certain rights in the marketplace, and assesses how well those rights are protected or furthered, either by the structure of the marketplace itself, or the institutions which govern it."[121]

In addition, it has long been recognized in standard neoclassical analysis that "market failures related to market structure and the incentives of market participants […] can all be applied to consumer financial markets."[122] Market failures such as the power and structural asymmetries between the lender and the consumer and the potential harm inflected on financial consumers further justify the adoption of the theoretical framework of consumer protection underpinning this dissertation. These are explored following a description of the "emerging worldwide consensus" on the importance of consumer protection legislation.[123]

2.2.1 Domestic and International Recognition of the Importance of Consumer Protection

In Canada, the response to the pressure on government to better protect consumers was reflected in the enactment in 1967 of the *Department of Consumer and Corporate Affairs Act*[124] followed by the establishment of similar governmental departments at the provincial

[120] OECD Council, "Report on the Implementation of the Recommendation of the Council on High-Level Principles on Financial Consumer Protection," (2022) at 10, online: *OECD* <https://one.oecd.org/document/C(2022)7/en/pdf>. See also: Paolo Siciliani, Christine Riefa & Harriet Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Oxford, UK; Chicago, Illinois: Hart Publishing, 2019) at 24.
[121] Office of Consumer Affairs, *The Consumer Trends Report* (Ottawa: Industry Canada, 2004) at 209.
[122] John Y Campbell et al, "Consumer Financial Protection" (2011) 25:1 J Econ Perspectives 91 at 92.
[123] Budnitz, *supra* note 118 at 692.
[124] SC 1967-68, c 16, repealed by *Department of Health Act*, SC 1996, c 8, s 37 following its absorption in the super-ministry of Industry of Canada created by *Department of Industry Act*, SC 1995, c 1.

level.[125] Following the dissolution of this Department, the responsibility for overseeing consumer protection was largely diffused between the new Department of Industry Canada and the Office of the Superintendent of Financial Institutions (OSFI) which ensures the safety and soundness of the Canadian financial system. In 2001, the Financial Consumer Agency of Canada was created "to consolidate and strengthen the oversight of consumer protection measures in the federally regulated financial sector, and to expand consumer education."[126]

The importance of consumer protection was also being recognized by international and intergovernmental organizations and institutions. In 1977, the OECD adopted a recommendation calling upon members to enact consumer protection measures related to credit transactions.[127] Led by the G20/OECD Task Force on Financial Consumer Protection, a revised and updated *Recommendation of the Council on Consumer Protection in the field of Consumer Credit* was adopted in 2019 including "measures that seek to promote fairness, suitability and help prevent or reduce over-indebtedness."[128]

Likewise, the concept of consumer rights was endorsed by the United Nations in 1985. The *United Nations Guidelines for Consumer Protection* expands the initial consumer basic rights extolled by President Kennedy to eight basic rights which are described as:

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[125] Jacob Ziegel, "Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card" (2011) 50 Can Bus LJ 259 at 259–62 [Ziegel, 2011]; Christopher S Axworthy, "Recent Developments in Consumer Law in Canada" (1980) 29 INLQ 346 at 346; Sidor, *supra* note 114 at 17–22.

[126] Office of the Superintendent of Financial Institutions, "Our History" (last modified 2023-08-14) online: *OSFI* <osfi-bsif.gc.ca/Eng/osfi-bsif/Pages/hst.aspx>. See also Canada, Department of Finance, *Reforming Canada's Financial Services Sector: A Framework for the Future* (Ottawa: Department of Finance, 1999) at 46 [Canada, 1999].

[127] OECD, *Recommendation of the Council concerning Consumer Protection in the Field of Consumer Credit*, OECD/LEGAL/0150 (1977).

[128] *Recommendation of the Council on Consumer Protection in the field of Consumer Credit*, OECD/LEGAL/0453 (2019) at 3. See also: OECD, *Recommendation of the Council on Principles and Good Practices for Financial Education and Awareness*, OECD/LEGAL/0338 (2005); OECD, *Recommendation of the Council on Consumer Dispute Resolution and Redress*, OECD/LEGAL/0356 (2007); OECD, *Recommendation of the Council on Good Practices on Financial Education and Awareness relating to Credit*, OECD/LEGAL/0370 (2009); OECD, *Recommendation of the Council on High-Level Principles on Financial Consumer Protection*, OECD/LEGAL/0394, (2012) [OECD, *High-Level Principles*], which have also been endorsed by the G20; OECD, *Recommendation of the Council on Consumer Policy Decision Making*, OECD/LEGAL/0403 (2014); OECD, *Recommendation of the Council on Consumer Protection in Electronic E-Commerce*, OECD/LEGAL/0422 (2016).

> a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States and encouraging the sharing of experiences in consumer protection.[129]

According to the Secretary-General of the United Nations, these guidelines, adopted by consensus, have been "likened to an international consumer bill of rights" and are often "cited as the single most important set of principles for consumer protection in the world."[130] It has been argued that these consumer rights should be recognized as human rights and are "an essential part of the right to the adequate standard of living" already protected under Article 11 of the *International Covenant on Economic, Social and Cultural Rights* adopted by the United Nations in 1966.[131]

Among numerous recommendations, the *United Nations Guidelines for Consumer Protection* specifically encourage member states to adopt "measures to reinforce and integrate consumer policies concerning financial inclusion, financial education and the protection of consumers in accessing and using financial services" and to implement the following measures to protect financial consumers:

> (a) Financial consumer protection regulatory and enforcement policies;
> (b) Oversight bodies with the necessary authority and resources to carry out their mission;
> (c) Appropriate controls and insurance mechanisms to protect consumer assets, including deposits;
> (d) Improved financial education strategies that promote financial literacy;
> (e) Fair treatment and proper disclosure, ensuring that financial institutions are also responsible and accountable for the actions of their authorized agents. Financial services providers should have a written policy on

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[129] *United Nations Guidelines for Consumer Protection*, UN Doc A/RES/39/248, (1985). The guidelines were first adopted by the General Assembly in resolution 39/248 of 9 April 1985, later expanded by the Economic and Social Council in resolution E/1999/INF/2/Add.2 of 26 July 1999, and recently revised by the General Assembly in resolution 70/186 of 22 December 2015.

[130] Development and International Economic Cooperation, *Consumer Protection*, Report of the Secretary-General, 29 May 1992, UN Doc E/1992/48 published in "Consumer Protection. Report of the Secretary-General of the United Nations" (1993) 16 J Consumer Pol'y 97 with N Reich & G Woodroffe, eds, "Editor's Note" (1993) 16 J Consumer Pol'y 95. See also Deutch, *supra* note 112 at n 128, n 181.

[131] Deutch, *supra* note 112 at para 32.

conflict of interest to help detect potential conflicts of interest. When the possibility of a conflict of interest arises between the provider and a third party, that should be disclosed to the consumer to ensure that potential consumer detriment generated by conflict of interest be avoided;

(f) Responsible business conduct by financial services providers and authorized agents, including responsible lending and the sale of products that are suitable to the consumer's needs and means;

(g) Appropriate controls to protect consumer financial data, including from fraud and abuse;

(h) A regulatory framework that promotes cost efficiency and transparency for remittances, such that consumers are provided with clear information on the price and delivery of the funds to be transferred, exchange rates, all fees and any other costs associated with the money transfers offered, as well as remedies if transfers fail.[132]

Since the Global Financial Crisis, the World Bank Group and the Financial Stability Board endorsed by the G20 have both underscored the importance of financial consumer protection for long-term global financial stability.[133] Indeed, "national and international efforts have intensified to strengthen consumer protection policies to promote financial stability"[134] and the "need for financial stability, financial integrity, financial inclusion, and financial consumer protection objectives to complement one another has become an increasingly common theme highlighted by global policy makers in recent years."[135]

Consistent with this objective, the G20/OECD Task Force on Financial Consumer Protection developed the *G20/OECD High-Level Principles on Financial Consumer Protection* which were subsequently endorsed by the G20 Leaders in 2011 and adopted by

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[132] *United Nations Guidelines for Consumer Protection*, *supra* note 129, ss 66–67.

[133] See also Mateja Durovic & Hans W Micklitz, *Internationalization of Consumer Law: A Game Changer*, SpringerBriefs in Political Science (Cham: Springer International Publishing, 2017).

[134] Financial Stability Board, *Consumer Finance Protection with particular focus on credit* (Basel, Switzerland: Financial Stability Board, 2011) at 19.

[135] World Bank Group, *Good Practices for Financial Consumer Protection* (Washington, DC: World Bank, 2017) at ix, 1: "A strong consumer protection regime is key to ensuring that expanded access to financial services benefits consumers, enabling them to make well-informed decisions on how best to use financial services, building trust in the formal financial sector, and contributing to healthy and competitive financial markets." See also Micheline Gleixner, "Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency" in Janis Sarra, ed, *Ann Rev Insolv L 2013* (Toronto: Carswell, 2014) 587 [Gleixner, 2014]; Tsai-Jyh Chen, "Introduction and Overview of This Book" in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection* (Singapore: Springer, 2018) 1 at 1: "the financial crisis of 2008 which caused many people incurring disastrous loss in wealth has attracted attention to financial consumer protection. The creation of the Consumer Financial Protection Bureau (CFBP) in the US in 2010 could be regarded as a significant movement for the trend."

the OECD Council in 2012.[136] Although not binding, these high-level principles assist G20 countries and other interested economies to enhance financial consumer protection and are intended to be applicable across all financial services sectors. Regulation of financial services is prioritized to better protect consumers and prevent consumer overindebtedness. According to the first principle,

> [f]inancial consumer protection should be an integral part of the legal, regulatory and supervisory framework, and […] should reflect and be proportionate to the characteristics, type, and variety of the financial products and consumers, their rights and responsibilities and be responsive to new products, designs, technologies and delivery mechanisms. Strong and effective legal and judicial or supervisory mechanisms should exist to protect consumers from and sanction against financial frauds, abuses and errors.[137]

The OECD recently affirmed in 2022 that these high-level principles are "the primary and leading international standard for financial consumer protection frameworks" and "set out the foundations of an effective and comprehensive framework for financial consumer protection."[138] According to the OECD report on the implementation of the high-level principles of financial consumer protection

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[136] "Report on the Implementation of the Recommendation of the Council on High-Level Principles on Financial Consumer Protection", *supra* note 120 at 8, 12. See also OECD, "G20 High-Level Principles on Financial Consumer Protection," (October 2011), online: *OECD* <oecd.org/regreform/sectors/48892010.pdf>; OECD, *High-Level Principles*, *supra* note 128. The high-level principles were endorsed by the G20 Finance Ministers and Central Bank Governors at their meeting on 14-15 October 2011 and adopted by the Council of the OECD on 17 July 2012. These principles call for the "legal recognition of financial consumer protection, oversight bodies with necessary authority and resources to carry out their mission, fair treatment, proper disclosure, improved financial education, responsible business conduct by financial services providers and authorised agents, objective and adequate advice, protection of assets and data including from fraud and abuse, competitive frameworks, adequate complaints handling and redress mechanisms and policies which address, when relevant, sectoral and international specificities, technological developments and special needs of vulnerable groups. This approach complements and builds upon financial regulation and supervision and financial governance." (*Ibid* at 4). The High-Level Principles on Financial Consumer Protection are as follows:

1. Legal, Regulatory and Supervisory Framework
2. Role of Oversight Bodies
3. Equitable and Fair Treatment of Consumers
4. Disclosure and Transparency
5. Financial Education and Awareness
6. Responsible Business Conduct of Financial Services Providers and Authorised Agents
7. Protection of Consumer Assets against Fraud and Misuse
8. Protection of Consumer Data and Privacy
9. Complaints Handling and Redress
10. Competition

[137] "Report on the Implementation of the Recommendation of the Council on High-Level Principles on Financial Consumer Protection", *supra* note 120 at 5.

[138] *Ibid* at 8.

> [t]hese goals are even more relevant in today's dynamic financial services marketplace with increasing numbers of new financial products, services, market participants and distribution channels available to consumers, coupled with trends such as increasing digitalisation and the growth in sustainable finance. The importance of financial well-being and resilience are other relevant trends.[139]

Parallel to the international call to strengthen financial consumer protection law, the Task Force on the Future of the Canadian Financial Services Sector recognized, in 1999, the information and power imbalance between financial institutions and consumers and concluded that the current framework was unable to correct the existing disequilibrium[140]. The following year, the government adopted a framework reforming Canada's financial services sector, in which it concluded that:

> [i]t is the responsibility of both financial institutions and the government to establish the conditions that create a marketplace of well-informed consumers and a sufficient number of competitive suppliers. Adequate information and range of choice, backed by strong regulatory oversight and an effective redress process, will ensure a relative balance of power between the consumer and the provider and justify consumer confidence in their financial institutions. This, in turn, will deliver the best results for consumers, firms and the economy as a whole.[141]

Since 2013, the Government of Canada has committed to enacting a comprehensive financial consumer protection code to

- better protect consumers of financial products and ensure that they have the necessary tools to make responsible financial decisions
- be adaptable to suit the needs of consumers of today and tomorrow in a rapidly evolving and innovative financial marketplace
- respond to the realities of a digital and remote banking environment and the needs of vulnerable Canadians
- provide the exclusive and comprehensive consumer protection regime that applies to products and services offered by banks anywhere in Canada, and the basis for consumer protection for federally regulated financial institutions, replacing a currently dispersed mix of legislation and regulations
- be simple and clear in expressing the government's expectations of accountable financial institutions

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[139] *Ibid* at 11.

[140] Task Force on the Future of the Canadian Financial Services Sector, *Change, Challenge, Opportunity: Report of the Task Force* (Ottawa: Department of Finance, 1998) at 15.

[141] Canada, 1999, *supra* note 126 at 46.

- be enforceable and provide criteria by which actions can be assessed.[142]

Following a public consultation and a first unsuccessful attempt to legislate in 2016,[143] the *Report on Best Practices in Financial Consumer Protection*, published in 2017 by the FCAC, identified 11 best practices to establish a strong financial consumer framework and to conform to international guidelines and principles.[144] Financial consumer protection has thus become a priority in Canada, at least at the federal level. Provincial regulation is still fragmented, dispersed, differing and often rudimentary, as exposited in Chapter 5.

2.2.2 Power and Structural Asymmetries Between the Parties

According to Jacob Ziegel, consumer protection legislation is an essential part of the legal framework of modern society because the "average consumer suffers from three disadvantages vis-à-vis the commercial or professional supplier of goods and services: lack

[142] Financial Consumer Agency of Canada, "Report on Best Practices in Financial Consumer Protection," (31 May 2018), online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/best-practices-financial-consumer-protection.html> at 4 [FCAC*, Report on Best Practices*] (last modified 29 May 2018) [perma.cc/H928-VY7P], referring to Canada, Department of Finance, "Canada's Financial Consumer Protection Framework: Consultation Paper," (3 December 2013), online: *Canada* <web.archive.org/web/20131210103735/www.fin.gc.ca/activty/consult/fcpf-cpcpsf-eng.asp>. See submissions online: *Canada* <canada.ca/en/department-finance/programs/consultations/2013/canadas-financial-consumer-protection-framework-submissions.html>.

[143] Bill C-29, *Budget Implementation Act, 2016, No. 2*, 1st Sess, 42nd Parl, 2015 (first reading 25 October 2015).

[144] FCAC*, Report on Best Practices*, *supra* note 142 at 1–3. The best practices found in Canada are as follows:

1. A regulator is specifically responsible for overseeing financial consumer protection;
2. A standalone legal framework establishing clear minimum standards to protect financial consumers;
3. Legislation providing for the fair treatment of financial consumers at all stages of their relationship with financial service provider;
4. Legislation setting out enforceable principles;
5. Legislation requiring prominent disclosure of key information;
6. Legislation prohibiting misleading practices, such as misleading advertising;
7. Consumers having access to alternative dispute resolution systems;
8. Legislation providing regulators with the power to compel compliance;
9. Legislation promoting transparency with consumers;
10. Consumers having access to affordable, independent and impartial redress mechanisms;
11. Consumers having access to different remedies in the event of non-compliance by financial institutions.

of knowledge, lack of resources and inequality of bargaining power."[145] The World Bank concurs with his assessment of these market asymmetries:

> At its heart, the need for financial consumer protection arises from an imbalance of power, information and resources between consumers and their financial service providers, placing consumers at a disadvantage. Financial institutions know their products well but individual retail consumers find it difficult and costly to obtain sufficient information regarding their financial purchases. In addition, financial products and services tend to be difficult to understand, compounded by increasing complexity and sophistication in recent years. Also consumers typically find it expensive and problematic to launch lawsuits to sue firms to enforce the terms of individual contracts.[146]

In Canada, financial consumers are not faring any better. The FCAC has described the reality facing Canadian financial consumers as follows:

> The complexity of the financial marketplace is increasing rapidly. Canada has one of the fastest growing financial sectors in the world, and access to services has become easier as more people are using online or mobile financial services and products and three quarters own a smartphone.[147]

The increased accessibility and use of financial products and services in the Canadian market have rendered credit vital to the consumer's effective participation in society and the functioning economy. However, along with this continued expansion of the financial marketplace, vulnerable members of society are increasingly being neglected or excluded.[148] According to research findings of the FCAC, vulnerable consumers include "low-income earners, women, Indigenous Peoples, newcomers, and those with low

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[145] Ziegel, 2011, *supra* note 125 at 269. See also: Niamh Moloney et al, "The Consumer Interest and the Financial Markets" in Niamh Moloney, Eilís Ferran & Jennifer Payne, eds, *The Oxford Handbook of Financial Regulation* (Oxford, UK: Oxford University Press, 2015) 695 at 697.

[146] World Bank, *Good Practices for Financial Consumer Protection* (Washington, DC: World Bank, 2012) at 100.

[147] Financial Consumer Agency of Canada, "Review of Financial Literacy Research in Canada: An Environmental Scan and Gap Analysis" (26 November 2020), online: *Canada* <canada.ca/en/financial-consumer-agency/programs/research/review-financial-literacy-research.html> at 21 [FCAC, 2020], referencing Canadian Bankers Association, "Focus: How Canadians Bank" (2018) (see (2022) online: *CBA* <cba.ca/technology-and-banking>; Competition Bureau Canada, "Canada's progress in fintech: Regulatory highlights following the Competition Bureau's Market Study" (26 September 2018), online: *Competition Bureau of Canada* <competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04392.html> (last visited 10 July 2023); Klaus Edenhoffer, *Toronto on the Global Stage: 2018 Report card on Canada and Toronto's financial services sector* (Ottawa: The Conference Board of Canada, 2018).

[148] FCAC, 2020, *supra* note 147 at 29.

educational levels."[149] With the increase in the complexity and the variety of types, options, technologies and qualities of goods and services along with the overall volume of transactions, "the average consumer, although better educated than his predecessors, finds it much more difficult to judge the performance and quality of what he is buying and to know that he is getting the best value for his money."[150]

Lacking fundamental information and knowledge, financial consumers may be unaware of the existence or accessibility of alternative sources of credit, uninformed of their legal protection and remedies or may be confused about which level of government protects their interests and where to address their questions or complaints.[151] Particularly marked in financial markets, information asymmetries are further compounded by financial illiteracy, behavioural biases such as overconfidence, information overload and impulsiveness as well as other cognitive limitations.[152]

With the rapidity and apparent simplicity of the consumer credit transaction, consumers are often unaware of its subtle complexity. In addition to the obstacles encountered in assimilating available information and requesting further clarification from the lender, financial illiteracy undermines the capability and ability of consumers to protect their interests and ensure their financial well-being. In 2004, research undertaken by the Office of Consumer Affairs of Industry Canada reported the following level of financial illiteracy:

> significant numbers of Canadian consumers have difficulty understanding the complex information needed to assess the value and risks associated with many important consumer products and transactions, particularly those involving financial and other important service contracts that require high

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[149] *Ibid* at 22.

[150] Amirault & Archer, *supra* note 113 at 1.2. See also: Ziegel, 2011, *supra* note 125 at 265–66, 269. See also "Report on the Implementation of the Recommendation of the Council on High-Level Principles on Financial Consumer Protection", *supra* note 120 at 10.

[151] Sidor, *supra* note 114 at 41.

[152] OECD, *High-Level Principles*, *supra* note 128 at 3. See also: "Report on the Implementation of the Recommendation of the Council on High-Level Principles on Financial Consumer Protection", *supra* note 120 at 10; David Cayne & Michael J Trebilcock, "Market Considerations in the Formulation of Consumer Protection Policy" (1973) 23:4 UTLJ 396 at 405–06; Sina Akbari, "Against the Reductionism of an Economic Analysis of Contract Law" (2015) 28 Can JL & Juris 245 at 245–64; Campbell et al, *supra* note 122 at 92; Geneviève Helleringer, "A behavioural perspective on consumer finance" in Hans-W Micklitz, Anne-Lise Sibony & Fabrizio Esposito, eds, *Research Methods in Consumer Law* (Northampton, MA: Edward Elgar Publishing, 2018) 334 at 334.

> literacy and numeracy skills. For example, four out of ten Canadians between the ages of 16 and 65 do not meet the minimum desired threshold of literacy skills, experiencing significant challenges when trying to complete a basic task such as extracting information from a typical bus schedule.[153]

In addition, the Survey on Measuring Financial Literacy and Financial Inclusion conducted by the OECD in 2015 measured respondents' financial knowledge, attitudes and behaviours. Although Canadians' financial literacy ranked third overall out of 29 countries, only 61% of Canadians could correctly answer five of seven financial knowledge questions.[154] These results are analogous to the federal government's Canadian Financial Capability Survey which indicated in 2009 and again in 2014 that on average respondents answered correctly 8.7 of 14 objective-knowledge questions with 31.4% correctly answering seven questions or less in 2014.[155] In addition to the limited financial education received by Canadians, "[s]ome consumers may lack the cognitive capacity to optimize their financial situation even if presented with all the information that in principle is required to do so."[156]

Moreover, in financial consumer transactions, behavioural economics has demonstrated the cognitive biases of consumers hampering not only their financial well-being but the ability of the market to better respond to their needs and traditional market failures.[157] Recently recognized behavioural biases and cognitive limitations have brought into question the economic and political rationales for past and current consumer credit regulation. The relevant assumptions underlying neoclassical economics rests upon the individual pursuit of self-interest by maximizing the utility of products and services chosen based on their knowledge of all relevant information on quality and price.[158] Concurrently,

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[153] Office of Consumer Affairs, *supra* note 121 at 202. See also Gleixner, 2014, *supra* note 135 at 603–14.
[154] OECD, *OECD/INFE International Survey of Adult Financial Literacy Competencies* (Paris: OECD, 2016) at 26.
[155] Statistics Canada, "The Daily—Canadian Financial Capability Survey, 2014," (11 June 2014), online: *Canada* <www150.statcan.gc.ca/n1/daily-quotidien/141106/dq141106b-eng.htm>.
[156] Campbell et al, *supra* note 122 at 92.
[157] *Ibid* at 95.
[158] Siciliani, Riefa & Gamper, *supra* note 120 at 27.

firms or lenders seek to maximize their profits by selling to well-informed and rational consumers and "achieving both allocative and productive efficiency."[159]

As explained, however, financial consumers are not optimal decision makers.[160] They are not well-informed and rational consumers, notwithstanding years of consumer credit and financial disclosure regulation. The OECD recently confirmed that future regulation and policy choices must therefore take into account information asymmetries: "justifications for financial consumer protection regulation can also be found in behavioural economics, a field which has documented cognitive patterns of consumers that divert them from behaving as the rational, self-interested actors that neo-classical economics would predict."[161] OECD researchers of behavioural economics have concluded that "[m]arket forces left to themselves will often not work to reduce these mistakes, so interventions may be needed."[162] The darker side of consumers' behavioural biases and cognitive limitations and their exploitation by lenders is further explored in the following subsection.

According to an OECD Working Paper entitled *Behavioural economics and financial consumer protection*, researchers have identified eleven types of biases relevant to financial services.[163] Explaining the consequences of these biases on consumers, a Working Paper of the Bank of Canada has recently recognized that some vulnerable financial consumers are "over-optimistic about their future income […], that they generally underestimate the probability of experiencing negative events" and they are therefore "more prone to shocks

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[159] *Ibid*.

[160] *Ibid* at 29.

[161] "Report on the Implementation of the Recommendation of the Council on High-Level Principles on Financial Consumer Protection", *supra* note 120 at 10. "Such biases include: heuristics; present-based preferences; anchoring effect; hyperbolic discounting; overconfidence; mental accounting; endowment effect, and others." See Anne-Françoise Lefevre & Michael Chapman, *Behavioural economics and financial consumer protection*, OECD Working Papers on Finance, Insurance and Private Pensions No 42 (Paris: OECD, 2017), online: <doi.org/10.1787/0c8685b2-en>.

[162] Lefevre & Chapman, *supra* note 161 at 9–10. See also: Campbell et al, *supra* note 122; Peter Lunne, Regulatory Policy and Behavioural Economics (Paris: OECD, 2014), online: *OECD* <doi.org/10.1787/9789264207851-en>; Financial Conduct Authority, *Applying behavioural economics at the Financial Conduct Authority, Occasional Paper 1* (London, UK: FCA, 2013), online: *FCA* <fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>.

[163] Lefevre & Chapman, *supra* note 161 at 12–14.

and being unaware of the higher risks they face."[164] The research horizon on consumer law is expanding and behavioural insights previously ignored now inform legal research and the debate on potential solutions and legal reform.[165]

The above information asymmetries about the legal mechanics of consumer credit further contribute to the inability of financial consumers to bargain on equal terms.[166] In the contemporary marketplace, Jacob Ziegel outlined additional resources and power asymmetries:

> The corporation has much greater bargaining power (even if constrained by competition), knows much more, and has access to the internal and external resources necessary to enable the corporation to make informed decisions about its role in the marketplace. It is this disparity between the parties that sustains the movement in favour of a consumer bill of rights.[167]

Following his study of the effects of Canada's federal system on the development of national consumer protection policy, Nicholas Sidor similarly concludes that "Canadian consumers are economically and politically weak. Their problems begin with diffused market power, and are exacerbated by the organizational problems which plague voluntary public interest groups."[168] The consumer is further disadvantaged by lobbying efforts on behalf of powerful industry interests which drown out the limited influence exerted by consumer groups due to asymmetrical resources.[169] Michael Trebilcock has repeatedly argued that "the consumer interest is systematically underrepresented in the regulatory processes of the modern state."[170]

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[164] Florian Exler et al, *Consumer Credit with Over-Optimistic Borrowers*, Staff Working Paper 2020-57 (Ottawa: Bank of Canada, 2020) at 2.

[165] Hans-W Micklitz, "The bright and adventurous future of consumer law research" in Hans-W Micklitz, Anne-Lise Sibony & Fabrizio Esposito, eds, *Research Methods in Consumer Law* (Northampton, MA: Edward Elgar Publishing, 2018) 1 at 31, 34.

[166] Jacob S Ziegel & RE Olley, eds, *Consumer Credit in Canada: Proceedings of a Conference on Consumer Credit* (Saskatoon: University of Saskatchewan, 1966) at 79.

[167] Ziegel, 2011, *supra* note 125 at 270.

[168] Sidor, *supra* note 114 at 67.

[169] *Ibid* at 68. Jacob S Ziegel, "Is Canadian Consumer Law Dead?" (1994–1995) 24:3 Can Bus LJ 417 at 422.

[170] Trebilcock, 1991, *supra* note 115 at 417. See also Michael J Trebilcock, "Winners and Losers in the Modem Regulatory State: Must the Consumer Always Lose?" (1975) 17 Osgoode Hall LJ 619; Kenneth G Engelhart & Michael J Trebilcock, *Public Participation on the Regulatory Process: The Issue of Funding, Study for the Regulation Reference* (Ottawa: Economic Council of Canada, 1981).

2.2.2 Preventing Consumer Harm

In addition to the above power and structural asymmetries between the parties, the regulation of consumer credit poses "special public policy concerns in light of the mounting evidence that consumers do not always behave as time-consistent, rational utility maximizers."[171] Recent studies have observed that many consumers overextend themselves financially because they are unable to rationally assess future costs and the suitability of the financial product or service if the information is inadequate or misunderstood or if other asymmetries are at play.[172]

As explained in Chapter 1, the consequences of overindebtedness and financial hardship are severe and all-consuming for the financial consumer. Insolvency and bankruptcy lead to loss of assets and often result in long-term financial, psychological and potential physical harm. Financial products are intangible, complex and opaque, and unintended costs and repercussions often arise when it is too late to avoid the damages already incurred.[173] The International Association of Restructuring, Insolvency & Bankruptcy Professionals assessed financial consumer harm and recognized the importance of financial consumer protection in their 2011 report on consumer debt:

> Over-indebtedness may lead to social and health problems, social exclusion and puts basic needs at risk. Preventing or solving these problems effectively requires political, legal and practical measures. These measures should strike a balance between the legitimate interests of creditors and the basic rights of consumer debtors.[174]

John Campbell further argues that "these considerations provide a rationale for consumer financial protection that goes beyond the standard market failures, both because unregulated financial markets may be inefficient and because they may generate undesirable distributional outcomes".[175] Stakeholders of the consumer credit industry can

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[171] Campbell et al, *supra* note 122 at 91.
[172] Amirault & Archer, *supra* note 113 at 1.6.
[173] Moloney et al, *supra* note 145 at 697.
[174] International Association of Restructuring, Insolvency & Bankruptcy Professionals, *Consumer Debt Report II: Report of Findings and Recommendations* (London: INSOL International, 2011) at 8.
[175] Campbell et al, *supra* note 122 at 92.

rationally exploit these vulnerabilities and represent their services and products that best suit their needs to encourage consumer consumption. The profit-motivated behaviour of firms "has shown that business firms, by fixing prices, by use of misleading advertising, high-pressure selling, poor product quality and other ways, have often exploited the consumer."[176] Although written in 1979, Terence Ison's comments are still relevant:

> The blandishments of advertising (much of it seductive and some of it false or misleading) carefully prepared with the expertise of modern psychology and widely disseminated, and the subtle pressures of experienced salesmen, are all brought to bear on the ordinary consumer. […] The documents used in retail transactions are prepared by sellers and finance companies (or their legal advisers) and routinely signed by consumers in circumstances in which they are not read.[177]

Unfair, deceptive and abusive practices are unfortunately found throughout the consumer credit industry and carried out by regulated and unregulated lenders. Recent examples are the market failures in the American market, such as those that culminated in the recent Global Financial Crisis and the deceptive selling practices in Canada's six largest banks investigated by the FCAC. Although breaches in market conduct obligations and mis-selling (i.e., the sale of financial products or services that are unsuitable for the consumer or sold without complete, clear and correct information) were not found to be widespread throughout the heavily regulated industry, the FCAC's review did find in 2018 that "retail banking culture encourages employees to sell products and services, and rewards them for sales success. This sharp focus on sales can increase the risk of mis-selling and breaching market conduct obligations. The controls banks have put in place to monitor, identify and mitigate these risks are insufficient."[178]

The call for further consumer protection regulation is also prompted by predatory or abusive practices rampant within the alternative financial services sector, especially in unregulated markets such as high-cost and online lenders. As explained by Jacob Ziegel, "the bulk of the problems have arisen because of the enormous growth in the volume and

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[176] Amirault & Archer, *supra* note 113 at 1.1.

[177] Terence George Ison, *Credit Marketing and Consumer Protection* (London: Croom Helm, 1979) at 40.

[178] Financial Consumer Agency of Canada, "Domestic Bank Retail Sales Practices Review" (20 March 2018) at 1, online: <canada.ca/en/financial-consumer-agency/programs/research/bank-sales-practices.html>. See also: Budnitz, *supra* note 118 at 663.

uses of consumer credit and the enhanced opportunities and, one might add, the temptations it therefore offers for possible abuses by those who provide it."[179]

Finally, the prevention of microeconomic and macroeconomic consequences has always been at the forefront of the agenda justifying financial consumer protection legislation. In his inaugural speech on consumer protection, John F Kennedy proposed in 1962 the strengthening of existing programs, including the financial protection of consumers and "truth in lending" requirements, the increase of consumer information and research and consumer representation in Government. He justified these legislative reforms to consumer credit regulation as follows:

> Excessive and untimely use of credit arising out of ignorance of its true cost is harmful both to the stability of the economy and to the welfare of the public. Legislation should therefore be enacted requiring lenders and vendors to disclose to borrowers in advance the actual amounts and rates which they will be paying for credit.[180]

As previously explained in the introductory chapter and succinctly summarized by Joseph Spooner, "[i]n recent decades, household credit became widely available to an unprecedented degree, occupying an essential role in financing macro-economic growth, and well as the improvement and maintenance of household living standards at the micro-economic level."[181] The protection of consumers' rights thus becomes an issue of paramount importance for the public interest when one further considers the macroeconomic domestic and international risks and vulnerabilities. As the Global Financial Crisis demonstrated, global financial interdependence, which has only increased since then, allows for "truly global shocks as well as for substantial spillovers of shocks between countries."[182] In 2011, the Financial Stability Board assessed these risks and the importance of preventing individual and collective harm as follows:

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[179] Ziegel & Olley, *supra* note 166 at 79.

[180] *Special Message to the Congress on Protection the Consumer Interest*, *supra* note 117.

[181] Joseph Tobias Spooner, *Personal Insolvency Law in the Modern Consumer Credit Society: English and Comparative Perspectives* (PhD, University College London, 2013) at 10 published under the title Joseph Spooner, *Bankruptcy: The Case for Relief in an Economy of Debt* (Cambridge, UK: Cambridge University Press, 2019).

[182] Maurice Obstfeld, "Understanding and Managing Financial Interdependence," (8 November 2017), online: *IMF Blog* <blogs.imf.org/2017/11/08/understanding-and-managing-financial-interdependence/>.

> Policies that protect the interests of consumers of financial products and services contribute to enhanced risk management by households, more competitive financial markets, and greater financial stability. This financial crisis demonstrated the desirability of strengthening such policies and ensuring that the use (or misuse) of individual financial products do not become a source of financial instability.[183]

These microeconomic consequences to the consumer can be compounded by the systemic risk in the global financial markets with macroeconomic repercussions.[184] The International Monetary Fund's *Global Financial Stability Report* of 2017 warned of potential vulnerabilities to financial consumers and global market stability.

> The [Report] finds a trade-off between a short-term boost to growth from higher household debt and a medium-term risk to macroeconomic and financial stability that may result in lower growth, consumption, and employment and a greater risk of banking crises. This trade-off is stronger when household debt is higher and can be attenuated by a combination of good policies, institutions, and regulations. These include appropriate macroprudential and financial sector policies, better financial supervision, less dependence on external financing, flexible exchange rates, and lower income inequality.[185]

Although there are a few exceptions,[186] the overwhelming consensus is that financial consumers must be better protected and that regulation must be enacted to fulfill this objective. For this reason, consumer protection is a core concept that guides the analysis and the suggested solutions offered in this dissertation. It is recognized, however, that this theoretical framework has some limitations. Collective expectations and the individual interests and needs of financial consumers are difficult to ascertain. In addition, the analysis may be skewed if the industry's perspective is not taken into account. To counterbalance the consumer protection perspective, submissions by industry representatives to various

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[183] Financial Stability Board, *supra* note 134 at 3.

[184] Chen, *supra* note 135 at 2.

[185] *Globa Financial Stability Report: Is growth at risk?*, World economic and financial surveys (Washington, DC: International Monetary Fund, 2017) at xii.

[186] For example George J Benston, "Consumer Protection as Justification for Regulating Financial-Services Firms and Products" (2000) 17:3 J Financial Services Research 277 at 295: "unless one asserts that all consumer products and their producers should be regulated, consumer protection against possible misrepresentation [and fraud] is not a sufficient reason to regulate financial-services providers or products to a greater extent than other products."

federal and provincial commissions, inquiries and committees have been included in this dissertation where relevant to the historical analysis of consumer credit legislation.

2.3 Research Scope and Additional Limitations

Because this dissertation has the potential to become expansive, it is imperative to limit the breadth and scope of the data considered and analyzed to write the historical evolution of consumer credit regulation in Canada. Congruous with the limitations previously identified in this chapter, additional limitations are therefore placed on the scope of the research undertaken.

To simplify a very complex and fragmented area of the law, consumer protection measures relating to consumer credit are categorized for the purpose of this dissertation into the deep-rooted lender-vendor division in credit arrangements in common law jurisdictions. Legal analysis of consumer credit regulation reveals a historical distinction between lender credit and vendor credit. While vendor credit is offered in the form of retail charge accounts or instalment time sales, the majority of credit advanced to consumers in the Canadian consumer credit market is in the form of money-lending services.[187] Benjamin Geva further explains the classification of credit products as follows:

> Financing arrangements facilitating the required consumer credit plans are classified as "lender credit" or "vendor credit" arrangements. "Lender credit" is extended to a buyer of goods by a lending institution by way of direct loan. "Vendor credit" originates from a seller as an incident of the contract for sale. It is common for sellers of goods who extend "vendor credit" to obtain cash from lending institutions on the security of their buyers' credit obligations. Hence, "vendor credit" is also held by lending institutions. Advances of funds by lending institutions towards the purchase of goods, whether by way of a direct loan to buyers, or by way of the purchase of buyers' credit obligations from sellers, is conveniently referred to as "sales financing".[188]

[187] Ronald C C Cuming, "Canada" in Royston Miles Goode, ed, *Consumer Credit* (Leyden/Boston: AW Sijthoff International Publishing, 1978) 186 at 194.

[188] Benjamin Geva, *Financing Consumer Sales and Product Defences in Canada and the United States* (Toronto: Carswell, 1984) at 3 [footnotes omitted].

This dichotomization of consumer credit is embodied in the historical interpretation of the constitutional division of powers between the federal and provincial governments discussed in Chapter 4. With matters of "Interest" found under federal legislative jurisdiction, vendor credit had been historically distinguished from federal money lending legislation given there was technically no "interest" charged directly to the consumer. Interest was either integrated into the initial and inflated price charged to the consumer or charged in the event there was a breach of contract by the consumer by the nonpayment of instalments. Vendor credit was therefore considered a matter under provincial jurisdiction and was largely unregulated until it was recently integrated as high-cost credit in some consumer credit provincial legislative reforms as mentioned in Section 5.3.6. In fact, the Royal Commission of Banking and Finance observed that sales finance companies are "the only major financial institutions which are unregulated by any act other than normal company legislation".[189]

Given the historical limited access to and extent of vendor credit and the lack of regulation of vendors dealing in consumer credit products, legislation dealing only with vendor, creditor or debtor remedies such as those found in the federal *Bill of Exchange Act*[190] as well as provincial legislation regulating the sale of goods, bills of sale, conditional sales, personal property security agreements or other issues related to warranties, conditions and disclaimer clauses have been excluded from the scope of this dissertation.

Although debt collection and enforcement of money judgment legislation provide remedies to both types of creditors and that regulation regarding default remedies and the recovery of debt, whether the debtor is insolvent or not, does have an indirect effect on the lending practices of creditors, these ancillary remedies to a consumer credit agreement were excluded to further manage the scope of the project. Likewise, matters relating to the bankruptcy and insolvency of overindebted consumers are also beyond the scope of this

[189] Canada, Royal Commission on Banking and Finance, *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 201.
[190] *Bills of Exchange Act*, RSC 1985, c B-4.

dissertation since these issues are not found within the ambit of consumer credit legislation.[191]

As a result, the focus of this dissertation remains on the initial credit transaction when the consumer enters into the credit agreement for the issuance or renewal of credit rather than the resulting consequence of consumer credit overindebtedness or the legal remedies of the parties following a breach of contract. Nevertheless, the prevention of financial hardship has been and remains an important consideration regarding the scope, form and content of consumer credit legislation, as is discussed throughout this dissertation.

Given the complexity of the Canadian consumer credit legal framework, additional limitations have been placed on the scope of this study, thereby excluding legislation regulating collateral industries such as debt collection agencies, credit counselling agencies and credit-reporting agencies. It is further acknowledged that industry self-imposed regulatory norms such as voluntary codes of conduct in the banking industry play an important role in the regulatory framework of consumer credit. However, the current levels of indebtedness and insolvency discussed in Chapter 1 as well as the remaining chapters of this dissertation confirm that industry self-regulation has historically failed to protect financial consumers. Statutory regulation has always been necessary to rein in the predatory and abusive practices of a consumer credit industry focussed on profits at the expense of vulnerable consumers. Industry-motivated voluntary norms have therefore not been analyzed in detail but are mentioned and considered where relevant.

Other delimitations on the research were imposed due, on the one hand, to the abundance of relevant jurisprudential data and, on the other hand, the absence of relevant statistics. Although warranted to determine the efficacy and direct impact of the consumer credit regulatory framework, jurisprudence interpreting and applying the prolific number of statutes enacted by the federal, provincial and territorial governments has not been undertaken. Given the monumental task it would have involved, this study does not attempt

[191] See *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and various provincial statutes relating to personal property security and judgment enforcement legislation.

to determine if, when or how these statutes were applied or enforced, but limited observations have been included when previous studies have reported on such questions.

Empirical research could have been undertaken to analyze relevant case law during the last 150 years, but that would have entailed a very different and all-consuming endeavour requiring significant resources and time. By their very nature, empirical research methods would have limited the focus of this dissertation to a specific subject or time since it would need to be accomplished within a realistic timeframe and with limited resources. Although an empirical study could have been an interesting contribution and might shape the design of future research, existing research with available results provides the analytical support required to answer the research questions of this dissertation.

Notwithstanding the constraints placed on the extent of jurisprudential analysis of relevant primary sources, legal opinions based on doctrinal analysis of appellate judicial decisions found in Chapters 4 and 7 were required for the purposes of this study given the central hypothesis on the importance to harmonize and centralize Canadian consumer credit regulation at the federal level.

With the exception of data and statistics from the OSB on the level of consumer insolvencies and the aggregate data on the amounts and sources of consumer credit available from Statistics Canada,[192] the paucity of accessible empirical data rendered a thorough and comprehensive analysis of the impact of credit on the financial consumer and its regulatory framework impractical and laborious. Jacob Ziegel noted in his Preface of the proceedings of the first conference on the regulation of consumer credit in Canada that in 1966 "little empirical research into these subjects has so far been undertaken in Canada".[193] Unfortunately, the situation remains essentially the same to this date in Canada

[192] See for example: Micheal J Bray & Micheline Gleixner, "Differing Climates of Bankruptcy: A Question of Latitude?" in Janis Sarra, ed, *Ann Rev Insolv L 2011* (Toronto: Carswell, 2012) 281 at 283–89; Canadian Consumer Loan Association & Federated Council of Sales Finance Companies, *Canadian consumer credit factbook* (Toronto, Ontario: Canadian Consumer Loan Association and Federated Council of Sales Finance Companies, 1972); Debra Frazer & Janet McClain, *Credit, a mortgage for life: a review of consumer debt and credit in Canada and the impact of increasing shelter costs on the nature of debt* (Ottawa: Canadian Council on Social Development, 1981).

[193] Ziegel & Olley, *supra* note 166 at iii.

and represents a significant barrier to legal research and possible legislative reform, as explained by Michael Tribelcock and Arthur Shulman in their article "The Pathology of Credit Breakdown": "Without hard, empirically unassailable facts, policy-making in the regulation of the consumer credit market will remain what it has always been - at best an exercise in accidental wisdom."[194]

Finally, the author's focus and bias in favour of consumer protection as well as limited expertise in the financial and economic consequences of regulation on the industry is acknowledged. This legal scholarship aims to provide a deeper understanding of past and present consumer credit regulation to better frame future studies on specific legislative reforms. It does not intend to propose nor recommend detailed regulatory reform in the form of specific and detailed legislative amendments. Further research by experts in economics, finance, public administration and behavioural psychology as well as the authentic accounts and analysis of the problems and needs of consumers provided by community groups and organizations working with and for financial consumers are required to enrich specific recommendations to further improve Canada's financial consumer protection framework. Nonetheless, published economic analysis and consumer perspectives on relevant issues are considered and integrated throughout this dissertation.

In the end, it is believed that the above limitations placed on the scope and the type of data collected will respond to the critics arguing that "the 'intellectual range and provenance' of a wide range of material can shipwreck on the practical reality that the contextual factors are too vast and arcane for these ever to be addressed in sufficient depth to demonstrate adequate comprehension."[195]

[194] Michael Trebilcock & Arthur Shulman, "The Pathology of Credit Breakdown" (1976) 22 McGill L J 415 at 466–67.
[195] Salter & Mason, *supra* note 8 at 178.

CHAPTER 3: The Rise and Demise of Federal Consumer Credit Legislation

3.1 Introduction

As explained in Chapter 1, consumer credit was limited given the self-sufficiency of most households at Confederation in 1867. The demand for consumer credit grew steadily, however, with the development of the Canadian economy and increasing urbanization and industrialization at the beginning of the 20th century.[1] Since then, the accelerated and exponential growth of consumer credit, spurred by a culture of consumerism and the immediate consumption of products and services that has thrived since World War II, is undeniable. In response, governments have enacted regulation to protection financial consumers from abusive and predatory lending practices.

To test our hypothesis that the current regulatory framework fails to achieve its consumer protection objective, this thesis aims to chronicle, contextualize and analyze the evolutionary path of consumer credit regulation in Canada. This thesis therefore begins with an historical analysis of early Canadian federal legislation regulating consumer credit during the first 100 years following Confederation. The objective is to provide a greater context to recent and future legislative reform since it is only by understanding our past that can we better regulate and protect financial consumers in the future.

According to Mary Anne Waldron, the inherent vulnerability of debtors and their protection from the abusive treatment by lenders were the object of Parliament's sustained effort, which resulted in the early regulation of money lending in Canada:[2]

> Those abuses included mortgages locked-in for lengthy terms with payment clauses that confused and concealed; interest rates made to look smaller than they were by being expressed for periods less than a year; and clauses that substantially increased the burden on defaulters not only by compounding

[1] Mary Anne Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at 11 [Waldron, 1992].
[2] Mary Anne Waldron, "The Federal Interest Act: It Sure is Broke, But is It Worth Fixin'?" (1997) 29:2 Can Bus LJ 161 at 164 [Waldron, 1997].

> unpaid interest, but by effectively increasing the rate at which it was charged, thus making repayment all but impossible.[3]

Legislative action of the new Dominion Parliament culminated relatively quickly with the adoption of various acts dealing with money lending. The 1886 Revised Statutes of Canada already included *An Act Respecting Interest*[4]*, An Act Respecting Pawnbrokers*[5], *The Companies Act* with sections 86-103 dealing with loan companies[6], and *An Act Respecting Banks and Banking*.[7]

These new Canadian statutes, their precursors and their progressive reforms as well as additional money lending legislation, governed the country's fledgling money lending industry to better protect financial consumers against abusive lending practices. The objectives and effectiveness of these statutes are further explored in the following sections of this chapter.

3.2 Regulating Consumer Credit in Canada: The First 100 Years

3.2.1 Usury and Interest Rates

The legislative history of the law of interest in Canada[8] began when the new Canadian colonies automatically received English common law and statutes and were therefore subject to English statutes, which had permitted an interest rate of up to 5% since 1713.[9] In 1777, Québec increased the permissible interest rate to 6% with Prince Edward Island, Upper Canada, New Brunswick and Nova Scotia following suit in 1795, 1811, 1854 and

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[3] *Ibid* at 164.
[4] *An Act Respecting Interest*, RCS 1886, c 127 [*Interest Act, 1886*].
[5] *An Act Respecting Pawnbrokers*, RSC 1886, c 128 [*Pawnbrokers Act, 1886*].
[6] *The Companies Act*, RCS 1886, c 119, ss 86-103 (Loan Companies) [*Companies Act, 1886*].
[7] *An Act respecting Incorporated Banks*, CSC 1859, c 54; *An Act respecting Banks*, SC 1867, c 11 [*Bank Act, 1867*]; *The Bank Act*, RCS 1886, c 120 [*Bank Act*].
[8] For a succinct summary see the dissenting reasons of Mr. Justice De Grandpré in *Immeubles Fournier Inc et al v Construction St-Hilaire Ltée*, [1975] 2 SCR 2 at 20–24, 1974 CanLII 155.
[9] *An Act to reduce the Rate of Interest without any Prejudice to Parliamentary Securities*, 1713, (U-K), 12 Ann, stat 2, c 16 (also printed under 1713, (U-K), 13 Ann, c 15). See also previous English usury legislation: *A Byll against Usurie*, 1551-2, (U-K), 5 & 6 Edw VI, c 20; *An Acte against Usurye*, 1571, (U-K), 13 Eliz I, c 8; *An Act against Usury*, 1623-24, (U-K), 21 Jac I, c 17; *An Act for restraining the taeking of Excessive Usury*, 1660, (U-K), 12 Car II, c 13.

1858, respectively.[10] In 1853, the Province of Canada clearly abolished "all prohibitions and penalties on the lending of money at any rate of interest whatsoever" but nevertheless retained an interest rate ceiling of 6% rendering void contracts and securities in regard to any excess of interest above 6%.[11]

Following in the footsteps of the United Kingdom[12], the Province of Canada repealed, in 1958, the maximum interest rate prescribed and enacted provisions allowing freedom of contract permitting any rate of interest or discount agreed upon in any contract or agreement.[13] However, in the event that no rate of interest was fixed by the parties to the contract or legally prescribed, a rate of 6% per annum would apply.[14] Interestingly, it continued to be unlawful for banks incorporated under provincial charters to "stipulate for, take, reserve or exact a higher interest rate not exceeding seven per centum per annum; and any rate of interest not exceeding seven per centum per annum may be received and taken in advance by any such Bank".[15]

Although the Province of Canada had eliminated general controls on interest rates, the maritime provinces retained interest rate caps of 6%.[16] As explained in the 1868 statute's Preamble, Prince Edward Island progressively eliminated restrictions on interest rates in

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[10] *An Ordinance for ascertaining damages on protested Bills of Exchange, and fixing the rate of interest in the Province of Québec*, SQ 1777, 17 G III, c 3, s 5; *An Act for establishing the rate of interest*, SPEI 1785, 25 G III, c 6; *An Act to repeal an Ordinance of the Province of Québec, passed in the seventeenth year of His Majesty's Reign, entitled, "An Ordinance for ascertaining damages on Protested Bills of Exchange, and fixing the rate of Interest in the Province of Québec;'' also, to ascertain damages on Protested Bills of Exchange, and fixing the rate of Interest in this Province*, S Upper Canada 1811, 51 G III, c 6; *Of Interest and Usury*, RSNB 1854, c 102; *Of Interest*, RSNS 1859 (2nd S), c 82.

[11] *An Act to modify the Usury Laws*, SC 1853, 16 V, c 80; Joseph E Roach, *The Canadian law of mortgages*, 2nd ed (Markham, Ont: LexisNexis, 2010) at 599: This authorization was deemed necessary since "[h]istorically, legislation concerning interest originated at the time when penalties were imposed for usury."

[12] *An Act to repeal the Laws relating to Usury and to Enrolment of Annuities,* 1854 (U-K), 17 & 18 Vict, c 90; Jacob S Ziegel, "Consumer Insolvencies, Consumer Credit, and Responsible Lending" in Janis P Sarra, ed, *Ann Rev Insolv L 2009* (Toronto: Carswell, 2010) 343 at 354–55 [Ziegel, 2010].

[13] *An Act to amend the Laws of this Province regulating the Rate of Interest*, SC 1858 (22 Vict), c 85 [*Act to Amend Interest Act, 1858*] (the statute permitted banks to charge up to 7% interest, see Section 3.2.6).

[14] *Ibid*; *An Act respecting Interest*, CSC 1859 (22 Vict), c 58 [*Interest Act, 1859*]. In 1859, ss. 2, 5 of the 1858 Act became CSC 1859, c 58, ss 3, 8.

[15] *Act to Amend Interest Act, 1858*, *supra* note 13, s 3.

[16] *An Act to modify the Laws relating to Interest and Usury*, SNB 1859, 22 V, c 21; *Of Interest*, RSNS, *supra* note 10; *An Act for establishing the rate of interest*, SPEI 1785, 25 G III, c 6.

1861 and in 1868 "in order to induce as much as possible, the influx of capital into this Island".[17] This legislative diversity was mentioned by the Minister of Finance, Sir John Rose, during parliamentary debates in 1868: "the House was aware that there was on this subject very considerable difference of opinion throughout the country, and of the state of the law in the various Provinces of the Dominion."[18] Although the *Constitution Act, 1867* granted Parliament exclusive jurisdiction over matters relating to "Interest" and "Banking", the federal government moved very gradually and timidly during the following 40 years to enact national legislation dealing with usury and other credit related matters.[19]

Confronted with the new political reality of Confederation and the subsisting legal and economic diversity, the federal government initially declared in 1868 its intention to propose a bill embracing the principles of freedom to contract that were first enacted in 1858 by the Province of Canada while also recognizing provincial diversity on the matter noting in particular statutes applicable to the provinces of New Brunswick and Nova Scotia. Although "it would not secure uniformity throughout the Dominion", the Act would "meet the varied interests and views of the different sections of the country" and address the exorbitant rates on loans secured by real estate exacted in rural regions in Québec and Ontario.[20]

However, in her book *The Law of Interest in Canada*, Mary Anne Waldron reviewed in detail parliamentary debates following Confederation, which revealed that the government was under pressure from various members of Parliament to harmonize and enact new general usury legislation applicable throughout the country.[21] The Parliament of the new Dominion therefore "attempted to bring uniformity to the new nation, albeit in an arguably

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[17] *An Act to exempt certain bills of exchange, promissory notes, contracts and agreements from the operation of the laws relating to usury*, SPEI 1861, 24 V, c 28; *An Act to repeal the Acts now in force, establishing and regulating the rate of interest, and to make some provisions on the same subject*, SPEI 1868, 31 V, c 8.

[18] "Rate of Interest Question", *House of Commons Debates*, 1–1, (1867–1868) at 659 (8 May 1868) (Sir John Rose).

[19] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(15), (19), reprinted in RSC 1985, Appendix II, No 5.

[20] "Rate of Interest Question", *House of Commons Debates*, *supra* note 18 at 660 (8 May 1868) (Sir John Rose).

[21] Waldron, 1992, *supra* note 1 at 5–6; Waldron, 1997, *supra* note 2 at 164.

half-hearted fashion", but failed.[22] Hoping to secure a majority of the House, a bill imposing general limits on interest rates was proposed in 1870, debated and amended but ultimately failed to reach its third reading.[23] Mary Anne Waldron summarized the proposed bill, which clearly represented a compromise among the regional interests, as follows:

> Where interest was payable by agreement or by law but no rate was fixed, the rate would be 6% per annum. Rates up to 8% per annum could be agreed to and paid, retained or recovered. Rates higher than 8%, if agreed to, could not be recovered, but would instead be reduced to 6% as a penalty and the difference between the contract rate and 6%, if paid, could be recovered by the borrower provided action was brought within six months. Finally, any person or body corporate currently permitted to stipulate for and receive a rate above 8% would be exempt from the resolutions. This would leave building societies unregulated. Banks were already confined to a limit of 7% interest.[24]

Notwithstanding amendments to lower the interest rate to 6% for both individuals and corporations and prescribing the forfeiture of interest at a higher rate, the bill failed to gather support given the large number of members of Parliament favouring the free trade of money, including Prime Minister Sir John A Macdonald.[25] This economic ideology continued to permeate the debate on the regulation of interest rates.

Conforming to these modern ideals and pursuant to its once exclusive constitutional jurisdiction over "Interest", Parliament received petitions from several provinces[26] and repealed usury legislation applicable only in the provinces of Nova Scotia and New Brunswick in 1873 and 1875, respectively.[27] Banks and incorporated companies remained, however, regulated under previous legislation in New Brunswick, and, in Nova Scotia, the maximum interest rate remained at 6% if the rate was not fixed otherwise and the

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[22] Waldron, 1992, *supra* note 1 at 5.

[23] "Bill 69, An Act respecting Interest", 2nd reading, Canada, *House of Commons Debates*, 1–3, (1870) at 1145 (22 April 1870); "Interest Bill", *Ibid* at 1145–53, 1405–06 (22 April and 6 May 1870).

[24] Waldron, 1992, *supra* note 1 at 6.

[25] "Rate of Interest", *House of Commons Debates*, *supra* note 23 at 876 (5 April 1870) (Sir John A Macdonald); Waldron, 1992, *supra* note 1 at 5–9.

[26] See e.g. *Journals of the House of Commons*, 1–5, (1872) at 66 (1 May 1872).

[27] *An Act relating to Interest and Usury in the Province of New Brunswick*, SC 1875, 38 V, c 18 (repealing a portion of the laws in the province of New Brunswick relating to usury but not applicable to banks or incorporated companies); *An Act respecting Interest and Usury in the Province of Nova Scotia*, SC 1873, 36 V, c 71. See also *An Act respecting interest in the Province of British Columbia*, SC 1886, 49 V, c 44.

legislation prescribed a ceiling rate of 7% for a loan or forbearance of money to be secured on real estate and 10% if other types of security or personal guarantees were given. While the latter statute eliminated the penalty for exceeding the legal rate, it provided that these illegal amounts were uncollectable, nonetheless. In British Columbia, the legal interest rate was set by Parliament at 6% when the rate had not been agreed upon in writing and judgment interest was limited to 12% per annum.[28]

Despite, or rather given, these ideological disparities, the essential elements found in today's *Interest Act*[29] were added piecemeal over a 20-year period between 1880 and 1900 and were never the subject of a comprehensive debate that examined all facets of the legislation at one time.[30] Unable to find a compromise on the interest rate, national legislation was nonetheless enacted in 1880 to protect borrowers by imposing standards for disclosure of the cost of credit on loans secured by real estate.[31] The purpose of these new provisions was to protect landowners from charges "that would make it impossible for [them] to redeem, or to protect their equity".[32] According to Chief Justice Fitch of the British Columbia Court of Appeal, the legislative history and the debate that led to the regulation of money lending secured by mortgages on real estate revealed that

> money lenders were viewed in an unfavourable light and were held largely responsible for the ruin of many farmers and the resulting exodus of farmers from Canada to the United States. Members expressed concern that the real rates of interest were often not clear to borrowers; that the rates of interest were exorbitant; that the fines for arrears were often unknown to or not present in the minds of borrowers; and that borrowers were often trapped by long loans.[33]

With minor legislative amendments, these provisions were to become subsections 6, 7, 8 and 9 of the current *Interest Act*. According to these new statutory provisions, no interest

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[28] *An Act respecting interest in the Province of British Columbia*, SC 1886, 49 V, c 44.
[29] *Interest Act*, RSC 1985, c I-15.
[30] Waldron, 1992, *supra* note 1 at 5–10; Waldron, 1997, *supra* note 2 at 164.
[31] *An Act relating to Interest on moneys secured by Mortgage of Real Estate*, SC 1880, c 42 [*Interest on Moneys Secured by Mortgage Act*]; Richard H Bowes, "Annual Percentage Rate Disclosure in Canadian Cost of Credit Disclosure Laws" (1998) 29 Can Bus LJ 183 at 186.
[32] *Krayzel Corp v Equitable Trust Co*, 2016 SCC 18 at paras 20–21 [*Krayzel*], citing with approval *Reliant Capital Ltd v Silverdale Development Corp*, 2006 BCCA 226 at para 53 [*Reliant Capital*]. See also: *PARCEL Inc v Acquaviva*, 2015 ONCA 331 at para 51 [*Acquaviva*].
[33] *Reliant Capital*, *supra* note 32 at para 53.

was chargeable, payable or recoverable on loans secured by the mortgage of real estate unless the mortgage contained a statement showing the amount of such principal money and the rate of interest, calculated yearly or half-yearly, not in advance. In addition, it permitted the payment of interest on arrears of interest or principal, however, "[n]o fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrear of principal or interest which shall have the effect of increasing the charge on any such arrear beyond the rate of interest payable on principal money not in arrear".[34] Finally, any amounts illegally paid could be "recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal."[35]

Referring to the first remedial statutory provision, Justice Walsh of the Alberta Court of Appeal[36] noted, in 1911, the unfortunate consequences on debtors of the absence of a comprehensive definition of "interest" and the public interest objectives that the debtor be informed of the exact amount of interest and penalties payable in a mortgage transaction in order to avoid usurious rates. He further explained the importance of these new provisions as follows:

> The evil which the section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system without the protection which this section affords a highly usurious rate of interest might be wrapped up in these innocent-appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it. And so parliament stepped in and decreed that such a mortgage should itself tell the mortgagor exactly how much of the aggregate of these blended payments represents principal and exactly the rate at which the interest included in them calculated yearly or half-yearly not in advance is charged under penalty of the loss of all interest for breach of this direction.[37]

While diverging opinions progressively coalesced around the freedom to contract out of a 6% interest rate, provincial diversity remained in Canada's first national general statute

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[34] *Interest on Moneys Secured by Mortgage Act*, *supra* note 31, s 2.
[35] *Ibid*, s 4.
[36] *Canadian Mortgage Invest Co v Cameron*, 1916 CanLII 371 (ABCA) at 452 cited with approval in *Standard Reliance Mortgage Corp v Stubbs* (1917), 55 SCR 422, 1917 CanLII 592 and *Asconi Building Corp v Vocisano*, [1947] SCR 358 at 362, 1947 CanLII 37. See also: *Interest Act*, RSC 1906, c 120, s 6 [*Interest Act, 1906*].
[37] *Canadian Mortgage Invest Co v Cameron*, *supra* note 36.

protecting debtors against usury, entitled *An Act Respecting Interest*.[38] Parliament enacted, in the 1886 Revised Statutes, present-day sections 2 and 3, which reaffirmed a general right of freedom to contract for "any rate of interest or discount," with the caveat that such freedom is subject to the requirement that the interest rate be fixed by the parties in their contract or agreement and to what is "otherwise provided by this Act or any other Act of Parliament".[39] The new federal Act thus confirmed the general principle established in several provinces since before Confederation that the parties to a loan transaction are free to fix their own interest rates unless legislative restrictions apply.[40] In the event no rate of interest had been fixed by the parties in their agreement or by law, the Act set the rate of interest at 6%.[41]

In addition to these two sections which are essentially disclosure requirements, subsections 3, 4, 5 and 6 repeated the provisions of the 1880 *Interest on moneys secured by Mortgage Act*, with certain minor modifications. Prior to the birth of modern consumer credit, it is unsurprising that the majority of Canada's first *Interest Act* applicable to all provinces regulated interest on moneys secured by real property.

Consolidation did not include, however, harmonization of usury legislation. Although sections 1 to 8 applied to all provinces, sections 9 to 30 were divided and applicable to specific provinces. In Ontario and Québec, regulated loan companies were restricted to 6% and insurance companies and corporations constituted for religious, charitable or educational purposes to 8%.[42] In Nova Scotia, interest rates in secured lending transactions relating to real estate remained restricted to 7% while transactions in personal property

[38] *Interest Act, 1886*, *supra* note 4, ss 1–2 (ss 9-30 repealed SC 1890, c 34); *Interest Act, 1906*, *supra* note 36, s 4 (disclosure requirement added by SC 1897, c 8, s 2); RSC 1927, c 102; RSC 1952, c 156; RSC 1970, c I-18; RSC 1985, c I-15 [*Interest Act*]. In 1889, the *Interest Act, 1886* was amended for the Northwest Territories with respect to interest on judgment debt: SC 1889, c 31.

[39] *Interest Act, 1886*, *supra* note 4, s 1. See also: *Krayzel*, *supra* note 32 at para 26; *Tomell Investments Ltd v East Marstock Lands Ltd*, [1978] 1 SCR 974 at 983, 1977 CanLII 33 [*Tomell Investments*]; *Reliant Capital*, *supra* note 32 at para 34; *Acquaviva*, *supra* note 32 at para 51.

[40] Jacob S Ziegel, "Recent Developments in Canadian Consumer Credit Law" (1973) 36:5 Mod L Rev 479 at 493 [Ziegel, 1973].

[41] *Interest Act, 1886*, *supra* note 4, s 2.

[42] *Ibid*, ss 9–11.

could include a rate as high as 10%.[43] These restrictions did not apply to secured lending relating to ships or vessels, their cargo or freight, or to contracts respecting grain or livestock. Provincially regulated banks and incorporated companies remained restricted to a 6% interest rate in New Brunswick[44] and, in British Columbia, post judgment interest could not exceed 12%.[45] Sanctions and penalties for non-compliance varied across all provinces, including Prince Edward Island.[46]

Harmonization was finally attained, in 1890, when sections 9 to 30 prescribing provincial limits were repealed and the Act was amended to remove from its application mortgages issued by corporations.[47] According to Mary Anne Waldron, although legislative attempts were a regular occurrence during the first century following Confederation, "[g]enerally applicable usury legislation came to an end in Canada in 1890, at which time the provisions of the *Interest Act* that had consolidated provincial limits to interest as they existed prior to Confederation were repealed."[48] With these amendments, "any individual or corporation, in the absence of some special (Dominion) statutory prohibition, might stipulate for, allow, and exact, on bills and notes or on any other contract or agreement, any rate of interest or discount which is agreed upon."[49] Among these special statutory restrictions, chartered banks, for instance, remained regulated by the *Bank Act* prescribing a 7% interest rate ceiling.[50]

Following the repeal of the usury provisions and the resulting legislative prohibitions in Canadian law, money lenders were free to charge higher interest rates. Given the potentially lucrative market and the fact that banks had not yet discovered the profitability of consumer credit since they remained strictly regulated, unregulated money lenders and

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[43] *Ibid*, ss 12–17.
[44] *Ibid*, ss 18–23.
[45] *Ibid*, ss 24–27. See also *An Act further to amend the Revised Statute respecting Interest*, SC 1894, c 22 (lowering the interest rate on judgment debts to 6%).
[46] *Interest Act, 1886*, *supra* note 4, ss 28–29.
[47] *An Act to amend Chapter 127 of the Revised Statutes of Canada intituled "An Act respecting Interest"*, SC 1890, c 34, s 2.
[48] Waldron, 1992, *supra* note 1 at 9.
[49] Frederick Read, *MacLaren's Bills, Notes and Cheques*, 6th ed (Toronto: Carswell Co, 1940) at 215.
[50] *Bank Act, 1867*, *supra* note 7, s 17. See also *infra*, section 3.2.6.

loan sharks spawned a new money lending industry.[51] The repercussions on consumer debtors were significant as noted by Jacob Ziegel: "it was found […] that unscrupulous lenders were exploiting their newly won freedom to the detriment of necessitous borrowers of modest means".[52]

Consequently, a new attempt to revive usury legislation to better protect borrowers was spearheaded by Sir Oliver Mowat in the Senate in 1897. The bill sent to committee prescribed a ceiling interest of 8% per annum and that, in an action against the debtor, the amount paid exceeding this rate could be applied against the principal by the court.[53] The preamble of the proposed bill clearly outlined its objectives:

> Whereas on the part of some lenders of money, a practice has obtained of charging exorbitant rates of interest to needy or ignorant borrowers, sometimes as much as five per cent per diem or at the rate of 1825 per cent per annum; and whereas it is desirable that the protection of the law should be extended to necessitous borrowers.

In addition, courts were unable to prevent the enforcement of unconscionable contracts since the *Interest Act, 1886* failed to prescribe a maximum interest rate or define "interest", and that only in the case of loans secured by the mortgage of real estate was interest recoverable if the amount, calculated yearly or half-yearly, was not specified in the mortgage or exceeded the stated amount.[54]

The bill was ultimately diluted in committee because it threatened the freedom of contract.[55] As stated by Senator George Drummond, "the new proposal entirely, or almost entirely, removes any objections that may have arisen to the bill which I know would have been met with great opposition in the House and out of it, and would be a revival of the old

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[51] Jacob S Ziegel, "The Legal Regulation of Consumer Credit in Canada" (1966) 31:2 Sask B Rev 103 at 106 [Ziegel, 1966]; Roach, *supra* note 11 at 599.
[52] Ziegel, 1973, *supra* note 40 at 493.
[53] "Bill I, An Act Respecting Interest", 2nd reading, *Senate Debates*, 8-2, (1897) at 391 (20 May 1897).
[54] "Interest Bill", *Ibid* at 344, 460–64, 520–26 (17 May, 3, 8 June 1897). See e.g. *Lynch v The Canada North-West Land Co* (1891), 19 SCR 204, 1891 CanLII 60 [*Lynch*]; *London Loan & Savings Co of Canada v Meagher*, [1930] SCR 378, 1930 CanLII 6.
[55] "Interest Bill", *Senate Debates*, *supra* note 53 at 460–64 (3 June 1897).

usury laws".[56] Instead of a general usury provision, a new disclosure provision was included in the statute which remains to this day in the following form:

> Whenever any interest is, by the terms of any written or printed contract and whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.[57]

Although not applicable to mortgages on real estate which continued to be regulated by sections 3 to 8 of the *Interest Act, 1886*, the 1897 statute thus reconfirmed the general principle established in Canadian law since before Confederation that the parties to a loan transaction are free to fix their own interest rates. Although the amendments would fail to protect the most vulnerable and effectively sanction exorbitant rates, it would require lenders to inform borrowers of the rate or percentage of interest per annum, ensuring informed consent on the actual rate of interest charged by the lender.

In addition, the 1897 statute further provided a new remedy that any overcharge may be recovered back by the debtor: "If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may be recovered back or deducted from any principal or interest payable under such contract".[58] This remedy, largely unchanged, is now found at section 5 of the current *Interest Act*.

Minor amendments to the *Interest Act, 1897* were adopted in the following years. In 1900, the legal rate of 6% where none had been fixed by the parties or by law prescribed in the Act was lowered to 5%,[59] which remains in force by virtue of section 3 of the current *Interest Act*. Provisions defining judgment interest in the provinces of British Columbia,

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[56] *Ibid* at 463 (3 June 1897) (George Drummond).
[57] *The Interest Act, 1897*, SC 1897, c 8, s 2 [*Interest Act, 1897*].
[58] *Ibid*, s 3.
[59] *An Act to amend the Acts respecting Interest*, SC 1900, c 29, s 1.

Alberta and Saskatchewan and in the territories were added to the revised Act of 1906 but repealed in 1992.[60]

Considering its initial objective to protect necessitous borrowers from abusive lending practices, it is discouraging to recognize a scholarly consensus confirming the ineffectiveness of the federal *Interest Act*, which has remained essentially the same since 1906. Not only is the Act "unquestionably not adapted to today's economic and financial markets,"[61] but it also contains severe internal flaws as explained by Leon Letwin. Referring to the remedial provisions enacted in 1897, he presented his arguments as follows:

> Since very little consumer credit today can be profitably extended at five per cent per annum, this provision might be thought more effective as a disclosure requirement than as a rate limitation. Yet this is probably not the case. First, the provision applies to written contracts only. Second, it applies only to interest rates for periods less than a year, and therefore appears to be inapplicable to loans in which the charge is expressed as a lump sum rather than as a rate over time. Third, "interest" is undefined in the act, thus inviting the usual abuses accorded an interest rate regulation that does not unequivocally specify what charges must be included within the limit. Finally, the only remedies provided in case of overcharge are restitution or an equal deduction from any principal or interest outstanding under the contract; these are hardly remedies calculated to secure maximum compliance.[62]

The eventual result was a federal *Interest Act*, described as "primarily a rudimentary disclosure statute", that essentially ensures a borrower is informed of the applicable rate of interest.[63] The disclosure requirements were, however, "minimal and largely ineffectual" given that knowledge of the interest rate is but one part of the equation to strengthen financial consumer protection.[64] In addition to disclosure, comprehension and uniformity

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[60] *Interest Act, 1906*, *supra* note 36, ss 12–15; *Miscellaneous Statute Law Amendment Act*, 1991, SC 1992, c 1, s 146.
[61] Roach, *supra* note 11 at 600.
[62] Leon Letwin, "Canadian Consumer-Credit Legislation" (1966) 8 BC Indus & Com L Rev 201 at 204 [footnotes omitted] referencing at n 15 *Proceedings of the Special Joint Committee on Consumer Credit of the Senate and House of Commons*, 26th Parl, 2d Sess 118 (1964) at 27 (Superintendent of Insurance).
[63] Canada, *Memorandum to the Cabinet*, No 806/70 (30 June 1970) at 2 (Ron Basford, Minister of Consumer and Corporate Affairs).
[64] Ziegel, 1973, *supra* note 40 at 479–95.

are also required in order to make an informed decision and to properly compare different financial options.[65] Unfortunately, neither objectives was achieved by this Act.

Given the lack of financial literacy of many Canadians, the complexity of financial documents and the absence of a truly encompassing definition of interest as the entire cost of credit, lenders were never obliged to disclose and oftentimes misrepresented the total cost of the loan to the consumer. Today the legislation has been described as "hopelessly dated" with "antiquated provisions" and "functionally dead".[66]

Following her in-depth analysis of interest legislation in Canada, Mary Anne Waldron confirmed, that, since 1890, "sporadic attempts to revive the idea of a generally applicable ceiling to interest have been made, particularly from 1955 to 1967."[67] During this period, various members of Parliament regularly, and often yearly, unsuccessfully proposed new bills to amend the *Interest Act* to impose new ceilings on interest rates.[68] In 1970, the Minister of Consumer and Corporate Affairs recommended the following reforms to the *Interest Act*:

> The Act is in part obscure and in part obsolete. It should be revised and brought up to date so as to constitute, inter alia, a general disclosure statute. It would also be desirable to clarify some of the important concepts such as principal and interest which are of central importance in the Interest Act and other related statutes.[69]

Instead, Parliament enacted legislation in 1906 and 1939 to regulate money lenders and specifically, small consumer loans which are discussed in detail in the following sections

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[65] Waldron, 1992, *supra* note 1 at 96–97.

[66] Harvin Pitch, "Consumer Credit Reform: The Case for a Renewed Federal Initiative" (1971–1972) 5 Ottawa L Rev 324 at 325. Thomas GW Telfer, "Preliminary Background Paper on the Canada Interest Act" (Report prepared for the Uniform Law Conference of Canada Annual Conference, Charlottetown, September 2007) at para 1, online: <ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1263&context=lawpub> [perma.cc/4QHD-DUDG], citing Jacob S Ziegel, "Is Canadian Consumer Law Dead?" (1994–1995) 24:3 Can Bus LJ 417 at 421 [*Ziegel, 1994*]; *Waldron, 1997*, *supra* note 2 at 162.

[67] Waldron, 1992, *supra* note 1 at 9.

[68] See *Ibid* at 9–10, n44-46.

[69] Canada, *Memorandum to the Cabinet*, supra note 63 at 7.

of this chapter. The *Interest Act* did not conflict with the wording of these statutes and continued to apply to other larger money lending transactions.[70]

3.2.2 Pawnbrokers

Along with usury, pawnbroking is one of the oldest social and legal institutions, dating as far back as the Middle Ages, and in Canada, to its first colonies. As explained by Jacob Ziegel, "[t]he pledging of chattels as collateral, commonly known as pawnbroking when conducted by a lender operating from fixed premises open to the public, is the oldest security device known to most legal systems."[71] By the early 18th century, new usury legislation in Great Britain recognized the legitimacy of money lending and pawnbroking became a "more specialised and capital-intensive venture".[72]

The essence of pawnbroking is that the pawnbroker retains the debtor's personal property pledged as security for the repayment of a small loan. "On transfer of the pledge, the pledgor retained ownership. The pledgee gained possession."[73] If the loan is not repaid, the borrower is considered to have forfeited the right to redeem the goods pledged as security and the goods could thereafter be resold by the pawnbroker to recover the amount owed by the borrower.

Representing an expensive form of short-term consumer credit, pawnbroking remains an alternative option for many low-income or financially distressed borrowers.[74] The historical and current appeal of this type of credit for consumers is explained by the

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[70] *Elcano Acceptance Ltd v Richmond*, [1989] OJ No 794 at paras 6–8, 1989 CanLII 4401 (ON HCtJ) [*Elcano Acceptance*].

[71] Ziegel, 2010, *supra* note 12 at 356.

[72] Warren Swain & Karen Fairweather, "The legal regulation of pawnbroking in England, a brief history" in James Devenney & Mel Kenny, eds, *Consumer Credit, Debt and Investment in Europe* (Cambridge, UK: Cambridge University Press, 2012) 142 at 143, citing Beverly Lemire, "From Petty Pawns and Informal Lending: Gender and the Transformation of Small-Scale Credit in England, circa 1600–1800" in Kristine Bruland & Patrick O'Brien, eds, From Family Firms to Corporate Capitalism: Essays in Business and Industrial History in Honour of Peter Mathias (Oxford University Press, 1998) 112 at 112, 129.

[73] Swain & Fairweather, *supra* note 72 at 144.

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

simplicity and rapidity of the transaction and the absence of the requirement to meet a creditworthiness test since the loans are based on secured collateral.

During parliamentary debates, it was stated, in 1899, that pawnbrokers generally advance "but one-fourth of the value of the goods pledged."[75] In 2001, Iain Ramsay's research revealed that a lender's loan was typically between "5-10% of the original price of the goods, which represents about one-third to one-half the price the broker can expect to receive for the sale of a pawned good during the worst of times", and that the repayment rate of pawnbrokers varied from 70 to 80%.[76]

Pawnbroking has been regulated in England since the 17th century,[77] and pawnbroking legislation was first enacted by the provinces of New Brunswick[78] and Canada[79] starting in 1836 and 1851, respectively. These provincial statutes remained in force until the enactment of new legislation relating to pawnbroking in the 1886 Revised Statutes of Canada.[80] Early legislation on both sides of the Atlantic Ocean regulated the licensing of pawnbrokers, the rates charged and their disclosure to borrowers, as well as the pawnbroker's obligations to deliver a note to the owner containing a description of the goods pledged and to deliver the goods when redeemed by the borrower.

Given the mistaken perception that goods pawned were often stolen property,[81] legislation prohibited pawnbrokers from accepting goods without the borrower providing identification and required pawnbrokers to enter such information along with a description

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[75] "Usury Bill", 2nd reading, 1899, *Senate Debates*, 8-4, No 8-4 at 291 (29 May 1899) (Raoul Dandurand).
[76] Ramsay, 2001, *supra* note 74 at 348, referring to John Caskey, *Fringe Banking: Check Cashing Outlets, Pawn Shops and the Poor* (New York: Russell Sage Foundation, 1994).
[77] *Act against brokers* (UK), 1603, 1 Jac I, c 21; *Pawnbrokers Act 1784* (UK), 24 GEO III, c 42; *Pawnbrokers Act 1785* (UK), 25 GEO III, c 48; *Pawnbrokers Act 1800* (UK), 39 & 40 GEO III, c 99; *Pawnbrokers Act 1872* (UK), 35 & 36 Vict, c 93.
[78] *An Act to regulate Pawn Brokers within this Province*, SNB 1836 (6 WILL IV), c 35; SNB 1840 (3 Vict), c 13; SNB 1845 (8 Vict), c 34; SNB 1850 (13 Vict), c 15; *Of Pawn Brokers*, RSNB 1854, c 17 (under title 3).
[79] *An Act for the regulation of Pawnbrokers and Pawnbroking*, SC 1851 (14 & 15 Vict), c 82; *An Act respecting Pawnbrokers and Pawnbroking*, CSC 1859 (22 Vict), c 61.
[80] Peter W Hogg, *Constitutional law of Canada*, 5th supp (Toronto: Thomson/Carswell, 2007) (loose-leaf revision 19 May 2023) at I.2.IV.2.7; *Constitution Act, 1867*, *supra* note 19, s 129.
[81] Swain & Fairweather, *supra* note 72 at 148.

of the goods into a book available for inspection. The statute further prescribed sanctions for the pledge of stolen property, the falsifying of one's identity and the forging of a pawnbroker's note. In addition, pawnbrokers were permitted to sell by auction property that was not redeemed within a prescribed period.

Notwithstanding the maximum statutory rates pawnbrokers were permitted to charge, many if not most pawnbrokers operated with "blatant indifference to the legislation."[82] During parliamentary debates in 1882, references were made to case law and a newspaper article which confirmed pawnbrokers' practice of charging exorbitant charges.[83] Members of Parliament in 1882 and 1885 noted that since the repeal of general usury legislation, and with the absence of sanctions in current legislation regulating the pawnbroking industry preventing any possible prosecution, pawnbrokers were essentially free to charge exorbitant rates without punishment or sanctions.[84] With such a state of affairs, Justice Cameron included the following message in his 1881 decision *Regina v Adams*:

> Though it is not the province of a Judge to suggest what laws should be enacted or abrogated, it may not be out of place, as the Usury Laws were modified in favour of the poorer or needier classes in the enactment of the law relating to pawnbrokers, to call attention to the fact, those classes would seem to require some protection from the exorbitant demands of those who carry on that trade or business by the imposing of restrictions upon pawnbrokers, so as to confine their exactions upon necessity within something like reasonable bounds.[85]

The importance of providing greater protection to the poorer classes of society and the more vulnerable was further explained in 1885 by Senator Sir James Robert Gowan during the second reading of a bill to enact federal criminal penalties for violations of pawnbroking legislation:

> Hon. gentlemen will be aware that the class of persons who resort to the pawnbroker to obtain temporary loans are the very humblest persons in the community, who often strip the clothes from their bodies in order to obtain

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[82] *Ibid* at 154.

[83] "Bill No. 24 respecting Pawnbrokers", 1st reading, *House of Commons Debates*, 4–4, (1882) at 266 (8 March 1882) (GT Orton).

[84] *Ibid*; "Bill R, An Act to make further provision respecting Pawnbrokers", 2nd reading, *Senate Debates*, 5-3, (1885) at 724 (27 April 1885 (Sir James Robert Gowan); *Regina v Adams*, [1881] OJ No 356 at para 5, 8 PR 462 (Prac Ct).

[85] *Regina v Adams*, *supra* note 84 at para 8.

> the means of getting a meal, and a class of persons that require, more than any others, the protection of the law to prevent imposition upon them. They may be told, if they come in with a small article of three or four or five dollars in value, that they will be charged so much per month. They may be unable to compute how much that will be; they may be, and commonly are, ignorant of figures, and looking at the small sum that is named by the month, they may imagine that they are paying only a reasonable interest for the money borrowed. That class of persons require special protection, which the law at present does not give them.[86]

The sanction against violations of statutory rates was eventually included in the *Pawnbrokers Act* of 1886, which provides that "[e]very pawnbroker who, in any case, stipulates for or takes a higher rate than that herein prescribed, shall, on summary conviction, be liable to a penalty not exceeding fifty dollars."[87] Pursuant to the statute, monthly interest and charges for warehouse storage were limited to five cents for every four dollars when the sum advanced exceeded 20 dollars which represented an approximate annual percentage rate ("APR") of 15.2% if the property pledge was redeemed after 30 days.[88] For loans advanced under 20 dollars, the APR increased to 24.3% for a 30-day period.[89]

In addition to the penalty for charging an unlawful rate, the consolidated federal *Pawnbrokers Act*[90] continued to protect consumers of pawnshops by recognizing their right of redemption upon payment of the regulated fees.[91] The Act continued to impose criminal sanctions for forging a pawnbroker's notes and provided the pawnbroker the right to seize the goods and detain and deliver a suspicious person into the custody of a peace officer or constable.[92] Suspicious behaviour could relate to the identity and address of the borrower, the origins of the goods or any "other reason to suspect that such goods have been stolen

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[86] "Bill R, An Act to make further provision respecting Pawnbrokers", 2nd reading, *Senate Debates*, *supra* note 84 at 724 (April 27, 1885 (Sir James Robert Gowan).
[87] *Pawnbrokers Act, 1886*, *supra* note 5, s 6.
[88] *Ibid*, s 2.
[89] *Ibid*, s 3.
[90] *Pawnbrokers Act, 1886*, *supra* note 5; RSC 1906, c 121; RSC 1927, c 152; RSC 1952, c 204; RSC 1970, c P-5 as repealed by *Miscellaneous Statute Repeal Act*, SC 1980-81-82-83, c 159. Legislation now applicable to all pawnbrokers is *Criminal Code*, RSC 1985, c C-46, s 347.
[91] *Pawnbrokers Act, 1886*, *supra* note 5, s 5 (becoming section 6 in RSC 1906, c 121).
[92] *Ibid*, ss 7–10 (becoming sections 8–11 in RSC 1906, c 121).

or otherwise illegally or clandestinely obtained" or unlawfully redeemed.[93] The federal statue excluded, however, any licensing requirement and any obligation to keep records for inspection by the authorities.

Post-Confederation, the *Pawnbrokers Act* remained essentially the same for almost 100 years. Even the $50 penalty for charging unlawful rates was never updated. Clearly, Parliament's intention to sanction exorbitant rates failed to materialize given the inadequate deterrence against future violations and the lack of any interest to reform the statute. In 1970, the Minister of Consumer and Corporate Affairs summarized to Cabinet the state of federal pawnbroking legislation as follows:

> Although this Act purports to fix maximum rates for pawnbroking, it is questionable whether it is effective. No provision is made for administration of the Act and the rates were set years ago. In the meantime, at least one of the provinces has made serious inroads into the federal jurisdiction over pawnbroking. It would be useful to clarify the federal responsibilities or if this is not done to abandon the statute as superfluous.[94]

The statute was eventually repealed in 1983 and replaced in part by the usury provisions of the *Criminal Code*, which prescribed a criminal interest rate of 60%.[95] With the exception of this criminal provision, provincial legislation, where enacted, now regulates this industry and is further analyzed in Chapter 5.

Following the repeal of their regulatory framework and a decline in numbers during the 1970s and 1980s, Iain Ramsay observed a resurgence of the industry in number in several provinces by 2000.[96] Although the industry remains an indispensable alternative source of short-term financial services for financially constrained consumers, the recent rise in payday loans suggests that many borrowers may have migrated to this newer and even

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[93] *Ibid*, s 9.
[94] Canada, *Memorandum to the Cabinet*, supra note 63 at 7.
[95] *Miscellaneous Statute Repeal Act*, *supra* note 90; *Criminal Code*, *supra* note 90, s 347.
[96] Ramsay, 2001, *supra* note 74 at 348. Claude Masse, "Le prêt sur gage - qu'en est-il et comment est-il contrôlé?" (2000), online: *Réseau juridique du Québec* <avocat.qc.ca/public/iipretgage.htm> [perma.cc/CKY8-VW26].

simpler form of high-cost consumer credit, as is also discussed in Chapter 5, Section 5.3.5.[97]

3.2.3 Money Lenders

At the end of the 19th century, policymakers remained troubled by the abusive and predatory practices of unscrupulous credit lenders, notably loan sharks, despite existing federal legislation governing interest rates and pawnbroking.[98] In fact, a review of early federal legislation reveals Parliament's sustained effort to regulate money lending in Canada in order to protect vulnerable debtors from abusive lending practices.[99] As a result, not only were usury and money lending regulated but licensing and supervision of early loan companies were also contemplated by federal legislation, as is discussed in the next three sections of this chapter.

During a parliamentary debate on a new usury bill, the scourge of indebtedness created by these new money lenders was astutely described as follows:

> Montreal is full of spider webs spun to trap the unwary. Among them is the short-loan agency, an Institution whose bait too often proves a curse instead of a blessing. Neatly worded advertisements and circular letters invite those whom careless profligacy or cruel fate has made penniless to step in and help themselves to money. They get the money, but it is upon such terms as keeps them in the power of the money-lender until the very life-blood is sucked out of them. The araneida mercifully kills his victims outright; his human namesake holds him in the bondage of financial slavery. Once entangled in the meshes of the loan agent's web, escape is almost impossible. Flutter and struggle as they may, the victims are drawn tighter into the clutches of the voracious agents, to be released only when sapped of financial life and subsistence. There seems to be no adequate way of reaching the offenders by legal prosecution.[100]

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[97] Anthony Duggan, "Pawnbroking, Priorities and the PPSA" (2022) 65 Can Bus LJ 146 at 148.
[98] Ziegel, 1973, *supra* note 40 at 479–95.
[99] Waldron, 1997, *supra* note 2 at 164. See also *Interest Act, 1886*, *supra* note 4; *Pawnbrokers Act, 1886*, *supra* note 5; *Companies Act, 1886*, *supra* note 6, ss 86–106; *Bank Act, 1886*, *supra* note 7; *An Act Respecting Loans in Canada by British Companies*, RCS 1886, c 125; *An Act respecting Bills of Exchange and Promissory Notes*, RCS 1886, c 123 [*Bills of Exchange Act, 1886*].
[100] *Usury Bill*, 2nd reading, *Senate Debates*, *supra* note 75 at 287 (29 May 1899) (Raoul Dandurand), citing Daily Witness, (21 March 1899) Montreal, Québec.

Accordingly, in addition to the *Pawnbrokers Act*, which regulated interest charged by pawnbrokers, and the *Interest Act*, which required money lenders to disclose the yearly rate of interest, Parliament attempted to address this social scourge in 1899 by reintroducing an interest ceiling rate of 20% with post-judgment interest limited to 10%.[101] The consideration of the bill "An Act Respecting Usury" as initially drafted was deferred by the Committee on Banking and Commerce "in order to give time for a more matured and considered measure to be introduced" given the arguments raised by lawyers, bankers and business men appearing before the Committee.[102] The main argument raised against the bill was the power granted to the courts to "re-open the whole transaction" should the amount of interest charged to the borrower exceed 20% which would "encourage an exceedingly large crop of lawsuits".[103]

The following year, the Senate passed *The Money-Lenders Act, 1900*, which represented a "watered-down version" of the bill initially introduced by Senator Raoul Dandurand in 1899, with the most significant changes made to limit the application of the Act to small loans of $500 or less and to money lenders charging more than 10% per annum.[104] Parliament finally enacted a virtually identical piece of legislation, *The Money-Lenders Act, 1906*, to protect the most vulnerable consumer debtors.[105] The Preamble of the Act corroborates the obvious failings of the emerging money lending industry as perceived by Parliament: "Whereas on the part of some money-lenders a practice has obtained of charging exorbitant rates of interest to needy or ignorant borrowers, and whereas it is in the public interest that the transactions of money-lenders should be controlled by limiting their rates of interest".

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[101] *Usury Bill*, 2nd reading, *Senate Debates*, *supra* note 75 at 292 (7 July 1899) (Raoul Dandurand).
[102] *Usury Bill*, motion, *ibid* at 501 (29 May 1899) (George William Allan).
[103] *Ibid*.
[104] Canada, Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living, *Report on Consumer Credit* (Ottawa: 1967) at 30 [*Report of Special Joint Committee on Consumer Credit, 1967*]; Bill (T), *The Money-Lenders Act, 1900*, 5th Sess, 8th Parl, 1990 (as passed by the Senate 15 May 1990). See also Canada, Superintendent of insurance, *Report of the Superintendent of Insurance, Small Loan Companies* (Ottawa: King's Printer, 1936) at 41 [*Report of the Superintendent of Insurance, 1936*].
[105] *The Money-Lenders Act, 1906*, SC 1906, c 32 [*Money-Lenders Act, SC 1906*]; *Money-Lenders Act*, RCS 1906, c 122; RSC 1927, c 135, as repealed by *An Act to amend the Small Loans Act*, SC 1956, c 46, s 8 (CIF 14 August 1956) [*Money-Lenders Act*]. See also Ziegel, 1973, *supra* note 40 at 493.

It was therefore determined to be in the public interest that the transactions of money lenders be controlled by limiting their rates of interest. Instead of general usury legislation, the legislative objective was to regulate small money lenders and limit rates of interest to 12% per annum on loans under $500, thereby protecting the most vulnerable consumers, and to 5% for post judgment interest.[106] A "money-lender" was broadly defined to include "any person who carries on the business of money-lending, or advertises, or announces himself, or holds himself out in any way, as carrying on that business, and who makes a practice of lending money at a higher rate than ten per cent per annum, but does not comprise registered pawnbrokers as such".[107] It therefore applied to all money lenders, whether provincially incorporated or not but excluded most credit unions and caisses populaires since they rarely loaned at rates higher than 12%. Given the monetary cap prescribed in the statute, it did not apply to federal loan companies, which usually loaned larger amounts. As is discussed in the following section of this chapter, the first federal consumer loan company was only incorporated in 1928.

Although regulation of consumer credit was initially considered unnecessary legislative interference in the free market, it quickly represented the legitimization of a new industry and its acceptance by policymakers pursuant to new norms and values in North America.[108] Analysis of small loan legislation enacted in the United States between 1915 and 1925 confirmed that "the business of money lending has been brought into the light, has changed from an underhanded, semi-legal enterprise which the world stigmatized as loan shark to that of an honorable, commercial venture".[109] As Iain Ramsay observed, federal money lending legislation in Canada recognized the "legitimacy of the industry, making it

[106] *Money-Lenders Act, SC 1906*, *supra* note 105, s 3.
[107] *Ibid*, s 2.
[108] See e.g. *La Caisse Populaire Notre Dame Limitee v Moyen* (1967), 1967 CanLII 383, 61 DLR (2d) 118 (Sask QB) at para 70: "The right of money lenders to lend money was recognized by Federal legislation by requiring them to obtain a license from the Minister of Finance if charging on loans more than 12% interest per year (Section 5)."
[109] "Current Legislation: The Uniform Small Loan Law" (1923) 23:5 Colum L Rev 484 at 487. See also Anne Fleming, *City of Debtors A Century of Fringe Finance* (Cambridge, Mass: Harvard University Press, 2018) at 47–77.

extremely difficult to de-legitimise it."[110] In addition to creating a level playing field for all legal money lenders, it effectively neutralized the threat of new usury legislation prohibiting money lending.

The Act also provided for the English solution found in the *Money-Lenders Act (UK)*[111] in the form of relief for borrowers by permitting a court to re-open a transaction and order a remedy should the cost of a loan exceed the prescribed amount of interest paid which included "charges for discount, commission, expenses, inquiries, fines, bonus, renewals, or any other charges, but not including taxable conveyancing charges".[112] Given the low monetary threshold of the statute's applicability, thereby excluding commercial lending, previous fears of potential lawsuits hampering economic activity were overcome. Under the *Money-Lenders Act*, the court could

> in any suit, action or other proceeding concerning a loan of money […] relieve the person under obligation to pay from payment of any sum in excess of the said rate of interest; and if any such excess has been paid, or allowed in account, by the debtor, [the court] may order the creditor to repay it, and may set aside, either wholly or in part, or revise, or alter, any security given in respect of the transaction.[113]

To address several perceived deficiencies in the sanctions in the *Interest Act*, which only applied to written contracts, the *Money-Lenders Act* applied to all loans whether in writing or not.[114] It also prescribed an additional penalty that any money lender who stipulated for, allowed, or exacted on any negotiable instrument, contract or agreement a rate of interest greater than 12% per annum, could be liable to one year's imprisonment, or a penalty of $1,000.[115]

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[110] Iain Ramsay, "Of Payday Loans and Usury: Further Thoughts" (2003) 38:3 Can Bus LJ 386 at 390 [Ramsay, 2003].
[111] *An Act to amend the Law with respect to Persons carrying on business as Money-Lenders, 1900* (UK), 63-64 Vict, c 51; *An Act to amend the Law with respect to Persons carrying on business as Moneylenders, 1927* (UK), 17 & 18 Geo V, c 21 at 10, 12 [*Money-Lenders Act* (UK)].
[112] *Money-Lenders Act, SC 1906*, *supra* note 105, s 4.
[113] *Ibid*.
[114] *Elcano Acceptance*, *supra* note 70 at para 9.
[115] *Money-Lenders Act, SC 1906*, *supra* note 105, s 9.

Regrettably, this genuine and ambitious attempt to protect consumers was a "dismal failure" given the ease with which lenders could circumvent the statutory prohibition of lending money at "a rate of interest greater than that authorized by this Act", which was simply defined as "a rate of interest or discount greater than twelve per cent per annum".[116] Over the following two decades, "[l]enders were evidently quick to understand that a variety of fees and charges could be added to the borrowers' bill and increase their return," as confirmed in *R v Climans*.[117] In that case, the Court accepted the lender's defence, arguing that the amount charged, which represented an interest rate equivalent to 51.9% per annum, included proper and reasonable charges for services necessarily performed in good faith in connection with the loan.[118] These services included

> the drawing and preparation of the chattel mortgage, the assignment of wages, the statutory declaration, the inspection and valuation of the chattels covered by the chattel mortgage, the search made in the County Clerk's Office and the Sheriff's Offices for encumbrances, liens and executions that might affect the borrower's property, and the fees paid in connection with the searches and the registration of the chattel mortgage.[119]

As a result, the Court was unable to determine whether the interest actually charged in addition to these fees violated the Act and the case was dismissed. Justice O'Connell clearly voiced the Court's discontent with the current state of consumer credit regulation:

> [S]uch apparently exorbitant charges in connection with these small loans must necessarily shock one's conscience, and sense of fair dealing, and excite astonishment that the present state of the law permits such transactions to be carried on with impunity, and that the parties engaged in making such loans and charges are seemingly immune from criminal liability and its appropriate penalties.
>
> It must be borne in mind that in a great many of these cases, if not in the majority of them, where small loans are required, the borrower finds himself in circumstances of distress and is confronted with a very urgent need of money, so pressing that for the purpose of obtaining immediate relief, he is

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[116] Waldron, 1992, *supra* note 1 at 11–12; *Money-Lenders Act, SC 1906*, *supra* note 105, ss 6, 9. See also Ziegel, 1966, *supra* note 51 at 106.

[117] Mary Anne Waldron, "A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past" (2011) 50 Can Bus LJ 300 at 303 [Waldron, 2011]; *R v Climans*, [1938] 2 DLR 711, 69 CCC 336 (ON CoCt).

[118] *R v Climans*, *supra* note 117 at para 15. The Court referred to other transactions where the whole amount charged for interest and services represented rates of 94.1%, 223% and 385% per annum (at para 19).

[119] *Ibid* at para 14.

> willing to assume obligations of a harsh and excessively oppressive character, only to find himself in course of time, as a result of his efforts to relieve his present financial needs, in still greater financial embarrassment, if not in fact in a mesh of financial obligations from which he is unable to extricate himself. It seems to me imperative that steps should be speedily taken by the Legislature having for their object the prevention of these unjust and oppressive transactions in which these exorbitant charges are made for services rendered and which result in unjust and oppressive burdens being placed on the shoulders of the necessitous small borrower.[120]

Likewise, Mary Anne Waldron concluded that, with the resulting difficulties associated with enforcement, the regulation of interest rates in existing statutes did not protect vulnerable debtors from other usurious charges given their "simplistic approach and the absence of a licensing requirement" for non-federally regulated money lenders.[121] The *Money-Lenders Act* was deemed unenforceable and thus ineffective because "no one was fixed with responsibility for its administration"[122] and the absence of a definition of "interest" hindered any possible prosecution under the statute.[123] Consequently, as confirmed by the Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living ("Special Joint Committee on Consumer Credit"), "money-lending was, for all practical purposes, unregulated" during the first quarter of this century, that is until the federal incorporation of the first consumer loan company in 1928.[124]

Given the well-deserved criticism that existing statutes were ineffective and did not protect vulnerable debtors from other usurious charges and the continued concern of members of

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[120] *Ibid* at paras 20–21.

[121] Waldron, 1992, *supra* note 1 at 11–12; Ziegel, 1966, *supra* note 51 at 106; *The Small Loans Act*, SC 1939, c 23, at Preamble [*Small Loans Act*]; "Bill 97, An Act respecting Small Loans", 2nd reading, *House of Commons Debates*, 18-4, vol 3, (1939) at 3203–07 (25 April 1939) (JL Ilsley); *William E Thomson Associates v Carpenter*, 1989 CanLII 185, 69 OR (2d) 545 (CA) [*Thomson Associates*]; Jacob Ziegel, "Time to clarify Canada's lending law," *The Globe and Mail* (20 April 2004, last modified 20 April 2018), online: <theglobeandmail.com/opinion/time-to-clarify-canadas-lending-law/article1136034/> [perma.cc/X6MA-9Q46].

[122] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 30–31.

[123] Waldron, 1992, *supra* note 1 at 11–12. See e.g. *R v Climans*, *supra* note 117 at para 17.

[124] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.

Parliament,[125] it is not surprising that the regulatory framework of the consumer credit industry continued to evolve along with the industry itself.

3.2.4 Consumer Loan Companies

As the country evolved and progressed, the consumer credit industry developed in response to consumer demand. While it was considered imprudent to purchase goods and services, or even real estate, on credit in the early 1900s, the reliance on credit grew steadily along with its moral legitimacy.[126] The Select Committee of the Ontario Legislature on Consumer Credit explained this cultural and financial shift as follows:

> Information presented to the Committee showed that the regulated consumer loan business developed in response to an urgent social and economic need for cash loans to service families of modest means. This need followed Canada's change from an agrarian to an industrial economy, with consequent shift of population from rural to urban areas. One result of this was the dependence of more people on cash income rather than the physical products of their own hands.[127]

And the market responded accordingly. Along with unregulated lenders, new provincially and federally incorporated companies quickly filled the void. Provincially incorporated and unincorporated lenders were referred to as money lenders and companies incorporated pursuant to federal legislation were called consumer loan companies.

After Confederation, Dominion statutes were enacted to authorize British loan companies to operate in Canada[128] and to facilitate the incorporation of new federal corporations. In addition to their incorporation by a special act of Parliament, *The Canada Joint Stock and*

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[125] Select Standing Committee on Banking and Commerce, *Proceedings*, *Journals of the House of Commons*, 14-2, vol 60, app 2, (1923) at 793, 951 (Leon Johnson Ladner against fixing the rates of bank interest).

[126] *Final Report of the Select Committee of the Ontario Legislature on Consumer Credit*, Sessional Paper (No 85) (Toronto, Ontario: 1965) at 3 [Ontario*, Final Report on Consumer Credit, 1965*]; Waldron, 1992, *supra* note 1 at 11.

[127] Ontario*, Final Report on Consumer Credit, 1965*, *supra* note 126 at 8. See also: K Bruce Newbold, "Migration Up and Down Canada's Urban Hierarchy", 20:1 *Can J Urban Research* (Summer 2011) at 133.

[128] For e.g. *An Act to authorize corporations and institutions incorporated without the limits of Canada to lend and invest moneys therein*, SC 1874, c 49; *An Act respecting Loans in Canada by British companies*, RSC 1886, c 125.

Companies' Act, 1877 permitted that companies formed for a certain purpose, such as lending money, be granted charter by letters patent under Great Seal which further prescribed their powers.[129] Sections 88 to 104 of the Act related specifically to loan companies and regulated their specific rights and powers, including their power to charge interest. Although these companies were prohibited from imposing a fine or penalty on money in arrears that increased the interest charged beyond the fixed interest rate, they were free to charge any interest rate.[130] The statutory provisions applied to all loans made by loan companies, whether secured by a mortgage on land or not.[131]

In order to further encourage new loan companies to request their charter by letters patent instead of by a special act of Parliament, *The Loan Companies Act, Canada, 1899*, was enacted with the objective of standardizing loan company charters.[132] It further set out the rules for their incorporation, governance, ownership, business activities, investments and capital. The previous limits on interest charges were omitted and loan companies were permitted to "carry on in Canada the business of lending money on the security of or purchasing or investing in" mortgages upon real estate or other types of immovables as well as public and private debentures, bonds, stocks and other securities.[133] Excluded were bills of exchange and promissory notes. Although loan companies could take personal security as collateral for a permitted loan, lending money on the security of chattel mortgages was not included in their permitted business activities. This could be explained by the fact that, until 1928, federally incorporated loan companies were essentially mortgage loan companies. "[T]heir aim was to lend to those wishing to build homes rather than to make personal loans or invest in securities."[134]

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[129] *The Canada Joint Stock Companies' Act, 1877*, SC 1877, c 43, ss 3, 88–104; *Companies Act, 1886*, *supra* note 6, ss 86–101; *Companies Act*, RSC 1906, c 79, Part III [*Companies Act, 1906*] limited by *The Loan Companies Act, Canada, 1899*, SC 1899, c 41, s 46 [*Loan Companies Act,1899*]; *The Loan Companies Act, 1914*, SC 1914, c 40, s 4 [*Loan Companies Act, 1914*].

[130] *The Canada Joint Stock Companies' Act, 1877*, *supra* note 129, s 97.

[131] *Krayzel Corp v Equitable Trust Co* (2016), 1 SCR 273 at para 28; *Reliant Capital*, *supra* note 32 at para 48.

[132] *Loan Companies Act,1899*, *supra* note 129, s 4. See also "Loan Companies", 3rd reading, *House of Commons Debates*, 8-4, (1899) at 8475–76 (26 July 1899).

[133] *Loan Companies Act,1899*, *supra* note 129, s 20.

[134] Canada, Royal Commission on Banking and Finance, *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 173 [*Report of the Royal Commission on Banking and Finance, 1964*].

In the 1906 Revised Statutes, the loan companies' regulatory framework was reintegrated in the *Companies Act*[135] and introduced the new requirements of submitting annual statements to the Minister of Finance, which included details on the capital stock of the company, the assets and liabilities, the amount and nature of its investments, the extent and value of the lands held by it and the nature and extent of the company business.[136]

Isolating the industry's legal framework once again from the *Companies Act*, the *Loan Companies Act*[137] was enacted in 1914. It required that each new federal loan company be incorporated by special Act of Parliament and provided a model bill for that purpose. Previous requirements remained essentially the same. In 1927, all loan companies were thereafter required to obtain an annual licence by the Minister of Finance and subjected to the supervision of the Superintendent of Insurance.[138] The first list published in the Canada Gazette included 10 companies authorized to transact the business of a loan company.[139] In comparison, the Board of Inquiry into Cost of Living in Canada identified, in 1915, 110 provincial and federal loan companies operating in the country, providing mortgages and other types of secured loans.[140]

The new consumer credit industry in Canada, which had emerged following its legitimization in 1906 with the enactment of money lending legislation, therefore largely comprised provincially regulated and unregulated companies. However, with money lending clearly becoming a profitable enterprise, several bills were presented to Parliament between 1926 and 1928 to incorporate a federal consumer loan company, with the first company successfully incorporated in 1928.[141]

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[135] *Companies Act, 1906*, *supra* note 129.
[136] *Ibid*, s 255.
[137] *Loan Companies Act, 1914*, *supra* note 129; RSC 1927, c 28; RCS 1952, c 170; RCS 1970, c L-12; RCS 1985, c L-12 as repealed by SC 1991, c 45, s 561 [*Loan Companies Act*].
[138] *An Act to amend The Loan Companies Act, 1914*, SC 1926-27, c 61, s 3-5.
[139] Canada, Memorandum (Department of Insurance), (1927) 61:2 C Gaz, 85.
[140] Canada, Board of Inquiry into Cost of Living in Canada, *Report of the Board* (Ottawa, Canada: 1915) at 725 [*Report of the Board of Inquiry into Cost of Living, 1915*].
[141] *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 45–50.

These new federally regulated loan companies, incorporated by private Acts of Parliament, were subject to federal control pursuant to the *Loans Companies Act* in addition to the specific legal framework governing their consumer lending operations. The Superintendent of Insurance explained that "[t]he foregoing redrafts of the Bill are of interest as indicating the first appearance of the distinction between interest and charges on loans on personal security which later became a feature of small loan companies' private Acts."[142] Although these new federal consumer loan companies were enabled to provide a new type of consumer credit secured by personal property, their incorporating statutes also "created new difficulties of their own", which "remained thoroughly unsatisfactory until the enactment of the *Small Loans Act* in 1939", as explained below.[143]

In addition to lending money on the security of real estate and assignments of choses-in-action, the Central Finance Corporation, newly incorporated by a special Act, could "buy, sell, and deal in conditional sales agreements, lien notes, hire-purchase agreements and chattel mortgages, and may receive, accept and enforce from the vendors or transferors thereof guarantees for the performance and payment thereof".[144]According to Leon Letwin, these loan companies could "thus engage in sales financing through the purchase of conditional sales agreements from retail merchants".[145] In addition, unlike banks, which were not allowed to take chattel mortgage security on personal loans until 1954, consumer loan companies did not require endorsers or guarantors given their power to lend money based on the security of personal property given by their clients.[146]

Contrary to mortgage loan companies, the rate of interest charged by consumer loan companies was restricted to 6% per annum but could be deducted in advance, thereby increasing the effective interest rate. The Special Joint Committee on Consumer Credit

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[142] *Ibid* at 50.
[143] Ziegel, 1966, *supra* note 51 at 106.
[144] *An Act to incorporate Central Finance Corporation*, SC 1928, c 77, s 5.
[145] Letwin, *supra* note 62 at 206.
[146] House of Commons, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence, No 27*, 22-1, vol 2, (1954) at 1068 (Neil J McKinnon, General Manager, The Canada Bank of Commerce) [*Minutes of Proceedings and Evidence, No 27, 1954*].

confirmed that the "actual annual rate was then 'about double the apparent rate,' – roughly 14 per cent for a loan of $100 and 16 per cent for $500."[147]

The special Act also excluded the restrictions prescribed by the *Interest Act*, the *Money-Lenders Act* and subsection 63(c) of the *Loan Companies Act*, which prohibited loan companies from lending "upon the security of or purchase in bills of exchange or promissory notes."[148] The applicability of the *Money-Lenders Act* was never an issue prior to the incorporation of a consumer loan company, as mortgage loan companies did not charge interest rates above 10%, given that their loans were secured by real estate.

Consumers had the right to repay the loan at any time and receive a refund of any interest paid in advance not earned by the loan company above the amount of interest for three months. They were also protected against abusive practices of fees charged upon application and retained even if the loan was rejected or charged upon the renewal of a loan within one year.[149] Additional charges for expenses incurred by the loan company, such as "all expenses for inquiry and investigation into character and circumstances of the borrower, his co-maker or surety, for taxes, correspondence and professional advice, and for all necessary documents and papers," were permitted but restricted pursuant to a sliding scale of between 1% and 1.5% of the principal amount loaned, up to $500.[150] When the loan exceeded $500, the charges were limited to 2% but the permitted interest rate increased to 7%.

In 1929, upon the request of the Central Finance Corporation, amendments were enacted to enlarge the nature of the business and increase the charges permitted under the special act. Powers of the company thereafter included the power to

> buy, sell, deal in and lend money on the security of conditional sales agreements, lien notes, hire purchase agreements, chattel mortgages, trade paper, bills of lading, warehouse receipts, bills of exchange and choses-in-action; and may receive and accept from the ["makers" was added in

[147] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.
[148] *An Act to incorporate Central Finance Corporation*, *supra* note 144, s 5(1)b).
[149] *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 61.
[150] *An Act to incorporate Central Finance Corporation*, *supra* note 144, s 5(ii).

> subsequent special acts], vendors or transferors thereof guarantees or other security.[151]

The prescribed interest rate was increased to 7%, the charges for expenses necessarily incurred in good faith further increased to 2% of the principal and new distinct charges were permitted when a loan had been "made or renewed on the security of a chattel mortgage, or of subrogation of taxes equal to the legal and other actual expenses disbursed by the Company in connection with such loan" but were capped to ten dollars.[152] The Superintendent of Insurance explained the rationale for the inclusion of these additional charges:

> The intention of the 2% charge was that it should cover ordinary loaning expenses incurred by the Company itself. The intention of the $10 charge was, as stated, to reimburse the Company for disbursements made by it in taking the chattel mortgage. Such disbursements were understood to be the valuation fees, the legal expenses in having the mortgage deed drawn and the registration fee.[153]

Although attempts were made to increase the prescribed interest rate to the *Money-Lenders Act* limit of 12% and eliminate the restrictions on additional charges, the Industrial Loan and Finance Corporation and the Discount and Loan Corporation of Canada were incorporated by almost identical special Acts in 1930 and 1933.[154] Along with the Central Finance Corporation, these were the "big three" consumer loan companies operating before World War II.[155]

In 1934, Parliament enacted several statutes enabling the incorporation of The Small Loan Company of Canada and the Personal Finance Corporation and to amend the special Act

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[151] *An Act respecting Central Finance Corporation*, SC 1929, c 94, s 1.
[152] *Ibid*, s 2.
[153] *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 60.
[154] *An Act to incorporate Industrial Loan and Finance Corporation*, SC 1930, c 68, s c 68 (later known as Community Finance Corporation); *An Act to incorporate Discount and Loan Corporation of Canada*, SC 1932-33, c 63, amended SC 1934, c 68 (later known as Beneficial Finance Co of Canada); *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 52–56. See also *An Act to incorporate The People's Thrift Corporations*, SC 1928, c 80 which expired before the company organized.
[155] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.

incorporating The Discount and Loan Corporation of Canada.[156] During the committee stage, however, to the outrage of many members of Parliament, the Superintendent of Insurance submitted that on loans secured by chattel mortgage when charges are included in the amount, the effective annual rates charged by federally incorporated consumer loan companies for a loan of $100 for 12 months would be 49% and for a $50 loan for the same period, the rate could be as high as 94%.[157]

That same year, at a meeting with the Department of Insurance to address these exorbitant rates,

> representatives of the small loans companies agreed that the practice of deducting charges in advance should be abandoned. Instead, there would be "single monthly percentage applied to the amount of the loan actually made and remaining outstanding from time to time." But this did not solve all the problems, and it finally became clear that effective legislation was needed.[158]

During parliamentary debates, in reaction to comments from members of Parliament and pursuant to the recommendation for reform of the Superintendent of Insurance, the Prime Minister Richard Bedford Bennett proposed that the *Loan Companies Act* be amended to restrict all loan companies to charging a rate of 2% per month, including all charges, with the exception of registration fees.[159] After a comparison of prescribed rates in the United Kingdom and the United States of 3% and between 4% and 5%, respectively, the proposed rate was increased to 2.5% per month.[160] As a result, the federal *Loan Companies Act* was amended in 1934 to prescribe an overriding interest rate ceiling of 2.5% per month on all loan companies operating under powers granted by the Parliament of Canada representing an effective annual rate of 34.5%.[161] In response to the lenders' practice that the maximum

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[156] *An Act to incorporate The Small Loan Company of Canada*, SC 1934, c 72; *An Act to incorporate Personal Finance Corporation*, SC 1934, c 69; *An Act to amend The Discount and Loan Corporation of Canada*, SC 1934, c 68.

[157] "Loan Companies Act Amendment", *House of Commons Debates*, 17-5, vol 4, (1934) at 4388–89 (28 June 1934) (Henry Elvins Spencer); *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 66.

[158] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 33.

[159] "Loan Companies Act Amendment", *House of Commons Debates*, *supra* note 157 at 4388–89, 4478 (28–29 June 1934) (Henry Elvins Spencer); *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 67.

[160] "The Small Loan Company of Canada", *House of Commons Debates*, *supra* note 157 at 4478 (29 June 1934) (Richard Bedford Bennett).

[161] *An Act to amend the Loan Companies Act*, SC 1934, c 56, s 1; Waldron, 1992, *supra* note 1 at 13.

fee of $10 for charges was charged on all loans even though no expenses had actually been disbursed by the company,[162] the 1934 amendment included in the prescribed rate all charges exclusive of fees actually disbursed for registration purposes.

This eliminated the mountain of additional fees consumer loan companies were charging to their clients, who were often unaware of or confused about the total amounts payable as confirmed by the Special Joint Committee on Consumer Credit: "[d]uring the early thirties borrowers were finding it difficult to understand the effective rate of interest represented by the complicated scale of charges on loans."[163] The 1934 legislative reforms also included a penalty of forfeiture of a company's charter if it were established to the satisfaction of the Minister of Finance that a company imposed interest and charges exceeding the new statutory limits. "Although this Act is mainly concerned with companies which lend money on the security of real estate, the ceiling affected small loans companies along with others."[164]

Although the intention was to reduce the financial burden on consumers, the 1934 amendment was "comfortably in excess of what the federally incorporated companies were actually charging" on consumer loans without a chattel mortgage fee, calculated by the Superintendent of Insurance as 19.3%.[165] Rather than benefit consumers, the federally regulated loan companies quickly increased their rates to the maximum amount for loans secured by chattel mortgage in response to the new regulatory framework.[166]

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[162] *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 65, 67.

[163] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32. See also: Canada, House of Commons, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence Respecting Bill No 58 (Letter C of the Senate), An Act Respecting Central Finance Corporation and to change its name to Household Finance Corporation*, *Minutes of Proceedings and Evidence, No 1*, 18-2, vol 1, (1937) at 33 (30 March 1937) [*Minutes of Proceedings and Evidence, No 1, 1937*].

[164] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.

[165] Waldron, 1992, *supra* note 1 at 13; *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 66.

[166] Waldron, 1992, *supra* note 1 at 13, referring to Canada, *House of Commons Debates*, 18-4 (1939) at 3205. See also: Canada, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence Respecting Bill No 58 (Letter C of the Senate), An Act Respecting Central Finance Corporation and to change its name to Household Finance Corporation*, *Minutes of Proceedings and Evidence, No 1, 1937*, *supra* note 163 at 33 (30 March 1937); *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 67:

In 1936, three additional consumer loan companies petitioned Parliament for their incorporation by special act.[167] These bills were referred to a Senate sub-committee along with an enlarged mandate to consider "the question of general legislation regarding money lending and to the revision of the special Acts incorporating small loan companies theretofore granted."[168]

In addition, between the Superintendent's attempt to impose additional limitations on their annual licences and borrowers' successful recoveries of excess interest and illegal charges before the courts,[169] two loan companies petitioned Parliament in 1937 to amend their acts of incorporation and clarify their lending practices and their right to charge interest.[170] Following second reading, these private bills were also referred to the Standing Committee on Banking and Commerce, which was ordered "to enquire into the practices of individuals, partnerships and companies in making small loans on personal security and to consider the maximum rate of interest and charges which should be permitted for such loans."[171] Instead of amending the private bills individually, the Committee's report recommended, in 1937, general legislation to regulate the consumer credit industry and submitted a draft bill entitled "An Act Respecting Interest on Small Loans".[172]

Although the rates remained the same for unsecured consumer loans, the average monthly rate charged by loan companies including interest and all charges calculated by the Superintendent of Insurance ranged from 2.63% and 2.38%. Secured loans under $181.20 were charged the maximum rate of 34.5% with larger loans progressively lowering the rate charged to 24.5% on loans of $500.

[167] *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 63–64. The companies were The Domestic Finance Corporation, The United Credit Association and the Atlantic Loan and Finance Corporation.

[168] *Ibid* at 69–70.

[169] *Kellie v Industrial Loan & Finance Corp*, 1936 CarswellQue 259, [1937] 1 DLR 57; *Discount and Loan Corp of Canada v Canada (Superintendent of Insurance)*, [1938] Ex CR 194, 1938 CanLII 238, appeal failed for want of jurisdiction [1939] SCR 285, 1939 CanLII 24.

[170] *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 73–74, referring to Bill C, *An Act respecting Central Finance Corporation and to change its name to "Household Finance Corporation"* and Bill H, *An Act Respecting Industrial Loan and Finance Corporation*. See also Waldron, 1992, *supra* note 1 at 13–14.

[171] Canada, Superintendent of insurance, *Report of the Superintendent of Insurance, Small Loan Companies* (Ottawa: King's Printer, 1937) at 5 [*Report of the Superintendent of Insurance, 1937*].

[172] *Ibid* at 52–60 with the Bill reproduced at 61–73.

This recommendation aimed to address the fact that "[t]he entire situation continued to be unsatisfactory from almost every point of view"[173] and adhered to the Superintendent of Insurance's recommendation that Parliament address the legislative deficiencies of the regulatory framework. With higher profits and human ingenuity as vital drivers, it is not surprising that consumer loan companies developed financial devices to circumvent their special Acts and charge higher rates and fees to the detriment of consumers despite the critical scrutiny of the Superintendent of Insurance. In his 1937 report to Parliament on small loan companies, the Superintendent summarized the importance of legislative reform as follows:

> The business of lending on personal security by incorporated companies is attaining fairly large proportions, and it is important that the charges made for such loans are not in excess of that necessary to yield a fair profit to the lenders. So long as the provisions of the special Acts remain obscure the lenders are able to impose undue charges on the borrowers and it is in the public interest that legislation should be secured to impose the necessary restrictions in language which cannot be misunderstood.[174]

Before examining the next phase of legislative action in the following section, it is important to note that, following the reforms of 1939, the industry continued to develop and federally incorporated consumer loan companies remained important players in the consumer credit industry. According to the 1967 Report of the Special Joint Committee on Consumer Credit,

> [n]ine other small loans companies have been incorporated since that time, of which three Canadian Acceptance Company, Laurentide Finance Company and the Brock Acceptance Company are still in business, making a total of six. The three last named were set up in the post-war years. At the close of 1964, the three original companies held more than half of the balance of small loans in Canada. They have left it to others, generally speaking, to take the leadership in providing large loans and purchasing conditional sales agreements.[175]

The steady growth of consumer loan companies, however, stagnated in the third quarter of the 20th century. Although these lenders increased their share of the consumer credit market

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[173] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.
[174] *Report of the Superintendent of Insurance, 1937*, *supra* note 171 at 6.
[175] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.

from 7.7% to 15.4% between 1948 and 1969, "this trend was reversed in 1970 so that by the end of 1976 their share had dropped to 6.3 per cent" due to the successful entry of chartered banks and credit unions in the industry.[176] Since then, many consumer loan companies have diversified their consumer financial services to include credit cards, retail finance, revolving credit and residential mortgages.

3.2.5 Small Loans

As a result of the new federal legislation, which is described in the previous subsections, the first decades of the 20th century witnessed an emerging and flourishing consumer credit industry. By 1933, consumer credit amounted to nearly $10 million from the three federally incorporated loan companies alone.[177] This unprecedented boom, however, prompted growing calls for general legislative reform of consumer loans. In its report to Parliament, the Standing Committee on Banking and Commerce of the House of Commons concluded that problems remained despite earlier reforms to the *Loan Companies Act*.[178] In addition to evidence revealing "that unregulated lenders have been currently charging rates running into several hundred per cent per annum," the Committee described in its report to Parliament the predatory practices of money lenders as follows:

> The borrower's initial interest lies in a clear-cut statement of the total obligations contained in the loan contract and much of the abuse connected with personal finance has plainly arisen from the incapacity of borrowers to decipher the arithmetic of credit contracts. The confusion has been confounded by specious advertising with combinations of charges so intricate that even mathematicians have trouble in arriving at the actual burden of the borrower.[179]

Responding to these concerns and the lobbying of loan companies previously mentioned in Section 3.2.4, the Committee recommended, after detailed hearings, a general bill entitled *An Act Respecting Interest on Small Loans* to regulate all money lenders whether

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[176] Ronald C C Cuming, "Canada" in Royston Miles Goode, ed, *Consumer Credit* (Leyden/Boston: AW Sijthoff International Publishing, 1978) 186 at 190, referring to Statistics Canada, *Canadian Statistical Review*, Pulication No 11-003 (June 1967) at 63; (July 1977) at 122.

[177] Waldron, 1992, *supra* note 1 at 14–15.

[178] *Journals of the House of Commons*, 18-3, vol 76, (1938) at 405 (June 1, 1938); *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 33.

[179] *Journals of the House of Commons*, *supra* note 178 at 402, 405 (1 June 1938).

unincorporated or incorporated provincially or federally.[180] According to Mary Ann Waldron, the "federal loan companies, perhaps seeing resistance to their requests for special legislation and considerable competitive advantage to having all lenders subject to the same limitations, apparently supported the legislation vigorously."[181] With the *Loan Companies Act* having already restricted the rate to 2.5% per month, federal loan companies may have hoped that the new regulatory framework would have forced unregulated lenders charging higher rates out of the market.[182]

Moreover, since "banks and other financial institutions were generally not interested in making small personal loans", vulnerable small borrowers were constrained to absorb the usurious charges of money lenders and loan sharks, thereby warranting further legislative reform.[183] The Royal Commission on Banking and Finance aptly summarized the main purpose of these reforms as follows:

> to control the total charges on small cash personal loans, as distinct from the instalment financing of merchandise. Since most of the borrowers who approach loan companies or money-lenders are in financial difficulties and in no position to bargain strongly because no other major lending institutions will normally accommodate them, it is considered necessary to "even out the bargaining power" by prescribing maximum lending rates.[184]

Enacted in 1939, the *Small Loans Act*'s preamble confirmed that "limitations placed on interest rates in existing statutes did not protect necessitous debtors from other usurious charges":[185]

> Whereas it has become the common practice for money-lenders to make charges against borrowers claimed as discount, deduction from an advance,

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[180] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 33. See also *Report of the Superintendent of Insurance, 1937*, *supra* note 171 at 52–60 (Draft Bill at 61–73). According to Jacob Ziegel, the proposed bill was "copied from the sixth draft of the American Uniform Smal loan Law": Ziegel, 1973, *supra* note 40 at 494.

[181] Waldron, 1992, *supra* note 1 at 15–16, referring to *House of Commons Debates*, *supra* note 121 at 3218 (25 April 1939) (JS Woodsworth).

[182] Waldron, 1992, *supra* note 1 at FN 82, referring to *House of Commons Debates*, *supra* note 121 at 3218 (25 April 1939) (JS Woodsworth).

[183] *Thomson Associates*, *supra* note 121 at para 9; Brian J H MacDonald, *The Canadian Chartered Banks and the Federal Government: An Analysis of the 1954 and 1967 Bank Act Revisions* (MA Political Science, University of British Columbia, 1978) [unpublished] at 37.

[184] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 202.

[185] *Thomson Associates*, *supra* note 121 at para 8. See also address on second reading in *House of Commons Debates*, *supra* note 121 at 3203–07 (25 April 1939) (JL Ilsley).

> commission, brokerage, chattel mortgage and recording fees, fines and penalties, or for inquiries, defaults or renewals, which, in truth and substance are, in whole or in part, compensation for the use of money loaned or for the acceptance of the risk of loss or are so mixed with such compensation as to be indistinguishable therefrom and are, in some cases, charges primarily payable by the lender but required by the lender to be paid by the borrowers; and whereas the result of these practices is to add to the cost of the loan without increasing the nominal rate of interest charged so that the provisions of the law relating to interest and usury have been rendered ineffective.[186]

In order to meet this problem, the statute prohibited small loans from being "compounded or deducted or received in advance" and broadly defined the "cost" of loans casting a vast net over not only the notional interest charge but also "every other type of charge by whatever name it may be described".[187] The Act limited the "cost" of the loan for money lenders and small loan companies to 2% per month on a loan for a period of 15 months or less and to 1% per month for loans with longer durations.[188] Exceptions to the definition of "cost" have been recognized, however, by the Superintendent of Insurance. For example:

> credit life insurance, though the imposition of this charge is closely regulated; property insurance on property given as security on the loan, provided the insurance is placed through an agency other than that of the licensee; court costs in the event of default and attorney fees if permitted by provincial law; and certain expenses of recovery of the security on chattel mortgage loans, including out-of-pocket expenses of seizure, charges by public officials, and reasonable expenses of repair to render the seized chattel saleable. Expenses for storage and sale of the chattel and other default costs, on the other hand, form a part of the cost of the loan, and no additional charges for such expenses are allowed.[189]

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[186] *Small Loans Act*, *supra* note 121 (CIF 1 January 1940); RCS 1952, c 251; as amended by SC 1956, c 46; RSC 1970, S-11; as repealed by *An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code*, SC 1980-81-82-83 c 43 (CIF 1 April 1981) [*An Act to repeal the Small Loans Act*].

[187] *Ziegel, 1966*, *supra* note 51 at 106. See *Small Loans Act*, *supra* note 121, s 2(a):

> "cost" of a loan means the whole of the cost of the loan to the borrower whether the same is called interest or is claimed as discount, deduction from an advance, com-mission, brokerage, chattel mortgage and recording fees, fines, penalties or charges for inquiries, defaults or renewals or otherwise, and whether paid to or charged by the lender or paid to or charged by any other person, and whether fixed and determined by the loan contract itself, or in whole or in part by any other collateral contract or document by which the charges, if any, imposed under the loan contract or the terms of the repayment of the loan are effectively varied.

[188] *Small Loans Act*, *supra* note 121, s 2(a), 3(2), 14(2).

[189] Letwin, *supra* note 62 at 208–09, FN 35-39.

Pursuant to the definitions included in the Act, it applied generally to all money lenders and to loans of less than $500. While Part II of the Act applied to federally incorporated "small loans companies," Part I applied to "money-lenders", which were defined as "any person other than a chartered bank who carries on the business of money-lending or advertises himself, or holds himself or itself out in any way, as carrying on that business, but does not include a registered pawnbroker as such".[190] The definition therefore included all other money lenders: provincially incorporated companies, partnerships and individuals. In addition to sellers of goods offering vendor's credit, who remained unregulated, pawnbrokers and banks were also excluded since they were regulated under separate federal acts as explained in Sections 3.2.2 and 3.2.6 of this chapter.[191]

Although disclosure requirements were not included, the Act nonetheless protected financial consumers through the registration and licensing of all money lenders and all small loans companies with the Minister of Finance if the cost of loans charged to their client exceeded 12% per annum.[192] As under the *Money-Lenders Act*, provincially regulated credit unions and caisses populaires were excluded from the application of the statute since their small loans generally did not exceed this prescribed rate.[193] According to Leon Letwin, "[t]he licensing requirement is an important feature of the *Small Loans Act*, and serves two distinct functions: first, it permits the licensing authority to limit access to the lending market; second, the concomitant power of license revocation provides a continuing stimulus for lender compliance with the terms of the act."[194] Before granting a licence, the Minister of Finance had to believe that the applicant would "carry on with efficiency, honesty and fairness to borrowers the business of money-lending pursuant to this Act".[195]

Contrary to the *Interest Act* and the *Money-Lenders Act*, under the *Small Loans Act*, the responsibility for the effective administrative supervision of the consumer credit industry

[190] *Ibid* at 204.
[191] *Ibid* at 205.
[192] *Small Loans Act*, *supra* note 121, ss 5, 13.
[193] Letwin, *supra* note 62 at 205.
[194] *Ibid*.
[195] *Small Loans Act*, *supra* note 121, s 5(2), 13(1).

was finally delegated to a governmental authority. In addition to receiving financial statements submitted annually by all licensees, the Superintendent of Insurance determined the annual assessment fee payable by each licensee; inspected the chief place of business annually and looked "carefully into the conduct of business of every licensee"; prepared annual reports on the industry for the Minister of Finance; and could investigate any unlicensed money lenders to determine compliance with the Act.[196]

To improve lender compliance and strengthen its enforcement, the Act made interest charged by money lenders in excess of an amount equivalent to the amount or the rate prescribed a criminal offence.[197] The *Criminal Code* of Canada was amended during the same parliamentary session to add a similar indictable offence rendering a money lender other than a bank or a pawnbroker "liable, if an individual, to imprisonment for a term not exceeding one year and to a penalty not exceeding one thousand dollars and, if a corporation, to a penalty not exceeding five thousand dollars."[198] Mary Anne Waldron explained that the criminal offence was included "to ensure that the legislation would be related to the cost of borrowing, rather than to the interest alone, and thus immune to constitutional challenge."[199] Moreover, additional sanctions were prescribed for other statutory violations:

> Every person who transacts the business of a money-lender without a licence, contrary to the provisions of this Act, or who in any other respect contravenes the provisions of this Act, shall be guilty of an offence and if no other penalty is provided be liable on summary conviction to a fine not exceeding one thousand dollars.[200]

The Act also protected small borrowers from the abusive lending practices of money lenders by providing relief similar to the *Money-Lenders Act* and permitting a court to re-open a transaction and take an account between the parties to relieve the borrower of amounts payable in excess of the prescribed amount, order the money lender to repay any

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[196] *Ibid*, ss 7, 9, 10, 13(1).
[197] *Ibid*, s 3.
[198] *An Act to amend the Criminal Code*, SC 1939, c 30, s 12 adding *Criminal Code*, RSC 1927, c 36, s504A.
[199] Waldron, 1992, *supra* note 1 at 15.
[200] *Small Loans Act*, *supra* note 121, s 20.

excess amounts already paid and review the terms of the loan.[201] Notably exempt from the liability pursuant to this consumer remedy were consumer loan companies.

While money lenders remained provincially regulated, Part II of the Act further regulated consumer loan companies (now termed "small loan companies") and also applied to companies previously incorporated by a special Act.[202] The *Small Loans Act* enabled the incorporation by special Act of Parliament of new small loan companies which were authorized to lend money on promissory notes, chattel mortgages or other personal security in sums not exceeding $500. Similar to the one prescribed in the *Loan Companies Act*, a model bill was prescribed for the incorporation of new companies. The Act further prescribed the company's powers and limitations complementing the governance provisions in the *Loan Companies Act*, which continued to apply with certain exceptions when they were not inconsistent with the *Small Loans Act*.[203] Contrary to previous practices, the Act further prohibited small loan companies from compounding, deducting or receiving in advance the cost of the loan or any part thereof.[204]

Ten years later, adequate licensed and supervised money services were available in all major Canadian cities.[205] According to the 1949 Report of the Royal Commission on Prices,

> [o]ver the years there have been several factors leading to increased demand for consumer credit. The desire for a higher standard of living coupled with increasing production of consumer goods has led to a considerable increase in the number and size of credit institutions. Financing "on time" has become an accepted practice. The small loan business has grown and has become highly competitive.[206]

However, with the increased cost of living, along with the demand for larger loans, approximately three quarters of consumer loans were unregulated in 1956 given the low

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[201] *Ibid*, s 4.
[202] *Ibid*, s 19.
[203] *Ibid*, s 13(2).
[204] *Ibid*, s 14(b).
[205] Canada, Royal Commission on Prices, *Minutes of Proceedings and Evidence, No 35* (Ottawa: King's Printer, 1948) at 1911 (30 November 1948) (AP Reid, Vice-President and General Manager, Household Finance Corporation of Canada) [*Minutes of Proceedings and Evidence, No 35, 1948*].
[206] Canada, Royal Commission on Prices, *Report* (Ottawa: King's Printer, 1949) at 38.

threshold of $500 of the *Small Loans Act*.[207] As a result, legislative amendments increased the monetary ceiling of $500 to $1,500 with a graduated scale of interest rate ceilings permitting up to 2% per month to be charged on the first $300, 1% per month to be charged on amounts between $300 and $1,000 and 0.5% per month to be charged on amounts between $1,000 and $1,500 on loans by money lenders and small loan companies.[208] Taking into account the higher administrative cost for small loans, the effective annual rates permitted under the Act therefore progressively decreased as the amount of the loan increased. Consequently, this graduated scale allowed 24% per annum to be charged on loans of $300 and 15.24% per annum to be charged on the maximum loan of $1,500.[209] Long-term loans were also regulated to limit the cost of loans to 1% per month on loans of $500 or less payable over a period greater than 20 months or loans exceeding $500 for a term of more than 30 months.[210] As Leon Letwin explained, the "premise behind such a variable rate structure is, no doubt, that the cost of lending is disproportionately high for smaller or shorter term loans."[211]

In order to address abusive lending practices of lenders, the amendments further clarified that when a licensee provides a new loan to a borrower or that borrower's spouse "while any part of the principal balance remains unpaid," the total cost of the loan, including the amount in excess of the $1,500 ceiling amount remained limited to the rate of 0.5% per month.[212] If the total aggregate of the unpaid principal balance of all loans was lower than $1,500, the loan was subject to the rate restriction on the total amount and not the higher rate for each individual smaller loan. Initially proposed in the bill at first reading, but ultimately not included in the *Small Loans Act* of 1939, the 1956 amendments finally repealed the *Money-Lenders Act*.[213]

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[207] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 209.
[208] *An Act to amend the Small Loans Act*, *supra* note 105, ss 1, 6.
[209] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 31.
[210] *An Act to amend the Small Loans Act*, *supra* note 105, ss 2, 4 adding s 3(3), 6(3).
[211] Letwin, *supra* note 62 at 207.
[212] *An Act to amend the Small Loans Act*, *supra* note 105, ss 2, 4 adding ss 3(4), 6(4).
[213] *Ibid*, s 8.

Although the *Small Loans Act* initially provided the necessary legislative framework to a developing consumer credit industry and applied to all money lenders and small loan companies, the graduated rate ceilings prescribed quickly became totally "unrealistic" and "in need of extensive overhaul."[214] The *Small Loans Act* was criticized by many as "totally inadequate" in light of the increased cost of living, the "rapid escalating cost of money," the growth of the consumer credit industry and the increased demand for and access to consumer credit.[215] Moreover, enforcement of the federal statute was inadequate: "[b]etween 1940, when the Act came into force, and 1966 there were only 9 prosecutions under the *Small Loans Act*" as Jacob Ziegel's research revealed in 1968.[216]

Despite the 1956 reform, the monetary ceiling of $1,500 had become once again an unrealistically low ceiling in the 1970s and thus easily evaded, akin to previous consumer credit legislation.[217] According to the Royal Commission on Banking and Finance, the statute became ineffective and even created a distortion in the availability of small loans within the regulated field, since "there [was] no regulation of the substantial amount of larger lending."[218] Indeed, lenders criticized the graduated rate ceilings prescribed by the Act, especially the lower rate of 6% per annum on higher loans between $1,000 and $1,500, which created a disincentive to lend for those amounts.[219] Borrowers were therefore encouraged to borrow smaller amounts at a higher cost or borrow more than the ceiling amount, which was permitted and remained unregulated. Jacob Ziegel's research further demonstrated that the industry adjusted its financial services accordingly. Between 1968

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[214] Pitch, *supra* note 66 at 325; Jacob Ziegel, "Bill C-44: Repeal of Small Loans Act and Enactment of a New Usury Law" in "Comments on Legislation and Judicial Decisions" (1981) 59 Can Bar Rev 188 at 188 [Ziegel, 1981].

[215] Pitch, *supra* note 66 at 325, 330; Ziegel, 1981, *supra* note 214 at 188–89. See also Letwin, *supra* note 62 at 209; Ziegel, 1966, *supra* note 51 at 107; *Minutes of Proceedings and Evidence, No 35, 1948*, *supra* note 205 at 1910–12 (30 November 1948) (AP Reid, Vice-President and General Manager, Household Finance Corporation of Canada). The temporary success of the *Small Loans Act* is highlighted in *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 55; Ziegel, 2010, *supra* note 12 at 355–56.

[216] Jacob S Ziegel, "Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint" (1968) 68:3 Colum L Rev 488 at n 181 [Ziegel, 1968]. See also Ziegel, 1966, *supra* note 51 at 107.

[217] Ziegel, 1968, *supra* note 216 at 496; Waldron, 1992, *supra* note 1 at 16; Waldron, 2011, *supra* note 117 at 305–06; *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 382; *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 31.

[218] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 209–10; Waldron, 1992, *supra* note 1 at 16.

[219] Ziegel, 1973, *supra* note 40 at 494; Letwin, *supra* note 62 at 209.

and 1970, "the outstanding balance on unregulated loans increased by more than 50 per cent, from $345 million to $534 million, while loans in the regulated area decreased by approximately 15 per cent. In 1970, loans in the $1,000–$1,500 range decreased 44 per cent. in number and 45 per cent. in amount."[220]

The Royal Commission therefore recommended, in 1964, that general uniform legislation be enacted to apply to all money lenders, including banks and be subjected to the supervision of the Inspector General of Banks. In addition to the requirement to inform the borrower of the effective rate of charge per year, the Commission also recommended that

> all personal cash lending, not just that covered by the *Small Loans Act*, be subject to a maximum charge on all amounts up to $5,000 rather than the present $1,500. This extension should help to curb the exploitation of ill-informed borrowers by certain fringe institutions and lenders. We also recommend that the formula retain the present 2% per month maximum on the first $300 borrowed–on which administrative expenses are high–and that a flat rate of 1% per month apply to all higher amounts.[221]

Finally, recommendations also included the necessity of fines and "stiff penalties for excessive charges or failure to disclose," the forfeiture of all principal and interest on illegal transactions and the "suspension of licenses of lending institutions in cases of flagrant violation".[222] Confirming that there was "widespread support" for the suggested reform to the *Small Loans Act*, the Special Joint Committee on Consumer Credit endorsed the same recommendations in 1967.[223]

Despite these recommendations, lobbying efforts failed to persuade the government to increase the monetary ceiling. Provinces therefore intervened to protect debtors of loans above $1,500 by adopting unconscionable transactions relief legislation. New provincial legislation for consumer protection conferred to the judiciary almost identical powers to those found in existing federal legislation on small loans as well as new disclosure in

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[220] Ziegel, 1973, *supra* note 40 at 494.
[221] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 382–83, 562.
[222] *Ibid* at 383.
[223] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 31.

lending requirements.[224] Most of the provincial legislation dealt not only with money lending but also with credit transactions involving the sale of goods and services.[225] Still in force today, provincial legislation provides the majority of the protection given to financial consumers with the main exception being limited regulations on consumer credit provided by federally regulated financial institutions such as banks, credit unions, insurance companies and trust and loan companies. Relevant provincial legislation and current federal legislation regulating consumer credit are further examined in Chapters 5 and 6 of this dissertation.[226]

Notwithstanding the high administrative expenses and bad debt losses that stabilized at about 1% of assets, the consumer credit industry was profitable and "doubled in the seven years ending in 1961 to the point where the industry [had] a quarter as many offices as the chartered banks."[227] The industry was, however, "highly concentrated in the hands of a few firms", with the 10 largest lenders holding almost "90% of the assets of all licensees (including their loans in excess of $1,500) and 940 out of a total of 1,148 branch offices."[228] The 1967 Report of the Special Joint Committee on Consumer Credit further revealed that the three original consumer loan companies "held more than half of the balance of small loans in Canada" and that a "few giants also dominate among the licensed money-lenders, with six of the 79 holding 80 per cent of their small loans outstanding at the end of 1964."[229]

Following unsuccessful attempts to further regulate consumer credit during the 1960s and 1970s,[230] Parliament hastily repealed the *Small Loans Act*, in 1980, without any debate or

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[224] Ziegel, 1968, *supra* note 216 at 496; Ziegel, 1973, *supra* note 40 at 479–95; Pitch, *supra* note 66 at 325; Jacob S Ziegel, "Recent Legislative and Judicial Trends in Consumer Credit in Canada" (1970) 8 Alta L Rev 59 at 67 [Ziegel, 1970].

[225] Pitch, *supra* note 66 at 327–28.

[226] Ziegel, 1966, *supra* note 51 at 105.

[227] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 211, 215.

[228] *Ibid* at 202–03.

[229] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 32.

[230] See *Bill C-16, An Act to provide for the protection of borrowers and depositors, to regulate interest on judgment debts, to repeal the Interest Act, the Pawnbrokers Act and the Small Loans Act and to amend certain other statutes in consequence thereof*, 2nd Sess, 30th Parl, 1976 (first reading 27 October 1976). See also Canada, *Memorandum to the Cabinet*, supra note 63 at 5.

plan to protect consumers.[231] Instead of reforming the Act, Parliament followed the recommendation of the Superintendent of Insurance and opted to repeal it instead.[232] With the ongoing growth and resulting changes in the Canadian economy and the consumer credit industry since the 1960s, consumer credit had become a mainstream financial service available in different forms, including credit cards, offered by all types of financial institutions, including banks and credit unions.[233] The Superintendent of Insurance Competition claimed that competition and new credit products had therefore essentially eliminated the abuse financial consumers were subjected to when the *Small Loans Act* was initially enacted. In addition, the amended prescribed interest rate ceilings once again became inappropriate given that interest rates in the market rose very rapidly following the 1956 reforms.[234] Acknowledging this new reality and invoking recent consumer protection provincial legislation, which is analyzed in Chapter 5, the Superintendent of Insurance therefore recommended to the Standing Senate Committee on Banking, Trade and Commerce that "the best course at this point would be to repeal the rate regulation and leave it to the competitive system plus disclosure to serve the interests of consumers."[235] With the emergence of economic analysis of the law in the 1970s,[236] along with the evolution of economic theories of deregulation and the "less, not more, government" conservative mantra, which permeated policy debates in the late 1970s and early 1980s, the recommendation to deregulate the consumer credit industry could have been easily justified at the time.[237]

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[231] Ziegel, 1981, *supra* note 214 at 188; *Nelson v CTC Mortgage Corp*, [1984] 16 DLR (4th) 139 at para 7, 1984 CanLII 572 (BCCA) [*Nelson*].

[232] *An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code*, SC 1980-81-82-83, c 43, s 8.

[233] *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 32-1, issue no 21, (1980) at 21:8 (29 October 1980); *Thomson Associates*, *supra* note 121 at para 9.

[234] *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, *supra* note 233 at 21:8 (29 October 1980).

[235] *Ibid* at 21:9 (29 October 1980); *Thomson Associates*, *supra* note 121 at para 9.

[236] See eg, Richard A Posner, "Theories of Economic Regulation" (1974) 5:2 Bell J Econs Management Science 335.

[237] David Johnson, *Thinking government: public administration and politics in Canada*, 5th ed (Toronto: University of Toronto Press, 2022) at 87: "'Less, not more, government' became the conservative mantra, with the concomitant position that more business-friendly, private sector-oriented policies would promote economic growth. From this viewpoint the desired government was one that would rein in a bloated and incompetent state, 'freeing enterprise' to get on with the task of building a strong and viable economy (Woolstencroft 1996)."

The Superintendent concluded that small loans legislation had been a success and had addressed the issues it was meant to resolve, namely protecting "the necessitous borrower who really did not have any source or any defence."[238] He recognized, however, that Parliament still needed to protect consumers from loan sharks, which operated illegally and charged usurious rates of interest. The bill submitted before Parliament therefore repealed the *Small Loans Act* and proposed a new criminal rate of interest, which was defined as an effective annual rate of interest exceeding 60% (equivalent to a 47% APR[239]) on a credit advanced under an agreement added to the *Criminal Code*, which is discussed further in Chapter 6 of this dissertation.[240] According to the Superintendent, this amendment aimed

> to put in the hands of the law enforcement officers a tool that will help them attack and, hopefully, reduce, if not eradicate, the problems associated with loan-sharking in a serious way. And when I say loan-sharking, I am talking about rates that may be 100 or 200 per cent a year […] [W]hile the 60 per cent a year may seem at first blush an extraordinary rate, it is certainly a rate that would be regarded as being extremely low by any people engaged in this kind of loan-sharking, and there is no way, under a statute such as the *Small Loans Act*, with a ceiling on it, that you can get at that kind of problem.[241]

Despite these laudable intentions, the proposed reform was based on unsound assumptions. On one hand, the new criminal interest rate ignored the financial and commercial reality and the advantages of borrowing at higher rates pursued by many commercial borrowers. Jacob Ziegel posited that "it is economically unsound to stigmatize any cost of credit as extortionate if the borrower was a free agent and was not coerced into borrowing the money."[242] This was particularly true in the commercial market. On the other hand, the

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[238] *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, *supra* note 233 at 21:8–21:10 (29 October 1980).

[239] Canada, Department of Finance, *Consultation on Cracking Down on Predatory Lending by Further Lowering the Criminal Rate of Interest and Increasing Access to Low-Cost Credit* (10 May 2023), online: <canada.ca/en/department-finance/programs/consultations/2023/consultation-on-cracking-down-on-predatory-lending-faster-by-further-lowering-the-criminal-rate-of-interest-and-increasing-access-to-low-cost-credit.html> [Canada, 2023 Consultation].

[240] *An Act to repeal the Small Loans Act*, *supra* note 186, s 9; *Criminal Code*, *supra* note 90, s 347.

[241] *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, *supra* note 233 at 21:10 (29 October 1980).

[242] Ziegel, 1981, *supra* note 214 at 192–93. He explained as followed: "Assume an employee requests a loan of $10.00 from another employee and promises to repay $11 a week later. The one dollar charge if interpreted as interest, corresponds to an annual interest rate of approximately 520 per cent, which sounds extortionate. In fact it is not because the time spent by the fellow employee in making and collecting the loan would lone be worth a dollar." See also: *Nelson*, *supra* note 231 at para 8.

above-noted shortcomings of the Act could have been overcome by the statutory reforms proposed by the Royal Commission and Banking and Finance and the Special Joint Committee on Consumer Credit in 1964 and in 1967, respectively, thereby ensuring the sustained success of the *Small Loans Act* of protecting consumers and regulating the consumer credit industry.[243]

He further argued that "[it] was not true […] that low income consumers, financially illiterate consumers, and consumers who have overcommitted themselves no longer need protection" and that Parliament failed to consider the full ramifications of abdicating its responsibility to regulate the consumer credit industry:

> On July 22nd, 1980, only a day after its first reading, the House of Commons gave second and third reading to Bill C-44, "An Act to amend the *Small Loans Act* and to provide for its repeal and to amend the *Criminal Code*." The Bill was not debated and its adoption had the unanimous support of all three political parties. Any public discussion of the merits of the Bill was effectively forestalled by the haste with which it was rushed through the House. This failure to give interested parties an opportunity to study and comment on the Bill would be serious enough if the Bill only dealt with minor technical matters. But it does not. The Bill deals with questions of major social, economic, and legal importance which warranted careful examination. Even if one accepts the soundness of the objectives of the Bill, it does not follow that its technical implementation is equally unobjectionable or that the same goals could not have been realized in a less controversial manner. In the writer's view, the Bill is open to objections on both counts and may generate as many new problems as it was designed to resolve.[244]

In any event, the 1980 reforms were enacted and came into force in two stages. The first transitional step involved the elimination of any rate restrictions on new small loans with the repeal of the *Small Loans Act* coming into force when the last loan granted prior to the amendment was paid by the borrower.[245] Interestingly, or, rather, dishearteningly, the

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[243] Ziegel, 1981, *supra* note 214 at 189.

[244] *Ibid* at 188, 191–92; *An Act to repeal the Small Loans Act*, *supra* note 186; *Nelson*, *supra* note 231 at para 7.

[245] *An Act to repeal the Small Loans Act*, *supra* note 186, s 6.

Small Loans Act was finally repealed by proclamation on 1 September 1994, signifying presumably that the last regulated small loan likely took more than 14 years to repay.[246]

As previously noted, in addition to consumer loan companies and money lenders, a new player in the consumer credit industry arrived on the scene, albeit a bit late: chartered banks. These institutions have since revitalized the industry and become a major service provider of consumer credit.

3.2.6 Banks

It has been stated that chartered banks are "in many ways the heart of the private financial system" in Canada.[247] According to the Royal Commission on Banking and Finance,

> [t]hey are the country's largest deposit institutions, its main source of short-term credit, and managers of its payments system. They have an especially wide range of dealings with all parts of the community and their activities thus have an important influence on the financing decisions of individuals, businesses, and even governments. Competition has made them more flexible and shrunk their once awesome status, but the chartered banks are still by far the biggest and most prominent of Canada's financial institutions.[248]

In 1867, Parliament enacted the first statute regulating chartered banks pursuant to its constitutional jurisdiction over matters relating to banking.[249] This temporary measure essentially re-enacted the general banking legislation previously in force in the Province of Canada which became applicable throughout the Dominion. It also provided the government three years to create "one uniform system of currency and banking for the Dominion, applicable to all banks", whether newly incorporated under the federal statute or one of the 19 banks previously doing business under a provincial charter listed in the

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[246] *Proclamation Fixing September 1, 1994 as the Day on which Subsection 6(3) of An Act to Amend the Small Loans Act and to Provide for Its Repeal and to Amend the Criminal Code, and the Small Loans Act, are Repealed*, SI/94-115, (1994) C Gaz II, at 3208.
[247] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 113.
[248] *Ibid*.
[249] *An Act respecting Banks*, *supra* note 7; *Constitution Act, 1867*, *supra* note 19, s 91(15).

Schedule.[250] "In the interval all banks worked under their existing provincial charters which had been continued."[251]

Although it confirmed that "[n]o Bank shall after the passing of this Act incur any penalty or forfeiture for usury," this statute nevertheless re-enacted restrictions imposed on chartered banks in the Province of Canada that "any Bank may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by any bank".[252] As noted by Mary Anne Waldron, this "limit to lending rates for banks, fixed at either 7% or 6%, remained a feature of Canadian banking legislation for one hundred years."[253]

The process of harmonization commenced tentatively with the 1870 federal statute.[254] The objective was the practicable uniformization of banking law relating to the incorporation and governance of banks to protect the interests of the public and the bank's shareholders.[255] The Act enacted clauses and provisions that amended the charters of existing banks and would be incorporated into any new charter without having to repeat them therein.

Repealing both previous statutes, the comprehensive federal statute of 1871, regarded as the "first Bank Act of the Dominion", applied to future chartered banks and modified charters of existing banks requesting to be regulated under the new federal statute.[256]

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[250] John Delatre Falconbridge, *The Canadian Law of Banks and Banking: The Clearing House, Currency, Dominion Notes, Bills, Notes, Cheques and other Negotiable Instruments* (Toronto: Canada Law Book Co, 1907) at 4.

[251] Canada, Royal Commission Banking and Currency in Canada, *Report* (Ottawa: King's Printer, 1933) at 15 [*Report of the Royal Commission on Banking and Currency, 1933*].

[252] *Bank Act, 1867*, *supra* note 7, s 17; *Interest Act, 1859*, *supra* note 14, s 4.

[253] Waldron, 1992, *supra* note 1 at 10. See "Act respecting Banks", 2nd reading, *House of Commons Debates*, *supra* note 18 at 330 (19 December 1867).

[254] *An Act respecting Banks and Banking*, SC 1870, c 11.

[255] *Ibid*, at Preamble.

[256] John Delatre Falconbridge, *The Canadian Law of Banks and Banking: the Clearing House, Currency, Dominion Notes, Bills, Notes, Cheques and other Negotiable Instruments* (Toronto: Canada Law Book Co, 1907) at 6–7, referring to *An Act relating to Banks and Banking*, SC 1871, c 5, at Schedule [*Bank Act, 1871*]. The Banks listed in the Schedule are The Bank of Montreal, The Québec Bank, The City

Sections 51 to 53 re-enacted the interest ceiling of 7% and permitted banks to charge collection and agency fees. In addition, given the real possibility of bank failures and the importance of banks to the Canadian economy, the supervision and inspection of chartered banks was strictly enforced by requiring that annual statements be submitted at annual shareholders' meetings and that a yearly list of stockholders and monthly returns be submitted to the government.[257] By 1952, chartered banks were required to submit 11 various statements or returns to the Minister of Finance under penalty of daily sanctions.[258] The responsibility of regulating and supervising chartered banks was delegated to the Office of the Inspector General of Banks, an agency of the federal Department of Finance established in 1923 following the failure of the Home Bank, which later became the Office of the Superintendent of Financial Institutions, in 1987, the role of which is further discussed in Chapter 6.[259]

The evolution of Canada's banking system reflected the country's phases of economic development and progress.[260] Following Confederation, Canada's expansion west and north created the need for a widespread system of branches. Local banking facilities were essential to encourage trade over a wider area and in diverse industries such as the fur trade, wheat production, lumbering and fisheries.[261] Banks were therefore authorized to "open branches or agencies and offices of discount and deposit and transact business, at any place or places in the Dominion".[262] Between 1867 and 1884, the number of branches operated by Canadian banks increased from 147 to 335.[263]

Bank, The Niagara District Bank, Molson's Bank, The Bank of Toronto, The Ontario Bank, The Eastern Townships Bank, La Banque Nationale, La Banque Jacques Cartier, The Merchants' Bank of Canada, The Royal Bank of Canada, the Union Bank of Lower Canada, The Canadian Bank of Commerce, The Mechanics' Bank, The Dominion Bank, The Merchants' Bank of Halifax, The Bank of Nova Scotia and the Bank of Yarmouth. Exceptions were granted to the Bank of British North America and La Banque du Peuple

[257] *Bank Act, 1871*, *supra* note 256, ss 12–13; Office of the Superintendent of Financial Institutions, "Our History," (7 May 2021), online: <osfi-bsif.gc.ca/Eng/osfi-bsif/Pages/hst.aspx>.

[258] *Bank Act*, RSC 1952, c 12, s 157 [*Bank Act, 1952*].

[259] *Bank Act, 1871*, *supra* note 256, ss 12–13; *Our History*, *supra* note 257.

[260] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 14.

[261] *Ibid*.

[262] *Bank Act, 1871*, *supra* note 256, s 4.

[263] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 16.

Unprecedented economic development further contributed to the banking system's expansion in resources and branches.[264] Canadian expansion at the beginning of the 20th century led to a population growth of 45% and increases in the amount of currency in circulation (notes, silver and bronze) by two and a half times and in the number of Canadian branch banks from 708 to 3,140 during the first 13 years of the 20th century.[265] According to the Royal Commission on Banking and Finance, "[f]ollowing Confederation nineteen banks operated under Dominion charters, a number which increased to thirty-eight by 1886 and remained little changed until the eve of the First World War."[266] At the end of 1932, the 10 Canadian chartered banks, which had successfully traversed a period of sustained failures, amalgamations and mergers permitted by the *Bank Act*, had 3,158 branches across the country.[267]

Contrary to its provincial predecessor, the federal *Bank Act* lacked strong enforcement provisions. Prior to Confederation, banks in the Province of Canada charging higher rates of interest would "forfeit and lose for every such offence treble the value of the moneys […] lent or bargained for, to be recovered by action of debt in any Court of competent jurisdiction".[268] The penalty was divided between the plaintiff and the Receiver General. Unfortunately, the federal *Bank Act* did not contain any comparable penalties.

Notwithstanding the enactment of a prescribed maximum interest rate in the *Bank Act*, the absence of penalties or other mechanisms of enforcement became points of concern raised during the parliamentary debates of the new Dominion.[269] Evidence submitted and testimony given before the Select Standing Committee on Banking and Commerce in 1923

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[264] *Ibid* at 17.
[265] *Report of the Board of Inquiry into Cost of Living, 1915*, *supra* note 140 at 1043–44, 1053.
[266] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 113.
[267] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 30. The 10 chartered Banks were Bank of Montreal, Bank of Nova Scotia, Bank of Toronto, Banque Provincial du Canada, The Canadian Bank of Commerce, Royal Bank of Canada, Dominion Bank, Banque Canadienne Nationale, Imperial Bank of Canada and Barclays Bank (Canada). See *also Summary showing fate of all banks which were active at or incorporated since July 1, 1867*, Exhibit No. 3 found in Canada, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence, No 15*, 22-1, (1954) at 672–73 (16 March 1954) [*Minutes of Proceedings and Evidence, No 15, 1954*].
[268] *Interest Act, 1859*, *supra* note 14, s 9.
[269] Waldron, 1992, *supra* note 1 at 10.

would seem to suggest that banks, "[i]n practice, […] were able to circumvent the ceiling with almost childish simplicity—and did so regularly in the case of consumer instalment loans" given that the *Bank Act* did not define the meaning of "interest".[270] During the meetings, members of the Committee questioned the effectiveness of the maximum statutory rate and called the statutory provision "useless", a "pretence", "the purest camouflage", a "smoke screen behind which the banks can charge any rate they can agree upon with the borrower" and "a delusion and a snare; it simply deludes people."[271] These complaints were warranted, as explained by the Royal Commission on Banking and Currency in 1933:

> [t]he rate of interest charged on good commercial loans has generally been 6 per cent. On small loans and in branches where the volume of business is small the rate of interest was 8, 9, or even 10 per cent. The nominal rate of interest has frequently been increased through the process of discounting notes or of compounding the interest at intervals of three or four months.[272]

Frustrating many financial consumers, these two common banking practices enabled banks to collect interest charges in addition to the interest rate indicated in the loan agreement. As discussed by the members of the Select Standing Committee, compounding interest was common practice in 1923, thereby increasing interest charges: "[t]he great majority [of loans] are payable in three months, and failure to pay principal and interest at the due day results in the principal and interest being compounded, and a new note is made out for that amount."[273] According to the Royal Commission on Banking and Currency, the banks justified the practice as being "necessary to ascertain from time to time that their position had not been prejudiced by the acts of the borrower," especially unsecured consumers.[274] It must be noted, however, that "[t]here is no statutory authority for the charging of

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[270] Ziegel, 1968, *supra* note 216 at 495.
[271] Canada, Select Standing Committee on Banking and Commerce of the House of Commons, *Proceedings*, 14-2, vol 1, appendix 2, (1923) at 785, 951–52, 1001 (8 May, 1, 6 June 1923).
[272] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 32. See also: Canada, Standing Committee on Banking and Commerce, *Proceedings*, *supra* note 271 at 310–12, 361–62, 421, 950–51, 1002 (19 April–6 June 1923).
[273] Canada, Standing Committee on Banking and Commerce, *Proceedings*, *supra* note 271 at 950 (6 June 1923) (Joseph Tweed Shaw).
[274] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 73.

compound interest" and the consumer's consent had to be given either by express or implied agreement, or by acquiescence or voluntary payments.[275]

The banks also argued that their general practice to discount notes was a "fair banking practice […] as old as banking itself" and that "this custom is world wide and not peculiar to Canada". Essentially, the practice of discounting notes is the withholding of a part of the interest charged in advance when the funds are initially disbursed. According to research undertaken in Alberta by DA McGibbon, the consumer therefore received less than the principal initially requested since the discount at the higher rate of interest is withheld, thereby reducing the principal actually given to the borrower, creating a "mechanism whereby the bank insures that its non-legal rate of interest is paid in advance, and thus made safe against legal attack."[276]

During his testimony, Sir John Aird, the General Manager of The Canadian Bank of Commerce, recognized that the rate of interest that banks have a right to collect is 7% but that they can also legally charge a discount rate "so long as borrowers understand it".[277] He further justified this practice by adding: "[i]t is legal that we can discount and it is authorized by the Act, and it has been sustained by the Privy Council in England."[278] Indeed, the Judicial Committee of the Privy Council in *Union Bank v McHugh* held that the contractual chattel mortgage stipulation of 8% was an illegal rate of interest, thus rendering it inoperative.[279] The bank could therefore only recover the legal rate of 5% pursuant to the *Interest Act*, given the contract no longer fixed an interest rate.[280] Despite the *Bank Act* prohibiting a bank from recovering a higher rate than 7%, the Court further concluded that if the bank had already recovered interest from discounting or by other payments made by the borrower, the interest was considered to have been paid voluntarily

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[275] John James MacLaren, *Banks and Banking. The Bank Act, Canada*, 5th ed, Albert Swindlehurst, ed (Toronto: Carswell Co, 1928) at 363, referring to *Montgomery v Ryan*, (1908) 16 OLR 75, 1908 CarswellOnt 49 (CA) and *Thomson v Stikeman*, (1913), 30 OLR 123, [1913] OJ No 14 (CA).
[276] Canada, Standing Committee on Banking and Commerce, *Proceedings*, *supra* note 271 at 950 (6 June 1923) (Joseph Tweed Shaw), 961 (6 June 1923) (Henry Elvins Spencer), citing Report of DA McGibbon.
[277] *Ibid* at 362 (20 April 1923) (Sir John Aird, General Manager of The Canadian Bank of Commerce).
[278] *Ibid* at 363 (20 April 1923) (Sir John Aird, General Manager of The Canadian Bank of Commerce).
[279] *Union Bank v McHugh*, [1913] AC 299 at 316, 1913 CanLII 397 (UKJCPC).
[280] *Ibid* at 315–16.

and therefore valid.[281] The borrower was "deemed to have been aware of his statutory right to a lower rate" and therefore any payment or other recognition of a debit or discount was considered to have been made voluntarily.[282] As a result, the borrower had no right to recover the excess interest paid. Not only did the Act provide no remedy to the borrower, but there was also no penalty imposed on banks charging illegal interest rates.

Moreover, the statutory interest rate cap was clearly ineffective by the very fact that banks were permitted to charge a higher interest rate in advance by discounting the note.[283] Banking practices charging higher rates of interest were therefore legally validated by the judiciary and commercially justified by the industry.[284] Witness testimony from bank representatives before the Select Standing Committee explained, in 1923, that many banks would not be able to continue operating should they have to limit the interest rate charged to 7% given the carrying costs of business in rural communities in the western provinces.[285] Many smaller banks in the West, which had higher carrying costs, were competing against large banks, many of which had their headquarters in Eastern Canada.[286]

During these parliamentary proceedings, several members of the Committee spoke out against statutory interest rates for banks. In addition to the argument that legislative reforms should either eliminate entirely the rate or impose the same rate on all types of lenders, it was noted that the limits placed on banks simply forced a risky borrower to seek funds from other types of lenders which would charge a higher rate than the bank would have charged were it not for the statutory interest rate.[287] "You only drive the man from one set of money lenders more reputable, into the hands of one less reputable."[288]

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[281] *Ibid*.
[282] Ian FG Baxter, *The Law of Banking and the Canadian Bank Act*, 2nd ed (Toronto: Carswell, 1968) at 180–81.
[283] See: Canada, Standing Committee on Banking and Commerce, *Proceedings*, *supra* note 271 at 971 (6 June 1923) (Henry Herbert Stevens); *Merchants Bank of Canada v Bush* (1918), 56 SCR 512 at 518, 1918 CanLII 28 (Indington J).
[284] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 250.
[285] Canada, Standing Committee on Banking and Commerce, *Proceedings*, *supra* note 271 at 310–12, 361–62, 407, 794 (19 April–8 May 1923).
[286] *Ibid* at 973 (6 June 1923) (Henry Herbert Stevens).
[287] *Ibid* at 958–59 (6 June 1923) (John Babington Macaulay Baxter).
[288] *Ibid* at 959 (6 June 1923) (John Babington Macaulay Baxter).

Raising the importance of the commercial viability of smaller branches and consumer access to banking services, a majority of the members of the Royal Commission on Banking and Currency concluded in 1933 that the statutory maximum rate of interest prescribed in the *Bank Act* was "anomalous and an undesirable interference with freedom of contract" and recommended the repeal of the provision.[289] The Royal Commission further recommended that if Parliament chose to recast the statutory interest rate definition, it should be "beyond doubt that it is illegal to stipulate for more than seven per cent interest or discount" and that "if the latter course is adopted a penalty for contravention should be imposed".[290] Despite calls for reform, the statutory interest rate remained and was lowered to 6% in 1944.[291]

Parliament did, however, follow the Royal Commission's recommendation and add a penal provision in the revised banking legislation of 1934, which reads as follows:

> The bank shall not in any part of Canada, excepting the Territories, stipulate for, charge, take, reserve or exact any rate of interest or discount exceeding seven per centum per annum and no higher rate of interest or discount shall be recoverable by the bank, and every bank which violates the provisions of this subsection shall be guilty of an offence, and for every such offence shall be liable, on summary conviction, to a fine not exceeding five hundred dollars, and every one who, being a manager or officer of any bank, violates the said provisions shall be guilty of an offence, and for every such offence shall be liable, on summary conviction, to a fine not exceeding one hundred dollars.[292]

Two years later, directly competing with small loan companies and money lenders, The Canadian Bank of Commerce formally entered the consumer credit industry by establishing

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[289] *Report of the Royal Commission on Banking and Currency, 1933*, *supra* note 251 at 73.
[290] *Ibid* at 72 (Recommendation 251).
[291] *The Bank Act*, SC 1944, c 30, s 91.
[292] *The Bank Act*, SC 1934, c 24, s 91(1). The provision further clarified permitted rates on small loans:
> Provided, however, that in a case where the interest or discount amounts to less than one dollar the bank may stipulate for, charge, take, reserve or exact a total charge not exceeding one dollar: Provided, further, that when the advance or loan is not in excess of twenty-five dollars, and the interest or discount thereon amounts to less than fifty cents, the maximum charge shall not exceed fifty cents.

the Personal Loan Plan, which was administered by a central office.[293] "The cost to the borrower [was] made up of a discount of 6 per cent per annum and a service charge varying from 50 cents to $3 depending on the amount of the loan."[294] According to the evidence submitted by the Bank to the Standing Committee on Banking and Commerce in 1954, the Plan adapted American practices to the Canadian market and offered loans with a discount rate of 6% on the initial amount, thereby reducing the effective amount received by the consumer, plus service charges and life insurance. In addition, the consumer was required to make monthly payments into a savings account until the full amount was collected, thereby generating an average yield on loans since the inception of the plan of 10.46%.[295]

Between 1949 and 1953, the new centralized financial service of The Canadian Bank of Commerce had given out on average of $22.4 million per year in loans to consumers in addition to individual loans granted by its local branches.[296] Refusals of consumer applications were less than 8% and the total of loans written off during the first 18 years of the plan was 0.1% of total consumer loans.[297] Although the bank relied on a legal opinion confirming the legality of the Plan, members of the Standing Committee on Banking and Commerce were clearly concerned about the bank circumventing the intent of section 91 of the *Bank Act* prescribing a maximum interest rate of 6% and thus rendering it "wholly ineffective".[298]

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[293] The Canadian Bank of Commerce, "A Brief on Personal Loans, Submitted on Request by The Canadian Bank of Commerce to the Standing Committee on Banking and Commerce of the House of Commons", *Minutes of Proceedings and Evidence, No 22*, 22-1, vol 2, (1954) at 807–22 [*Minutes of Proceedings and Evidence, No 22, 1954*] [The Canadian Bank of Commerce, "Brief"].

[294] *Report of the Superintendent of Insurance, 1937*, *supra* note 171 at 54.

[295] Canada, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1064 (8 April 1954) (Neil J McKinnon, General Manager, The Canada Bank of Commerce); *Minutes of Proceedings and Evidence, No 27, 1954*, *supra* note 146 at 1458–59 (11 May 1954) (Neil J McKinnon, General Manager, The Canada Bank of Commerce).

[296] The Canadian Bank of Commerce, "Brief", *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 814.

[297] *Ibid* at 1065, 1074 (8 April 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce).

[298] *Minutes of Proceedings and Evidence, No 27, 1954*, *supra* note 146 at 1455–56, 1459 (Neil J McKinnon, General Manager, The Canadian Bank of Commerce), 1470 (Mr. Tucker, member of the Committee) (11 May 1954). See also: The Canadian Bank of Commerce, "Brief", *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1094 (Table 1 "Classification of Loans").

During this same period, in 1938, the Standing Committee on Banking and Commerce inquiring into the consumer credit industry debated whether Parliament "should encourage the chartered banks to expand their personal loan services".[299] The Committee concluded, however, that the effect on general banking policy and the risk to the Canadian economy rendered such a proposal untenable. "The Canadian banking system is generally regarded as organized to finance industrial productive effort and facilitate the movements of trade and commerce; and, as illustrated by the restriction of loans on real estate, banking regulations are expressly designed to maintain the liquidity of banking assets."[300] The prohibitions on long-term lending secured by real and chattel mortgages and other restrictions to consumer lending reflected the traditional view that, in the event of a financial crisis, "a bank's assets should be kept very liquid to ensure the safety of its note and deposit liabilities."[301]

Despite these concerns, banks timidly entered the nascent consumer credit industry. Personal loans granted by local branches represented, on average, $224.6 million per year or 7.37% of total loans granted by chartered banks in Canada during the five-year period between 1948 and 1953.[302] In 1954, the President of the Canadian Bankers' Association informed the Standing Committee on Banking and Commerce that all banks in Canada were involved in the personal loan industry but that The Canadian Bank of Commerce had specialized in the field.[303] According to the documentation submitted by The Canadian Bank of Commerce, personal loans were requested for medical, dental and hospital bills; the consolidation of debts; monthly real property expenses; travel and education; house improvement; clothing; and motor vehicles.[304] Between 1936 and 1953, the average

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[299] *Journals of the House of Commons*, *supra* note 178 at 399 (1 June 1938).
[300] *Ibid* at 397 (1 June 1938).
[301] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 115.
[302] The Canadian Bank of Commerce, "Brief", *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1098 (Table 6 "Loans to Individual Borrowers").
[303] Canada, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence, No 21*, 22-1, vol 2, (1954) at 975 (6 April 1954) (T H Atkinson, President, Canadian Bankers' Association) (House of Commons Standing Committee on Banking and Commerce) [*Minutes of Proceedings and Evidence, No 21, 1954*].
[304] *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1064 (8 April 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce). See also: The Canadian Bank of Commerce, "Brief", *ibid* at 1094 (Table 1 "Classification of Loans").

amount of a loan was $260, but this increased to $515 in 1958, which was explained by higher wages and salaries along with the increased costs of goods and services.[305] In addition, personal loans were mostly used in urban areas where the population was largely composed of wage earners and salary earners.[306] In comparison, the majority of financial consumers in rural regions were farmers who could borrow on their own name at the local bank branch.[307]

Consumer loans were extended by chartered banks pursuant to the credit standing of the borrower and often required security in the form of a negotiable instrument or one or two endorsers (co-signors) or guarantors, since banks were forbidden from directly taking chattel mortgages.[308] Until the *Bank Act* revision of 1954, it was generally considered that banks were unable to lend on the security of household property or motor vehicles for personal use. The *Bank Act* specifically prohibited chartered banks from lending money upon "the security, mortgage or hypothecation of any lands, tenements or immovable property" and "the security of any goods, wares and merchandise".[309]

Despite these lending restrictions, The Canadian Bank of Commerce's 18 years of experience with the Personal Loan Plan demonstrated that chartered banks could provide loans at a lower cost to the consumer than other small loan companies, but that "authority to take security in the form of chattel mortgages [was] a necessary condition to the providing of comprehensive personal loan facilities".[310] In comparison with other lending companies, the growth of consumer lending by chartered banks stagnated since consumers, embarrassed to have to ask a non-family member to act as guarantor, often preferred to pay

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[305] The Canadian Bank of Commerce, "Brief", *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1096 (Table 3 "Classification of Loans").

[306] *Ibid* at 1072 (8 April 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce). See also: The Canadian Bank of Commerce, "Brief", *ibid* at 1095 (Table 2 "Classification of Loans").

[307] *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1072 (8 April 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce).

[308] *Minutes of Proceedings and Evidence, No 21, 1954*, *supra* note 303 at 975 (6 April 1954) (T H Atkinson, President, Canadian Bankers' Association).

[309] *Bank Act, 1952*, *supra* note 258, s 75(2)c). See also *Ball v Royal Bank of Canada* (1915), 52 SCR 254, 1915 CanLII 587; *An Act respecting Banks and Banking*, SC 1913, c 9, s 76(2)c).

[310] *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1068 (8 April 8 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce). See also: The Canadian Bank of Commerce, "Brief", *ibid* at 1106.

higher interest rates for services offered by small loan companies that accepted personal property security.[311]

At the request of The Canadian Bank of Commerce and upon a recommendation from the City of Toronto and without any objection from the Canadian Bankers' Association,[312] the 1954 legislative reforms excluded this legal prohibition on banking activities. The wording of this new authorization was as follows:

> the lending of money or the making of advances upon the security (whether by way of mortgage, transfer or otherwise) of household property, that is to say, motor vehicles and any personal or movable property for use in or about dwellings and lands and buildings appurtenant thereto, to any individual other than a manufacturer thereof or dealer therein, or to the purchase, subject to a right of redemption, of such household property from any such individual.[313]

With the 1954 reforms, banks acquired the right to take chattel mortgages and real property mortgages insured by the Central Mortgage and Housing Corporation pursuant to the *National Housing Act*, thereby facilitating their full-scale and successful entry into the consumer credit industry.[314]

Interestingly, until these reforms, chartered banks were not particularly interested in consumer loans, given the seemingly higher risk and administrative costs involved in non-secured loans and the lower levels of profitability.[315] Even The Canadian Bank of

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[311] *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1068 (8 April 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce).

[312] Canada, Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence, No 23*, 22-1, vol 2, (1954) at 1111 (27 April 1954) (House of Commons Standing Committee on Banking and Commerce) [*Minutes of Proceedings and Evidence, No 23, 1954*]; *Minutes of Proceedings and Evidence, No 27, 1954*, *supra* note 146 at 1476 (11 May 1954) (T H Atkinson, President, Canadian Bankers' Association).

[313] *Bank Act*, SC 1953–1954, c 48, s 75(6) [*Bank Act, 1953-54*]. Re-enacted as *Bank Act*, RSC 1970, c B-1, s 75(1)c).

[314] *Bank Act, 1953-54*, *supra* note 313, s 75(2): Banks were still prohibited from lending money or making advances upon the security of real or immovable property pursuant to s 75(2)(d) except as authorized by the *National Housing Act, 1954*, SC 1953-54, c 23, the *Farm Improvement Loans Act*, RSC 1952, c 110 or the *Veteran's Business and Professional Loans Act*, RSC 1952, c 278). See also JV Poapst, "The National Housing Act, 1954" (1956) 22:2 Can J Economics & Political Science 234.

[315] *Minutes of Proceedings and Evidence, No 27, 1954*, *supra* note 146 at 1478 (11 May 1954) (T H Atkinson, President, Canadian Banker's Association). According to the submission of The Canadian

Commerce, in its submission to the Standing Committee on Banking and Commerce, indicated that "an extension of this plan would not produce a lot of profit for the banks, but it would improve public relations and bring more people into the banks and provide a public service which […] would be well worth while."[316]

Although there were attempts by The Canadian Bank of Commerce to increase the maximum interest rate in the *Bank Act* relating to personal loans in 1944 and 1954, the Canadian Bankers' Association, which represented all Canadian chartered banks, had not sought such reforms.[317] Ten years later, the industry's position changed drastically when it provided its submissions to the Royal Commission on Banking and Finance. During this period, chartered banks discovered the "attractive higher-yielding outlets such as personal loans in which to employ their funds" and, though they had once been reluctant, now entered the consumer credit industry with vigour and determination.[318] With the enhanced flexibility that occurred following the 1954 reforms, the banks moved aggressively into the field of consumer credit transactions to the extent that the old method of personal banking, involving the discount of promissory notes guaranteed by friends or relations of the customer was almost completely superseded by modern security lending procedures followed by the banks, in common with other consumer credit grantors.[319]

As a result, the "banks' share of the consumer loan market […] increased to the point where they are the largest lenders in the field."[320] According to the 1964 Report of the Royal Commission on Banking and Finance, "[s]ince 1945 chartered bank lending to individuals

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Bank of Commerce the average yearly profit of their Personal Loan Plan for the previous18 years was approximately $54,000: *Ibid* at 1463 (24 March 1954).

[316] *Ibid* at 1453 (11 May 1954) (Neil J McKinnon, General Manager, The Canadian Bank of Commerce).

[317] *Minutes of Proceedings and Evidence, No 22, 1954*, *supra* note 293 at 1077 (8 April 1954) (Neil J McKinnon, General Manager, The Canada Bank of Commerce); *Minutes of Proceedings and Evidence, No 27, 1954*, *supra* note 146 at 1449–74 (Neil J McKinnon, General Manager, The Canada Bank of Commerce), 1480 (T H Atkinson, President, Canadian Banker's Association) (11 May 1954).

[318] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 128; R M MacIntosh, "The 1967 Revision of the Canadian Banking Acts Part II: A Banker's View" (1968) 1:1 Can J Economics 91 at 91 [MacIntosh, 1968].

[319] RM MacIntosh, "The Bank Act Revision of 1954" in *Money and Banking in Canada*, EP Neufeld, ed (Toronto: McClelland & Stewart, 1964) 299 at 305-5 referred to in Bradley Crawford, *Crawford and Falconbridge Banking and Bills of Exchange*, (Canada Law Book: Toronto, 1986) vol 1, no 106 at 144.

[320] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 127.

ha[d] jumped from $269 million to $2,573 million, accounting for 32% of the increase in the banks' loans and holdings of non-government securities."[321] During this same period, the number of chartered banks was reduced to eight with five of them having a national branch system. Two other banks operated only in Québec with the eighth chartered bank having branches only in Montréal, Toronto and Vancouver.[322]

The Royal Commission noted in its report that the industry lobbied aggressively to remove the remaining legal barriers in order to expand and diversify their financial services to consumers, notably conventional residential mortgages and consumer loans.[323] The banks argued that the maximum permitted loan rate "precludes them at times from [an] attractive lending business, distorts markets by concentrating excessive demands on them when market rates exceed six per cent, and reduces their ability to compete for deposits with other institutions to whom the ceiling does not apply."[324] Moreover, with the strong upward shift in interest rates and banks' decisive entry into the consumer credit market, chartered banks "finally reached a point where the 6 per cent ceiling was a serious competitive disadvantage".[325]

The Royal Commission ultimately agreed that a "broader range of lending powers should be granted to all-banking institutions" and justified this recommendation as follows: "[o]ur financial system has developed to the point where a measure intended to protect smaller borrowers now works against them by denying them access to bank funds and sending them elsewhere to borrow at interest rates which are often well in excess of the rates which banks would charge."[326]

Strengthened by the Royal Commission's recommendations, chartered banks continued their successful lobbying for the elimination of the maximum interest rate of 6% during the legally mandated legislative revisions of the *Bank Act* that followed. As a result, the

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[321] *Ibid* at 126.
[322] *Ibid* at 113.
[323] *Ibid* at 115–16.
[324] *Ibid* at 116.
[325] MacIntosh, 1968, *supra* note 318 at 91.
[326] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 129, 563.

inhibiting influence on consumer financial services induced by the statutory limitation of 6% interest upon chartered banks was finally eliminated in 1967.[327] Nonetheless, "[c]ertain corporations by their individual charters [remained] restricted as to the rate of interest they may take" and were not affected by these statutory revisions.[328]

Along with the liberalization of consumer lending regulation previously imposed on chartered banks, Parliament nonetheless expanded the *Interest Act* disclosure requirements by enacting limited banking disclosure and transparency requirements as part of the 1967 banking legislative reforms.[329] The new compulsory disclosure requirements were limited to loans of up to $25,000 and established rules for the calculation and disclosure to consumers of the cost of borrowing as defined in the Act, which were further nuanced by the *Bank Cost of Borrowing Disclosure Regulations*.[330] This new type of regulation and its evolution is further discussed in Section 6.3.1 of this dissertation.

The above analysis of the regulatory framework of consumer financial services offered by chartered banks reveals that, despite Parliament's continued concern for the financial well-being of consumers and their need for protection against abusive lending practices, it had progressively, during the first 100 years since Confederation, essentially eliminated all lending restrictions protecting financial consumers with the exception of the above-noted limited disclosure requirements.

3.3 Conclusion

Inspired by Jacob Ziegel's 2010 article "Consumer Insolvencies, Consumer Credit, and Responsible Lending", which briefly explored some of the same statutes, this chapter

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[327] *Bank Act*, SC 1966-67, c 87, s 91(2)-(8), expired 31 December 1967, pursuant to SOR/67-329, 101 Can Gazette, Part 2 at 1069 [*Bank Act, 1966-67*].

[328] Read, *supra* note 49 at 93.

[329] *Bank Act, 1966-67*, *supra* note 327, s 92; Pitch, *supra* note 66 at 327. See also Bill S-2, *Finance Charges (Disclosure) Bill*, *Senate Debates,* 5th Sess, 24th Parl, 1962 (first reading 31 January 1962) at 43, reintroduced as Bill S-3, *Finance Charges (Disclosure) Bill*, *Senate Debates*, 1st Sess, 25th Parl, 1962 (first reading 4 October 1962) at 30.

[330] *Bank Act, 1966-67*, *supra* note 327, s 92; *Bank Cost of Borrowing Disclosure Regulations*, SOR/67-504, s 10. See also: Ziegel, 1968, *supra* note 216 at 495.

provides the first in-depth historical analysis of Canada's federal legislation relating to consumer credit. Contrary to previous historical studies of specific acts, such as the *Bank Act* and the *Interest Act*, this chapter provides a clear picture of Parliament's various attempts to protect financial consumers and regulate consumer credit since Confederation.

At the end of the first century following Confederation, the Special Joint Committee on Consumer Credit invoked the persistent problems stemming from consumer credit, which have plagued parliamentary debates since the creation of the new Dominion: access to consumer credit and disclosure of the cost of a loan.[331]

The first critical issue was the availability and accessibility to consumer credit, especially for "low-income families who are from time to time in desperate need of credit for necessary goods or services".[332] During the first century following Confederation, Parliament repeatedly addressed the needs of vulnerable necessitous borrowers by securing their access to credit. The initial regulatory framework recognized that money lending was a legitimate industry through the licensing of money lenders and consumer loan companies. Subsequently, the deregulation of banking financial services in 1954 and 1967 removed the remaining constraints on the chartered banks' lending capacity to consumers. These legislative measures contributed significantly to the unrelenting growth of the consumer credit industry and its importance to the financial and economic stability and growth of the country and the welfare of Canadian households as previously mentioned in Chapter 1.[333]

Parliament also attempted to address the second problem of consumer overindebtedness created by the "troubles besetting those who buy on credit without understanding the price they are paying for borrowing."[334] Early provisions in the *Interest Act* required disclosure of the annual interest rate in the contract if it was higher than 6% and other relevant

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[331] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 3.
[332] *Ibid*.
[333] *Report of the Royal Commission on Banking and Finance, 1964*, *supra* note 134 at 14. See also Poonam Puri & Andrew Nichols, "Developments in Financial Services Regulation: A Comparative Perspective" (2014) 55 Can Bus LJ 454 at 460; Emilio S Binavince & H Scott Fairley, "Banking and the Constitution: Untested Limits of Federal Jurisdiction" (1986) 65:1 Can Bar Rev 328 at 333.
[334] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 3.

legislative enactments restricted the annual interest rate that consumer lenders were able to charge on loans. These statutory provisions proved ineffective, however, given the ease with which lenders could circumvent the interest rate restrictions on consumer loans, rendering ineffectual and therefore futile any disclosure initially made to the consumer. As a countermeasure, Parliament included a comprehensive definition of the "cost" of the loan in the *Small Loans Act* to prohibit discounting, compounding or charging of additional fees and expenses.

Although the legislative strategy to define the "cost of borrowing" was implemented again in the 1967 banking legislative reforms, the failure of Parliament to modernize the *Small Loans Act* represented an abdication of its responsibility to regulate all lenders in the consumer credit industry for the protection of all financial consumers. Consequently, with the exception of a short period during which the *Small Loans Act* was economically relevant, initial federal legislation was a complete failure from a consumer protection perspective.[335] It is also worth noting that the report of the Special Joint Committee on Consumer Credit conclusively confirmed in 1967 that consumer credit remained a problem and that federal legislation "leaves much to be desired."[336] Indeed, the justification for the repeal of the *Small Loans Act* was that "necessitous borrowers" were now protected from credit lenders, with the exception of illegal lenders such as loan sharks. However, as the level of indebtedness and the rate of consumer insolvencies demonstrated in Chapter 1, the reality is quite different.

Given the evident loopholes and lack of enforcement, the absence of a federal licensing requirement for all money lenders as well as the impact of inflation and the absence of any substantive reform, consumer credit in Canada was essentially unregulated for nearly 100 years.[337] Although there was an unsuccessful attempt in the 1970s, which is further explored in Chapter 6, no other comprehensive financial consumer protection legislation reform has been introduced to date by the federal government to regulate all forms of credit

[335] *Ibid* at 32; Waldron, 2011, *supra* note 117 at 303–07.
[336] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 7.
[337] Ziegel, 1966, *supra* note 51 at 106–07.

products and services or all types of credit grantors, including provincially regulated companies. Considering the state of affairs and the lack of consumer protection, and despite the federal constitutional jurisdiction over interest and banking, provincial governments rose to the occasion to enact various consumer protection statutes which are examined in Chapter 5.

The question arises, however, as to why Parliament shied away from its responsibility to protect financial consumers. The answer is found, in part, in the Special Joint Committee on Consumer Credit's description of Parliament's role and responsibility to regulate the consumer credit industry, contained in its 1967 Report:

> We are convinced that consumer credit has become a major industry, standing on its own feet, and in the words of an expert witness, "separate and apart from the sales which underlie it." It has, to a considerable extent, replaced money as the means by which the average man acquires what he needs for daily living and what luxuries he is able to secure. In view of these developments, the former Superintendent of Insurance put the interests of the Committee well in these words: "the various kinds of consumer credit, the sources of it, and especially the cost of it; perhaps, more particularly still, the ways in which the cost can be controlled or influenced by legislation designed to ensure that the public is not charged an exorbitant cost."[338]

As discussed in this chapter, federal legislation was initially limited to controlling the cost of borrowing through the regulation of specific rates of interest. However, during the first 100 years following Confederation, Parliament gradually expanded its legislative framework to better protect financial consumers by regulating a new consumer credit industry, which progressively gained a strong foothold not only in the financial services market but also in the economy as a whole.

It thus becomes evident that Parliament's doubts, misgivings and hesitation to fully regulate the field of consumer credit stem from the uncertainty of its constitutional power to regulate these matters relating to its federal jurisdiction over interest. Serious concerns have repeatedly been raised as to the constitutional authority to legislate on matters relating

[338] *Report of Special Joint Committee on Consumer Credit, 1967*, *supra* note 104 at 7.

to consumer credit that do not fall under the federal legislative power over interest.[339] In response, the Department of Justice provided a legal opinion to the Parliamentary Committee in 1938 with the following conclusions:

> That a project for the regulation of money lenders which would fall short of complete control would probably be inadequate and almost useless. […] [T]he projected provisions [of the Small Loans Act] are justifiable, constitutionally, first, as being legislation in relation to interest, or as being indispensably or reasonably ancillary to interest legislation.
>
> The differentiation between true interest charges and service charges is so difficult (they are in many cases probably indistinguishable) and the possibility of disguising interest as other charges is so great that it becomes indispensably or reasonably necessary to regulate or fix these charges in order to make good the interest restriction and there appears to be no reason why the ancillary doctrine may not be relied on notwithstanding that the restriction of the rate of interest and the ancillary restriction of the service charges are contained in one and the same restrictive regulation.[340]

Despite these assurances, doubts remained and potential references to the Supreme Court were regularly discussed during parliamentary proceedings. In light of the ambiguity surrounding the constitutional framework governing the regulation of consumer credit, the next chapter of this dissertation proposes to clarify Parliament's constitutional jurisdiction over consumer credit before analyzing current provincial and federal legislation protecting financial consumers in Chapters 5 and 6.

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[339] See e.g. *Report of the Superintendent of Insurance, 1936*, *supra* note 104 at 1, 117; Canada, House of Commons, *Report of the Committee on the Subject-matter of Bill C-16,"The Borrowers and Depositors Protection Act"*, 30-2 (6 July 1976) at 49-14–49-19.

[340] Canada, *Proceedings of the Standing Committee on Banking, Trade and Commerce*, "Report of the Committee on its Inquiry into Small Loans Companies, Including Draft Bill Intituled 'An Act Respecting Interest on Small Loans'", *Journals of the House of Commons*, *supra* note 178 at 402 (1 June 1938).

CHAPTER 4: Reconsidering Legislative Competence Over Consumer Credit

4.1 Introduction

The objective of this chapter is to determine whether a national regulatory scheme can be developed and adopted by Parliament to reduce our collective vulnerabilities and protect individual consumers from abusive and negligent lending practices as well as from unnecessary overindebtedness and insolvency. Similar to any banking law reform,[1] the division of responsibility for the regulation of consumer credit between the provincial and federal governments has been perceived as an obstacle to legislative reform. As explained by Ronald Cuming, "[s]ince there was no consumer credit industry in Canada in the 1860s when the Canadian constitution was written, the division of legislative jurisdiction set out in it has not been conducive to the development of an integrated, universal body of consumer credit law for Canada".[2]

With Parliament's refusal to legislate to the full limit of its power in relation to consumer credit and with a policy of progressive abandonment of its consumer protection[3] responsibilities pursuant to its constitutional jurisdiction over interest[4], as Chapter 3 revealed, a legal analysis of the federal government's constitutional authority to regulate this growing industry will be crucial before engaging in any dialogue. A better understanding of the distribution of legislative authority between Parliament and provincial legislatures will provide a constitutional framework for reflections on the future of consumer credit legislative reform.

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[1] John F Chant & James W Dean, "An Approach to the Regulation of Banking Institutions in a Federal State" (1982) 20:4 Osgoode Hall LJ 721 at 721.

[2] Ronald C C Cuming, "Canada" in Royston Miles Goode, ed, *Consumer Credit* (Leyden/Boston: AW Sijthoff International Publishing, 1978) 186 at 193–94.

[3] Jacob Ziegel, "Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card" (2011) 50 Can Bus LJ 259 at 659–65 [Ziegel, 2011].

[4] Mary Anne Waldron, "The Federal Interest Act: It Sure is Broke, But is It Worth Fixin'?" (1997) 29:2 Can Bus LJ 161 at 161 [Waldron, 1997].

This chapter analyzes through a chronological approach the judicial interpretation given to the relevant heads of power to determine the scope and extent of federal power to legislate on subject matters related to consumer credit. Accordingly, the five relevant heads of power assigned to Parliament in relation to banking, bills of exchange and promissory notes, interest, bankruptcy and insolvency as well as criminal law will each be explored in turn.[5] The aim is not to analyze the merits or deficiencies of past or existing legislation but rather to reflect on judicial scrutiny of the constitutional validity of previously adopted legislation in an attempt to provide clarification and perhaps direction for future reform. The objective is to foster a better understanding of past and present perceptions of the scope of federal power over consumer credit within the appropriate legal and social context.

In moving forward with this research agenda, a brief summary of Canada's constitutional framework and relevant constitutional doctrines provides the proper historical and legal context that bears directly on the constitutional analysis of the federal power to regulate consumer credit undertaken in Section 4.2 of this chapter.

4.1.1 Canada's Constitutional Framework: Creating an Economic Union

Although consumer lending was in its infancy at the time of Confederation, one thing is clear: the framers of Confederation clearly assigned most legislative powers regarding the financial and economic well-being of the country as a whole as well as its individual citizens to the Parliament of the new dominion. Under Canada's constitutional legislation, sections 91 and 92 of the *Constitution Act, 1867* delineate the legislative authority of Parliament and of the provincial legislatures and assign to each "classes of subjects".

Accordingly, section 91 confers to Parliament the exclusive legislative authority on "all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" by sections 92 and 93 or concurrently assigned to both levels of government by sections 92A and 95. However, to promote the economic and financial

[5] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(15, 18, 19, 21 and 27), reprinted in RSC 1985, Appendix II, No 5.

welfare of Canada and "for greater Certainty" specific classes of subjects were assigned exclusively to Parliament relating to financial matters and the country's economy, such as the public debt and property[6], unemployment insurance[7], the regulation of trade and commerce[8], the raising of money by any mode or system of taxation[9], the borrowing of money on the public credit[10], currency and coinage[11], banking, incorporation of banks, and the issue of paper money[12], savings banks[13], bills of exchange and promissory notes[14], interest[15], legal tender[16] as well as bankruptcy and insolvency.[17]

From a judicial perspective, these heads of power reserved for Dominion legislation are "related to the general commercial and financial system of the country at large"[18] with "the prime object evidently being to secure a uniform commercial law for the Dominion".[19] Moreover, Justice Hudson of the Supreme Court of Canada referred to the above mentioned heads of power related to financial matters and stated that, read together, these have a cumulative effect much greater than if they were considered separately.[20] In 2011, the Supreme Court of Canada confirmed again in *Reference Re: Securities Act*, that the Constitution gives Parliament legislative powers to "promote the integrity and stability of the Canadian financial system".[21]

Likewise, in his treatise *Crawford and Falconbridge Banking and Bills of Exchange*, Bradley Crawford stated that "[t]he grouping of the foregoing heads of powers in the

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[6] *Ibid*, s 91(1A).
[7] *Ibid*, s 91(2A).
[8] *Ibid*, s 91(2).
[9] *Ibid*, s 91(3).
[10] *Ibid*, s 91(4).
[11] *Ibid*, s 91(14).
[12] *Ibid*, s 91(15).
[13] *Ibid*, s 91(16).
[14] *Ibid*, s 91(18).
[15] *Ibid*, s 91(19).
[16] *Ibid*, s 91(20).
[17] *Ibid*, s 91(21).
[18] *Lynch v The Canada North-West Land Co* (1891), 19 SCR 204 at 225, 1891 CanLII 60 [*Lynch*].
[19] *Schultz v Winnipeg (City of)*, 1889 CanLII 127 at 51, 270 Man LR 269 (MBCA) [*Schultz*].
[20] *Reference Re Alberta Statutes—The Bank Taxation Act*, [1938] SCR 100 at 162, 1938 CanLII 1 [*Alberta Reference, 1938*].
[21] *Reference re Securities Act*, 2011 SCC 66 at para 46 [*Securities Reference 2011*].

federal sphere provides a strong indication of an intention on the part of the draftsmen to bestow upon the Parliament of Canada responsibility for the basic economic order within the country, the arrangement of the market place and the responsibilities of the participants in it".[22] Other commentators and academics have described the reason for the centralization of these exclusive heads of federal jurisdiction as "a concern with uniformity and the free circulation of investment capital within the dominion",[23] with the "national economy",[24] with "an orderly and uniform financial system for the new Dominion, subject to national jurisdiction and control".[25] Already in 1858, legislative debates confirm that the new Province of Canada's Legislature recognized the importance of harmonizing commercial legislation.[26]

Parliament's objective to create an economic union through a uniform commercial, financial and banking system is evidenced by the numerous laws adopted early on for the new Dominion. A review of Parliament's first Revised Statutes of 1886 reveals the sustained effort to fulfill this desire to unify the country via commercial and financial legislation by the adoption of the *An Act Respecting Government Savings Banks*,[27] *An Act Respecting Certain Savings Banks in the Provinces of Ontario and Quebec*,[28] *An Act Respecting Returns by Certain Persons and Corporations Receiving Moneys on Deposit at*

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[22] Bradley Crawford, *Crawford and Falconbridge Banking and Bills of Exchange* (Toronto: Canada Law Book, 1986) at 37 [Crawford, 1986]. See also Benjamin Geva, "Payment Law: Legislative Competence in Canada" (2015) 31 BFLR 1 at 31.

[23] Mary Anne Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at 18 [Waldron, 1992].

[24] M H Ogilvie, "Canadian Western Bank v. Alberta: Cooperative Federalism and the End of Banking" (2008) 47 Can Bus LJ 75 at 75 [Ogilvie, 2008].

[25] Emilio S Binavince & H Scott Fairley, "Banking and the Constitution: Untested Limits of Federal Jurisdiction" (1986) 65:1 Can Bar Rev 328 at 329. See also Denis Nadeau, "L'intérêt de l'argent en droit constitutionnel canadien" (1985) 16:1 RDUS 1 at 19: "l'attribution de la compétence législative sur l'intérêt au Parlement fédéral s'inscrivait dans une volonté de centraliser la politique de crédit sur la plan national et visait ainsi à éviter que les taux d'intérêt varient selon les provinces".

[26] *Le Journal des Débats Iégislatifs et littéraires du Canada*, vol 1, n^0 1 (3 mars 1858) at 4. See also Jean Leclair, "La Constitution par l'histoire: Portée et étendue de la compétence fédérale exclusive en matière de lettres de change et de billets à ordre" (1992) 33 C de D 535 at 593–94, 610.

[27] *Government Savings Banks*, RSC 1886, c 121.

[28] *An Act Respecting Certain Savings Banks in the Provinces of Ontario and Quebec*, RSC 1886, c 122; RSC 1906, c 32 as repealed by *The Quebec Savings Banks Act*, 1913, c 42; RSC 1927, c 14.

Interest,[29] *Act Respecting Insurance,*[30] and *An Act Respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Companies*.[31]

More importantly, federal regulation of credit and money lending was undertaken by the adoption of various acts such as *An Act Respecting Pawnbrokers*,[32] *An Act Respecting Interest*,[33] *An Act Respecting Loans in Canada by British Companies*,[34] *Act Respecting the Incorporation of Joint Stock Companies by Letters Patent*, with sections 86-103 dealing with loan companies,[35] *An Act respecting Bills of Exchange and Promissory Notes*[36] and *An Act Respecting Banks and Banking*.[37] Although personal loans were not yet a pressing issue, initial legislative history reveals that Parliament's clear objective was not only to protect and develop Canada's economy and financial system but also to protect borrowers

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[29] *An Act Respecting Returns by Certain Persons and Corporations Receiving Moneys on Deposit at Interest*, RSC 1886, c 126.

[30] *Act Respecting Insurance*, RSC 1886, c 124.

[31] *An Act Respecting Insolvent Banks*, *Insurance Companies, Loan Companies, Building Societies, and Trading Companies*, RSC 1886, c 129.

[32] *An Act for the regulation of Pawnbrokers and Pawnbroking*, SC 1851 (14 & 15 Vict), c 82; *An Act Respecting Pawnbrokers and Pawnbroking*, CSC 1859, c 61 [*Pawnbrokers Act*]; *An Act Respecting Pawnbrokers*, RSC 1886, c 128 [*Pawnbrokers Act, 1886*]; RSC 1906, c 121; RSC 1927, c 152; RSC 1952, c 204; RSC 1970, c P-5 as repealed by *Miscellaneous Statute Repeal Act*, SC 1980-81-82-83, c 159, in force on December 1, 1983 and replaced in part by the usury provisions of the *Criminal Code*, RSC 1985, c C-46.) [*Pawnbrokers Act*].

[33] *An Act respecting Interest*, CSC 1859 (22 Vict), c 58 [*Interest Act, 1859*]; *An Act Respecting Interest*, RCS 1886, c 127, ss 1, 2; (ss 9-30 as repealed by SC 1890 (53 Vict), c 34) [*Interest Act, 1886*]; RSC 1906, c 120 (s 4 disclosure requirement); RSC 1927, c 102; RSC 1952, c 156; RSC 1970, c I-18; *Interest Act*, RSC 1985, c I-15 [*Interest Act*].

[34] *An Act Respecting Loans in Canada by British Companies*, SC 1874, c 34 [*British Loan Companies Act*]; RSC 1886, c 125; consolidated in the *Companies Act*, RSC 1906, c 69, ss 258–68 [*British Loan Companies Act*].

[35] *The Companies Act*, RCS 1886, c 119, ss 86–103 (Loan Companies) [*Companies Act, 1886*]; *Loan Companies Act*, SC 1899 (62 & 63 Vict), c 41; *Companies Act*, RSC 1906, c 79, s 177–258 (Loan Companies); *The Loan Companies Act, 1914*, SC 1914, c 40 [*Loan Companies Act, 1914*]; RSC 1927, c 27; RSC 1952, c 170; RSC 1970, c L-12; RSC 1985, c L-12 [*Loan Companies Act*].

[36] *An Act to amend and explain the Acts therein mentioned relative to Promissory Notes and Bills of Exchange, and to limit the sum to be allowed fro the expenses of noting and protesting Bills and Notes, in certains cases, under the Act to regulate the damages on protested Bills of Exchange within this Province*, S Prov C 1850 (13 & 14 Vict), c 23; CSC 1859 (22 Vict), c 57; *An Act respecting Bills of Exchange and Promissory Notes*, RCS 1886, c 123 [*Bills of Exchange Act, 1886*] (this Act simply inventoried existing legislation in the colonies prior to Confederation)*; Bills of Exchange Act*, RCS 1906, c 119; RSC 1927, c 16; RSC 1952, c 15; RSC 1970, c B-5, RSC 1985, c B-4 [*Bills of Exchange Act*].

[37] *An Act respecting Incorporated Banks*, CSC 1859, c 54; *An Act respecting Banks*, SC 1867, c 11; *The Bank Act*, RCS 1886, c 120 [*Bank Act, 1886*] as repealed and replaced by SC 1890, c 32, s 104; RSC 1906, c 29; RSC 1927, c 12; RSC 1952, c 12; RSC 1970, c B-1, *Bank Act*, RSC 1985, c B-1; *Bank Act*, SC 1991, c 46 [*Bank Act*].

from abusive treatment by lenders.[38] Access to commercial credit upon reasonable terms was prioritized by the regulation of credit, money lending, loan companies, pawnbrokers, bills of exchange, promissory notes, interest, banks and banking services.

At first glance, it would therefore seem that matters in relation to money lending, such as consumer credit, would fall under the powers invested to Parliament by section 91 of the *Constitution Act, 1867*. It must be remembered, however, that the Dominion of Canada was created by the delegation by the individual British colonies on the North American continent of specific powers to a centralized government. As a result, the assignment of most subjects relating to financial and commercial matters to Parliament must be considered in conjunction with the important powers, including those relating to contracts and property, remaining under provincial jurisdiction pursuant to section 92. In particular, the provincial heads of power in relation to "Incorporation of Companies with Provincial Objects", "Property and Civil Rights in the Province" and "Matters of a merely local or private Nature in the Province"[39] have been held to include consumer protection law,[40] real and personal property security law,[41] as well as rights arising from contract.[42] Considering the large interpretation given to the provincial head of power over property and civil rights, it can be fair to say that all matters of private law fall to the provincial legislatures with the exception of the specific legislative powers given to Parliament pursuant to section 91.[43]

With regards to consumer credit, the Supreme Court of Canada has repeatedly confirmed the provinces' authority to adopt consumer protection legislation that specifically and expressly deals with consumer credit. For example, a majority of the Court confirmed, in the absence of any applicable federal legislation, the constitutional validity of consumer protection legislation relating specifically to "money lent"[44] and relief against harsh and

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[38] Waldron, 1997, *supra* note 3 at 164.
[39] *Constitution Act, 1867*, *supra* note 5, s 92 (11), (13), (16).
[40] *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 74 [*Marcotte*].
[41] *Bank of Montreal v Hall*, [1990] 1 SCR 121 at para 13, 1990 CanLII 157 [*Hall*].
[42] *Citizens Insurance Co of Canada v Parsons*, [1881] UKPC 49, 7 App Cas 96 at 100 [*Citizens Insurance*]. See also Peter W Hogg, *Constitutional law of Canada*, 5th supp (Toronto: Thomson/Carswell, 2007) (loose-leaf revision 19 May 2023), ch 21 at 21-29.
[43] Leclair, *supra* note 26 at 547–48.
[44] *The Unconscionable Transactions Relief Act*, RSO 1960, c 410 [*ON-UTRA, 1960*].

unconscionable money lending contracts,[45] as well as general consumer protection legislation that imposes various rules on the content and disclosure of charges and fees in contracts extending variable credit, such as credit card contracts.[46] Provincial powers further included the incorporation of provincial companies participating in the credit industry unless expressly prohibited by Parliament.[47]

Given the foregoing, the regulation of contracts, such as loans or other types of credit agreements, would therefore seem to be a provincial matter unless it has been exclusively assigned to Parliament under a subject matter enumerated in section 91 of the *Constitution Act, 1867*. Notwithstanding the extent of civil rights, recognized by the Judicial Committee of the Privy Council, the Supreme Court of Canada has nonetheless confirmed Parliament's exclusive jurisdiction on various matters falling within property and civil rights, such as interest, bills of exchange and promissory notes that have been assigned to Parliament pursuant to section 91 of the *Constitution Act, 1867*.[48] Furthermore, section 91 clarifies that any matter coming within the classes of subjects assigned to Parliament "shall not be deemed to come within the Class of Matters of a local or private Nature" found at subsection 92(16). In other words, the "legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92".[49]

Federal jurisdiction over consumer credit therefore depends on whether it relates to specific heads of power enumerated under section 91 of the *Constitutional Act, 1867*. As previously mentioned, Section 4.2 of this chapter proposes to explore five relevant heads of power. In the hopes of establishing some basic concepts early and avoiding lengthy explanations and

[45] *Ontario (AG) v Barfried Enterprises Ltd*, [1963] SCR 570, 1963 CanLII 15 [*Barfried Enterprises*].
[46] *Marcotte v Fédération des caisses Desjardins du Québec*, 2014 SCC 57 at para 21 [*Desjardins*].
[47] *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan* (1979), [1980] 1 SCR 433, 1979 CanLII 180 [*Canadian Pioneer*]; *infra*, note 174.
[48] *Triglav v Terrasses Jewellers Inc*, 1983 CanLII 138, [1983] 1 SCR 283 at 291–92; *Clark v Canadian National Railway Co*, 1988 CanLII 18, [1988] 2 RCS 680 at 695.
[49] *Reference Re: Fisheries Act, 1914 (Can)*, [1930] AC 111 at para 9, [1930] 1 DLR 194; *Tennant v Union Bank of Canada*, (1893), [1894] AC 31, [1893] UKPC 53 [*Tennant*].

repetition in Section 4.2, the next subsection reviews applicable constitutional doctrines in order to determine the constitutional validity of statutes from a division of powers perspective and upon which subsequent development may confidently be rested.

4.1.2 Constitutional Doctrines

According to the Supreme Court of Canada, the first step to determine whether a law falls within a particular head of power is the "pith and substance analysis", which "looks at the *purpose* and *effects* of the law to identify its 'main thrust'".[50] Once the main thrust of the statute is established, discounting any incidental effects, the second step of the inquiry is the classification stage, which entails the interpretation of the scope of the power; that is "whether the legislation so characterized falls under the head of power said to support it. […] If the main thrust of the legislation is properly classified as falling under a head of power assigned to the adopting level of government, the legislation is *intra vires* and valid".[51] During this first step, the court has to take a "progressive approach to ensure that Confederation can be adapted to new social realities" when identifying the head of power:

> The Court has on numerous occasions cited the "living tree" metaphor […] While the debates or correspondence relating to the constitutional amendment are relevant to the analysis as regards the context, they are not conclusive as to the precise scope of the legislative competence. They reflect, to a large extent, the society of the day, whereas the competence is essentially dynamic […]
>
> A progressive interpretation cannot, however, be used to justify Parliament in encroaching on a field of provincial jurisdiction.[52]

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[50] *Securities Reference 2011*, *supra* note 21 at para 63; *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 29, 1995 CanLII 64 [*RJR-MacDonald*]; *Quebec (AG) v Lacombe*, 2010 SCC 38 at para 20; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 53.

[51] *Securities Reference 2011*, *supra* note 21 at para 65; *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 15 [*Firearms Reference*].

[52] *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at 9 (citations omitted) [*Employment Insurance Reference*]; *Edwards v Canada (AG)*, [1930] AC 124 at 136, [1929] UKPC 86 (JCPC); *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 29 [*Marriage Reference*]; *Martin Service Station Ltd v MNR*, [1977] 2 SCR 996 at 1006, 1976 CanLII 208 [*Martin Service*]; *Canadian Western Bank v Alberta*, 2007 SCC 22 at 23 [*Canadian Western Bank*].

Initially, the doctrine of exclusiveness provided that federal abstinence from legislating or abandonment of responsibility of its legislative power did not permit a province to legislate on matters of federal jurisdiction. *Intra vires* provincial legislation within matters enumerated in section 92 of the *Constitution Act, 1867* was rendered invalid because it extended upon a federal matter.[53] However, in 1960, the Supreme Court of Canada firmly rejected the notion that a head of power "assumes a complete identity of subject-matter",[54] or that Parliament intended to "occupy the field" and recognized that areas of overlapping powers are unavoidable. "The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject."[55]

The doctrine of exclusiveness was also restricted in *Robinson v Countrywide Factors Ltd*,[56] when the majority of the Supreme Court of Canada concluded that, given their characterization of the impugned provincial legislation dealing with fraudulent preferences given by insolvent debtors, it remained *intra vires* of the province's authority notwithstanding the doctrine of exclusiveness and the exclusive federal head of power over insolvency and bankruptcy. Pursuant to the doctrines of paramountcy and double aspect doctrine, if federal legislation properly ancillary to federal matters extends to matters dealing with "property" or "civil rights", it overcomes existing valid provincial legislation, it bars future provincial legislation contra thereto but does not invalidate other valid provincial legislation based upon "property" and "civil rights".[57] Nevertheless, if the pith and substance of a statute does not fall within the enacting government's jurisdiction, the doctrine of exclusiveness will apply and render the law constitutionally invalid.

When legislation overlaps in division of powers disputes, the doctrine of paramountcy requires that provincial law gives way to federal law only in cases of operational conflict and the doctrine applies only to the extent of the conflict. In addition, duplication is not, on

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[53] *Union Colliery Co of British Columbia Ltd v Bryden*, [1899] UKLawRpAC 40, [1899] AC 580 at 588.
[54] *O'Grady v Sparling*, [1960] SCR 804 at 807, 1960 CanLII 70 [*O'Grady*].
[55] *Canadian Western Bank*, *supra* note 52 at para 74.
[56] *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753, 1977 CanLII 175 [*Robinson*].
[57] *Ibid* at 794.

its own, enough to trigger paramountcy.[58] These restrictions protect validly adopted provincial legislation that would otherwise have become inoperative when conflicting federal legislation applies. In *Alberta (AG) v Moloney*, the Supreme Court of Canada further clarified the applicable test: "A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment".[59] The Court warns, however, that "care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose. The mere fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area".[60] In *Orphan Well Association v Grant Thornton Ltd*, the majority of the Court insisted that the doctrine of paramountcy must be applied with "restraint":

> Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of 'very clear' statutory language to the contrary". "It is presumed that Parliament intends its laws to co-exist with provincial laws".[61]

Limiting the scope of federal paramountcy is also essential to avoid frustrating the double aspect doctrine which recognizes that both federal and provincial legislation may apply concurrently since "Canadian constitutional law has long recognized that the same subject or 'matter' may possess both federal and provincial aspects".[62] Ensuring that the policies

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[58] *Marcotte*, *supra* note 40 at para 80; *Hall*, *supra* note 41 at 151. The Supreme Court has repeatedly cited with approval the following passage from *Multiple Access Ltd v McCutcheon*, 1982 CanLII 55, [1982] 2 SCR 161 at 190 written by Justice Dickson (as he then was) on the concurrent application of duplicative federal and provincial legislation: "there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament".

[59] *Alberta (AG) v Moloney*, 2015 SCC 51 at para 18 [*Moloney*]. See also: *Marcotte*, *supra* note 40 at para 70; *Canadian Western Bank*, *supra* note 52 at para 73; *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 65 [*Orphan Well*].

[60] *Marcotte*, *supra* note 40 at paras 70–72; *Robinson*, *supra* note 56 at 808–09. Justice Beetz, citing with approval *Provincial Secretary of Prince Edward Island v Egan* [1941] SCR 396, 1941 CanLII 1; *Ross v Registrar of Motor Vehicles,* [1975] 1 SCR 5, 1973 CanLII 176 and *O'Grady*, *supra* note 54.

[61] *Orphan Well*, *supra* note 59 at para 66 [references omitted]. See also *Saskatchewan (AG) v Lemare Lake Logging Ltd*, 2015 SCC 53 at paras 21, 27 [*Lemare Lake*]; *Moloney*, *supra* note 59 at para 27.

[62] *Securities Reference 2011*, *supra* note 21 at para 66.

of the elected legislators of both levels of government are respected,[63] the double aspect doctrine recognizes that some matters cannot be categorized under a single head of power since they may involve by their nature both provincial and federal aspects.[64] "Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence."[65]

It is important to note that, given the overlapping of financial and commercial matters between the exclusive heads of legislative power distributed by sections 91 and 92, the scope of federal legislative authority over "Trade and Commerce" has also been narrowed down to interprovincial or international trade and commerce along with a limited general trade and commerce power in favour of greater provincial control of "property and civil rights", including the regulation of local trade and commerce and particular industries.[66] The second branch of the "modern" federal power over trade and commerce has been recently clarified in several decisions rendered by the Supreme Court of Canada. The Court reiterated in the *Securities Reference 2011* that in order to maintain constitutional balance between subsections 91(2) and 92(13) five indicia of federal competence must be considered to determine whether matters fall properly within the general interest branch of subsection 91(2):

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[63] *Canadian Western Bank*, *supra* note 52 at para 30.

[64] *Ibid*; *Securities Reference 2011*, *supra* note 21 at para 66; *Hodge v R*, [1883] UKPC 59 at 9–10, 9 App Cas 117 (JCPC); *Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749 at 765, 1988 CanLII 81.

[65] *Canadian Western Bank*, *supra* note 52 at para 30.

[66] *Citizens Insurance*, *supra* note 42 at 112–13:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. […] in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.

See also: *Reference Re: Reciprocal Insurance Act, 1922 (Ont)*, [1924] AC 328, 1924 CanLII 460 (UKJCPC); *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham: LexisNexis, 2013) at 233.

(1) whether the impugned law is part of a general regulatory scheme;
(2) whether the scheme is under the oversight of a regulatory agency;
(3) whether the legislation is concerned with trade as a whole rather than with a particular industry;
(4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and
(5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.[67]

The Court further confirmed in the *Securities Reference 2018* that "[a]lthough these inquiries are neither exhaustive nor determinative of a law's validity under the general trade and commerce power, affirmative answers to these questions will strongly suggest that the subject matter of a federal enactment is 'genuinely a national economic concern'".[68]

Several problems arise, however, when applying the general interest test to consumer credit. Firstly, the third criteria would favour a negative response given that only a particular industry would be involved. In addition, the Court specified that this head of power must aim to regulate the national economy and not laws "merely aimed at centralized control over a large number of local economic entities".[69] Although the indicia of validity are not exhaustive, the Supreme Court further stated:

> Provided the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory agency, it will fall under the general federal trade and commerce power if the matter regulated is genuinely national in importance and scope. To be genuinely national in importance and scope, it is not enough that the matter be replicated in all jurisdictions throughout the country. It must, to use the phrase in *General Motors*, be something that the provinces, acting either individually or in concert, could not effectively achieve. To put it another way, the situation must be such that if the federal government were not able to legislate, there

[67] *Securities Reference 2011*, *supra* note 21 at paras 76–80; *Reference re pan-Canadian securities regulation*, 2018 SCC 48 at para 103 [*Securities Reference 2018*]; *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 661–62, 1989 CanLII 133 [*General Motors*]; *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65, [2005] 3 SCR 302 at 315.

[68] *Securities Reference 2018*, *supra* note 67 at para 103 [references omitted]. See also: *Canada (AG) v Canadian National Transportation Ltd*, [1983] 2 SCR 206 at 268, 1983 CanLII 36 [*Canadian National Transportation*]; *General Motors*, *supra* note 67 at 662–63.

[69] *Securities Reference 2011*, *supra* note 21 at para 79; *Canadian National Transportation*, *supra* note 68 at 267.

> would be a constitutional gap. Such a gap is constitutional anathema in a federation.[70]

Not only is the consumer credit industry a specific branch of commercial or economic activity, but also considering the passive role of Parliament and the active role some provincial governments have played in the regulation of consumer credit to date, any federal regulation adopted pursuant to its head of power over trade and commerce would most likely meet the same defeat as the proposed federal *Securities Act*[71]. With this restriction to the power over trade in commerce in mind, this article's objective is to determine whether other federal heads of power may justify future national consumer credit regulation.

Given this objective, an analysis of the judicial interpretation of relevant heads of power assigned to Parliament requires a review of one additional constitutional doctrine. The doctrine of interjurisdictional immunity was developed to "prevent [valid] laws enacted by one level of government from impermissibly trenching on the 'unassailable core' of jurisdiction reserved for the other level of government" while respecting the "modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government". This doctrine requires an "impairment" of the core federal power and two criteria must be satisfied before the doctrine can be applied: "First, does the power to regulate [...a matter] lie at the core of federal jurisdiction over [… a federal matter]? Second, if so, do the provisions of the [… provincial statute] at issue significantly trammel or impair the manner in which the federal power can be exercised?"[72]

In *Canadian Western Bank*, the Supreme Court refused, however, to accept the sweeping immunity created by the federal head of power over banking and the incorporation of banks, as argued by the Bank, to exclude the application of provincial insurance legislation. The Court noted "the dangers of allowing the doctrine of interjurisdictional immunity to

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[70] *Securities Reference 2011*, *supra* note 21 at para 83.
[71] *Order to refer to the Supreme Court of Canada for hearing and consideration the proposed Canadian Securities Act,* PC 2010-667.
[72] *Marcotte*, *supra* note 40 at paras 62–64.

exceed its proper (and very restricted) limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine".[73] Furthermore, "[a] broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote".[74]

Likewise, in *Bank of Montreal v Marcotte,* the Supreme Court had to decide whether Québec's *Consumer Protection Act*[75] applied to federally incorporated financial institutions. Several class actions were launched to seek repayment of the conversion charges imposed by several credit card issuing financial institutions on credit card purchases made in foreign currencies, primarily on the basis that the conversion charges violated Québec's consumer protection legislation. The Court refused to conclude that the doctrine of interjurisdictional immunity rendered the provincial legislation inapplicable to credit card activities and warned that the doctrine must be applied with restraint and should in general be reserved for situations already covered by precedent.[76] "In the rare circumstances in which interjurisdictional immunity applies, a provincial law will be inapplicable to the extent that its application would 'impair' the core of a federal power. Impairment occurs where the federal power is 'seriously or significantly trammel[ed]', particularly in our 'era of cooperative, flexible federalism'".[77]

Finally, any application of the constitutional doctrines must take into account the principle of cooperative federalism, which protects, where possible, valid legislation within both fields of provincial and federal jurisdiction and, as previously mentioned, has restricted the scope of other constitutional doctrines.[78] The Supreme Court observed in *Canadian Western Bank*:

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[73] *Canadian Western Bank*, *supra* note 52 at para 42.
[74] *Ibid*.
[75] *Consumer Protection Act*, CQLR c P-40.1 [*QC-CPA*].
[76] *Marcotte*, *supra* note 40 at para 63; *Canadian Western Bank*, *supra* note 52 at paras 66–67.
[77] *Marcotte*, *supra* note 40 at para 64; *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 45 [*COPA*].
[78] *Marcotte*, *supra* note 40 at para 63; *Canadian Western Bank*, *supra* note 52 at para 37; *Husky Oil Operations Ltd v MNR*, [1995] 3 SCR 453 at paras 87, 162, 1995 CanLII 69 [*Husky Oil*]; *Employment*

> The "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. […]
>
> It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.[79]

Given the relative inexistence of consumer credit at that time of Confederation, it seems that both Parliament and provincial legislatures have substantial jurisdiction in the consumer credit area.[80] Commenting on the overlapping constitutional jurisdiction over consumer credit, Jacob Ziegel observed that in practice, "the federal government has not attempted to flex its full constitutional muscle in the consumer credit area and considerable leeway has been left to the provinces."[81] It is therefore within this constitutional framework that the most relevant federal subject matters assigned to Parliament are analyzed in order to determine whether the federal government may still "flex its full constitutional muscle" to reform and regulate on a national level the consumer credit industry.

4.2 Federal Legislative Power in Relation to Consumer Credit

4.2.1 Insolvency and Bankruptcy

Pursuant to the new Dominion Parliament's exclusive legislative powers in relation to matters dealing with insolvency and bankruptcy under subsection 91(21) of the

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Insurance Reference, *supra* note 52 at para 10; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44 at para 50, citing *General Motors*, *supra* note 67.

[79] *Canadian Western Bank*, *supra* note 52 at paras 37–38. See also *Orphan Well*, *supra* note 59 at para 66.

[80] Jacob S Ziegel, "Consumer Insolvencies, Consumer Credit, and Responsible Lending" in Janis P Sarra, ed, *Ann Rev Insolv L 2009* (Toronto: Carswell, 2010) 343 at 378 [Ziegel, 2010].

[81] *Ibid* at 386.

Constitution Act, 1867, the commercially based insolvency legislation of 1869[82] was adopted as a temporary four-year measure but extended twice in 1873 and 1874.[83] Although the federal Act was not applicable, the Judicial Committee of the Privy Council considered in *Union St. Jacques de Montreal v Bélisle* the scope of legislative competence in relation to bankruptcy and insolvency to determine the validity of provincial legislation enabling a provincial society to avoid bankruptcy:

> The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.[84]

Although Parliament had enacted federal insolvency legislation, Lord Selborne determined that the provincial Act relieving the defendant provincial society from financial distress and thus preventing its insolvency was held to be *intra vires* of the Province's legislative authority over matters of local or private nature in the province and "not an Act relating to bankruptcy and insolvency".[85]

Following the adoption of new federal legislation entitled *An Act respecting Insolvency*[86] in 1875, the Judicial Committee of the Privy Council confirmed in *Cushing v Dupuy* the constitutionality of the Act as well as Parliament's authority to interfere with provincial property and civil rights exclusively assigned to provincial legislatures and stated that it would be impossible to establish "a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting,

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[82] *An Act Respecting Insolvency,* SC 1869, c 16.

[83] Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, 2014) at 27.

[84] *Union St Jacques de Montreal v Bélisle*, [1874] LR 6 PC 31 at para 2, [1874] JCJ No 1.

[85] *Ibid* at para 4 [emphasis added]. In *Quirt v Canada* (1891), 19 SCR 510 at 517, 522, 1891 CanLII 9, the Supreme Court of Canada distinguished *Union St Jacques de Montreal v Bélisle*, *supra* note 84, since the provincial Act in that case was enacted to prevent bankruptcy and not the winding-up of the society. The Court therefore concluded that the special statute of the Dominion providing for the winding-up of an incorporated company, the Bank of Upper Canada, was valid bankruptcy or insolvency legislation.

[86] *An Act respecting Insolvency,* SC 1875, c 16 [*Insolvency Act*].

realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent".[87]

Although the majority of the Court refused to address the constitutionality of the federal *Insolvency Act* of 1875 in *Shields v Peak*, Chief Justice Ritchie described the scope of Parliament's authority to legislate on matters relating to bankruptcy and insolvency as follows:

> So soon as a debtor becomes insolvent and subject to any bankrupt or insolvent law passed by the Dominion Parliament, and proceedings are taken against him and his estate, under the provisions of such enactments, the provincial legislature ceases to have jurisdiction over his civil rights, either in relation to the disposition of his insolvent estate, or in relation to his dealings with his creditors, or their rights or remedies against his person or estate. Legislation on the subject of bankruptcy and insolvency, belonging exclusively to the Dominion Parliament, necessarily involves the exclusive right to deal alike with the rights of the debtor as of his creditor in relation to their dealings.[88]

Given the legislative void with the repeal in 1880[89] of the federal insolvency statute of 1875, the Judicial Committee held in *Ontario (AG) v Canada (AG)*[90] that the provincial Act relating to purely voluntary assignments, whether the assignor was insolvent or not, did not infringe on the exclusive legislative power conferred upon the Dominion Parliament since an "assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency".[91] Although it was not necessary nor expedient to attempt to define what is covered by the head of power relating to "bankruptcy" and "insolvency", the Judicial Committee further concluded that matters relating to assignments and preferences by insolvent persons were ancillary to federal bankruptcy law and therefore within the powers of the Dominion Parliament but added that these matters were *intra vires* the provincial legislature because they did not conflict with

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[87] *Cushing v Dupuy*, [1880] UKPC 22 at para 13, 5 App Cas 409.
[88] *Shields v Peak*, 1883 CanLII 4, 8 SCR 579 at 589 [emphasis added].
[89] *An Act to repeal the Acts respecting Insolvency now in force in Canada*, SC 1880, c 1.
[90] *Ontario (AG) v Canada (AG)*, [1894] UKLawRpAC 10, (1894) AC 189, (sub nom *Reference Re: An Act respecting Assignments and Preferences by Insolvent Persons (Ont)*).
[91] *Ibid* at para 20.

any existing bankruptcy or insolvency legislation of the Dominion Parliament.[92] In this respect, Lord Chancellor Herschel, reasoned as follows:

> But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. […]
>
> In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the *British North America Act*. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the exit scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament.[93]

The Judicial Committee therefore recognized the broad exclusive federal power over bankruptcy and insolvency as well as the ancillary power of the Dominion Parliament to include provisions relating to voluntary assignments in future legislation. However, the Court was silent on Parliament's authority, albeit ancillary, to enact provisions relating to preferences, which were primarily dealt with by provincial legislation until 1919 when the first general bankruptcy law in Canada was enacted.[94] With the resulting legal uncertainty,

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[92] *Ibid* at para 26.

[93] *Ibid* at para 27 [emphasis added].

[94] *Bankruptcy Act, 1919*, SC 1919, c 36. See also *Robinson*, *supra* note 56. According to Justice Spence for the majority at 761,

> It will be seen, therefore, that the Judicial Committee in this decision only determined that a system providing for voluntary assignments enacted in a province prior to the enactment of any federal Bankruptcy Act was *intra vires* but acknowledged that a subsequently enacted *Bankruptcy Act* by the federal Parliament might well overcome the provisions of the provincial statute. It would seem that the decision is quite silent as to the effect of provisions

several contradictory provincial appellate court judgments were rendered on the constitutionality of provincial legislation in relation to fraudulent preferences[95] until 1949 when Parliament amended the *BIA*.[96] The crux of the issue was whether valid federal legislation on the subject of bankruptcy and insolvency would overcome provincial legislation pertaining to fraudulent preferences which was clearly within the subject of property and civil rights, or whether an operational conflict was required to render the provincial provisions inapplicable but only to the extent of the conflict. The federal amendment resolved the matter as it provided that the "provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act". The new statutory provision permitted the trustee to avail himself or herself of all rights and remedies provided by provincial legislation as supplementary to and in addition to the rights and remedies provided by the federal Act. Operational conflict between federal and provincial provisions was thereby required to render provincial legislation inapplicable in a bankruptcy matter.

Taking the observations made by Lord Chancellor Herschell in *Ontario (AG) v Canada (AG)* as affording assistance in the interpretation of subsection 91(21) of the *Constitution Act, 1867*, Lord Chancellor Viscount Cave opined in the seminal case of *Royal Bank of Canada v Larue*, "that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment"[97] notwithstanding its interference with provincial

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in a provincial *Assignments and Preferences Act* other than one permitting a voluntary assignment of debts except that one might well argue that by implication provisions in the provincial statute dealing with fraudulent preferences would be equally within the purview of the province under "property" and "civil rights" unless and until overcome by federal legislation ancillary to its power in bankruptcy and insolvency.

[95] *Hoffar Ltd v Canadian Credit Men's Trust Association Ltd,* 1929 CanLII 558, [1929] 1 WWR 557 (BCCA); *Re Pommier*, 1930 CanLII 373, 65 OLR 415 (CA); *Re Trenwith*, 1934 CanLII 153, [1934] OR 326 (CA).

[96] *An Act respecting Bankruptcy*, SC 1949, c 7, s 50; *Bankruptcy Act*, RSC 1952, c 14, s 50(6), now *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 72(1) [*BIA*].

[97] *Royal Bank of Canada v Larue*, [1928] UKPC 1 at para 10, 1928 CanLII 514 at 950 (UKJCPC), affirming 1926 CanLII 49, [1926] SCR 218, (sub nom *Reference Re: Bankruptcy Act of Canada s 11, ss 10*) [*Larue*].

property and civil rights. According to the Supreme Court of Canada, it has since been "accepted that the first goal of ensuring an equitable distribution of a debtor's assets is to be pursued in accordance with the federal system of bankruptcy priorities".[98] In fact, the Court has repeatedly confirmed the exclusive authority given to Parliament to determine the collocation of priorities in the event of a bankruptcy.[99]

The constitutional validity of the federal *Farmers' Creditors Arrangement Act, 1934*[100] was considered by the Judicial Committee of the Privy Council in an appeal of the decision rendered by the Supreme Court of Canada in a reference to the Court.[101] Although the Judicial Committee of the Privy Council may have seemed to have limited the federal legislative competence to a scheme of distribution of an insolvent person's assets among creditors of the estate in *Ontario (AG) v Canada (AG)*,[102] Lord Thankerton clearly adopted in *Reference Farmers' Creditors Arrangement Act (Can)* on behalf of the Judicial Committee, a broad interpretation of the federal head of power over bankruptcy and insolvency, which included preventative measures in aid to an insolvent person prior to bankruptcy:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the

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[98] *Husky Oil*, *supra* note 78 at para 8.

[99] *Produits Caoutchouc Marquis Inc v Gingras Autombile Ltée (Trustee of)*, [1962] SCR 676 at 678, 1962 CanLII 79:

> The present Act, like its predecessor acts, provides that subject to the Act all debts proved in bankruptcy shall be paid *pari passu*. To that rule of absolute equality, certain exceptions are made including those provided for by s. 95. The exclusive authority given to Parliament by s. 91(21) of the *British North America Act* to deal with all matters arising within the domain of bankruptcy and insolvency, enables Parliament to determine the relative priorities of creditors under a bankruptcy: *Royal Bank v Larue*. To the extent that such priorities may be in conflict with provincial law, the federal statute must prevail.

See also: *Deloitte Haskins & Sells Ltd v Alberta (Workers' Compensation Board)*, 1985 CanLII 82, [1985] 1 SCR 785 at para 28; *Federal Business Development Bank v Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105, [1988] 1 SCR 1061 at paras 1, 13, 19; *British Columbia v Henfrey Samson Belair Ltd*, 1989 CanLII 43, [1989] 2 SCR 24 at para 14.

[100] *Farmers' Creditors Arrangement Act, 1934,* SC 1934, c 53.

[101] *British Columbia (AG) v Canada (AG)*, 1937 CanLII 367 (UKJCPC), [1937] AC 391 (sub nom *Reference Farmers' Creditors Arrangement Act (Can)*) affirming 1936 CanLII 35, [1936] SCR 384 [*Farmers' Creditors Reference*].

[102] *Robinson*, *supra* note 56 at 803–04.

> debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law.[103]

Lord Thankerton held that although the federal statute was designed to aid debtor farmers in financial difficulty and to prevent bankruptcy, the Act was genuine legislation relating to bankruptcy and insolvency: "it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation".[104] In addition, their Lordships were unable to hold that bankruptcy legislation was "intended to be stereotyped under head 21 of s. 91 of the *British North America Act* so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters".[105] The federal head of power was therefore not confined to the bankruptcy and insolvency scheme in place in 1867 and a progressive interpretation of the bankruptcy and insolvency head of power thus authorizes new techniques and innovative measures of preventing and providing for consumer insolvency.[106]

Following the depression of the 1930s, which was accompanied by a serious drought in the Prairies, the new Alberta Social Credit government elected in 1935 made several attempts to relieve farmers and other debtors from increasing financial burdens owned mainly to eastern creditors.[107] In delivering the judgment of the Judicial Committee of the Privy

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[103] *Farmers' Creditors Reference*, *supra* note 101 at para 700 [emphasis added].

[104] *Ibid* at paras 10, 14, referring to *Reference concerning the constitutional validity of the Companies' Creditors Arrangement Act*, 1934 CanLII 72, [1934] SCR 659 [emphasis added]. See also: *Ontario (AG) v Canada Temperance Federation*, 1946 CanLII 351 (UKJCPC) at 7, [1946] AC 193 [*Temperance Federation*]: "To legislate for prevention appears to be on the same basis as legislation for cure."; *Goodyear Tire & Rubber Co of Canada Ltd v R*, 1956 CanLII 4 at 309, [1956] SCR 202 [*Goodyear Tire*].

[105] *Farmers' Creditors Reference*, *supra* note 101 at 700–01.

[106] Pierre Carignan, "La compétence législative en matière de faillite et d'insolvabilité" (1979) 57 Can Bar Rev 47 at 51; Hogg, *supra* note 42 at 21–29.

[107] Hogg, *supra* note 42 at (looseleaf updated 2011), ch 25 at 25–5. See also: *Reference Re: Debt Adjustment Act, 1937 (Alta)*, 1943 CanLII 371 at para 1, [1943] AC 356 [*Alberta Reference, 1943*]: "Distress of a very serious nature was rife in Alberta and the adjoining prairie provinces from, at any rate, the year 1920, and divers statutes were passed in those provinces, and, in particular, in Alberta, directed to the relief of the inhabitants."

Council in *Reference Re: The Debt Adjustment Act, 1937 (Alta)*, Lord Maugham relied on its previous decisions in *Ontario (AG) v Canada (AG)* and *Royal Bank of Canada v Larue* and concluded that Alberta's legislation was *ultra vires* the Provincial Legislature. After determining that the pith and substance of the provincial legislation was to relieve residents in the province of Alberta and their estates from an enforceable liability to pay debts and to compel the creditors to accept compositions approved by the Debt Adjustment Board, the Court concluded that the Act was invalid since "as a whole [the Act] constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and, on the other hand, that it obstructs and interferes with the actual legislation of that Parliament on those matters".[108]

Given the invalidity of provincial legislation in aid to insolvent debtors previously adopted by the Province of Alberta, the Saskatchewan Legislature adopted new legislation furnishing similar debt relief in the form of *The Moratorium Act*.[109] In *Canadian Bankers Association v Saskatchewan (AG)*,[110] Justice Locke, writing for the majority of the Supreme Court of Canada, concluded that the pith and substance of the provincial legislation was in relation to insolvency and thus *ultra vires* the Provincial Legislature. In his concurring reasons, Justice Rand stated that "the responsibility for dealing with the affairs of debtors who, we must take it, are in financial straits, is one that has been exclusively allocated to Parliament".[111] He further elaborated on the scope of the matters coming within the head of power relating to bankruptcy and insolvency and broadly defined both terms as follows:

> Each of the two words, Bankruptcy and Insolvency, must be given its full force. Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors. To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

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[108] *Alberta Reference, 1943*, *supra* note 107 at 388, referring to *Larue*, *supra* note 97.
[109] *The Moratorium Act*, RSS 1953, c 98.
[110] *Canadian Bankers Association v Saskatchewan (AG)*, 1955 CanLII 78, [1956] SCR 31 [*Canadian Bankers*].
[111] *Ibid* at 45.

> Insolvency, on the other hand, seems to be a broader term that contemplates measures of dealing with the property of debtors unable to pay their debts in other modes or arrangements as well. There is the composition and the voluntary assignment, devices which, in appropriate circumstances, may avoid technical bankruptcy without too great prejudice to creditors and hardship to debtors. These means of salvage from the ravages of misfortune are of the essence of insolvency legislation, and they are incorporated in the *Bankruptcy Act*.
>
> The usual mark of insolvency is the inability to meet obligations as they mature; it constitutes an act of bankruptcy, and furnishes ground for proceeding against the debtor under the *Bankruptcy Act*.[112]

Notwithstanding recent jurisprudence invalidating previous provincial legislation, the Province of Alberta enacted in 1959 the *Orderly Payment of Debts Act*,[113] which applied, with certain exceptions, to contract and judgment debts not in excess of $1,000 and, with the consent of the creditors, to judgment debts in excess of $1,000. The Act also provided that the debtor could apply to the clerk of the Court for a consolidation order. On a reference as to the validity of the Act, Chief Justice Kerwin for the majority of the Supreme Court referred with approval to Lord Thankerton's definition in *Farmers' Creditors Reference* that "insolvency means inability to meet one's debts or obligations" and concluded that the Provincial Act was *ultra vires* on the ground that its pith and substance was bankruptcy and insolvency legislation.[114]

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[112] *Ibid* at 46–47 [emphasis added].

[113] *Orderly Payment of Debts Act*, SA 1959, c 61.

[114] *Reference Re: Validity of the Orderly Payment of Debts Act*, 1960 CanLII 56, [1960] SCR 571 at 576–77, citing with approval *Farmers' Creditors Reference*, *supra* note 101 at 700. See also Justice Locke's concurring reasons at 578–79 wherein he commented as follows on the definition of "insolvency":

> While "bankruptcy" and "insolvent person" are defined in s. 2 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, it is rather the meaning that these words commonly bear that is to be given to them in construing the words in s. 91. In *Parker v. Gossage* [(1835) 5 L.J. Ex. 4.], Parke B. said that an insolvent in the ordinary acceptation of the word is a person who cannot pay his debts. In *Reg. v. Saddlers Company* [(1863), 10 H.L.C. 404 at 425.], Willes J. adopted what had been said by Baron Parke as to the meaning assigned to the term "insolvent" and said that the words "in insolvent circumstances" had always been held to mean not merely being behind the world, if an account were taken, but insolvency to the extent of being unable to pay just debts in the ordinary course of trade and business.
> […]
> When the *Bankruptcy Act* was first enacted in 1919 (c. 36) "insolvent person" and "insolvent" were declared to include a person who is for any reason unable to meet his obligations as they respectively become due, or who has ceased paying his current obligations in the ordinary course of business, thus substantially adopting what had been

In *Robinson v Countrywide Factors Ltd,* the Supreme Court of Canada considered whether sections of *The Fraudulent Preferences Act*[115] were *ultra vires* the Provincial Legislature as an invasion of exclusive federal power in relation to bankruptcy and insolvency or, alternatively, were inoperative in the face of the preference provisions of the *BIA*.[116] In his dissenting reasons for judgment Chief Justice Laskin recognized that subsection 91(21) is an exclusive federal power "whose ambit, did not and does not lie frozen under conceptions held of bankruptcy and insolvency in 1867" and that "the term 'insolvency' in s. 91(21) has as much an independent operation in the reservation of an exclusive area of legislative competence to the Parliament of Canada as the term 'bankruptcy'".[117] Based on those principles, he concluded that "if provincial legislation avowedly directed to insolvency, and to transactions between debtor and creditor consummated in a situation of insolvency, can be sustained as validly enacted, unless overborne by competent federal legislation, there is a serious breach of the principle of exclusiveness which embraces insolvency under s. 91(21)".[118]

The majority of the Court under the penmanship of Justice Spence refused, however, to adopt the doctrine of exclusiveness espoused by Chief Justice Laskin in dissent and adopted instead a precursor of the current principle of cooperative federalism, which protects valid provincial legislation relating to property and civil rights unless it conflicts with existing federal legislation.[119] He therefore concluded that the impugned provisions were valid and that a trustee can make use of valid provincial legislation when administering the estate of

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> said by Parke B. and Willes J. The meaning commonly borne by the terms employed in head 21 of s. 91 did not differ in 1867 from their present day meaning.

Justice Locke also distinguished *Ladore v Bennett,* 1939 CanLII 270 (UKJCPC), [1939] AC 468 and *Abitibi Power and Paper Co v Montreal Trust Co*, 1943 CanLII 303 (UKJCPC), [1943] AC 536 given that in both decisions it was held that the impugned provincial legislation were to be in pith and substance in relation to municipal institutions and property and civil rights within the province and, as such, were *intra vires* the legislature under subsection 92(8) and (13).

[115] *The Fraudulent Preferences Act*, RSS 1965, c 397.

[116] *Canadian Bankers*, *supra* note 110 at 46. See also Hogg, *supra* note 42 (looseleaf updated 2008), ch 25 at 25–3.

[117] *Robinson*, *supra* note 56 at 759–60, referring to *Farmers' Creditors Reference*, *supra* note 101 at 700–01; *Canadian Western Bank*, *supra* note 52 at 46.

[118] *Robinson*, *supra* note 56 at 765.

[119] *Ibid* at 794.

a bankrupt. Chief Justice Laskin gives perhaps additional insight on the majority's approach to the constitutional question when he described the factors that influenced the Court's decision to uphold the validity of the provincial statute as follows: "the undesirability of interfering with what appeared to be a practical way of reaching as many alleged preferences in fraud of creditors as possible, to use provincial legislation where federal legislation did not reach far enough, and to use provincial insolvency legislation if nothing else was available".[120]

It has been suggested[121] that the majority of the Court adopted a restrictive interpretation of the words "bankruptcy" and "insolvency" in subsection 91(21) of the *Constitution Act, 1867* when Justice Spence wrote:

> I am assisted in coming to this conclusion by the view which I believe was behind the Lord Chancellor's reasons in *A.G. of Ontario v. A.G. for Canada*, *supra*, that the words "bankruptcy" and "insolvency" in s. 91, para. 21, of the British North America Act were aimed at legislative schemes which had the purpose of governing the distribution of a debtor's property amongst his creditors.[122]

It is important to note, however, that Justice Spence also quotes the full reference of Lord Chancellor Herschell in his reasons for judgment, which confirm that the Judicial Committee was not defining those terms and had in fact expressly said that: "It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words 'bankruptcy' and 'insolvency' in sect. 91 of the *British North America Act*".[123] Rather, the Court simply observed that a prescribed distribution of the debtor's assets to creditors is a common feature to all systems of bankruptcy and insolvency.

Contrary to previous jurisprudence providing a broad constitutional interpretation of "insolvency" as an independent matter assigned to the Dominion Parliament[124], Justice

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[120] *Ibid* at 774.
[121] *Sinco Trucking Ltd (Trustee of) v Paccar Financial Services Ltd*, 1989 CanLII 287, 57 DLR (4th) 438 (SKCA). See also Carignan, *supra* note 106 at 51.
[122] *Robinson*, *supra* note 56 at 794.
[123] *Ibid* at 780.
[124] *Canadian Bankers*, *supra* note 110 at 46.

Beetz in his concurring reasons for judgment endorsed a restrictive interpretation of the federal power in relation to bankruptcy. After quoting Lord Thankerton's general and technical definitions of "insolvency" in the *Farmers' Creditors Reference*, Justice Beetz commented on the nature of the exclusive federal power in relation to insolvency as follows:

> The primary meaning of "insolvency" in s. 91.21 of the Constitution is insolvency in the technical sense, not in the general sense. This Lord Thankerton made clear just a few lines after the passage quoted above: with respect to the jurisdiction of Parliament under s. 91.21, he referred to "... the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws ...".
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> […]
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> When the exclusive power to make laws in relation to bankruptcy and insolvency was bestowed upon Parliament, it was not intended to remove from the general legal systems which regulated property and civil rights a cardinal concept essential to the coherence of those systems. The main purpose was to give to Parliament exclusive jurisdiction over the establishment by statute of a particular system regulating the distribution of a debtor's assets. However, given the nature of general legal systems, the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails. On the other hand, provincial jurisdiction over property and civil rights should not be measured by the ultimate reach of federal power over bankruptcy and insolvency any more than provincial competence in relation to the administration of justice can be determined by every conceivable and potential use of the criminal law power.[125]

The resulting legacy of *Robinson* was the Court's initial indication to restrict the effect of the doctrine of exclusiveness and favour greater co-operation between Parliament and the provincial legislatures by allowing overlaps in the exercise of provincial and federal powers to occur as long as each level of government properly pursues objectives that fall within its jurisdiction. Further clarification was given by the Supreme Court of Canada in *Husky Oil Operations Ltd v MNR*. Justice Gonthier, writing for the majority the Court, explained that the purposes of federal bankruptcy legislation are, first, to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* by a regime of collective

[125] *Robinson*, *supra* note 56 at 803–05.

action and second, the financial rehabilitation of insolvent individuals.[126] He further stated that the goal of maintaining a nationally homogeneous system of bankruptcy priorities has been a constant concern of the Court in the past and affirmed that "its vigilance has ensured the continuing vitality of our nation's bankruptcy legislation".[127] Citing with approval *Royal Bank of Canada v Larue* to confirm Parliament's exclusive federal power over the ranking of creditors in bankruptcy,[128] Justice Gonthier further affirmed that when provincial law subverts the federal order of priorities in the *BIA* "the impugned legislation must be declared inapplicable rather than inoperable in bankruptcy". He reasoned as follows:

> this is preferable for the simple reason that bankruptcy is an exclusive federal domain within which provincial legislation does not apply, as distinguished from areas of joint or overlapping jurisdiction where federal legislation will prevail, rendering provincial legislation inoperable to the extent of any conflict. However, as bankruptcy is carved out from the domain of property and civil rights of which it is conceptually a part, valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, provincial legislation which conflicts with federal law must yield to the extent of the conflict and it becomes inapplicable to that extent.[129]

It is critical to underscore that the judgments rendered by the Supreme Court clearly reflect the acceptance of a high degree of integration between non-conflicting provincial legislation and federal insolvency and bankruptcy legislation.[130] Nevertheless, the above analysis further reveals that if a province enacts in pith and substance legislation relating to bankruptcy or insolvency it will be considered *ultra vires* the province's authority[131] but

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[126] *Husky Oil*, *supra* note 78 at para 7.

[127] *Ibid* at para 37.

[128] *Ibid* at para 8.

[129] *Ibid* at paras 81, 85 [emphasis added], referring to *Tennant*, *supra* note 49; *Crown Grain Company v Day*, [1908] AC 504, [1908] UKLawRpAC 66 (PC). Recently cited again with approuval in *Orphan Well*, *supra* note 59 at para 64.

[130] *Re Giffen*, 1998 CanLII 844, [1998] 1 SCR 91 at 118–19: Justice Iacobucci stated:

> Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the BIA is dependent on provincial property and civil rights legislation in order to inform the terms of the BIA and the rights of the parties involved in the bankruptcy. Section 72(1) of the BIA contemplates interaction with provincial legislation.

[131] As explained by Justice Beetz in *Robinson*, *supra* note 56 at 807–08:

laws provincial in their purpose, object and nature and thus validly enacted pursuant to a provincial head of power will not be rendered *ultra vires* even if they extend upon a federal matter.

Recent jurisprudence confirms that the doctrine of federal paramountcy will only apply when there exists an operational conflict with federal legislation or when the operation of the provincial law frustrates the purpose of the federal enactment. In both cases, federal bankruptcy and insolvency legislation will prevail and provincial legislation becomes inapplicable to the extent of the conflict. For example, Justice Gascon, writing on behalf of the majority of the Supreme Court of Canada in *Alberta (AG) v Moloney*, affirmed that the *BIA* is a complete code governing bankruptcy and, in particular, that section 178 is a complete code establishing which debts are released on discharge and which debts survive bankruptcy.[132] He further confirmed that "[i]t is beyond the province's constitutional authority to interfere with Parliament's discretion in that regard".[133]

Although Justice Beetz applied in *Robinson* a technical and restrictive interpretation of "insolvency", this constitutional definition was not adopted by the majority of the Court and the broader definition given to insolvency as an independent matter to bankruptcy should be "given its full force" as suggested by Lord Thankerton, Justice Rand and Chief Justice Laskin to determine the scope of federal power over bankruptcy and insolvency. This is further confirmed considering that at the time of Confederation, England had for almost three centuries, from 1571 to 1861, distinguished between bankruptcy laws directed against traders who had committed fraudulent acts (considered acts of bankruptcy) and insolvency laws concerning honest but unfortunate insolvent debtors. Eventually, relief

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> In the *Alberta Debt Adjustment Act reference* [[1943] AC 356], in *Canadian Bankers Association v. Attorney-General of Saskatchewan* [[1956] SCR 31], and in *Reference re Validity of the Orderly Payment of Debts Act, 1959* [[1960] SCR 571] (Alta), the various provincial laws found ultra vires were predicated upon insolvency. But they went further and set up elaborate statutory schemes involving one or more of the following features: the denial of creditors' access to courts or the restriction of their right to enforce their claims, the establishment of administrative boards, mediation, composition, arrangements, moratoriums, consolidation orders, staying of proceedings and the relief of debtors from liability to pay their debts.

[132] *Moloney*, *supra* note 59 at paras 40, 75.

[133] *Ibid* at para 90.

was provided via insolvency legislation permitting the honest debtor to avoid imprisonment[134] and legislation relating to bankruptcy and insolvency were consolidated into one act in 1861.[135] Considering the long English tradition of differentiating between bankruptcy and insolvency until a few years before Confederation, the inclusion of both terms in section 91 of the *Constitution Act, 1867* by implication assigns the power to Parliament over matters relating to bankruptcy and to insolvency.[136] According to the *BIA*, "insolvency" currently refers to the state of a debtor prior to bankruptcy whose liabilities amount to more than $1,000 and

> a) who is for any reason unable to meet his obligations as they generally become due,
> b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[137]

"Insolvency" having been defined more broadly than "bankruptcy" therefore encompasses the situation in which a consumer is unable to meet his or her debts or obligations, including consumer credit, prior to bankruptcy.[138] It could therefore be argued that any amendments to the *BIA* aiming to prevent the insolvency of consumers or to add new regulations providing relief of assistance to insolvent consumers[139] would be *intra vires* the Parliament's exclusive authority over insolvency as confirmed by the Judicial Committee of the Privy Council in *Farmers' Creditors Reference*.[140] As a result, preventative measures, such as debt adjustments or other measures modifying the debtor-creditor relationship for the purpose of permitting the consumer debtor to avoid bankruptcy, could be adopted by Parliament. According to Robert Kerr, the validity of such measure would

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[134] *An Act for the Relief of Insolvent Debtors Act*, (UK), 1842 (5 & 6 Vict), c 116.
[135] *An Act to amend the Law relating to Bankruptcy and Insolvency in England*, (UK), 1861 (24 & 25 Vict), c 134.
[136] Carignan, *supra* note 106 at 50–51.
[137] *BIA*, *supra* note 96, s 2 "insolvent person".
[138] *Canadian Bankers*, *supra* note 110 at 46. See also: Hogg, *supra* note 42 (looseleaf updated 2008), ch 25 at 25–3.
[139] Several proposals are found at Ziegel, 2010, *supra* note 80 at 391–92.
[140] *Farmers' Creditors Reference*, *supra* note 101 at paras 700–01. See also: Hogg, *supra* note 42 (looseleaf updated 2008), ch 25 at 25-4.

be contingent on the insolvency of a least one of the parties involved.[141] In addition, the wide sphere of competence assigned to Parliament would enable bankruptcy reform as proposed by Jacob Ziegel and Iain Ramsay, as further discussed in Chapter 7, to recognize the contribution of abusive or negligent lenders in the insolvency of their consumer debtors and to penalize such activities with the objective of preventing future consumer debtor insolvencies.[142]

4.2.2 Banking and Incorporation of Banks

Legislation relating to banking existed prior to Confederation but took on particular importance given the insolvency of several financial institutions in the United States and in Canada, which resulted in the assignment of matters related to "Banking, Incorporation of Banks, and the Issue of Paper Money" to the Dominion Parliament pursuant to subsection 91(15) of the *Constitution Act, 1867*.[143] As discussed in Chapter 3, Parliament quickly entered its field of legislation and enacted in 1870 the first federal statute entitled *An Act respecting Banks and Banking*.[144]

Not surprisingly, banking statutory provisions were constitutionally challenged early on but the majority of the Supreme Court of Canada in *Merchants' Bank of Canada v Smith*[145] concluded that the impugned sections of the *Banking Act* were *intra vires* of the Dominion

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[141] Robert Kerr, "The Scope of Federal Power in Relation to Consumer Protection" (1980) 12 Ottawa L Rev 119 at 135.

[142] Ziegel, 2010, *supra* note 80 at 393; Anna Lund, "Engaging Canadians in Commercial Law Reform: Insights and Lessons from the 2014 Industry Canada Consultation on Insolvency Legislation" (2016) 58:2 Can Bus LJ 123 at 148–49 referencing Submission of Iain Ramsay to Industry Canada (July 15, 2014) at 4.

[143] *Canadian Western Bank*, *supra* note 52 at para 83:

> The purpose of allocating "Banking, Incorporation of Banks and the Issue of Paper Money" to Parliament under s. 91(15) of the *Constitution Act, 1867* was to create an orderly and uniform financial system, subject to exclusive federal jurisdiction and control in contrast to a regionalized banking system which in "[t]he years preceding the Canadian Confederation were characterized in the United States by 'a chaotic era of wild-cat state banking'.

citing Patrick N McDonald, "the BNA Act and the Near Banks: A Case Study in Federalism" (1972) 10 Alta L Rev 155 at 156 [*BNA Act and the Near Banks*]; Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed (Toronto: Carswell, 1969) at 603.

[144] *An Act respecting Banks and Banking*, SC 1870, c 11, s 8; *Bank Act*, *supra* note 37.

[145] *Merchants' Bank of Canada v Smith*, 1884 CanLII 1, 8 SCR 512 [*Merchants' Bank*].

Parliament notwithstanding their encroachment on civil rights exclusively assigned to the provincial legislature. In a concurring majority judgment, Justice Fournier explained that: "[n]o doubt contracts entered into with banks under the *Banking Act* are encroachments on civil rights or civil law, but such encroachments have been declared to be legal and constitutional by the Privy Council in the case of *Dupuy v Cushing*", which is discussed in the previous section of this chapter.[146] Likewise, Justice Henry stated:

> The subjects of "banking" and incorporation of banks give, and no doubt the section intended to give, to Parliament full and exclusive powers to deal with those subjects, and I cannot for a moment believe that the power to deal with "property and civil rights in the province" was intended in any way to interfere with or control the action of Parliament in respect of the subject of banking.[147]

One of the earliest pronouncements on the meaning of banking in Canadian constitutional law is to be found in *Tennant v Union Bank of Canada.* In 1894, Lord Watson confirmed that the scope of the "legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. […] It also comprehends 'banking', an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker."[148] He therefore recognized, in his reasons for judgment, that the "lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction."[149] Relying again on *Cushing v Dupuy*, he further asserted that it "would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces" and confirmed the constitutionality of the federal banking legislation.

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[146] *Ibid* at 515, citing with approval *Cushing v Dupuy*, *supra* note 87.

[147] *Merchants' Bank*, *supra* note 145 at 540–41 cited with approval in *Hall*, *supra* note 41 at para 14.

[148] *Tennant*, *supra* note 49 at 46 [emphasis added]. This definition of "banking" was referred to in numerous decisions since: such as *Alberta Reference, 1938*, *supra* note 20 at 162; *Canada (AG) v Quebec (AG)*, 1946 CanLII 354 (UKJCPC) at 84, [1947] AC 33; *Alberta (AG) v Canada (AG) (sub nom Reference Re: Alberta Bill of Rights Act)*, 1947 CanLII 347 (UKJCPC) at 9–10, [1947] AC 503 [*Alberta Reference, 1947*]; *Canadian Pioneer*, *supra* note 47 at 467; *Hall*, *supra* note 41 at para 14.

[149] *Tennant*, *supra* note 49 at 46.

Likewise, the Supreme Court of Canada held in *Turgeon v The Dominion Bank*[150] that the enumeration contained in section 75 of the *Bank Act* of certain negotiable securities upon which the bank may lend money and make advances did not limit the generality of the comprehensive power separately conferred by a different subsection so as to exclude the general lending powers that appertain to banking. According to Justice Newcombe, the Court would be "reluctant to suggest a doubt as to the right of a trader to make his fire insurance available as a security to a bank in the manner adopted in this case, or as to the power or capacity of a bank to take or hold such a security."[151]

In 1938, the Supreme Court of Canada dealt with an attempt by the Legislature of Alberta, as part of the general scheme of social credit legislation, to set up a system of institutions given power to "create" credit but also designed to regulate all institutions dealing in credit in the province. In order to determine whether the provincial legislation encroached on the federal sphere of legislative power related to banking, Chief Justice Duff and Justice Kerwin (as he then was) in concurring judgments considered the definition of "credit" as it related to banking in the *Reference Re: Alberta Statutes*. Chief Justice Duff affirmed that "[a] banker is a dealer in credit" and both judges referred to various definitions and commentaries to distinguish between two forms of bank credit;[152] the first being the credit created by the bank in favour of its customer when he or she deposits money into an account with the bank. "A deposit is simply a credit in the banker's books. It is the evidence of the right of action which a customer has to demand a sum of money from the banker."[153] The second type of credit is when credit is created by the bank in the form of a loan advanced to a customer.

Considering the definition of "business dealing in credit" employed in the Alberta statute, Chief Justice Duff stated that transactions relating to "credit created, issued, lent, provided or dealt in by means of book-keeping entries" are in fact transactions of somebody who is

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[150] *Turgeon v The Dominion Bank*, 1929 CanLII 47, [1930] SCR 67.
[151] *Ibid* at 70.
[152] *Alberta Reference, 1938*, *supra* note 20 at 116, 124.
[153] *Ibid* at 124, quoting Henry Dunning Macleod, *The Theory of Credit*, vol 2 (London: Longmans, Green & Co, 1889) at 368–69.

carrying on business in banking.[154] These remarks were not intended to restrict the constitutional scope of "banking" as he further indicated:

> It is needless to say, perhaps, that we are not in the least concerned here with controversies about the creation of credit by bankers, touching the limits of the power of bankers in this respect, and the conditions to which the power is subject. Everybody concedes that bankers do create credit […]. Moreover, it is not in conflict with usage to speak of such credit being "credit created, issued, lent, provided or dealt in by means of book-keeping entries".[155]

Chief Justice Duff's reasons then focused "upon the monetary function of banks and dwelt upon the particular way in which bankers, as opposed to money lenders, create credit and deal in credit"[156] to draw a distinction between money lending and credit granting. When banks granted credit, they proceeded with a book-entry to credit a debtor's account, thus permitting the debtor to withdraw money from the account as required at a future date who then becomes indebted to the bank. "Bank credit therefore implies a credit which is convertible into money."[157] To clarify, Justice Kerwin quoted with approval the following description of bank credit: "Two debts are created; the trader who borrows becomes indebted to the bank at a future date, and the bank becomes immediately indebted to the trader. The bank's debt is a means of payment; it is credit money. It is a clear addition to the amount of the means of payment in the community. The bank does not lend money".[158] In comparison to credit granting, money lending did not imply the "creation" of credit but rather the lending of money from the creditor to the debtor. When a financial institution "lent" money it deprived itself of the use of the money and depleted its cash balances that it owned or borrowed.[159] Patrick McDonald further explains that "[b]anks, it is said, do not fall into the same category as other lenders because in making loans by creating deposits the bank is not lending the same thing as it borrowed".[160]

> Traditional monetary policy theory ascribes to "banks" a special place in the economic order because their distinctive role as issuers of means of payment

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[154] *Alberta Reference, 1938, supra* note 20 at 125.
[155] *Ibid* at 124–25.
[156] As summarized by Justice Beetz in *Canadian Pioneer*, *supra* note 47 at 456–57.
[157] *Alberta Reference, 1938*, *supra* note 20 at 124.
[158] *Ibid* at 155–56.
[159] McDonald, *supra* note 143 at 174–75, quoting John Alexander Galbraith, *The Economics of Banking Operation: A Canadian Study* (Montréal: McGill University Press, 1963) at 61.
[160] McDonald, *supra* note 143 at 174.

> gives them a peculiar ability to create credit. There is said to be a fundamental difference between an institution which transfers funds from savers to spenders and one which places effective purchasing power at the disposal of spenders by a mere exchange of obligations.[161]

According to his analysis, however, provincially created and regulated financial institutions are in fact exercising banking powers since they do issue payments instructions and "create deposit liabilities with all the characteristics of money".[162] Since there is "no difference between a monetary and a non-monetary institution as far as the effect of lending on the position of the lender is concerned", the previous distinction between banks and money lenders is therefore "not only false but above all irrelevant and meaningless".[163] Although the distinction made by the Court in 1938 between banks and money lenders was not intended to restrict the constitutional definition of banking but rather used to define the scope of provincial legislation, it was certainly reflected in existing legislation of the period which differentiated between banks and money lenders. Along with the *Bank Act*, Parliament also adopted, presumably pursuant to the federal interest power, *An Act respecting Money-Lenders*,[164] which focused on small money lenders as well as the *Small Loans Act*.[165] In addition, loan companies were separately regulated and distinguished from banks.[166] As a result, the majority of the Supreme Court confirmed that the transactions as defined in the provincial legislation fell within the meaning of the term "banking" and the provincial system of administration, management and circulation of credit constituted a system of "banking" and thus *ultra vires* the legislative competence of the Alberta Legislature.

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[161] *Ibid* at 188, quoting Québec, *Report of the Study Committee of Financial Institutions* (Québec: Province of Québec, 1969) at 13.

[162] McDonald, *supra* note 143 at 188.

[163] *Ibid* at 188–89.

[164] *The Money-Lenders Act, 1906*, SC 1906, c 32 [*Money-Lenders Act, SC 1906*]; RSC 1906, c 122; RSC 1927, c 135; *Money-Lenders Act*, RSC 1952, c 181 as repealed by *An Act to amend the Small Loans Act*, SC 1956, c 46, s 8, in force upon assent 14 August 1956 [*Money-Lenders Act*].

[165] *Small Loans Act*, SC 1939, c 23; RSC 1952, c 251 as amended by SC 1956, c 46; *Small Loans Act*, RSC 1970, c S-11 as repealed by SC 1980-81-82-83, c 43, s 8, in force on 1 September 1994 [*Small Loans Act*].

[166] *British Loan Companies Act*, *supra* note 34; *Loan Companies Act, 1914*, *supra* note 35; *Loan Companies Act*, *supra* note 35.

On appeal to the Judicial Committee of the Privy Council, the constitutionality of the Alberta statute entitled *An Act Respecting the Taxation of Banks* was challenged as it attempted to tax the banks out of existence. In *Reference Re Alberta Bills*, the Judicial Committee upheld the Supreme Court decision that the provincial legislation was *ultra vires* since it interfered directly with the activities of chartered banks and was "part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada".[167]

Although the next Supreme Court decision dealing with an Alberta statute was affirmed by the Judicial Committee of the Privy Council on the basis that the impugned provincial legislation encroached on a different head of power as discussed in the previous section on insolvency and bankruptcy, Chief Justice Duff had confirmed in *Reference Re: Debt Adjustment Act 1937 (Alta)* the federal exclusive power relating to banking and that since "lending of money is a principal part of the business of any bank" any provincial legislation that involves a considerable power of regulation of the business of the banks is "incompetent to the legislature to establish any such authority".[168]

The issue in *Canada (AG) v Quebec (AG)* was whether a provincial statute dealing with bank deposits, which for 30 years had not been the subject of any operation or claim by the persons entitled thereto, was invalid as conflicting with the exclusive power of the Parliament of Canada to legislate in the matter of "banking".[169] Lord Porter, on behalf of the Judicial Committee of the Privy Council, concluded that the provincial legislation came within "the legitimate business of a banker":

> Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined above is an essential part of the business of banking. The relation between banker and customer who pays money into the bank is stated in

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[167] *Alberta (AG) v Canada (AG)*, (sub nom *Reference Re: Alberta Bills*, 1938 CanLII 251 at 441 [1939] AC 117 (UKJCPC) [*Reference Re Alberta Bills*], quoting with approval Justice Kerwin in *Alberta Reference, 1938*, *supra* note 20, which was under appeal.

[168] *Reference Re: Debt Adjustment Act 1937 (Alta),* [1942] SCR 31 at 36–37, 1941 CanLII 52, aff'd by *Alberta Reference, 1943*, *supra* note 107.

[169] *Canada (AG) v Quebec (AG)*, *supra* note 148 at 83.

> words which have ever since been, accepted in *Foley v. Hill* as "the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts".
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> […]
>
> In their view, a Provincial legislature enters on the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking.[170]

Another provincial statute was constitutionally challenged when, at the height of the social credit movement, the *Alberta Bill of Rights Act*[171] was enacted to create, among others, several economic rights in accord with their economic theory. In addition, a licensing scheme for all credit institutions in the province, including chartered banks, was established to regulate credit transactions. In *Reference Re: Alberta Bill of Rights Act*, the Judicial Committee of the Privy Council recognized that "the business of banking has developed and expanded greatly since Confederation"[172] and concluded that credit transactions were covered by the term "banking":

> The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but what is the meaning of the term itself in the Act. To take what may seem a frivolous analogy, if "skating" was one of the matters to which the exclusive legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central legislature. […] The concept of banking certainly includes the granting of credit by banks; "a banker," as Duff C.J. said in dealing with the *Alberta Legislation Reference*, "has been defined as 'a dealer in credit'".[173]

Concluding the object and effect of the disputed provincial legislation is to interfere with and control the business carried on by a chartered bank in the province, which includes the

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[170] *Ibid* at 86–87, 89 [emphasis added and citation omitted].
[171] *Alberta Bill of Rights Act,* SA 1946, c 11.
[172] *Alberta Reference, 1947*, *supra* note 148 at 10.
[173] *Ibid* at 9 [emphasis added and reference omitted].

business "to make loans which involve an expansion of credit",[174] and was thus in pith and substance legislation relating to "banking", Viscount Simon held that the statute was beyond the powers of the Provincial Legislature to enact.

Given the absence of chartered banks in the consumer credit industry at the turn of the 20th century and the fact that the banks were limited to a simple annual interest rate of 6% and prohibited from entering the mortgage market until 1967,[175] caisses populaires and credit unions were created to meet the needs of consumers and small businesses. Essentially, their objectives were "to promote thrift among its members by paying interest on deposits and very limited dividends on money paid in for shares and to provide thereby credit to such members at legitimate rates of interest for provident and productive purposes with the interest from such loans returned to the borrowers over and above the cost of making same after allowing for reserves and other community purposes".[176] Along with provincial mortgage, loan and trust companies, these new financial institutions were regulated by provincial legislation, which were in turn subject to several constitutional challenges before the courts. These judicial decisions have consistently confirmed the provinces' constitutional jurisdiction over the regulation of these institutions pursuant to their provincial jurisdiction on matters relating to property and civil rights as well as the incorporation of companies with provincial objects.[177] Although the provincially incorporated financial institutions were conducting some business activities that could be considered part of the banking business and were actually carried on by chartered banks, the Courts held that the banking business was not exclusive to chartered banks regulated by the federal *Bank Act* since Parliament had not forbidden anyone else from carrying on

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[174] *Ibid* at 10.

[175] *An Act respecting Banks and Banking*, SC 1966-67, c 87, s 91; Canada, Royal Commission on Banking and Finance, *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 194 [*Report of the Royal Commission on Banking and Finance, 1964*]; Daniel J Baum, "Near-Banks: Trust Companies of Canada" (1970) 45 Tul L Rev 546 at 566; Jacob S Ziegel, "Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint" (1968) 68:3 Colum L Rev 488 at 495 [Ziegel, 1968].

[176] *La Caisse Populaire Notre Dame Limitee v Moyen*, 1967 CanLII 383 at para 50, 59 WWR 129 (SKQB) [*Caisse Populaire*].

[177] *Re Bergethaler Waisenamt*, 1949 CanLII 238, [1949] 1 DLR 769 (MBCA); *Caisse Populaire*, *supra* note 176. See also: *Caisse Populaire de St Arsene de Montreal v Benoit*, (1953) Que SC 272; *Shink v Ridgecrest Apts*, (1955) Que SC 239.

the business of banking. In the absence of conflicting legislation, the incorporation and activities of provincial financial institutions were therefore *intra vires* provincial legislatures under subsections 92(11) and (13) of the *Constitution Act, 1867*.

In 1980, the Supreme Court had to determine in *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan* whether a federally incorporated trust company was subject to provincial labour relations legislation or should be considered a federal "business outside the exclusive legislative authority of provincial legislatures"[178] and thus subject to the *Canada Labour Code.*[179] Although this company was not considered a "bank" under federal legislation, it contended nevertheless that it was engaged in "banking" in view of the fact that "99 per cent of the actual business conducted by the company is identical to the business carried on by chartered banks".[180] As such, it should be considered a federal business and fully within exclusive federal legislative authority pursuant to subsection 91(15) of the *Constitution Act, 1867*. Concurring in the result, Chief Justice Laskin and Justice Dickson explained that "[a]lthough a bank may be a dealer in credit, not every dealer in credit is a bank" and "[e]ven if Parliament could have brought trust companies within its regulatory authority in relation to banking, it has chosen not to do so, and I think that this Court should respect that position."[181]

For the majority of the Court, the issue turned on the elusive concept of banking. After reviewing the functions of banking, from an economic or legal point of view, Justice Beetz, writing for the majority, rejected the functional test given the difficulty of defining banking in purely functional terms, and applied the institutional test to determine whether a financial institution could be in the business of "banking".[182] Justice Beetz reasoned as follows:

> it is an approach which is particularly appropriate in a case where what has to be decided is whether a given institution falls within the concept of banking as a business, and not whether a legislative enactment is constitutionally depending on its relationship to banking within the meaning of s. 91.15 of the Constitution. The characterization of legislation and the

[178] *Canadian Pioneer*, *supra* note 47 at 434.
[179] *Canada Labour Code*, RCS 1970, c L-1.
[180] *Canadian Pioneer*, *supra* note 47 at 445.
[181] *Ibid* at 440–41 [emphasis added].
[182] *Ibid* at 454–61.

> characterization of a business are not identical processes. Legislation for instance, may be divisible whereas a business as a going concern is indivisible and must stand or fall as a whole on one side of the constitutional line or the other. The concept of banking as a business and the meaning of the word "banking" in s. 91.15 are not necessarily co-extensive; the meaning of "banking" in the section might very well be wider than the concept of banking as a business.[183]

Justice Beetz concluded that the loan and trust company did not possess the institutional character of a bank and therefore was subject to provincial legislation regulating labour relations: "Parliament having chosen to exercise its jurisdiction over Banking and the Incorporation of Banks from an institutional aspect rather than in functional terms, as was perhaps unavoidable, did not necessarily exhaust its exclusive jurisdiction; but it left institutions which it did not characterize as being in the banking business to the operation of provincial labour laws".[184] This decision confirmed the federal jurisdiction to regulate banks as well as other federally and provincially regulated financial institutions in the banking business, should Parliament have wanted to or decide in the future to fully occupy the field.

In his reasons, Justice Beetz stated that the definition of "banking" did not include "every transaction coming within the legitimate business of a banker" as declared by the Judicial Committee of the Privy Council in *Tennant* because taken literally such a definition "would then mean for instance that the borrowing of money or the lending of money, with or without security, which come[s] within the legitimate business of a great many other types of institutions as well as of individuals, would, in every respect, fall under the exclusive

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[183] *Ibid* at 440–41 [emphasis added]; *Hall*, *supra* note 41 at para 49. In order to explain the reasons of this disctinction, Justice Beetz quoted with appoval *Bank of New South Wales v The Commonwealth* (1948), 76 CLR 1 at 195:

> It is easy to give examples of laws which are laws having a most immediate relation to banking and which are therefore laws with respect to banking, though they do not deal with banker-customer relations as such. Among such laws would be a law requiring a bank to have a certain minimum capital or to maintain a percentage of uncalled capital, or a law prescribing the persons who may be allowed to hold bank shares, e.g. excluding bankrupts, or a law preventing banks in certain circumstances from disposing of their assets, or a law prescribing permissible forms of investment by banks. A law dealing with the management and staffing of banks would be a law relating to essential elements in the business of banking though not dealing with any transactions between any bank and any customer.

[184] *Canadian Pioneer*, *supra* note 47 at 469 [emphasis added].

legislative competence of Parliament. Such a result was never intended."[185] Notwithstanding his previous conclusion on the broad power of Parliament to regulate all institutions in the banking industry, these remarks seemed to restrict the definition of "banking" and the type of banking functions it includes, not only for the interpretation of statutes, but also for the constitutional interpretation of the federal head of power over banking.

The Supreme Court quickly resolved the issue in *Bank of Montreal v Hall*, by firmly restricting the *ratio decidendi* of *Canadian Pioneer,* to the definition of "banking" for statutory interpretation and thus confirmed the broad constitutional interpretation of the banking power.

> It is important to bear in mind that Beetz J.'s remarks were made with an eye to the transformation of the financial services industry that has taken place in this country; see also Laskin C.J., at p. 440. If at one time the lending of money in Canada was primarily the preserve of the chartered banks, this is, of course, no longer true. Myriad institutions now lend money on security, and engage in the enforcement and realization of their loans, among them trust companies, credit unions, finance companies, caisses populaires and department stores. The decision in *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan* addresses this reality and recognizes that it would be unrealistic to hold that federal jurisdiction extends to every entity engaged in transactions that might literally be described as coming within the "legitimate business of a banker". It is solely in this sense that the respondent is correct in its submission that not every transaction coming within the legitimate business of a banker is within the jurisdiction of Parliament.[186]

Referring to Justice Beetz's own constraint that the institutional approach should not be applied to a constitutional determination of validity of a federal legislative enactment[187] and that the meaning of "banking" in subsection 91(15) might very well be wider than the concept of banking as a business, the Supreme Court declared that "*Canadian Pioneer Management Ltd. v Labour Relations Board of Saskatchewan* simply has no bearing on the question of the constitutionality of the security interest created by ss. 178 and 179 [of the

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[185] *Ibid* at 468; *Hall*, *supra* note 41 at para 47; *Canadian Western Bank*, *supra* note 52 at para 65.
[186] *Hall*, *supra* note 41 at para 50 [emphasis added].
[187] *Canadian Pioneer*, *supra* note 47 at 466.

Bank Act], and can, therefore, in no way be taken as being in contradiction with *Tennant v. Union Bank of Canada* and the other authorities".[188] The Supreme Court of Canada further explained Justice Beetz's remarks that "banking" does not include "every transaction coming within the legitimate business of a banker" in *Canadian Western Bank*, a case involving the applicability of provincial legislation on federally incorporated financial institutions. According to the Court, the contrary would signify "that banks are immune from provincial laws of general application in relation to 'any' financial service, as this would not only render inapplicable elements of the *Insurance Act* but potentially render inapplicable provincial laws relating to mortgages, securities and many other 'services' as well".[189]

Contrary to *Canadian Pioneer*, the constitutional validity of provisions in the *Bank Act* was directly raised in *Hall*. In particular, the principal issue was "whether the legislative provisions in which Parliament has defined the manner in which a chartered bank may seize and realize on secured property can be considered legislation that Parliament may legitimately enact in the exercise of its banking power or, whether, on the contrary, it must be viewed as legislation which, in pith and substance, has taken on the true identity of valid provincial legislation".[190] Confirming the continuing applicability of the principles that emerged in *Merchants' Bank* and *Tennant*, Justice La Forest writing for the Court reaffirmed the "fact that a given aspect of federal banking legislation cannot operate without having an impact on property and civil rights in the provinces cannot ground a conclusion that that legislation is *ultra vires* as interfering with provincial law where the matter concerned constitutes an integral element of federal legislative competence".[191] The Court then proceeded to reject the restrictive institutional definition of "banking" proposed by Justice Beetz and declared that

> [t]his finding, however, cannot serve as a basis for the conclusion that a given aspect of the business of banking carried on by "institutions chartered as banks" no longer falls within the confines of the federal banking power.

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[188] *Hall*, *supra* note 41 at para 50.
[189] *Canadian Western Bank*, *supra* note 52 at para 65.
[190] *Hall*, *supra* note 41 at para 41.
[191] *Ibid* at paras 38–40, also referring to *Construction Montcalm Inc v Minimum Wage Commission*, 1978 CanLII 18, [1979] 1 SCR 754 at 768–69.

> Such a result could only flow from a case in which the constitutionality of a given legislative provision bearing on banking had been specifically put in issue.[192]

After reviewing the legislative history of the security interest banking provisions, the Court determined that

> the creation of this security interest was predicated on the pressing need to provide, on a nationwide basis, for a uniform security mechanism so as to facilitate access to capital by producers of primary resources and manufacturers. Such a security interest, precisely because it freed borrower and lender from the obligation to defer to a variety of provincial lending regimes, facilitated the ability of banks to realize on their collateral. This in turn translated into important benefits for the borrower: lending became less complicated and more affordable.
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> […] Far from being incidental, these provisions are integral to, and inseparable from, the legislative scheme. To sunder from the *Bank Act* the legislative provisions defining realization, and, as a consequence, to purport to oblige the banks to contend with all the idiosyncracies and variables of the various provincial schemes for realization and enforcement would, in my respectful view, be tantamount to defeating the specific purpose of Parliament in creating the *Bank Act* security interest.[193]

The Court therefore concluded that Parliament in the exercise of its power over banking can create new security interests and "define the rights and obligations of the bank and its borrowers pursuant to that interest".[194] Relevant to modern forms of consumer credit, the Court affirmed that based on the unbroken line of authority stretching back to the decision in *Tennant*, it is "beyond dispute that the federal banking power empowers Parliament to create an innovative form of financing and to define, in a comprehensive and exclusive manner, the rights and obligations of borrower and lender pursuant to that interest".[195]

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[192] *Hall*, *supra* note 41 at para 50.

[193] *Ibid* at paras 42–43. See also *Bank of Montreal v Innovation Credit Union*, 2010 SCC 47 at para 14.

[194] *Hall*, *supra* note 41 at para 36.

[195] *Ibid* at para 51. See also *Central Computer Services Ltd v Toronto Dominion Bank*, 1979 CanLII 2681, 107 DLR (3d) 88 at paras 4–8 (MBCA), in which Justice Monnin with Justice O'Sullivan concurring, affirmed that banking must have a much broader meaning than the restrictive definition of banking in the *Bank Act* and recognized the evolutionary nature of the business of banking across time. Concluding that accounting and payroll services now appertain to the business of banking, Justice Monnin reasoned as follows at para 6:

> Banking business must be allowed to develop in accordance with technological advances of today. The computer has revolutionized many an aspect of business and will do so for

The question raised before the Supreme Court of Canada in *Canadian Western Bank* is commensurable to the issue before the Court in *Canadian Pioneer* as to the extent to which federally regulated financial institutions such as banks must comply with provincial laws, in this case those regulating the promotion and sale of insurance.[196] The Court further explained that "the importance of national control was because of 'the peculiar status of bankers [as financial intermediaries], their importance at the centre of the financial community [and] the expectation of the public that it can grant them implicit and utmost confidence'".[197] Although the Court stated that is was unnecessary to define "banking", it nonetheless confirmed that it includes the incorporation of banks, as well as the securing of loans by appropriate collateral and made the following remarks:

> There is no doubt that banking is crucial to the economy and that even the basic, minimum and unassailable content of the exclusive power conferred on Parliament in this regard must not be given a cramped interpretation. Banks are institutions of great importance. The federal authorities monitor all aspects of their activities to ensure that they remain safely solvent and that they do not abuse their privileged position as takers of deposits and granters of credit. Courts have recognized that in its regulation of banks, Parliament may well trench on matters that would otherwise lie within provincial jurisdiction such as property and civil rights in the province, including insurance. […] Such considerations, however, should not lead to confusion between the scope of the federal power and its basic, minimum and unassailable content.[198]

Notwithstanding the recognition of a "basic, minimum and unassailable content" of the federal banking power, the Court rejected the bank's claim to interjurisdictional immunity

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> many years to come. One need only think of the facilities of making reservations with railways or air companies to think of the large benefits of the computer. In the days of Messrs. Falconbridge and McLaren, and other early writers on the subject of banking, a drive-in cashier or drive-in teller would have seemed revolutionary, yet this is one of the daily accepted banking services. It is useless to quote the law merchant or what Lord Mansfield said or did in his days, as what he did or said has no relevance whatsoever to modern banking business. What I must look at is the facts of the case as explained by the witnesses who testified and the current practices of reputable bankers is the field or what other banks are doing under the heading of business pertaining to banking.

[196] *Canadian Western Bank*, *supra* note 52 at para 2. Specifically, the Court was required to consider "whether and to what extent the market conduct rules enacted for consumer protection in Alberta's *Insurance Act*, RSA 2000, c I-3, govern the promotion of credit-related insurance by banks as now permitted under the *Bank Act*, SC 1991, c 46, as amended."

[197] *Canadian Western Bank, supra* note 52 at para 84, quoting *Canadian Pioneer*, *supra* note 47 at 461.

[198] *Canadian Western Bank*, *supra* note 52 at para 85 [emphasis added].

because the bank's promotion of its business of insurance was only secondarily furthering the security of the loan portfolios.[199] The Court emphasized the difference between *requiring* collateral, which is considered banking activity, and *promoting* the purchase of a certain type of product that could be used as collateral by the bank.[200] In addition, the Court concluded that the paramountcy doctrine was not engaged since there was no operational conflict with federal banking legislation and that "[c]ompliance by the banks with provincial insurance laws will complement, not frustrate, the federal purpose".[201] As a result, banks must comply with both federal and provincial laws. Although concurring in the result, Justice Bastarache dissented on the approach given to the doctrine of interjurisdictional immunity but made the following pertinent remarks on the core of the federal head of power over banking:

> After a thorough examination of the jurisprudence, the trial judge found that the lending of money, the taking of deposits, the extension of credit in the form of granting loans, as well as the taking of security for those loans were core elements of banking (paras. 129-30). I agree. When one considers these "essential" elements of the federal banking power, one is naturally drawn towards a consideration of the activities and operations performed by banks which are central to the reasons why they fall under federal jurisdiction. Thus, deposit taking and credit granting easily fall at the heart of this core set of operations and activities, since these activities constitute in many ways the *raison d'être* of banks. It is also possible to see these activities as part of the core of banking because this is so clearly and palpably the "domain" of banks as federal undertakings.[202]

The issue of whether provincial legislation applied to federally incorporated financial institutions was once again before the Supreme Court of Canada in *Marcotte*.[203] Several class actions were launched to seek repayment of the conversion charges imposed by several credit card issuing financial institutions on credit card purchases made in foreign currencies primarily on the basis that the conversion charges violated Quebec's *Consumer Protection Act*[204]. Based on the doctrines of interjurisdictional immunity and of federal

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[199] *Ibid* at para 4.
[200] *Ibid* at para 85.
[201] *Ibid* at para 4.
[202] *Ibid* at para 118 [emphasis added].
[203] *Marcotte*, *supra* note 40.
[204] *QC-CPA*, *supra* note 75.

paramountcy, the financial institutions argued that the provincial statute did not apply to them due to subsection 91(15) of the *Constitution Act, 1867* and that no repayment of the conversion charges was owed, regardless of the manner in which the conversion charge was disclosed in the credit card contracts. Applying the doctrine of interjurisdictional immunity to determine the degree of entrenchment of the provincial statute, the Court concluded that the provincial disclosure provision did not impair the core of the federal banking power and reasoned as follows:

> While lending, broadly defined, is central to banking and has been recognized as such by this Court in previous decisions, it cannot plausibly be said that a disclosure requirement for certain charges ancillary to one type of consumer credit "impairs" or "significantly trammels" the manner in which Parliament's legislative jurisdiction over bank lending can be exercised.
>
> […]
>
> Banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion. Provincial regulation of mortgages, securities and contracts can all be said to relate to lending in some general sense, and will at times have a significant impact on banks' operations.[205]

Taking into consideration the preamble of the *Bank Act*, the Court assumed, without deciding, that the purpose of the federal scheme is to provide for "clear, comprehensive, exclusive, national standards applicable to banking products and banking services offered by banks", as proposed by the banks. Since the federal and provincial standards were the same and duplication was not enough to trigger the doctrine of paramountcy, the Court concluded that the federal purpose was not frustrated by the provincial standards.[206] The Court further concluded that the provincial consumer protection provisions are not inconsistent with the *Bank Act* and that until the Province provides for a different grace period, or a different method of interest computation or disclosure, or different civil remedies, which could result in an operational conflict or undermine a federal purpose, the doctrine of paramountcy is not engaged.[207] This decision has been criticized by Bradley

[205] *Marcotte*, *supra* note 40 at para 68 [emphasis added].
[206] *Ibid* at para 80.
[207] *Ibid* at paras 80, 84.

Crawford who referred to the purpose of creating a national banking industry with uniform standards and stated that "[i]t can hardly be denied that the application of different civil remedies under provincial law to breaches of federally legislated duties of banks would be disruptive, if that was the federal purpose."[208]

From the preceding analysis, several points can be made about the nature and the scope of the banking power assigned to Parliament. First and foremost, the Supreme Court has repeatedly confirmed a broad constitutional interpretation of the head of power relating to "Banking and Incorporation of Banks", which is "wide enough to embrace every transaction coming within the legitimate business of a banker".[209] Furthermore, it has been decisively established that money lending and the granting of credit, which includes consumer credit, are central to banking and fall at the heart of the "unassailable core" of jurisdiction over banking operations and activities.[210]

It is therefore evident from the foregoing that the exercise of Parliament's power over matters related to banking has only been restrained by political choice or other considerations. As confirmed by Robert Kerr, "the federal government could, if it so desired, regulate such activity from a federal point of view under the banking power".[211] Likewise, Margaret Ogilvie stated that "the Supreme Court has stated yet again the well-established view that the scope of the federal banking power is very extensive and permits the Parliament through legislation to regulate banking in Canada on a national scale."[212]

Although the validity of provincial legislation on matters relating to mortgages, securities, contracts and provincial institutions carrying on banking activities has been recognized by the Courts, this type of legislation will continue to apply unless an operational conflict is created with federal legislation or it frustrates the purpose of a federal enactment.

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[208] Bradley Crawford, "Bank of Montreal v. Marcotte: 'Exclusive' Federal Financial Consumer Protection Law and the Role of the Law of Contract" (2015) 30:2 BFLR 346 at 355 [Crawford, 2015].
[209] *Supra* note 148.
[210] Crawford, 1986, *supra* note 22 at 145.
[211] Kerr, *supra* note 141 at 130.
[212] M H Ogilvie, "Commentary: Section 91(15) Revisited Again – and Again" (1991) 18 Can Bus LJ 432 at 444 [Ogilvie, 1991].

Notwithstanding the foregoing, with the exception of cooperative credit institutions, the number of provincial mortgage, loan and trust companies has considerably decreased in favour of the increased participation of the chartered banks in the financial services industry.[213] Along with the consolidation of financial institutions, the governance and regulatory framework has also been centralized under the auspices of Parliament and federally constituted governing bodies, such as the Canada Deposit Insurance Corporation,[214] the Financial Consumer Agency of Canada,[215] the Office of the Superintendent of Financial Institutions[216] and the Canadian Payments Association.[217]

> [T]he safety and reliability of the national financial system have become a new manifestation of banking, not in the old "core" business sense such that only banks may do it, but in a new, pragmatic sense that recognizes the prominence of the banks in every aspect of the operations of the national financial system, from the issue, trading in, and settlement of obligations evidenced by debt and equity securities, to the full range of clearing and settlement services for the transactions of individuals and enterprises of every size in the commercial and financial markets of the country.[218]

Bradley Crawford further explains that the recent amendments to the *Bills of Exchange Act* and the *Bank of Canada Act* in aid of the implementation of the new federal legislation creating the Canadian Payments Association have "begun the process of bringing the non-bank deposit-taking institutions of the country within the legislative framework by which the banking system and payments systems of the country are controlled under federal authority"[219] and suggests that Parliament is beginning to recognize that provincial financial institutions are nonetheless in the business of banking.[220] These developments

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[213] Poonam Puri & Andrew Nichols, "Developments in Financial Services Regulation: A Comparative Perspective" (2014) 55 Can Bus LJ 454 at 456: "The consumer banking sector in Canada is dominated by the 'Big-Five' banks who control over 85% of the assets in the Canadian financial system."

[214] *Canada Deposit Insurance Corporation Act*, SC 1966-67, c 70; now RSC 1985, c C-3.

[215] *Financial Consumer Agency of Canada Act*, SC 2001, c 9.

[216] *Office of the Superintendent of Financial Institutions Act*, SC 1987, c 23, Part 1.

[217] *Canadian Payments Association Act*, SC 1980-83, c 40, Part IV, ss 54–89; *Canadian Payments Act*, RSC 1985, c C-21.

[218] Bradley Crawford, *Payment, Clearing and Settlement in Canada* (Aurora: Canada Law Book, 2002) at 110 [Crawford, 2002].

[219] Crawford, 1986, *supra* note 22 at 17, no 103.1, referring to *Banks and Banking Law Revision Act, 1980*, SC 1980-81-82-83, c 40, s 92 & sub, SC 1983-84, c 40, s 79(1).

[220] Crawford, 2002, *supra* note 218 at 107. See also at 109:

signify that reform and consolidation of the financial services industry is already underway and will most likely continue in the future. Moreover, any future consumer credit regulatory reform by Parliament will be facilitated by the continuing evolution of the industry and its regulatory framework.

Although consumer credit was not considered a core banking service at Confederation, the judiciary has not only confirmed that the business of banking is not limited to the existing activities at the time of Confederation but also that the industry must adapt to new economic, social and technological realities and innovate as it has in the past.[221] In *Hall*, the Court considered the evolution of banking legislation and of the business of banking. In order to counter the deficiencies in the money market of the day, the principal aim of the security interest provisions in the *Bank Act* was to encourage banks and other lenders to facilitate commercial transactions, reduce the cost of borrowing and address the need felt by the business community and in particular smaller business enterprises with limited financial resources.[222] "This legislation, enacted against a backdrop of severe economic depression, aimed at fostering commerce by doing away with prohibitions in the charters of banks which had effectively prevented them from making loans on the security of real or personal property."[223] According to the Supreme Court, the creation of the *Bank Act* security interest had been a key factor in the evolution of the chartered banks into

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> However, in view of the effects of modern technology, it is clear that there is a very real and practical meaning to the concept of "the national financial system", which did not exist event a few years ago. The effects of on-line banking and the various electronic networks for proprietary and shared financial services and products are evident to the average Canadian every day in the increased choice and competition of providers, not only domestic, but international as well. No provincial government could credibly claim competence over any little part of these networks and communications systems. Legislative competence must rest with the federal Parliament if there is to be any coherent governance or effective control over the risks to the economy that such systems have the obvious potential to create. Viewed in that light, the real substance of the PCSA seems to be merely a further logical and practical extension of Parliament's control over what is essentially a part of the banking system of the country and only consequentially a bid for control of the "national financial system".

[221] Crawford, 1986, *supra* note 22 at no 103.1 at 12: "The legitimacy of such judicial recognition of the capacity for change in the legal concept of 'banking' cannot now be questioned."

[222] *Hall*, *supra* note 41 at paras 22–26; RH Anstie, "The Historical Development of Pledge Lending in Canada", Part I (Summer 1967) 74:2 *The Canadian Banker* 81 at 81–82.

[223] *Hall*, *supra* note 41 at para 22, referring to RH Anstie, *supra* note 222 at 81 and RH Anstie, Part II (Autumn 1967) 74:3 *The Canadian Banker* 35.

predominant national lending institutions in Canada.[224] As with the *Bank Act* security interest, innovative and new forms of consumer credit should also be considered as banking activities within the sphere of the federal banking power given that it is "beyond dispute that the federal banking power empowers Parliament to create an innovative form of financing and to define, in a comprehensive and exclusive manner, the rights and obligations of borrower and lender", as previously mentioned.

Although certain matters will continue to remain outside the competence of Parliament such as fiduciary activities and insurance services that are considered matters under the authority of provincial legislatures,[225] the question remains as to the extent of the federal banking power. What previous case law suggests is that "[i]t the very least, it includes all those matters for which Parliament has provided in the *Bank Act*."[226] It is therefore up to Parliament to exercise its federal exclusive power over banking and define the business of banking[227] including any and all matters relating to consumer credit, a core banking service. In addition to more explicit measures, Bradley Crawford provides some directives to Parliament should it decide to fully occupy the field of consumer protection of banking customers:

> [A]sserting "comprehensive, exclusive and national" legislative authority over the relations of banks with their customers could be successfully justified as an exercise of the exclusive federal power over Banking, but only on three conditions:
> (1) Parliament would have to enact specific and effective civil remedies provisions in lieu of those now found in provincial law.
> (2) It would have to assert explicitly its purpose of displacing the application of those provincial laws as an essential part of its plan to limit and unify the civil rights of consumers nationally. The need for explicit civil remedies provisions arises from the characterization of them by the Court as "contractual norms", rather than "standards". […]
> (3) The reference to "national standards" in the text of the Preamble to the *Bank Act*, having been found to be inadequate to signal the more

[224] *Hall*, *supra* note 41 at para 29, referring to William D Moull, "Security Under Sections 177 and 178 of the Bank Act" (1986) 65 Can Bar Rev 242 at 243.
[225] *Canadian Pioneer*, *supra* note 47 at 453–54, referring to *Colonial Building and Investment Association v Quebec (AG)* (1883), 9 App Cas 157; *Canadian Western Bank*, *supra* note 52.
[226] Ogilvie, 1991, *supra* note 212 at 438.
[227] Crawford, 1986, *supra* note 22 at 17, no 103.1.

> ambitious federal objective, would have to be augmented to include some reference to "the rights and remedies" of banks' customers.[228]

Finally, provincial consumer credit reporting acts, which are considered legislation in relation to property and civil rights within the sphere of provincial jurisdiction,[229] also merit consideration given the various ways banks use credit reports and the significant role they play to determine the creditworthiness of consumers and thus the terms of the loan. Similar to other consumer protection legislation, the federal banking power should enable Parliament to enact legislation regulating the activities of banks with respect to such credit reporting services within a valid federal regulatory scheme for consumer credit.[230]

4.2.3 Bills of Exchange and Promissory Notes

According to *Maclaren's Bills, Notes and Cheques*, "[i]t is difficult to over-estimate the importance to the commercial interests of the Dominion of not only uniform law, but also a uniform interpretation and application of the Law."[231] However, until the Imperial *Bills of Exchange Act, 1882*[232] there was no statute in England or in Canada containing any "comprehensive statement of the law relating to negotiable instruments, although there were some statutes amending or declaring the law on various points".[233] Notwithstanding the early reliance on common law, the subjects "Bills of Exchange and Promissory Notes" were assigned exclusively to Parliament pursuant to subsection 91(18) of the *Constitution Act, 1867* to uniform existing legal rules in the colonies with the objective of guaranteeing

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[228] Crawford, 2015, *supra* note 208 at 360.
[229] Crawford, 1986, *supra* note 22 at no 106 at 48.
[230] *Ibid*.
[231] John James MacLaren, *MacLaren's Bills, Notes and Cheques*, 6th ed, Frederick Read, ed (Toronto: Carswell, 1940) at 18. See also *ibid* at 3–4, quoting the Minister of Justice in the House of Commons when the bill was first introduced in the session of 1889: *House of Commons Debates*, 6-3 (1889) at 14 (4 February 1889); *Loczka v Ruthenian Farmers Co-Operative Co*, 1922 CanLII 419, 32 Man R 137 (MBCA) at 148.
[232] *Act to codify the Law relating to Bills of Exchange, Cheques and Promissory Notes governing the same matters*, (UK), 1882, 45 & 46 Vict, c 61.
[233] John Delatre Falconbridge, *The Law of Negotiable Instruments in Canada* (Toronto: The Ryerson Press, 1923) at 2.

a more efficient circulation of bills of exchange in the new Dominion.[234] Codifying in part the rules of common law, including the law merchant[235] that reflected the established commercial practices in matters relating to bills, notes and cheques, Parliament enacted *The Bills of Exchange Act*, 1890,[236] which copied in many respects the Imperial Act of 1882.

According to subsection 16(1) of the *Bills of Exchange Act*, a bill of exchange is "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer". Likewise, a promissory note, is "an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer" and a cheque is "a bill drawn on a bank, payable on demand".[237] An instrument that does not comply with these definitions or other prescribed requirements is not to be considered a credit instrument regulated by the Act. Generally, the federal statute does not merely define the form in which such instruments may be created but determines the rights and liabilities of parties to these financial instruments, defines a holder in due course and the rights of a holder as well as the manner in which a bill may be negotiated and some of the consequences of such negotiation. It is important to note that bills of exchange and promissory notes are credit agreements that are distinguished from other

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[234] Leclair, *supra* note 26 at 538; MacLaren, *supra* note 231 at 3, citing *House of Commons Debates*, *supra* note 231 at 14:

> The object of this Bill is to render uniform in almost every particular the laws throughout the Dominion with respect to these contracts. The law under this Bill will be uniform, in every particular, except as regards to statutory holidays, in respect of which special provision is to be made as regards the Province of Quebec. I may say that the Bill is principally the codification of the existing law relating to Bills, Cheques and Promissory Notes, and that the changes which are made in our law on these subjects are in the direction of making it uniform with the English Statute law.

[235] See *Goodwin v Robarts* (1875), LR 10 Ex 337 at 346, aff'd (1876), 1 App Cas 476 (UKHL), defining "law merchant" as "the usages of merchants and traders […] ratified by the decisions of Courts of law", cited by Geva, *supra* note 22 at 16.

[236] *Bills of Exchange Act*, *supra* note 36, s 165(1), 176(1). See also Maurice Coombs, Halsbury's Laws of Canada, *Bills of Exchange*, HBE-1 (June 15, 2014).

[237] *Bills of Exchange Act*, *supra* note 36, s 165(1), 176(1).

credit agreements by their negotiability. Essentially, "a bill of exchange is an unconditional order to pay money",[238] which is "assignable, at common law, by mere endorsement".[239]

Answering calls for legislative intervention to regulate consumer credit and resolve the judicial imbroglio concerning the status of consumer credit agreements and other less commonly used negotiable instruments,[240] amendments to the *Bills of Exchange Act* were adopted in 1970, to add a new Part V entitled "Consumer Bills and Notes".[241] These newly regulated consumer credit instruments are defined as bills of exchange and promissory notes "issued in respect of a consumer purchase".[242] Although the law of negotiable instruments usually involves litigation between merchants, these amendments confirm that the law pertaining to promissory notes and cheques also regulates certain types of consumer credit and often affects consumer rights.

Given the codification of existing law and the use of the same terminology in the statute and the constitutional head of power, it comes as no surprise that the constitutional validity of the *Bills of Exchange Act* or any of its provisions has never been challenged before the Courts. Nonetheless, several constitutional challenges of provincial laws have been considered by the Supreme Court and the Judicial Committee of the Privy Council, which have involved the interpretation and possible conflict with the federal statute, and afford a glimpse into the nature of the federal power over bills of exchange and promissory notes.

In *John Deere Plow Co v Agnew*[243], the Supreme Court considered whether the plaintiff's right of action on its promissory notes in the provincial court was barred by the provincial

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[238] Margaret Smith, *Bill S-9: An Act Respecting Depository Bills and Depository Notes and to Amend The Financial Administration Act* (Ottawa: Parliament of Canada, 1998), online: Library of Parliament <publications.gc.ca/Pilot/LoPBdP/LS/s9-e.htm>.

[239] *Canadian Law Dictionary*, 5th ed (Hauppauge, NY: Barron's Education Series, 2003) sub verbo "Bill of exchange".

[240] Jacob Ziegel, "Consumer Notes Bill C-208 - Bills of Exchange Amendment Act" (1971), 49 Can Bar Rev 121; (1970), 48 Can Bar Rev 310.

[241] Jacob Ziegel, "Canada regulates consumer notes" (1970-1971) 26:5 Bus Lawyer 1455.

[242] *An Act to amend the Bills of Exchange Act*, SC 1970, c 48; *Bills of Exchange Act*, *supra* note 36, s 176(1).

[243] *John Deere Plow Co v Agnew*, 1913 CanLII 30, 48 SCR 208 [*John Deere*].

Companies Act[244] prohibiting companies to carry on business in British Columbia without registration or licence in the Province. The majority of the Court allowed the appeal since the *Companies Act* was not applicable. In his concurring judgment, Justice Idington considered the constitutional attack on the provincial legislation advanced by the plaintiffs and whether the statutory definition of the word "contract" applied to promissory notes. Concluding that the provincial legislatures cannot use their exclusive legislative authority over property and civil rights "to affect the validity of promissory notes which Parliament has declared shall not be thereby invalidated", he also determined that the plaintiff's right of action in the provincial court was not barred by the provincial statute.[245]

In *Alberta (AG) v Atlas Lumber Co*[246], it was held that the absence of a permit issued to the plaintiff by the Debt Adjustment Board of Alberta was no defence because provisions of the provincial statute could not take away a right given to a holder of a promissory note by the *Bills of Exchange Act*, namely, the right to sue and recover judgment upon it against the maker. Indeed, legislation conferring the holder of a note or bill its rights and powers, including the right to enforce payment of the note and to recover from persons liable thereon by an action, was assigned to the Parliament of Canada.[247] In a concurring majority judgment, Chief Justice Duff concluded that a defence based upon the *Debt Adjustment Act* of Alberta which required the consent of a provincial board and raised in an action against a debtor upon a promissory note failed since it conflicted with federal legislation on promissory notes. Contrary to the *Bills of Exchange Act*, it placed a limitation on "the unqualified right of the holder of a promissory note to sue upon the note in his own name and to recover judgment from any party liable on it damages".[248] Referring with approval to the remarks of Lord Chancellor Herschell in *Ontario (AG) v Canada (AG)*, he held that since Parliament has dealt with the law concerning bills of exchange and promissory notes, the provincial legislatures are consequently precluded from interfering with this legislation

[244] *Companies Act*, SBC 1910, c 7, s 166.
[245] *John Deere*, *supra* note 243 at 226.
[246] *Alberta (AG) v Atlas Lumber Co*, [1941] SCR 87, 1940 CanLII 33 [*Atlas Lumber*].
[247] *Ibid* at 93–98.
[248] *Ibid* at 88.

and affecting the law of the Dominion Parliament in relation to that subject.[249] In his concurring reasons, Justice Rinfret summarized his constitutional analysis as follows:

> [T]he right to sue, or to enforce payment, or to recover on a bill or note is of the very essence of bills of exchange; it is one of the essential characteristics of a bill or of a promissory note. The matter falls within the strict limits of subhead 18 of sec. 91. It flows from the provisions establishing negotiability, which has become the primary quality of a bill or note and in which consist the true character and nature of these instruments.[250]
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> The provisions relating to the right to sue, to enforce payment and to recover before the courts are not incidental provisions; they are, in truth, the very pith and substance of the statute.
>
> If that be so, there is no question but that the *Alberta Debt Adjustment Act* providing, as it does, that no action or suit "shall be taken, made or continued" to enforce payment of a debt—including debts evidenced by bills of exchange or promissory notes—is in direct conflict with valid Dominion legislation.
>
> The Board created under the Provincial Act, as we have seen, has an absolute discretion to say whether or not the particular holder of a bill of exchange or of a promissory note will have the right and power to enforce payment by action or suit. The effect is to destroy the value of the negotiability of the bill or note and to deprive the holder of a bill or note of the right and power to sue and enforce payment and recover, which are conferred upon him by the *Bills of Exchange Act*.[251]

Similar to the two preceding cases, the question raised in *Duplain v Cameron*[252] was whether a person may be deprived by provincial legislation of the rights given to him by the *Bills of Exchange Act*. In particular, the question to be determined was whether the sections of the provincial securities legislation requiring a person wishing to negotiate such

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[249] *Ibid* at 95, referring to *Ontario (AG) v Canada (AG)*, *supra* note 90 at paras 200, 201. On appeal before the Privy Council, the Judicial Committee in *Alberta Reference, 1943*, *supra* note 107 at para 7 refused to express an opinion on the Supreme Court of Canada's analysis on the head of power relating to bills of exchange and promissory notes and concluded, rather, that the Act as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency and that conflicts with the actual federal legislation on those matters.

[250] *Atlas Lumber*, *supra* note 246 at 101.

[251] *Ibid*. *Contra Weingarden v Moss*, 1954 CanLII 594, (1955), 63 Man R 243 at 260 (CA): Justice Coyne of the Manitoba Court of Appeal indicated that the Parliament of Canada has not attempted to deal with limitation of time for actions on promissory notes but noted, however, that such limitation has been held to be within the legislative authority of the Province, referring to MacLaren, *supra* note 231 at 17.

[252] *Duplain v Cameron*, [1961] SCR 693, 1961 CanLII 81.

notes in the ordinary course of his business to register as a "security issuer" or a salesperson and receive written notice of such registration from the registrar are *ultra vires* the Provincial Legislature. Contrary to *Atlas Lumber*, the majority of the Supreme Court held that there was nothing in the provincial securities legislation to prevent the holder of a promissory note from suing upon the document. Although Justice Cartwright admitted, in his concurring majority judgment, that a person is prohibited from issuing promissory notes unless registered with the Securities Commission, he nevertheless concluded that

> the statute does not purport to alter or affect the character of a promissory note which is in fact issued in breach of the statute. The rights of the holder of such a note are not impaired; he is free to enforce payment of the note, to negotiate it or to deal with it in any manner in accordance with the law of bills and notes.
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> […]
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> If, contrary to the view that I have expressed, the statute had the effect of altering the character of promissory notes issued in contravention of its provisions, and particularly if it destroyed their negotiability, I would share the view of my brother Locke that its provisions are *pro tanto* invalid. I am in complete agreement with his statement that a provincial legislature may not extend its own jurisdiction, so as to trench upon the exclusive jurisdiction vested in Parliament by one of the heads of s. 91, by annexing to legislation within its power provisions which trespass upon such a field.[253]

Likewise, Justice Ritchie (as he was then) concluded that "none of the sections of *The Securities Act* of Saskatchewan which are now under attack has any effect on the form, content, validity or enforceability of promissory notes or is otherwise concerned with the 'law of bills and notes in the strict sense'" and that failure to register has no bearing on the law governing the note itself.[254] He further explained that

> [t]he legal nature and effect of promissory notes has been exhaustively dealt with by Parliament in the *Bills of Exchange Act*, but in my opinion this in no way prevents the provincial legislature from regulating the conduct of persons who issue such documents […] I am of opinion that these sections neither relate to nor purport to deal with the law of bills and notes and that the legislation is a valid exercise of provincial power.[255]

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[253] *Ibid* at 709.
[254] *Ibid* at 714.
[255] *Ibid* at 714–15.

Also worthy of consideration are Justice Locke's dissenting reasons in which he confirms that "[i]t has been for centuries the right of all persons in England, and for a lengthy, though lesser, time in Canada, to negotiate such bills of exchange or promissory notes freely in the conduct of their business and to vest in the promisee or endorsee of such instrument the rights given to them at common law, and since 1890 by the Canadian statute."[256] He then quite accurately questions the distinction made by the other judges between the *Atlas Lumber* case in which the "right to sue upon such an instrument without the consent of the Debt Adjustment Board was prohibited" and in the present case, "where the legislation goes farther and prohibits the negotiation of promissory notes, except to the limited extent mentioned, unless a permit to do so is obtained from the Saskatchewan Securities Commission".[257] Despite the majority's conclusion that the provincial statute was *intra vires* the Province's jurisdiction, the Court confirmed that federal legislation will prevail in the event of a conflict with provincial legislation.

Following the enactment of Québec's consumer protection legislation in 1970, several judicial decisions in the province considered the same issues raised in *Atlas Lumber* and *Duplain*. For example, in both *Banque Royale du Canada c Garber*[258] and *Morin c Banque de Montréal,*[259] the Court concluded that the provincial statute applied to banks and businesses dealing with bills of exchange in the absence of incompatibility with the fundamental characteristics of the *Bills of Exchange Act*. Likewise, the question raised in *127097 Canada Ltd c Québec (PG)*[260] concerned the provincial jurisdiction to enact section 251 of the *Consumer Protection Act*, which prohibits a person to charge a consumer for exchanging or cashing a cheque or other order to pay issued by the government of Québec or of Canada or by a municipality. Justice Gendreau on behalf of the Court of Appeal applied the Supreme Court's precedents, which confirm that provincial legislation is invalid if it is contrary to the essential elements of "the law of bills in the strict sense" and

[256] *Ibid* at 703.
[257] *Ibid* at 708.
[258] *Banque Royale du Canada* c *Garber,* [1982] CS 1114 (discontinuance of appeal, CA, 01-09-1983).
[259] *Morin* c *Banque de Montréal*, [1995] RJQ 457 (CS).
[260] *127097 Canada Ltd c Québec (PG)*, [1991] RJQ 2526 (CA).

quoted the following paragraphs of *Crawford and Falconbridge Banking and Bills of Exchange*:

> We consider that the law of bills, cheques and notes in the strict sense includes the essential elements of that law as such, and that legislation defining those elements is necessary legislation in relation to a matter coming within head 18 of s. 91 of *Constitution Act, 1867*. Some of those essential elements are expressed in the *Bills of Exchange Act* and some are to be found only in the common law. […]
>
> But, outside the limits of the law of bills in the strict sense, the law applicable to transactions involving bills, cheques or notes in a province may be the law of that particular province.
>
> In such matters provincial legislation may be valid, so far as it is legislation in relation to a matter, or for a purpose, coming within any of the classes of subjects assigned to the provincial Legislatures by s. 92 of the Constitution Act and so far as it is not invalidated by the doctrine of "paramountcy" for being inconsistent with valid federal legislation and therefore superseded.[261]

Relying on Bradley Crawford's definition of "negotiability", Justice Gendreau limited the "law of bills and notes in the strict sense" to the two elements of negotiability: the right to maintain an action upon the instrument and the right of a transferee, who takes in good faith, for value and without notice, to a transfer of a negotiable instrument free of equities and stated that a provincial statute will be valid if it does not conflict with these essential elements. Although the Court recognized that a broad and common interpretation of "negotiability" would have implied that section 251 affected the transfer or the acquisition of a cheque, it nonetheless relied on *Duplain* and concluded that the provincial provision did not affect the form, content, validity or enforceability of bills of exchange and the "law of bills and notes in the strict sense" and that the provincial prohibition against charging fees for exchanging or cashing a cheque did not conflict with the *Bills of Exchange Act*. The Court's restrictive interpretation of the "law of bills and notes in the strict sense" seems to contradict, however, earlier precedents.

Although negotiability is an essential element of the law of bills and notes, it is certainly not the only element. In fact, Justice Ritchie's reference to essential elements in *Duplain*

[261] *Ibid* at 2530–31, quoting Crawford, 1986, *supra* note 22 at vol 2, no 4705 at 1185 [emphasis added].

included "the form, content, validity or enforceability of promissory notes" as well as other matters that are concerned with the "law of bills and notes in the strict sense". Justice Ritchie's analysis and quoted references of John Falconbridge and Bradley Crawford's treatise on *Banking and Bills of Exchange* indicate that matters "outside of the limits of the law of bills and notes in the strict sense, as regards transactions more or less involving the use of bills or notes", are *intra vires* provincial legislative authority "so far as it is legislation in relation to a matter, or for a purpose, coming within any of the classes of subjects assigned to the provincial legislatures by s. 92 of the B.N.A. Act and so far as it is not inconsistent with valid federal legislation".[262] The constitutionality of the federal statute and the interpretation of the head of power were not considered and the reference to the "law of bills and notes in the strict sense" does not in any way aim to restrict the constitutional definition of bills of exchange and promissory notes but rather defines the scope of the existing federal statute as well as applicable common law rules in order to determine the validity of provincial legislation.

As asserted by the Halsbury's Law of Canada, the "authority of Parliament to enact a bills of exchange statute to regulate bills of exchange and promissory notes throughout the country is undeniable".[263] Although the legal nature and effect of bills of exchange and promissory notes, including their form, content, validity, issuance, transfer or enforceability has been dealt with by Parliament in the *Bills of Exchange Act* within its sphere of competence pursuant to subsection 91(18) of the *Constitution Act*, *1867* judicial precedents confirm that provincial legislatures are free to regulate the contracts and the conduct of parties to such documents within the province in the absence of any conflicting federal enactments.

This conclusion has once again been confirmed by the Supreme Court when it refused to affirm in *Marcotte v Fédération des caisses Desjardins du Québec* that payment by credit card fell under the exclusive federal jurisdiction over bills of exchange as argued by

[262] John Delatre Falconbridge, *Banking and Bills of Exchange*, 6th ed (Toronto: Canada Law Book Company, 1956) at 46 quoted in *Duplain v Cameron*, *supra* note 252 at 714 [emphasis added].
[263] Coombs, *supra* note 236.

Desjardins.[264] Should it have concluded otherwise, the application of Québec's *Consumer Protection Act*[265] to credit cards issued by Desjardins would have been inconsistent with the division of powers, and the Act would not be applicable either because of the interjurisdictional immunity or the paramountcy doctrines. Considering that the constitutional definition of "Bills of Exchange and Promissory Notes" has never been considered to determine whether a federal law or provision was enacted within Parliament's sphere of jurisdiction, the following comments are certainly of interest. After referring to various legal texts and commentaries that rejected the proposition that credit cards fall under the federal power over bills of exchange[266], the Court concluded as follows:

> This is not a case, as Desjardins argues, where the changed social circumstances in Canada, namely the increased popularity of payment by credit card as opposed to payment by cheque, would justify reinterpreting s. 91(18) of the *Constitution Act, 1867* so as to include credit cards. "Bills of exchange" is a well-established technical term around which an extensive structure of legislation, notably the *Bills of Exchange Act*, has developed. Although this Court has recognized that the Canadian Constitution must be "capable of adapting with the times by way of a process of evolutionary interpretation", that evolution must remain "within the natural limits of the text". There has been no shift in how the term "bills of exchange" is defined in Canada. While some of the effects of payment by credit card are the same as payment by bills of exchange, the natural limits of the text of s. 91(18) of the *Constitution Act, 1867* prevent it from being reinterpreted to include credit cards.[267]

In his analysis on the legislative competence over payment law in Canada, Benjamin Geva criticizes the Court's succinct rejection of the progressive interpretation argued by the bank:

> What was argued was not a redefinition of "bill of exchange" but rather an adjustment or adaptation of the "bills and notes" legislative power under

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[264] *Desjardins*, *supra* note 46 at para 21.

[265] *QC-CPA*, *supra* note 75, ss 12, 272.

[266] *Desjardins*, *supra* note 46 at para 19, referring to MH Ogilvie, *Bank and Customer Law in Canada*, 2nd ed (Toronto: Irwin Law, 2013) at 404–05: "The bills of exchange analogy also fails not only because there is no negotiable instrument, but also because credit card transactions involve three parties, whereas an instrument can only be negotiated between two parties."; Bradley Crawford, *The Law of Banking and Payment in Canada* (Toronto: Canada Law Book, 2008) (loose leaf) vol 2 at 13-9 (updated 12/2020 at 13-21) [Crawford, 2008]: "The analogy [that credit cards are bills of exchange] is quite close... . But there are two problems with it as an explanation of the legal foundation of the modern credit card systems."

[267] *Desjardins*, *supra* note 46 at para 20 [emphasis added], referring to *Canada (AG) v Hislop*, 2007 SCC 10 at para 94.

> section 91(18) of the Constitution Act. Effectively, the argument aimed at reading this provision as covering all payment orders and not being limited to "bills" no matter what the latter is interpreted to mean. So understood, the argument is premised on the fact that, at the time the Constitution passed, payment orders were mostly if not exclusively paper cheques or other bills of exchange so that what the drafters had in mind was to capture all payment methods. Had the Court accepted the argument, all types of payment orders, paper and electronic, initiated by card, telex, or otherwise, could have fallen within the federal "bills and notes" power under section 91(18) of the *Constitution Act*.
>
> The irony is that while, this analysis strikes as "progressive interpretation" of the Constitution, as a matter of fact it also reflects its "original understanding." This brand of "originalism" is not premised on treating "bills and notes" as "frozen concepts." Rather, it focuses on the drafters' likely original intention to capture the whole range of payment methods—as they keep emerging and developing.[268]

In fact, many other commentators have referred to the original use of bills of exchange and promissory notes as a medium of transfer of money with resulting monetary obligations.[269] According to Emilio Binavince and Scott Fairley, the unavailability of any official medium of exchange in Canada, encouraged the use of "bills of credit", such as promissory notes, tobacco receipts and bills of exchange. "From this device, the practice emerged of issuing official promissory notes for government expenses in anticipation of tax revenues. It may fairly be said that 'bills of credit' were the predecessors of paper money in North America. Hence, the dollar 'bills' which we circulate now."[270]

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[268] Geva, *supra* note 22 at 27–28, quoting Hogg, *supra* note 42 at 15–9.

[269] Geva, *supra* note 22 at 17:

> On the other hand, in *Miller v. Race* (1758), even before banknotes issued by the Bank of England became legal tender, Lord Mansfield rationalized their negotiability on the need to "give . . . them the credit and currency of money" as if they were "current coin." More than a hundred years later, negotiable instruments were said to "form part of the currency of the country." Negotiability is thus a concept overarching and linking currency, paper money, and legal tender, matters that fall under exclusive federal legislative competence. This appears to support the existence of an exclusive federal power over the negotiability of either all circulating debt instruments or those used as means of payment. Under this view, both the attribution of negotiability and the regulation of its aspects in relation to such debt instruments are under exclusive federal jurisdiction.

See also: Jacob S Ziegel & David L Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis*, 2nd ed (Toronto: Butterworths Canada, 2000) at 20; Bradley Crawford, "Money in Constitutional Law: the Demise of Debtor-Initiated Payments?" (2015) 56 Can Bus LJ 281 at 283: "Bills of exchange are a "medium of transfer of money, rather than money itself".

[270] Binavince & Fairley, *supra* note 25 at 335.

Although the latest decision of the Supreme Court may be interpreted as restricting the federal constitutional jurisdiction on matters relating to bills of exchange and promissory notes, it must be read in conjunction with the Supreme Court's rejection in *Hall* of similar comments made in *Canadian Pioneer*, which has already been discussed in the head of power of banking. As a result, it would be inappropriate for a court to apply a restrictive constitutional definition of "bills of exchange and promissory notes" given that "[s]uch a result could only flow from a case in which the constitutionality of a given legislative provision bearing on banking [or other subject matter] had been specifically put in issue".[271]

It is therefore submitted that the Supreme Court's remarks should be interpreted as limited to the analysis required to determine whether provincial legislation conflicts with the current *Bills of Exchange Act* and not restricting Parliament's authority to modify current legislation to reflect modern financial instruments and payment methods that have either supplemented bills, cheques and notes or will simply supplant them in the future. In fact, Bradley Crawford has already indicated that bills of exchange and promissory notes "are of rapidly declining importance"[272] and "[i]f the evolution of the payments system continues along its present lines, the importance of cheques will diminish greatly in the ordinary day-to-day business of banking as new, electronic forms of payments take their place for many types of transactions."[273] The problem the financial institution faced in *Desjardins* was that Parliament had not yet integrated credit cards within the statutory framework of the *Bills of Exchange Act* like it did for cheques and consumer notes and bills. Should such reform be introduced by Parliament, the Court could no longer state that "[t]here has been no shift in how the term 'bills of exchange' is defined in Canada" as it opined in *Marcotte*.

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[271] *Hall*, *supra* note 41 at para 50.
[272] Bradley Crawford, "Does Canada Need a Payments Code" (1982–1983) 7 Can Bus LJ 44 at 47 [Crawford, 1982].
[273] Crawford, 1986, *supra* note 22 at 15, no 103.1.

If "the federal banking power empowers Parliament to create an innovative form of financing and to define, in a comprehensive and exclusive manner, the rights and obligations of borrower and lender",[274] as the Court has confirmed in *Hall*, the federal power over bills of exchange and promissory notes should also empower Parliament to recognize existing financial instruments and to regulate the whole range of payment methods as well as the rights and obligations of parties involved. Given the foregoing, it is submitted that although Robert Kerr's analysis dates back to 1980 and has been rejected several times by the Québec judiciary, his analysis remains relevant within the context of the recent constitutional analysis and doctrines.

> Since specific federal power extends not only to banking, bills of exchange and promissory notes, but also to currency and coinage, the issue of paper money and legal tender, it seems likely that the federal power extends to all monetary media of exchange. Like banking, the power over bills of exchange and promissory notes is probably open-ended, and expands according to commercial practice to cover other forms of commercial paper which serve the same purpose.[275]

Given the judicial comments on the "law of bills in the strict sense", further comments are warranted on this potentially restrictive interpretation of the federal power. In his thorough analysis of Parliament's constitutional jurisdiction over negotiable instruments pursuant to subsection 91(18) of the *Constitution Act*, *1867*, Jean Leclair concluded that the federal power is restricted to the "law of bills and notes in the strict sense".[276] His analysis is, however, limited to jurisprudence and to the constitutional doctrines existing up to the time of his article in 1992. Contrary to modern constitutional doctrines, Jean Leclair postulated that determination of the scope of federal jurisdiction requires a comparison with opposing provincial concurring heads of power and how both levels of government share their respective exclusive jurisdiction on a subject.[277] In this regard, he theorized that if the provinces enjoyed a broad jurisdiction on private rights under their head of power over "property and civil rights" in section 92 of the *Constitution Act*, *1867*, including rights

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[274] *Hall*, *supra* note 41 at para 51.

[275] Kerr, *supra* note 141 at 133. See also Louis-Joseph De La Durantaye, *Traité des effets négociables* (Montréal: Wilson Lafleur, 1964) at 28, 29, 33; Maximilien Caron, *Précis de droit des effets de commerce* (Montréal: Librairie Beauchemin, 1978) at 1-2.

[276] Leclair, *supra* note 26 at 616. *Contra* Geva, *supra* note 22 at 13–14.

[277] Leclair, *supra* note 26 at 541.

arising from contract, the powers assigned to Parliament should be considered exceptional by nature and therefore be interpreted restrictively.[278] He further concluded that the intent of Parliament to codify existing Canadian law on bills of exchange and promissory notes with the enactment of the *Bills of Exchange Act, 1890* represents their recognition of the extent of their respective power relating to the law of negotiable instruments in the strict sense.[279] He assumed that "the purpose was to fully exercise the jurisdiction granted to the central Parliament".[280] The historical approach undertaken to analyze the exclusive heads of power omits to consider, however, the limitations of using historical facts to define a head of power and determine the extent of the power granted to Parliament. Although he referred to the latter part of the remarks made by the Supreme Court, he seemed to ignore the full statement made by the Court:

> It is quite true that the old Canadian Act, the re-enactment of which was made possible after the amendment of the Constitution, together with contemporaneous British legislation relating to unemployment insurance, were strictly limited to the coverage of persons employed under a contract of service. But this simply happened to represent the legislative policy of the time, and it was perhaps easier to administer. Legislative history provides a starting point which may prove helpful in ascertaining the nature of a given legislative competence; but, as is shown by the history of legislation relating to bankruptcy and insolvency and by the interpretation of the jurisdiction of Parliament in this matter, it is seldom conclusive as to the scope of that competence for legislative competence is essentially dynamic.[281]

In comparison, Benjamin Geva explained that although "the law of bills and notes in the strict sense" refers to the specific elements of the bill or note as a negotiable instrument, "the law of bills and notes in the wide sense" represents "a specialized distinct body of law dealing with specific proprietary and obligatory characteristics of a bill or note, such as in matters relating to the form, issue, liability, negotiation, and discharge."[282] He noted that

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[278] *Ibid* at 542.
[279] *Ibid* at 606.
[280] *Ibid* at abstract.
[281] *Martin Service*, *supra* note 52 at 1006 [emphasis added].
[282] Geva, *supra* note 22 at 12–13, referring to Aharon Barak, "The Nature of the Negotiable Instrument" (1983) 18 Isr LR 49 at 75 and Aharon Barak, "The Requirement of Consideration for Bills or Notes in Israel" (1967) 2 Isr LR 499 at 500–05 [emphasis added]; Crawford, 2008, *supra* note 266 (loose leaf), vol 3 at ss 20:30.20(2), 21:40.80(3).

the *Bills of Exchange Act* already contain a few "wide sense" provisions and concluded that "the expression 'matters coming within bills and notes' ought to be taken to be broad enough to cover the entire law of bills and notes, in its wide as well as its strict sense. It is unlikely, indeed, that the *Constitution Act* purported to deprive the Parliament of Canada of the power to legislate in relation to the general proprietary and obligatory elements of the instrument."[283]

Whether applying the law of negotiable instruments in the wide or strict sense pursuant to modern constitutional doctrines, confusion persists between the "core federal power" and the scope of the power pursuant to a constitutional head of power. Matters related to a head of power should not be limited to the core unassailable elements included in current federal legislation and Parliament should not need to base any new matters relating to an ancillary power should it fall directly under the head of power.[284]

In addition, several commentators have criticized the fact that the meaning of "bills" and "notes" as defined by the *Bills of Exchange Act* have been "crystallized" since its enactment in 1890, having since sustained only minor amendments.[285] Already in 1976, the *Bills of Exchange Act* was described as "jejune and out-dated" and a "legal framework that often reflects the day of the bank runner and stage coach, when the volume of business was negligible compared with today".[286] According to Paul Thomson and Vincent Orchard, the "ideal course of reform would be to repeal the *Bills of Exchange Act* and enact entirely new legislation with modern concepts dealing with commercial paper and bank deposits and collections".[287] The authors also raise technological advances and the reduced role of

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[283] Geva, *supra* note 22 at 14–15.

[284] *Contra* Jean LeClair, "L'interaction entre le droit privé federal et le droit civil Québécois en matière d'effets de commerce : perspective constitutionnelle" (1995) 40 McGill LJ 691 at 729: "Cependant, puisque la prescription n'entre pas, selon nous, dans le contenu spécifiquement fédéral de la compétence du Parlement en matière de lettres de change, la compétence fédérale à l'égard de cette matière se fonderait sur l'exercice d'un pouvoir accessoire."

[285] Geva, *supra* note 22 at 11; Paul Thomas & Vincent Orchard, "The Presentment and Collection of Cheques in Canada" (1976) 22 McGill LJ 203 at 205.

[286] *Ibid* at 231, 205: "The *Bills of Exchange Act,* indeed, gives only cursory treatment to the cheque. While the cheque has become the nation's primary negotiable instrument for commercial purposes, the Act, as its title suggests, concerns for the most part that relatively rare creature of twentieth century commerce, the bill of exchange." See also: Crawford, 1982, *supra* note 272 at 55.

[287] Thomas & Orchard, *supra* note 285 at 232.

commercial paper and state that until the area of chequeless or cashless society arrives, "the law should take formal cognizance of modern conditions including the custom and usage of bankers."[288]

Although the "natural limits of the text" refer specifically to bills of exchange and promissory notes, these commercial financial instruments were the methods of payments prevalent at the time of Confederation. Notwithstanding these limitations, cheques as well as consumer notes and bills have been included and defined in the *Bills of Exchange Act*. Should Parliament wish to reform the law of methods of payments to include other credit instruments and transactions, a progressive interpretation based on modern banking practices and other financial transactions would provide justification for the exercise of the federal power over bills of exchange and promissory notes.

4.2.4 Interest

Upon Confederation, the power to regulate what was considered at the time the money lending industry was clearly assigned to the Dominion Parliament. In the early post-Confederation years, Parliament enacted several statutes, as explained in Chapter 3, to regulate various matters relating to interest pursuant to its legislative power under subsection 91(19) of the *Constitution Act, 1867* such as the *Pawnbrokers Act* and the *Interest Act*, which eventually incorporated *An Act relating to Interest on moneys secured by Mortgage of Real Estate*,[289] imposing additional standards for the disclosure of the cost of credit. Indeed, the majority of Canada's first *Interest Act* regulated interest on moneys secured by real property. The only two sections dealing with other types of loans can be considered general disclosure legislation and provided that if parties to a contract or agreement do not stipulate the rate of interest, it was limited to 6% per year. In addition,

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[288] *Ibid*.

[289] *An Act relating to Interest on moneys secured by Mortgage of Real Estate*, SC 1880, c 42 [*Interest on Moneys Secured by Mortgage Act*]. With some changes, these provisions were to become ss 6–8 and 9 of the *Interest Act*. See also Richard H Bowes, "Annual Percentage Rate Disclosure in Canadian Cost of Credit Disclosure Laws, Symposium: Revision of the Federal Interest Act and Harmonization of Federal Provincial Consumer Credit Disclosure Legislation" (1998) 29 Can Bus LJ 183 at 186.

money lending companies were regulated by the *British Loan Companies Act,* sections 86-103 of the *Companies Act* and the *Loan Companies Act* enacted in 1899.[290]

The constitutionality of various provisions in the *Interest Act* as well as several provincial Acts have been challenged before the Courts and, initially, judicial precedents defined the term "interest" broadly.[291] In 1889, the majority of the Manitoba Court of Appeal concluded in *Schultz* that the provincial legislation was *ultra vires* since it permitted a higher interest rate than the federal legislation prescribed. Justice Dubuc defined "interest" as follows:

> the premium paid for the use of money, or the legal compensation or damage allowed to the owner of money for the detention thereof against his will. The damage suffered by a man who is deprived of a sum of money which he is entitled to have, is called interest. The rate may be agreed to or not. In the absence of agreement, the legal rate is allowed as compensation for such damage.
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> Now, whether the amount claimed in addition to the principal money is called a rate, an increase by way of damage, a penalty for non-payment, or otherwise, it is nothing else than compensation for the detention of money which should have been paid. And this comes within the legal definition of interest. As the Dominion Parliament has, be the B.N.A. Act, exclusive jurisdiction to legislate on the subject of interest, and has fixed the legal rate of interest to be six per cent., the Provincial Legislature has no authority to impose or to empower any corporation to impose a higher rate of interest upon any person unwilling to pay it.[292]

In comparison, two years later, the Supreme Court confirmed in *Lynch v Canada North-West Land Co* the constitutional jurisdiction of Manitoba's Legislature to enact legislation authorizing municipalities to impose an additional 10% on taxes unpaid after a certain time from the assessment being made.[293] Chief Justice Ritchie described the Dominion head of power over interest and explained the rationale for confirming the validity of the provincial statute notwithstanding its exclusive assignment to Parliament as follows:

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[290] *British Loan Companies Act*, *supra* note 34; *Loan Companies Act*, *supra* note 35.
[291] *Ross v Torrance* (1879), 2 LN 186 (CSQC); *Schultz*, *supra* note 19; *Morden v South Dufferin*, 1890 CanLII 153, 6 Man R 515 (MBKB). See also Nadeau, *supra* note 25 at 14–15.
[292] *Schultz*, *supra* note 19 at 44–45 [emphasis added].
[293] *Lynch*, *supra* note 18 at 212.

> It is obvious that the matter of interest which was intended to be dealt with by the Dominion Parliament was in connection with debts originating in contract, and that […] the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest, and fixing a certain rate when interest was payable by law without a rate having been named.
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> […]
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> Does not the collocation of number 19 "interest" with the classes of subjects as numbered 18 "Bills of Exchange," and 20 "legal tender" afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals, and not with taxation under Municipal institutions and matters incident thereto? The present case does not deal directly or indirectly with matters of contract.[294]

The previous broad interpretation given to the head of power over interest was therefore restricted to interest "in connection with debts orginating in contract" thus allowing the Court to uphold the constitutionality of provincial legislation enabling municipalities to impose late fees.[295]

In 1903, the first constitutional challenge to the federal *Interest Act* was considered in an action to compel a mortgagee in Great Britain to accept the principal money and interest due on a 10-year mortgage, which had run over six years, as permitted under the *Interest Act*. Although Justice Britton recognized the provincial authority over the civil right to interest upon a contract in *Bradburn v Edinburgh Life Assurance Co*, he nonetheless confirmed that subject matters within provincial jurisdiction may be affected by ancillary provisions to complete the effectual exercise of federal heads of power.[296] He therefore determined that the "Province can deal with [interest] as a civil right only, within the lines and subject to the limitations and restrictions laid down and imposed by Dominion legislation".[297] Concluding that the *Interest Act* was within the competence of the

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[294] *Ibid* at 207, 212 [emphasis added].
[295] *Waldron, 1992*, *supra* note 23 at 19; Nadeau, *supra* note 25 at 16–17.
[296] *Bradburn v Edinburgh Life Assurance Co*, [1903] 5 OLR 657 at para 35, [1903] OJ No 235 (HCJ) [*Bradburn*], referring to *Citizens Insurance*, *supra* note 42 at 330, *Edgar v Central Bank* (1888), 15 AR 193 (ONCA) at 207 and *Tennant*, *supra* note 49.
[297] *Bradburn*, *supra* note 296 at para 27.

Dominion Parliament, Justice Britton observed that "[m]oney is seldom lent except at interest, and next to getting security for its repayment, interest is the most important thing connected with the loan, and interest is one of the subjects reserved for the Dominion".[298] He further commented on the federal authority to regulate lending activities as follows:

> In so holding, I do not overlook the argument that, as a logical result, the Dominion can legislate to limit any contract to the shortest duration where interest is involved, nor do I overlook the decision in *The Citizens Insurance Co. of Canada v. Parsons*, that "property and civil rights" in section 92 of *British North America Act*, include "rights arising from contract, ... and are not limited to such rights only as flow from the law." It is, however, one thing to legislate where the contract has sole reference to security for money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident. The question is simply as to the power. The wisdom of the Dominion Parliament is likely to be equal to that of the Provincial, and private rights in regard to interest are not less likely to be protected in the Dominion than in the Provincial.[299]

The above remarks are interesting given the developments in the money lending industry. As previously explained in Chapters 1 and 3, consumer credit was essentially nonexistent at Confederation, with necessitous borrowers resorting to charity, a friendly loan from a friend or an acquaintance or a high-cost loan from a pawnbroker or a loan shark. Demand for small consumer loans grew steadily, however, in the new Dominion as the country prospered and thrived.[300] In response, Parliament progressively enacted legislation to regulate the emerging money lending industry via the *Loan Companies Act*, *Money-Lenders Act* and the *Small Loans Act*.

In *Board of Trustees of Lethbridge Irrigation District v Independent Order of Foresters*,[301] the Judicial Committee of the Privy Council considered in 1940 the constitutionality of several acts adopted by the Province of Alberta that purported to reduce by one-half the interest on certain securities guaranteed by the Province. The Court concluded that the provincial enactments were in pith and substance Acts dealing

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[298] *Ibid* at para 31 [emphasis added].
[299] *Ibid* at 666–67 [emphasis added and references omitted].
[300] Waldron, 1992, *supra* note 23 at 11.
[301] *Board of Trustees of Lethbridge Irrigation District v Independent Order of Foresters* (sub nom *Reference Re: Provincial Securities Interest Act (Alb)*), 1940 CanLII 278, [1940] AC 513 (UKJCPC).

with "interest" within the exclusive jurisdiction of the Dominion Parliament over interest pursuant to subsection 91(19) of the *Constitution Act, 1867*. The Acts were therefore *ultra vires* the Provincial Legislature. Viscount Caldecote, on behalf of the Court, refused to accept the appellants' arguments that "interest" should be given a restrictive interpretation and read down as meaning only interest that is exorbitant or usurious. Instead, the Court stated that the "Dominion Parliament in exercising the power to legislate upon 'interest' might very well include in an Act dealing generally with the subject of interest provisions to prevent harsh transactions"[302] and opined that

> so far from supporting the argument for a restricted interpretation of head 19 of s. 91 in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt to lay down any exhaustive definition of "interest." The word itself is in common use, and is well understood. It is sufficient to say that in its ordinary connotation it covers contractual interest, and contractual interest is the subject of the Act now in question.[303]

Likewise, the Judicial Committee of the Privy Council further considered the federal jurisdiction over interest when it was asked to determine, in *Saskatchewan (AG) v Canada (AG)*,[304] the constitutionality of Saskatchewan's crop failure relief legislation, which in effect altered contractually stipulated rates of interest. Confirming the Supreme Court's decision, the Judicial Committee concluded that the effect of the impugned provincial legislation was to increase the rate payable on the principal outstanding contrary to section 2 of the federal *Interest Act*, which provided for the freedom to contract for any rate of interest or discount and therefore entrenched upon the Dominion field. Viscount Simon, on behalf of the Court, confirmed previous judicial precedents that recognized a broad federal power to regulate interest notwithstanding the provincial power over civil rights:

> Contractual rights are, generally speaking, one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to "interest," the argument that the provincial legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject-matter of "interest" to the

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[302] *Ibid* at 277 [emphasis added].

[303] *Ibid* at 278 [emphasis added].

[304] *Saskatchewan (AG) v Canada (AG)*, [1948] UKPC 87, [1949] AC 110 affirming *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan*, 1947 CanLII 32 at 411, [1947] SCR 394 [*Reference Farm Security Act*].

> Dominion legislature under head 19 of s. 91 of the *British North America Act*. There is another qualification to the otherwise unrestricted power of the provincial legislature to deal with civil rights in head 18, "Bills of Exchange and Promissory Notes." The Dominion power to legislate in relation to interest cannot be understood to be limited to a power to pass statutes dealing with usury such as were repealed in the United Kingdom in 1854 (17 & 18 Vict., c. 90). […] It is therefore clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincial enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest.[305]

In 1963, the constitutionality of the *Small Loans Act* was confirmed in *R v Exchange Realty Co*, by Justice Monnin writing on behalf of the Court of Appeal:

> The *Small Loans Act* is essentially concerned with interest. The matter of interest is a subject of legislation expressly enumerated under sec. 91. Such legislation is of paramount authority even though it may trench upon property and civil rights with a province. Moreover, sec. 9 [power to investigate non-licensed money-lenders] of the *Small Loans Act* which is essential for the enforcement of the Act, must be regarded as necessarily incidental to effective dominion legislation upon the subject of interest, and therefore within the competence of the federal parliament.[306]

Given the broad federal interest power previously endorsed by the judiciary and consequently interpreted to include lending activities in general, the *Ontario (AG) v Barfried Enterprises Ltd* decision of the Supreme Court merits a closer review considering the restrictive interpretation it purported to establish. Instead of relying on jurisprudence that adopted a broad interpretation of the federal interest power,[307] Justice Judson in his majority judgment relied on Halsbury's definition, which specified that "[i]n general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another. Interest accrues *de die in diem* even if payable only at intervals, and is, therefore, apportionable in point of time

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[305] *Ibid* at para 4 [emphasis added].

[306] *R v Exchange Realty Co*, (1963) 45 WWR 346 at 349, 42 DLR (2d) 682 (MBCA).

[307] *Barfried Enterprises*, *supra* note 45 at 575, quoting the wide definition of "interest" in *Reference Farm Security Act*, *supra* note 304 at 411: "In general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another".

between persons entitled in succession to the principal."[308] It has been suggested, however, by the Federal Court of Appeal, relying on Vern Krishna's commentary, that Justice Judson incorrectly interpreted the Halsbury's definition:

> But Halsbury merely says that where an amount is considered to be 'interest', it is deemed to accrue from day to day. Unfortunately, the statement was read to mean that a payment cannot be interest unless it accrues from day to day even if payable only at intervals. This interpretation of Halsbury has caused a good deal of misunderstanding as to the meaning of interest.[309]

As a result, Justice Judson described the pith and substance of Ontario's unconscionable transactions relief legislation[310], which was applicable only to money lending contracts, as follows: "[t]he day-to-day accrual of interest seems to me to be an essential characteristic. All the other items mentioned in *The Unconscionable Transactions Relief Act* except discount lack this characteristic. They are not interest. In most of these unconscionable schemes of lending the vice is in the bonus."[311] Justice Judson therefore concluded that the true nature and character of the Act in question is not interest but rather deals with rights arising from contract and is therefore within the exclusive provincial jurisdiction relating to property and civil rights.

Once the provincial statute was confirmed *intra vires* the Provincial Legislature, the Court had to determine whether it conflicted with existing federal legislation on interest. Justice Judson applied his restrictive definition of interest to interpret the federal *Interest Act* and determine whether "bonus" was "interest". This is confirmed by Justice Pigeon writing for the majority of the Court in *Tomell Investments Ltd v East Marstock Lands Ltd* when he summarized the ratio of the *Barfried Enterprises* decision as follows: "It must be noted that *The Unconscionable Transactions Relief Act* was found not to be in conflict with the *Interest Act* because s. 6 was not construed as including in 'interest' a charge such as a

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[308] *Barfried Enterprises*, *supra* note 45 at 575, referring to *Halsbury's Laws of England*, 3rd ed, vol 27 (London: Butterworth & Co, 1959) at 7.
[309] *Sherway Centre Ltd v Canada*, 1998 CanLII 9046 (FCA) at para 10, quoting Vern Krishna, *The Fundamentals of Canadian Income Tax*, 5th ed (Scarborough: Thomson Canada, 1995) at 337.
[310] *ON-UTRA, 1960*, *supra* note 44.
[311] *Barfried Enterprises*, *supra* note 45 at 575.

bonus: this would have made 'interest' synonymous with 'cost of the loan'".[312] In his concurring reasons, Justice Cartwright agreed with Justice Judson, concluding as follows:

> The *Unconscionable Transactions Relief Act* appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest specified in head 19 of s. 91 of the *British North America Act*.[313]

He further clarified that, although this was not the case, "[p]articular cases may arise in which the provisions of the Provincial Act will come into conflict with those of the Dominion Act. In such cases the Dominion Act will of course prevail."[314] Since the majority of "the Supreme Court expressed no opinion as to what would have been the position if there had been conflicting federal legislation", as Jacob Ziegel noted,[315] Justices Martland and Ritchie's dissenting reasons are certainly interesting. After determining that the Ontario statute applied only to money lending contracts and that the "power of the Court to act under this Act arises only if it has found that the cost of the loan is excessive", they concluded that *The Unconscionable Transactions Relief Act* was *ultra vires* the Ontario Legislature because it conflicted directly with the provisions of section 2 of the *Interest Act* allowing freedom of contract with regards to rates of interest.[316]

It would therefore seem that the majority of the Court gives a restrictive interpretation to the exclusive federal legislative jurisdiction over matters relating to interest pursuant to

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[312] *Tomell Investments Ltd v East Marstock Lands Ltd*, [1978] 1 SCR 974 at 980, 1977 CanLII 33 [*Tomell Investments*].

[313] *Barfried Enterprises*, *supra* note 45 at 579.

[314] *Ibid* at 500. See also *British Columbia (Director to Consumer Protection Act) v Harbour Tax Services Ltd*, (1978) 87 DLR (3d) 96, [1978] 4 WWR 704 in which the British Columbia Supreme Court applied *Barfried Enterprises* prior to the *Tomell Investments* judgment by the Supreme Court and concluded that the maximum discount which a discounter may demand from a taxpayer regulated by the provincial *Consumer Protection Act*, SBC 1977, c 6, s 37, was intra vires of the Province. Justice Anderson duly noted at para 16, however, that "Nothing that I have said in these reasons is to be considered as a constitutional bar to federal legislation in this area".

[315] Jacob S Ziegel, "Recent Legislative and Judicial Trends in Consumer Credit in Canada" (1970) 8 Alta L Rev 59 at 67 [Ziegel, 1970].

[316] *Barfried Enterprises*, *supra* note 45 at 582–83.

subsection 91(19) of the *Constitution Act, 1867*. However, the question before the Court was not whether federal legislation was within the constitutional definition of interest and thus constitutionally valid but whether the consumer protection legislation relating specifically to "money lent" in Ontario was *ultra vires* of the Provincial Legislature. Rather, the *ratio decidendi* is that the pith and substance of *The Unconscionable Transactions Relief Act* was "not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act" and could be "classified as an extension of the doctrine of undue influence" and thus did not conflict with federal legislation.[317] As a result, if Justice Judson's comments could be interpreted as restricting the constitutional definition of interest, it would be considered an *obiter dictum*. In support of this proposition, Harvin Pitch also questioned whether the restrictive definition of interest was actually part of the *ratio decidendi* of the case.[318]

A critical reading of Justice Judson's reasons, however, throws doubt as to whether Justice Judson's restrictive interpretation of interest would still be applicable given the evolution of constitutional doctrines and the current recognition of concurrent jurisdiction on various matters based on the double aspect doctrine. In order to avoid the application of the doctrine of exclusiveness (as it was then defined) and thereby confirm the validity of provincial legislation protecting consumer debtors against harsh and unconscionable transactions, Justice Judson had to restrict what would be considered in today's constitutional terminology the "core" of federal power over interest as exercised by Parliament in the *Interest Act* and not the constitutional definition of "interest" as a federal head of power. Instead, Justice Judson applied the doctrine of exclusiveness, which did not permit a province to legislate on matters of federal jurisdiction. Once it was determined that the Act was within the jurisdiction of the province, Justice Judson inquired whether *The Unconscionable Transactions Relief Act* is "removed from the exclusive provincial legislative jurisdiction by s. 91(19) of the Act, which assigns jurisdiction over interest to the federal authority". Constitutional doctrines only evolved later to recognize that, in the

[317] *Ibid* at 574.

[318] Harvin Pitch, "Consumer Credit Reform: The Case for a Renewed Federal Initiative" (1971-1972) 5 Ottawa L Rev 324 at 334–35.

absence of conflict, federal legislation did not invalidate otherwise valid provincial legislation.[319] Viewed within this context, the limited use of *Barfried Enterprises* as a precedent to interpret the constitutional head of power over interest is confirmed by Mary Anne Waldron: "the effort to limit the federal jurisdiction over interest to contractual interest with the balance of legislative power falling automatically to the provinces has had little support. Comments that do support such a limit have primarily arisen in cases where the courts have attempted to protect spheres of legislative power that appeared necessary for reasons of social policy."[320]

Relying on Justice Judson's definition of "interest" in *Barfried Enterprises*, the respondent in *Construction St-Hilaire Ltée v Immeubles Fournier Inc* argued that the federal statute on interest, and in particular section 8, could only apply to a price that increased on a daily basis and that "the legislative authority, on which the power to legislate on interest must be based, must remain within the compass of the subject—namely a consideration earned daily in payment of a sum of money or debt".[321] Refusing to restrict the scope of the *Interest Act*, Justice Pigeon on behalf of the majority of the Court, noted that:

> the wording of s. 8 of the *Interest Act* deals not only with interest proper but with any "fine or penalty or rate of interest that has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrears." The wording of the enactment is thus counter to the limitation which respondent seeks to introduce by interpretation. The intention to prohibit recovery of any form of additional payment is made all the more obvious by subs. 2, which expressly authorizes a stipulation for the "payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears".[322]

According to Justice Pigeon, an attack on the *Interest Act*'s constitutional validity required the Court to consider the ancillary doctrine and its corollary, that of the unoccupied field,

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[319] See *Robinson*, *supra* note 56 at 764 (Spence J).

[320] Waldron, 1992, *supra* note 23 at 23–24; Nadeau, *supra* note 25 at 26–27. See also Louis J Romera, *Federal-Provincial Relations in the Field of Consumer Protection* (Ottawa: Consumer Research Council, 1975) at 11: "The judgment of the Supreme Court of Canada in the *Barfried Enterprises* case, while the most important constitutional law case in the area of consumer protection, is extremely difficult to understand and its effect on the distribution of legislative powers remain unclear."

[321] *Construction St-Hilaire Ltée v Immeubles Fournier Inc*, [1975] 2 SCR 2 at 14, 1974 CanLII 155.

[322] *Ibid* at 3.

which provided that Parliament may legislate on matters that are necessarily incidental to render effective valid federal legislation and, when Parliament has occupied the field, federal legislation will prevail if provincial and federal legislation overlap. Regrettably, the Court refused to pronounce itself and dispel the restrictive interpretation of the federal interest power purported to have been established by the Court's previous decision since the respondent did not provide the necessary notice to the Attorney General of Canada and the Attorney General of the province as required by *Rule 18* of the Supreme Court of Canada.[323]

In his analysis of Parliament's authority to regulate all the cost components of a consumer credit transaction by virtue of the exclusive head of jurisdiction of "interest", Harvin Pitch considered the influence the *Barfried Enterprises* decision may have had on the perceptions within government of its power to regulate matters relating to interest.

> In his testimony before the Joint Committee of the Senate and House of Commons on Consumer Credit, K. R. MacGregor, the former Superintendent of Insurance (responsible for the administration of the *Small Loans Act*), adopted an interpretation of the case which has since become popularized by provincial ministers in charge of consumer protection bureaus. Basically, he argued that the Court had defined the interest power as something less than the entire cost of the loan; in particular the Court held that the term interest did not include other costs such as bonuses. Therefore, he argued that the federal government exercising jurisdiction under the interest power was limited to regulating that portion of the loan restrictively defined as interest. It can be readily observed that, in order to defeat the purpose of such federal legislation, a lender need only classify the components of the cost of the loan in terms other than interest.[324]

Although the restrictive interpretation of the *Barfried Enterprises* decision was necessary to save valid provincial consumer protection legislation, it unfortunately created a fair amount of uncertainty on the scope of Parliament's authority over the subject matter of "interest". In fact, it was most likely a leading cause in the demise of what has been called "the most ambitious harmonization initiative"[325] made by the federal government to

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[323] *Ibid* at 14–15.

[324] Pitch, *supra* note 318 at 334 referencing Special Joint Committee of the Senate and House of Commons on Consumer Credit, *Evidence*, 26-2, No 2 (9 June 1964) at 41–69 (KR MacGregor).

[325] Bowes, *supra* note 289 at 188–89; Waldron, 1992, *supra* note 23 at 16–17.

regulate consumer credit in 1976 with Bill C-16, *The Borrowers and Depositors Protection Bill*.[326] According to Richard Bowes,

> The bill did not have the unqualified support of consumers' organizations, and certain of its provisions were strongly opposed by credit grantors. Moreover, many provinces objected to portions of the bill on the time-honoured principle of turf-protection. Given the lack of unqualified support from the consumer quarter, and the strong opposition from various quarters, it is not too surprising that the bill died in Committee after second reading.[327]

In 1978, the Supreme Court of Canada dealt with the first constitutional challenge to the federal *Interest Act* before the Court in *Tomell Investments.* Justice Pigeon, writing for the majority of the Court, concluded that section 8 of the *Interest Act*, which defined what interest may be charged on "arrears of principal or interest secured by mortgage on real estate", was *intra vires* Parliament's authority. Unwilling to overturn the Court's previous statements on the scope of the head of power over interest, Justice Pigeon reinterpreted the conclusions reached in *Barfried Enterprises* as follows:

> With respect for those who have expressed a contrary opinion in *Immeubles Fournier*, it does not appear to me that the conclusion reached in *Barfried Enterprises* implies a view of the extent of federal power over interest which excludes from its scope enactments such as s. 8 of the *Interest Act*. All that was decided was that the federal jurisdiction over interest does not exclude all provincial jurisdiction over contracts involving the payment of interest so as to invalidate provincial laws authorizing the courts to grant relief from such contracts, when they are adjudged to be harsh and unconscionable. This conclusion was based on the view that the subject of interest assigned to the Federal Parliament was not to be equated with the cost of money, in other words with interest in the widest sense.
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> This view of the limited scope of this federal power is consonant with the view taken in earlier cases that federal jurisdiction over interest does not

[326] Bill C-16, *The Borrowers and Depositors Protection Bill*, 2nd Sess, 30th Parl, 1976; "Borrowers and Depositors Protection Act", 2nd reading, *House of Commons Debates*, 30-2, vol 1 (1 November 1976) at 634 (Anthony Chisholm Abbott).

[327] Bowes, *supra* note 289 at 188–89; Waldron, 1992, *supra* note 23 at 16–17; Nadeau, *supra* note 25 at 40–42. See also: Binavince & Fairley, *supra* note 25 at 353: "Interestingly enough, at the instigation of the founder of the Caisses Populaires movement, Alphonse Desjardins, Parliament had once contemplated credit union legislation of its own. A bill passed the House of Commons in 1907 but missed support in the Senate by one vote. This was apparently on the basis of a legal opinion that such legislation might be beyond federal jurisdiction."; Edward Peter Neufeld, *The Financial System of Canada: Its Growth and Development* (Toronto: Macmillan Company of Canada, 1972) at 384–85.

> extend to interest on all kinds of debts or claims, but only on contractual obligations.[328]

The majority of the Court in *Tomell Investments* therefore seemed to refuse the broad constitutional definition of interest which had been previously given by the judiciary as "contractual interest", including the prevention of harsh transactions or the "cost of money". Justice Pigeon nonetheless tried to distance himself from *Barfried Enterprises* since "the Court was not concerned with that aspect of federal jurisdiction over interest" and refused to accept a narrow constitutional definition of interest that would have excluded any additional charges as well as the ability to effectively regulate matters relating to interest:

> In order to hold that Parliament cannot enact such a provision under the B.N.A. Act, s. 91, head no. 19, "Interest", it seems to me that one has to say that Parliament is not thereby authorized to prescribe a maximum rate. Any legislation fixing a maximum rate of interest is futile if it does not, expressly or impliedly, prohibit any stipulation that would have the effect of increasing the charge beyond the rate of interest allowed.[329]

Having applied *Barfried Enterprises* and refused a broad definition of the subject interest assigned to Parliament, Justice Pigeon relied on the application of the doctrine of ancillary powers[330] in order to prevent the purpose of the *Interest Act* from being defeated and concluded that

> s. 8 of the *Interest Act* is valid federal legislation in respect of interest because, although it does not deal exclusively with interest in the strict sense of a charge accruing day by day, it is, insofar as it deals with other charges, a valid exercise of ancillary power designed to make effective the intention that the effective rate of interest over arrears of principal or interest should never be greater than the rate payable on principal money not in arrears.[331]

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[328] *Tomell Investments*, *supra* note 312 at 985 [emphasis added].
[329] *Ibid* at 983-84.
[330] *Canada (AG) v British Columbia (AG)*, [1929] UKPC 80, [1930] AC 111 at 118. See also: *Ontario (AG) v Canada (AG)*, *supra* note 90; *Ontario (AG) v Canada (AG)*, [1896] AC 348, [1896] UKLawRpAC 27 (PC).
[331] *Tomell Investments*, *supra* note 312 at 987.

Chief Justice Laskin, writing a succinct two paragraph concurring majority judgment, did not see the need to rely upon the doctrine of ancillary powers and confirmed Parliament's jurisdiction on a broadly defined federal interest power.

> The central question raised by the constitutional attack on s. 8 of the *Interest Act*, R.S.C. 1970, c. I-18, is ascertainment of its pith and substance or, for convenience of expression, its focus. I agree with my brother Pigeon that it focuses on the maximum charge that can be exacted from a debtor on arrears of principal or interest under a land mortgage by limiting it to the rate of interest payable on principal not in arrears. A charge, whether called or found to be a fine or penalty or rate of interest, which exceeds this limit is precluded. In my opinion, s. 8 is valid legislation in relation to interest.
>
> Parliament's undoubted power to fix or limit rates of interest under any types of contracts or transactions extends to interest on arrears as well as to interest on principal payments as they fall due. Parliament is, in my view, entitled to require creditors to abstain from making or exacting a charge on arrears that goes beyond the rate of interest fixed for principal not in arrears and, in that respect, to prevent them from escaping the stricture through a designation of the charge as a fine or a penalty. This is an assertion of the interest power simpliciter, and […] it is unnecessary to invoke any doctrine of ancillary power. [332]

Several authors have interpreted this decision as rejecting a restrictive definition of interest in favour of a "broad definition of interest in s. 8 of [the] Federal *Interest Act* upheld as ancillary to control of interest and to avoid thwarting the effective use of the Interest power"[333] and "would seem to permit the enactment of federal legislation embracing matters that are not interest".[334] Harvin Pitch further explained as follows:

> If a federal statute based on the interest power will be circumvented because lenders will classify their costs as bonuses rather than interest, then the federal government can legislate, incidentally, to cover these other areas. As Professor Jacob Ziegel pointed out in his November 10, 1964 testimony to the Joint Committee: "the federal government has admitted jurisdiction over the so called interest element in loans—whatever the term 'interest' means in this context—it has also incidental jurisdiction to cover other charges so as to prevent evasion of the regulation of the interest element".[335]

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[332] *Ibid* at 974 [emphasis added].

[333] Iain Ramsay, *Access to Credit in the Alternative Consumer Credit Market* (Toronto: for Industry Canada and AG British Columbia, 2000) at n 150 [Ramsay, 2000].

[334] JA MacKenzie, "What is Interest? Tomell Investments Limited v East Marstock Lands Limited" (1979) 25 McGill LJ 121 at 125.

[335] Pitch, *supra* note 318 at 335.

In *British Pacific Properties Ltd v British Columbia (Minister of Highways and Public Works)*,[336] the Supreme Court of Canada refused to re-examine the previous "observations" on the definition of interest made by the Court in the *Tomell Investments* decision since it concluded that section 3 of the *Interest Act* did not apply to an arbitration award following the expropriation of land by the Province for highway purposes. Chief Justice Laskin, on behalf of the Court, nevertheless affirmed in *obiter* that the federal interest power is not limited to questions of interest arising under federal legislation and that neither the *Saskatchewan (AG) v Canada (AG)* nor the *Barfried Enterprises* decisions support the Appellant's contentions that section 3 applies only to contractual interest.[337] It is interesting to note that the Court refused to adhere to Justice Pigeon's "observations" in *Tomell Investments* that federal jurisdiction over interest extends only to contractual obligations and contends to state that consideration of this issue should be left to a "case in which they are relevant to its determination".[338]

In 1985, the Supreme Court of Canada upheld in *VK Mason Construction v Bank of Nova Scotia*[339] British Columbia's prejudgment and postjudgment interest legislation as ancillary to the administration of justice within the province and therefore valid in the absence of conflicting federal legislation. In rejecting the Respondent's restrictive interpretation of section 4 of the *Interest Act*, the Court referred to the legislative purpose of the Act: "the Bank's interpretation of s. 4 is much more in accord with the legislative purpose of the *Interest Act*. Section 4 is consumer protection law in the sense that, with respect to loans other than real estate mortgages, consumers are entitled to know the annual rate of interest they are paying."[340]

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[336] *British Pacific Properties Ltd v British Columbia (Minister of Highways and Public Works),* [1980] 2 SCR 283, 1980 CanLII 209.
[337] *Ibid* at 290.
[338] *Ibid* at 290–91.
[339] *VK Mason Construction v Bank of Nova Scotia*, [1985] 1 SCR 271 at 287, 1985 CanLII 608.
[340] *Ibid* at para 33 [emphasis added].

Following the repeal of the *Small Loans Act* and the enactment of section 347 (formerly section 305.1) of the *Criminal Code*, which came into effect in 1981,[341] the Supreme Court of Canada's decision in *Garland v Consumers' Gas Co*[342] concerned the interpretation and application of the new criminal interest rate provision, which made it an offence to enter into an agreement for, or to receive, interest at a rate exceeding 60% per year. Again in *obiter*, the majority of Court referred to the *Tomell Investments*, *Barfried Enterprises*, and the *Immeubles Fournier* decisions and noted that "[a]t common law, interest is a charge for the use or retention of money which accrues day by day; it does not include penalties".[343] Considering this definition, Justice Major's reasons for judgment further indicate that the extremely comprehensive definition of interest provided for the purposes of section 347 "encompassing many types of fixed payments […] would not be considered interest proper at common law or under general accounting principles".[344] Although a "time-factor" is "essential to the definition of common law interest", one-time charges or expenses in the form of fines, penalties, fees and commissions were included in the expanded definition of interest under section 347.[345] Omitting to refer to subsection 91(19) of the *Constitution Act, 1867* or the federal jurisdiction over interest, the Court limited the restrictive definition of interest to the interpretation of common law rules as opposed to legislative definitions, which like section 347 may be wider, and possibly to distance itself from a restrictive constitutional interpretation of a head of power.

The legislative purpose of the *Interest Act* was discussed again in *Krayzel Corp v Equitable Trust Co*.[346] The majority of the Supreme Court of Canada noted that the origins of section 8 of the *Interest Act* arose from its predecessor provision enacted in 1880,[347] which limited the enforcement of fines, penalties and rates of interest on arrears to loans that were secured

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[341] *Banks and Banking Law Revision Act*, *1980*, *supra* note 219.
[342] *Garland v Consumers' Gas Co*, [1998] 3 SCR 112, 1998 CanLII 766 [*Garland*].
[343] *Ibid* at para 27.
[344] *Ibid*.
[345] *Ibid* at para 29.
[346] *Krayzel Corp v Equitable Trust Co*, 2016 SCC 18 [*Krayzel*].
[347] *Interest on Moneys Secured by Mortgage Act*, *supra* note 289, s 3. Parliament rejected the clause that imposed an upper limit of 7% on the rate of interest on mortgages on real estate. See: "Mortgage Regulation Bill", 2nd reading, *House of Commons Debates*, 4-2, vol 1 (31 March 1880) at 953–76 (George Turner Orton).

by mortgages on real estate to deal with "a concern that farmers were at that time becoming 'trapped' by loans carrying fines for arrears that were unknown or unclear."[348] Under the penmanship of Justice Brown, the majority of the Court agreed with Chief Justice Finch of the British Columbia Court of Appeal in *Reliant Capital Ltd v Silverdale Development Corp* that the purpose of section 8 is to protect landowners against abusive lending practises such as charges "that would make it impossible for [them] to redeem, or to protect their equity":

> Parliament has singled out mortgages on real estate for special treatment, or at least treatment that differs from loans that are not secured on real property. I infer that at least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable.[349]

In addition, the majority of the Supreme Court confirmed that Parliament directed that the analysis must entail an inquiry to the *effect* of the impugned mortgage term and that "[s]ubstance, not form, is to prevail. What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended".[350] It is thus interesting to note that although the constitutionality of section 8 of the *Interest Act* was not raised again, the Court relied on the broader purpose of the *Interest Act* of protecting debtors from abusive lenders to interpret its provisions.

While it may be limited to contractual interest pursuant to the Court's earlier judgments, this broader legislative purpose of the *Interest Act* represents the intent of the framers of

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[348] *Krayzel*, *supra* note 346 at para 19 relying on the British Columbia Court of Appeal's analysis of parliamentary debates leading to s 8's enactment in 1880 in *Reliant Capital Ltd v Silverdale Development Corp*, 2006 BCCA 226 at para 56 [*Reliant Capital*].

[349] *Krayzel*, *supra* note 346 at paras 20–21, quoting *Reliant Capital*, *supra* note 348 at para 53. See also: *P.A.R.C.E.L. Inc v Acquaviva*, 2015 ONCA 331 at para 51.

[350] *Krayzel*, *supra* note 346 at para 25, citing Waldron, 1992, *supra* note 23 at 86; Halsbury's Laws of Canada, *Mortgages; Motor Vehicles* at HMO-198 "Mortgages", contributed by JE Roach (2011); *Re Weirdale Investments Ltd and Canadian Imperial Bank of Commerce* (1981), 32 OR (2d) 183 at 190, 1981 CanLII 1823 (HCJ); *Beauchamp v Timberland Inve6stments Ltd* (1983), 44 OR (2d) 512 at 516, 1983 CanLII 1816 (CA).

the *Constitution Act, 1867* to assign Parliament the responsibility of legislating on matters relating to interest, which includes money lending agreements such as consumer credit and the protection of debtors. Mary Anne Waldron addresses, however, the difficult issues raised with regards to the federal interest power:

> Realistically, we cannot escape the constitutional fact that interest is a head of jurisdiction given to the federal government. This has created a major difficulty in obtaining modern and rational legislation relating to interest. The neglect of the *Interest Act* despite extensive criticism of its provisions, the failure of the central government to provide any leadership in consumer credit legislation (except insofar as it retained jurisdiction over its federally created institutions such as banks) and the recent amendments to the *Interest Act* which appear to be aimed only at reducing the Act's nuisance value to a minimum - all illustrate that difficulty.[351]

Nevertheless, as the enactment of previous federal legislation regulating money lending confirms, the federal interest power includes the power to regulate this industry and provide direction to key issues relating to the parties involved, their rights and obligations and the licensing requirements for the industry, as well as credit agreements and other transactions involving interest, including their form, content, validity, issuance, transfer and enforceability. The wide scope of the federal interest power can be compared to the power over banking as well as over bills of exchange and promissory notes, which includes the power to legislate on such matters. As confirmed by Chief Justice Harvey, the interpretation of a head of power is "not a case of construing the words of a contract with reference to their meaning at the time the contract is made, but of a statute and one of general present and future application and the word is used as the statute says as describing a subject for legislation, not a definite object".[352] Moreover, it is important to note that the *Constitution Act, 1867* does not simply assign a subject but assigns "matters relating to" interest, which can be interpreted much broader than the subject itself. This is confirmed by the broad interpretation given to many heads of power, such as Chief Justice Laskin's interpretation of interest or the doctrine of ancillary powers applied by the majority of the Supreme Court to widen to scope of Parliament's jurisdiction over interest.

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[351] Waldron, 1997, *supra* note 3 at 178.

[352] *Reference Re: Alberta Bill of Rights Act*, [1947] 1 DLR 337, 1946 CanLII 224 at para 23 (CA), varied on different point *Alberta Reference, 1947*, *supra* note 148.

A restrictive interpretation is thus unwarranted and would severely frustrate the legislative intent of any federal enactments on the subject as confirmed by Peter Hogg: "[t]he narrow definition of interest given in *Barfried*, if carried over to cases in which federal legislation is in issue, would rob the interest power of all efficacy, since no regulation of interest could possibly be effective if it did not control all elements of the lender's rate of return."[353] A return to a broad constitutional interpretation of interest is most likely and recent decisions of the Supreme Court seem to be leaning in that direction, limiting the relevance of the restrictive definition of interest proposed by Justice Judson.

The above jurisprudential review of the power to legislate on matters relating to interest reveals the existence of concurrent jurisdiction in relation to the power of both levels of government to regulate this subject matter with the Courts adopting either a restrictive or a broad interpretation of interest to uphold valid legislation.[354] However, the recent evolution of constitutional doctrines confirms that a restrictive definition of interest is no longer necessary to maintain the validity of provincial legislation and the Supreme Court has repeatedly confirmed the double aspect doctrine recognizing concurrent jurisdiction on matters relating to the provincial power over property and civil rights and financial matters assigned to Parliament, such as insolvency and bankruptcy, banking, interest, bills of exchange and promissory notes. Constitutional doctrines require, however, that concurrent powers of legislation can only be exercised by a province in the absence of conflicting federal legislation.

Given Parliament's timid stance on the extent of its power since the repeal of money lending legislation, it is not surprising that the provinces have filled the void and enacted consumer protection legislation to protect consumer debtors. Nevertheless, Parliament should be allowed to legislate to the full extent of its powers on all matters relating to interest, including mortgages and consumer credit agreements which, as Justice Britton in *Bradburn* indicated, relates to interest since they are contracts for money lent and interest

[353] Hogg, *supra* note 42 (looseleaf updated 2011), ch 25 at 25-6.1.
[354] Ramsay, 2000, *supra* note 333 at 27.

is the most important thing connected with the loan. It has been indicated that matters relating to mortgage payment rights and limitations on charges after default are not proper constitutional areas for the federal government. Notwithstanding the doctrine of ancillary powers and the fact that the constitutionality of such provisions have been upheld, Denis Nadeau opined that the interest power should not authorize Parliament to extinguish contractual rights.[355] This position was expressed nearly 20 years ago before the Supreme Court of Canada clarified the importance of cooperative federalism and the importance of permitting both levels of government to exercise their respective powers pursuant to the *Constitution Act, 1867*. Furthermore, as previously mentioned, the Court has repeatedly confirmed Parliament's authority to interfere with contractual rights when it legislates within its sphere of competence.

4.2.5 Criminal Power

In relation to consumer credit, criminal offences have been used regularly since Confederation to curb abusive lending. For example, the *Money-Lenders Act* and the *Small Loans Act* have targeted money lenders who lend money at a greater rate than the prescribed rate of interest, unlicensed money lenders as well as uncooperative unlicensed money lenders in the investigations of the Superintendent.[356] Although the constitutionality of these provisions has never been challenged, other economic criminal sanctions and their complementary federal legislation were the subject of several references to the Courts.

In *Canada (AG) v Alberta (AG)*,[357] the Judicial Committee of the Privy Council was asked to determine whether *The Combines and Fair Prices Act, 1919*[358] and *The Board of Commerce Act*[359] were enacted within the legislative capacity of Parliament. According to

[355] Nadeau, *supra* note 25 at 47–48. See also Waldron, 1997, *supra* note 3 at 180.
[356] *Money-Lenders Act*, *supra* note 164, s 11; *Small Loans Act*, *supra* note 165, s 3(1), 9, 20.
[357] *Canada (AG) v Alberta (AG)*, 1921 CanLII 399 (UKJCPC), [1922] 1 AC 191 (sub nom *Reference Re: Board of Commerce Act, 1919 (Can)*) [*Board of Commerce Reference*].
[358] *The Combines and Fair Prices Act, 1919*, SC 1919, c 45. See also previous legislation: *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, SC 1889, c 41; *Combines Investigation Act*, SC 1910, c 9.
[359] *The Board of Commerce Act*, SC 1919, c 37.

the Court's judgment,[360] the first statute was directed to the investigation and restriction of combines, monopolies, trusts and mergers, and to the withholding and enhancement of the prices of commodities. The second statute established a Board of Commerce and enabled it to restrain and prohibit the formation and operation of such trade combinations for production and distribution as the Board may consider to be detrimental to the public interest. Although criminal consequences were prescribed, Viscount Haldane concluded that the subject matter did not belong to the domain of criminal law and considered the Acts *ultra vires* the legislative authority of Parliament pursuant to subsection 91(27) of the *Constitution Act, 1867*.[361] The Court's conclusion that the federal statutes were in substance an encroachment of the exclusive power of the provinces to legislate on property and civil rights[362] is not surprising given that the ambit of these Acts was much wider than the related *Criminal Code* provisions. They included prohibitions not only against combinations formed in restraint of trade and monopolies but also against the accumulation, withholding and sale of goods considered necessaries of life beyond the amount reasonably required resulting in unfair profits and were applicable to traders and households alike.

Following this decision, Parliament adopted the *Combines Investigation Act*[363] in 1923 which repealed the two previous Acts of 1919. Once again in 1931, the Judicial Committee of the Privy Council was asked in *Proprietary Articles Trade Association v Canada (AG)*[364] to review the constitutionality of the Act as well as the related provisions in the *Criminal Code*. In this second reference to the Judicial Committee, Lord Atkin noted that the matters that were considered under provincial jurisdiction were omitted and that the greater part of the statute was now occupied by matters directly related to the criminal offences prescribed by the Act.[365] As such, the validity the *Combines Investigation Act* and section 498 of the

[360] *Board of Commerce Reference*, *supra* note 357 at 514–15.
[361] *Ibid* at 517–18.
[362] *Ibid* at 516–17.
[363] *Combines Investigation Act*, SC 1923, c 9; *Combines Investigation Act*, RSC 1927, c 26.
[364] *Proprietary Articles Trade Association v Canada (AG)*, [1931] 2 DLR 1, 1931 CanLII 385 (UKJCPC) (sub nom *Reference Re: The Combines Investigation Act (Can) s 36*) [*Proprietary Articles*].
[365] *Ibid* at 9.

Criminal Code were therefore considered within the sphere of federal jurisdiction pursuant to the federal criminal law power:

> The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes.[366]

Although Lord Atkin interpreted the federal criminal law power in the widest possible terms to include any prohibited act with penal consequences and the power to make new crimes, he further concluded, however, that it was "not enough for Parliament to rely solely on powers to legislate as to the criminal law for support of the whole Act."[367] Two remaining provisions considered matters not related or connected with the criminal law had to be justified on other grounds and were held to be *intra vires* Parliament's jurisdiction pursuant to other heads of power. Nonetheless, the *Proprietary Articles* case confirmed that "the criminal law was capable of expansion into the world of commerce, and later changes in the anti-combines laws have been premised on this broad view of the criminal law."[368]

A necessary adjustment to the wide scope of the exclusive federal power over criminal law was introduced in *Reference Re: Validity of Section 5(a) of the Dairy Industry Act*,[369] in which Justice Rand drew attention to the need to identify the evil or injurious effect at which a penal prohibition was directed. His classic formulation of the scope of the tests for criminal law was expressed as follows:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or

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[366] *Ibid*, referring to *Ontario (AG) v Hamilton Street Ry Co*, 1903 CanLII 121, [1903] AC 524 (UKJCPC).
[367] *Proprietary Articles*, *supra* note 364 at 11.
[368] Peter W Hogg & Warren Grover, "That Constitutionality of the Competition Bill" (1975) 1 Can Bus LJ 197 at 204.
[369] *Reference Re: Validity of Section 5(a) of the Dairy Industry Act*, 1948 CanLII 2, [1949] SCR 1 [*Dairy Industry Reference*].

> political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> […]
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law […].[370]

The constitutionality of the *Combines Investigation Act* having been previously settled, it followed as a natural consequence that when this same legislation relating to price discrimination was challenged in *British Columbia (AG) v Canada (AG)*,[371] it was held to be a valid exercise of the power under subsection 91(27) of the *Constitution Act, 1867*. The Judicial Committee of the Privy Council refused to apply a narrow interpretation of Parliament's discretion to determine the public interest purpose in criminal law and thus rejected the argument that the prohibition prescribed in the Act could not have been made in the public interest because its purpose was the protection of the individual competitors of the vendor. Referring with approval the *Proprietary Articles* case, Lord Atkin affirmed that the only limitation on the federal jurisdiction over criminal law is the requirement that "Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in sec. 92" and that "there seems to be nothing to prevent the Dominion if it thinks fit in the public interest from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments".[372]

With this broad interpretation of the federal criminal law power, the prevention of crime has long been recognized in Canadian law within the constitutional jurisdiction of Parliament. Relying on the Judicial Committee of the Privy Council's judgment in *Ontario (AG) v Canada Temperance Federation*[373], Justice Locke for the majority of the Supreme

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[370] *Ibid* at 49-50. See also *R v Morgentaler*, [1993] 3 SCR 463 at 489, 1993 CanLII 74 [*Morgentaler*]; *RJR-MacDonald*, *supra* note 50 at paras 197–200.
[371] *British Columbia (AG) v Canada (AG)*, 1937 CanLII 365, [1937] AC 368 (UKJCPC).
[372] *Ibid* at 690.
[373] *Temperance Federation*, *supra* note 104 at 7.

Court in what appears to be broad language, confirmed in *R v Goodyear Tire and Rubber Co of Canada* that the "power to legislate in relation to criminal law is not restricted […] to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime".[374]

In *British Columbia (AG) v Smith*,[375] a case dealing with the constitutional validity of the *Juvenile Delinquents Act*,[376] Justice Fauteux (as he then was) recognized that the words "criminal law" in the federal head of power must mean criminal in its widest sense but reiterated the principles governing the extent and the limitations imposed on the constitutional jurisdiction of Parliament over criminal law:

> [T]though such legislation may incidentally affect the provincial legislative jurisdiction, it is not *ultra vires* of Parliament if its subject matter, purpose or object is, in its true nature and character, legislation genuinely enacted in relation to criminal law and not legislation adopted under the guise of criminal law and which, in truth and in substance, encroaches on any of the classes of subjects enumerated in s. 92.[377]

As previously mentioned in Chapter 3, after the repeal of the *Money-Lenders Act* in 1956,[378] Parliament repealed in 1980,[379] the *Pawnbrokers Act* and the *Small Loans Act* since the latter was considered an obsolete statute[380] and amended the *Criminal Code*, thereby adding section 347, to maintain a control on the perceived problem of loan-sharking and to aid in the prosecution of abusive lenders.[381] This new criminal provision

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[374] *Goodyear Tire*, *supra* note 104 at 309. See also Ronald I Cohen & Jacob S Ziegel, *The Political and Constitutional Basis for a new Trade Practices Act* (Ottawa: Minister of Supply and Services, 1976) at 41-44.

[375] *British Columbia (AG) v Smith*, [1967] SCR 702, 1967 CanLII 65 [*Smith*].

[376] *Juvenile Delinquents Act*, RSC 1952, c 160.

[377] *Smith*, *supra* note 375 at 708, citing with approval *British Columbia (AG) v Canada (AG)*, *supra* note 371 at 375–76. See also *Reference Re: Natural Products Marketing Act*, 1937 CanLII 364, 67 CCC 193 (UKJCPC) at 194–95.

[378] *An Act to amend the Small Loans Act*, *supra* note 164, s 8, in force upon assent 14 August 1956.

[379] *An Act to Amend the Small Loans Act and to Provide for its Repeal and to Amend the Criminal Code*, SC 1980-81-82-83, c 43 with s. 305.1 coming into effect 1 April 1981 but only repealed by proclamation on 1 September 1994.

[380] Stephen Waddams, "Commentaries: Notional Severance, Usurious Contracts, and Two Comments on the Supreme Court's Decision in the New Solutions Case" (2005) 42 Can Bus LJ 278 at 278–79.

[381] *Garland*, *supra* note 342 at para 25.

created two criminal offences by making it an offence to (a) enter into an agreement or arrangement to receive interest at a criminal rate, and (b) receive a payment or partial payment of interest at a criminal rate. The criminal rate of interest is defined as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement".

The power of Parliament to legislate in relation to consumer credit pursuant to its constitutional jurisdiction under subsection 91(27) in matters relating to "criminal law" was never challenged until this recent amendment. In 1993, the Supreme Court succinctly but conclusively confirmed in *Artell Developments Ltd v 677950 Ontario Ltd* that section 347 of the *Criminal Code* was not *ultra vires* the Parliament of Canada in so far as it purports to regulate matters within the exclusive provincial jurisdiction relating to property and civil rights in the Province pursuant to subsection 92(13) of the *Constitution Act, 1867*.[382]

Comparable to previous money lending legislation, section 347 gives a very wide definition to the word "interest", comprising the entire cost of the loans to the borrower, not only the conventional notion of compensation for the use of money, which could be only one component of the borrower's cost.[383] As confirmed by the Supreme Court in *Garland v Consumers' Gas Co*:

> The current provision goes far beyond the scope of the *Small Loans Act*, both by criminalizing a particular interest rate for the first time, and by imposing a generally applicable ceiling on all types of credit arrangements without regard to the sophistication of the parties or the amount in issue.

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[382] *Artell Developments Ltd v 677950 Ontario Ltd*, [1993] SCR 443 at paras 2–3, 1993 CanLII 94 [*Artell Developments*].

[383] See *William E Thomson Associates v Carpenter*, 1989 CanLII 185 at 549–50, 69 OR (2d) 545 (CA) [*Thomson Associates*]. The Court held that the definition of "interest" was comprehensive:

> It is all inclusive and covers charges of any kind or in any form paid or payable under an agreement or arrangement for the advancing of credit. […] The definition of "interest" includes fees and charges of every kind, however they may be described or disguised. Courts cannot permit any erosion of the protection of the public from usurious charges which Parliament manifestly intended to provide.

See also: *677950 Ontario Ltd v Artell Developments Ltd* (1989), 93 DLR (4th) 334, 1992 CanLII 8646 (ONCA) at para 3, aff'd *Artell Developments*, *supra* note 382; *Nelson v CTC Mortgage Corp*, [1984] 16 DLR (4th) 139 at para 10, 1984 CanLII 572 (BCCA) [*Nelson*].

> […] The scope of the language in s. 347 is extremely broad. Interest is defined, with the exception of six specific items, as the aggregate of all charges and expenses, in any form, that are paid or payable for the advancing of credit under an agreement or arrangement. The definition of credit is similarly expansive. It includes the aggregate of the money and the monetary value of any goods, services or benefits advanced under an agreement or arrangement, minus any fees, commissions or similar charges incurred by the creditor.[384]

The Court further indicated that the broad language adopted in section 347 was "presumably intended (as it was in the *Small Loans Act*) to prevent creditors from avoiding the statute simply by manipulating the form of payment exacted from their debtors—a practice which has historically undermined the effectiveness of anti-usury laws applying a strict definition of interest".[385] Although this broad definition may be seen as a positive measure to curb abusive lending, the new provision has been overwhelmingly criticized, as discussed in Chapter 6. Commentators have warned against the absence of general consumer credit regulation, the ineffectiveness of the offence against loan sharks and serious issues raised with the enforceability of legitimate commercial transactions as subsequent judicial decisions confirm.[386] Notwithstanding severe judicial and legal criticism, the Court confirmed that "it is now well settled that s. 347 applies to a very broad range of commercial and consumer transactions involving the advancement of credit", including secured and unsecured loans, mortgages, commercial financing agreements, credit sales and any other type of deferral of payment for any goods, services or benefits.[387]

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[384] *Garland*, *supra* note 342 at para 24.

[385] *Ibid* at para 28, referring to *Thomson Associates*, *supra* note 383 at 548–49.

[386] For example: *Nelson*, *supra* note 383 at paras 8–10; Jacob Ziegel, "Bill C-44: Repeal of Small Loans Act and Enactment of a New Usury Law" in "Comments on Legislation and Judicial Decisions" (1981) 59 Can Bar Rev 188 [Ziegel, 1981]; Jacob Ziegel, "Does Section 347 Deserve a Second Chance? A Comment" (2003) 38 Can Bus LJ 394 at 398 [Ziegel, 2003]; Waddams, *supra* note 380 at 278–79: "[b]ecause of the wide definition of interest, innocent infringement of the *Criminal Code* can easily occur, and often does". See also *Garland*, *supra* note 342 at para 25:

> the section has most often been applied to commercial transactions which bear no relation to traditional loan-sharking arrangements. Although s. 347 is a criminal provision, the great majority of cases in which it arises are not criminal prosecutions. Rather, like the case at bar, they are civil actions in which a borrower has asserted the common-law doctrine of illegality in an effort to avoid or recover an interest payment, or to render an agreement unenforceable. For this reason, the provision has attracted criticism from some commercial lawyers and academics, and calls have repeatedly been made for its amendment or repeal.

[387] *Garland*, *supra* note 342 at paras 25, 35–36.

While the criminal law power of Parliament is considered a broad area of federal jurisdiction,[388] the Supreme Court has stated that it is not unlimited and has consequently developed three criteria to determine whether legislation may be classified as criminal law and thus avoid the illegitimate invasion of provincial jurisdiction and usurpation of provincial powers. In *Reference Re: Firearms Act (Can)*, the Court confirmed that as "a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty".[389] In determining whether the purpose of a federal law constitutes a valid criminal law purpose, examples of previously recognized valid purposes, such as public peace, order, security, health and morality are considered, as well as whether similar laws have traditionally been held to be criminal law.[390] However, as confirmed by the Supreme Court, criminal law is not confined to prohibiting immoral acts: "While most criminal conduct is also regarded as immoral, Parliament can use the criminal law to prohibit activities which have little relation to public morality", such as market competition.[391] The Court further clarified that although the "*Criminal Code* is the quintessential federal enactment under its criminal jurisdiction" many other laws have been held *intra vires* of Parliament jurisdiction over criminal law, such as the *Food and Drugs Act*, the *Hazardous Products Act*, the *Lord's Day Act*, and the *Tobacco Products Control Act*.[392] Consequently, whether the provisions are contained or not in the *Criminal Code* "has no significance for the purposes of constitutional classification".[393]

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[388] *Firearms Reference*, *supra* note 51 at para 28. See also *R v Malmo-Levine*, 2003 SCC 74 at para 73 and *R v Demers*, 2004 SCC 46 at para 16: "The federal criminal law power is 'plenary in nature' and has been broadly construed."

[389] *Firearms Reference*, *supra* note 51 at para 27, referring to *RJR-MacDonald*, *supra* note 50; *R v Hydro-Québec*, [1997] 3 SCR 213, 1997 CanLII 318 and *Dairy Industry Reference*, *supra* note 369.

[390] *Firearms Reference*, *supra* note 51 at paras 31–32, referring to *Morgentaler*, *supra* note 370 at 491; *RJR-MacDonald*, *supra* note 50 at para 204. See also *Scowby v Saskatchewan (Board of Inquiry)*, [1986] 2 SCR 226, 1986 CanLII 30; *R v Westendorp*, [1983] 1 SCR 43, 1983 CanLII 1; *R v Zelensky*, [1978] 2 SCR 940, 1978 CanLII 8.

[391] *Firearms Reference*, *supra* note 51 at para 55, referring with approval to *Proprietary Articles*, *supra* note 364. and *British Columbia (AG) v Canada (AG)*, *supra* note 371.

[392] *Firearms Reference*, *supra* note 51 at para 29, referring to *Food and Drugs Act*, RSC 1985, c F-27, *Hazardous Products Act*, RSC 1985, c H-3, *Lord's Day Act*, RSC 1970, c L-13, *Tobacco Act*, SC 1997, c 13.

[393] *Firearms Reference*, *supra* note 51 at para 29.

According to Chief Justice Laskin "resort to the criminal law power to proscribe undesirable commercial practices is today as characteristic of its exercise as has been resort thereto to curb violence or immoral conduct".[394] Confirming this statement, various criminal sanctions addressing abusive or negligent lending already exist, in addition to section 347 prescribing a criminal interest rate, such as criminal sanctions found in the *Bank Act* against banks that breach their disclosure obligations.[395] These criminal offences aiming to protect consumer debtors were considered in *Marcotte*,[396] but their constitutional validity was not challenged. Instead, the Supreme Court of Canada recognized the existence of the criminal sanctions against banks that breach their disclosure obligations but refused the financial institution's argument that they corroborate a "federal intention to preserve banks' contracts and to provide for criminal sanctions *instead of* civil remedies such as punitive damages against banks that breach their disclosure obligations" as was imposed upon them by Québec's *Consumer Protection Act*.[397] Absent a conflict, provincial civil remedies remain valid against federal financial institutions notwithstanding criminal sanctions aiming to redress the same wrong.

Although Jacob Ziegel has consistently expressed the opinion that the best solution would be to repeal the *Criminal Code* provisions and restore a regulatory scheme for consumer loans,[398] the above analysis confirms Parliament's authority to enact future criminal offences within a comprehensive regulatory scheme on consumer credit. In addition, there has been "some judicial recognition that in appropriate cases, the federal criminal law power (head 27) may be invoked to ensure compliance with standards established for

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[394] Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 4th ed (Toronto: Casrwell, 1975) at 824, cited by Hogg & Grover, *supra* note 368 at 205. See also Nadeau, *supra* note 25 at 45.

[395] *Bank Act*, *supra* note 37, ss 450, 980.

[396] *Marcotte*, *supra* note 40 at para 82.

[397] *Ibid*.

[398] Jacob S Ziegel, "Bill C-44: Repeal of the Small Loans Act and Enactment of a New Usury Law", (1981), 59 Can Bar Rev 188; Jacob S Ziegel, "Does Section 347 Deserve a Second Chance: A Comment?", (2003) 38 Can Bus LJ 394 at 398; Jacob S Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1985) 11 Can Bus LJ 233; Jacob S Ziegel, "Section 347 of the Criminal Code" (1994) 23 Can Bus LJ 321; Jacob S Ziegel, "Criminal Usury, Class Actions, and Unjust Enrichment in Canada" (2002) 18 J Contract Law 121.

consumer protection".[399] Although the other heads of power previously discussed would enable Parliament to create civil remedies, criminal remedies may continue to be required to combat the undoubtable wrong of abusive and negligent consumer lending.

4.3 Conclusion: Justification for Federal Intervention

Regrettably, Canada is wandering in a "jurisdictional maze" when is comes to the regulation of consumer credit.[400] As exposited in Chapter 3, past bifurcation of legislative jurisdiction over the consumer credit industry, caused either voluntarily or by unintentional judicial constraints to the scope of federal power, has led to the relative inaction of Parliament and to an incoherent and *ad hoc* regulatory approach to the consumer credit market in Canada. According to Ronald Cuming, this results from "choosing to view problems which are the usual by-products of a poorly regulated consumer credit market as a series of independent phenomena and not as manifestations of fundamental deficiencies in the system of private bargain and exchange on which the consumer credit market is based."[401] Mary Anne Waldon further elaborated on the consequences of the federal abdication of responsibility to protect financial consumers:

> Without a strong federal assertion of its jurisdiction in the area, our past history shows us what happens. We disintegrate into separate jurisdictions, each maintaining its own favoured "bells and whistles" on its disclosure provisions. Even if agreement can be achieved on uniformity at this time, it could well be short-lived without the federal presence operating in a significant way to constrain provincial choices.[402]

As confirmed throughout this chapter, Parliament's extensive constitutional jurisdiction on consumer credit pursuant to the foregoing five federal heads of power and its resulting control of the financial services industry has reaffirmed the federal government's "preeminent position to play a leading role in the regulation of most types, and many

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[399] Crawford, 1986, *supra* note 22 at 37, no 106, referring to *Krassman v R* (1979), 102 DLR (3d) 262, 1979 CanLII 4201 (FCTD) (*Tax Rebate Discounting Act*, SC 1977-78, c 25); *R v Steinberg's Ltd – Steinberg Ltée* (1982), 134 DLR (3d) 85, 1982 CanLII 3219 (ONHCJ), aff'd 137 DLR (3d) 576, 1982 CanLII 3337 (ONCA) (*Consumer Packaging and Labelling Act,* SC 1970-71-72, c 41).

[400] Binavince & Fairley, *supra* note 25 at 347.

[401] Cuming, *supra* note 2 at 198.

[402] Waldron, 1997, *supra* note 3 at 180.

aspects, of consumer credit".[403] Although the exercise of federal leadership to create a single Canadian securities regulator failed, a reform of the consumer credit industry should not meet the same fate. Wary advocates of federal leadership in the regulation of the financial services industry following the *Securities Reference 2011* must realize the limited justification advances by the Canadian government which argued that "the securities market ha[d] evolved from a provincial matter to a national matter affecting the country as a whole and that, as a consequence, the federal general trade and commerce power g[a]ve Parliament legislative authority over all aspects of securities regulation".[404] Requiring justification for such a shift in regulatory authority, the Supreme Court concluded that the case law on the "general" branch of the trade and commerce power did not support or justify the proposed Act.[405]

Contrary to the federal attempt in 2011 of defending the constitutionality of federal securities legislation based on the head of power over trade and commerce, consumer credit legislation can be justified under several existing heads of power under section 91 of the *Constitution Act, 1867,* as the preceding analysis has confirmed. Judicial precedents interpreting the heads of power over bankruptcy and insolvency, banking, interest and criminal law currently justify the enactment by Parliament of consumer credit legislation. Moreover, previous restrictive interpretations, notably relating to interest and to bills of exchange and promissory notes, should be conclusively rejected since they were rendered to validate the constitutionality of a provincial statute. As previously mentioned in Section 4.2.2 on the federal head of power over banking, the Supreme Court of Canada has opined that an interpretation of a federal head of power could "only flow from a case in which the constitutionality of a given legislative provision […] had been specifically put in issue".[406]

Previous restrictive interpretations argued against Parliament's constitutional jurisdiction can be further dispelled by the broad and progressive interpretation of relevant federal heads of powers. Although "taken in their strictly legal context" and "within the natural

[403] Ziegel, 2010, *supra* note 80 at 388.
[404] *Securities Reference 2011*, *supra* note 21 at para 4.
[405] *Ibid* at para 5.
[406] *Hall*, *supra* note 41 at para 50.

limits of the text", the constitutional interpretation of a head of power requires a "generous reading of the words used" to determine the essential elements of a power, which must be "consistent with the natural evolution of that power".[407] The Supreme Court has further confirmed that the identification of these essential elements must be adapted to "contemporary needs" and to "modern-day realities".[408] The use of the "living tree" doctrine and progressive interpretation "recognizes that the law has changed, that the change must be acknowledged and that, from a given point in time, the new law or the new understanding of some legal principle will prevail".[409] Judicial comments on the federal banking power and the most recent remarks of the Supreme Court in *Desjardins* reinforce the notion that a progressive interpretation of federal heads of power could begin with legislative reform and the modernization of existing federal legislation. Moreover, Parliament can benefit from two remaining principles of constitutional interpretation, which requires the person challenging the constitutionality of legislation to bear the burden of proof and recognizes the "the presumption in law always is that the Dominion Parliament does not exceed its powers".[410]

The approach to constitutional interpretation requires therefore a "review of the historical and legal contexts [which] makes it possible to identify the essential characteristics onto which new realities can be grafted".[411] As previously discussed, leading experts in their respective fields, such as Jacob Ziegel, Bradley Crawford, Benjamin Geva and Mary Anne

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[407] *Employment Insurance Reference*, *supra* note 52 at paras 44, 46 [emphasis added].

[408] *Ibid* at paras 36, 10.

[409] *Canada (AG) v Hislop*, *supra* note 267 at paras 94–95, 144; *Marriage Reference*, *supra* note 52 at 710–11; *Ordon Estate v Grail*, 1998 CanLII 771 at 488–89, [1998] 3 SCR 437; Hogg, *supra* note 42 at 15-48, 15-51.

[410] *Hewson v Ontario Power Co of Niagara Falls* (1905), 36 SCR 596, 1905 CanLII 9 at 602–03. See also *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662, 1978 CanLII 6 at 687-88:

> In all such cases the Court cannot ignore the rule implicit in the proposition stated as early as 1878 by Mr. Justice Strong in *Severn v. The Queen* [(1878), 2 SCR 70], at p 103, that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted. As was said by Fauteux J., as he then was, in the *Reference re The Farm Products Marketing Act*, [[1957] SCR 198] at p 255:
>
> > There is *a presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.

[411] *Employment Insurance Reference*, *supra* note 52 at para 47.

Waldron have studied the historical and legal contexts of different heads of power and have justified a continued exercise of federal authority over consumer credit based on the realities of the relatively "new" consumer credit industry established since Confederation, as well as on the changes in Canadian society and the continuous evolution of financial services and products offered to consumers.[412] Unfortunately, the adaptability and innovativeness of the consumer credit industry have also been directed "toward developing new methods through which to maximize returns at the expense of the most unsophisticated credit consumers", such as credit insurance and credit card abuses.[413]

In Section 1.2, the broad goals of consumer credit regulation were described as the protection of consumer debtors and the safety of financial institutions. The second objective is being addressed with a new centralized governance framework over all financial institutions under the leadership of Parliament. Unfortunately, the same federal leadership is lacking to protect all Canadians against abusive and negligent lending. Although some provinces such as Québec have strong consumer protection legislation, consumers in other Provinces are left with the limited consumer protection left enacted by Parliament and inadequate provincial legislation.[414]

The amplitude of federal powers in relation to consumer credit is broad and could undoubtedly encompass various legislative reforms to attain the first objective of consumer credit law. Nevertheless, continuing constitutional ambiguities created legal uncertainties which in the past have resulted in the difficulty of gathering enough political support and to partial abdication of federal responsibility over consumer credit. As a result, instead of addressing the question of *what* the ideal content of consumer credit regulation should be, the debate has remained fixated on the question of *who* gets to regulate.[415] Having traced

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[412] Crawford, 1986, *supra* note 22 at 17, no 103.1. See also Geva, *supra* note 22 at 7.

[413] Cuming, *supra* note 2 at 210.

[414] Ronald CC Cuming, *Perspectives on the Harmonization of Law in Canada* (Toronto: University of Toronto Press, 1985) at 60: "a principal regret is the continued lack of protection to consumers living in those provinces whose governments have persistently failed to support protective legislation granting needed rights and remedies to consumer buyers and debtors".

[415] Ronald J Daniels, "Bad Policy as a Recipe for Bad Federalism in the Regulation of Canadian Financial Institutions: The Case of Loan and Trust Companies" (1993) 31:3 Osgoode Hall LJ 543 at 545.

the legal justification of Parliament's jurisdiction over consumer credit, the answer to *who* is authorized to regulate consumer credit has hopefully been answered and it is no longer an obstacle to future reform. The next question to address is the *what*.

Before addressing the content of future reforms to the regulatory framework of consumer credit, it is essential to contextualize these reforms and to understand the evolution of current provincial and federal regulation of the consumer credit industry, which is chronicled and analyzed in Chapters 5 and 6.

CHAPTER 5: Provincial Consumer Credit Regulatory Patchwork*

5.1 Introduction

Given Parliament's refusal to reform federal legislation to better protect financial consumers and the relentless growth of the consumer credit industry, as discussed in Chapters 1 and 3, Canadian provinces and territories intensified their enactment of consumer protection legislation since the 1960s. A historical review of the provincial legislative framework governing consumer credit in Canada will ascertain the extent and importance of such regulation.

Although each subset of provincial consumer protection legislation has previously been the subject of in-depth analyses and Canadian studies, the objective of this chapter is not to provide a thorough update of previous research. While such an endeavour is certainly warranted, this chapter intends to offer insight into the evolution and progression of financial consumer protection legislation in Canada and to provide the reader with a general overview of its current state in order to contextualize future reform.

Unfortunately, the critical analysis of provincial legislation demonstrates that the apparent sporadic, differing and fragmented nature of provincial consumer credit regulation reduces the effectiveness of consumer protection measures and justifies the calls for reforms further discussed in Chapter 7.[1]

5.2 Provincial Legislative Response

It is against the backdrop of ineffective federal legislation described in Chapter 3 that Canadian provinces, pursuant to provincial constitutional heads of power, enacted

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[*] Developments and legislative reforms related to consumer credit are being implemented at a rapid pace recently and the information contained in this chapter article is current up to 1 October 2023.

[1] Jacob S Ziegel, "The Legal Regulation of Consumer Credit in Canada" (1966) 31:2 Sask B Rev 103 at 112 [Ziegel, 1966]. According to the author: "Of greater concern is the unevenness of much of the legislation. Only rarely is it comprehensive. Much of it is scattered in a variety of statutes, even within the same province."

consumer credit and consumer protection legislation as matters relevant to the "Incorporation of Companies with Provincial Objects" and "Property and Civil Rights in the Province".[2] At first, many provinces enacted consumer protection provisions relating to the non-financial terms of credit agreements between buyers and vendors of goods and services. As described by Jacob Ziegel, matters relating to vendor's credit as opposed to lender's credit had long been determined to be within provincial jurisdiction.[3] Consequently, matters relating to sales of goods such as conditional sales, conditions and warranties relating to vendor's title and quality of goods as well as vendor's and buyer's rights and remedies were found throughout provincial legislation in Canada as explained in Chapter 2.[4]

In addition, provinces enacted various statutes regulating and licensing provincial companies carrying on the business of the lending of money such as legislation on pawnbroking, money lending and loan corporations, but with few consumer protection provisions.[5] The notable exception was money lending legislation enacted in Newfoundland, Ontario, Manitoba, Nova Scotia in 1907, 1911, 1932 and 1938, respectively, which included provisions providing relief to debtors from unconscionable bargains with money lenders similar to England's corresponding statute at the time.[6] These statutes were, however, on questionable constitutional footing and were not enacted in other provinces. Given the exclusive and paramount federal constitutional jurisdiction over

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[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(11), (13), reprinted in RSC 1985, Appendix II, No 5.

[3] Ziegel, 1966, *supra* note 1 at 104: "A loan of money involves the charging of interest, but the charge levied by the vendor in return for the privilege of permitting the buyer to pay for the goods over a period of time is not legally characterized as interest."

[4] *Ibid* at 108–11; Jacob S Ziegel, "Retail Instalment Sales Legislation: A Historical and Comparative Survey" (1962) 14:2 UTLJ 143 at 148 [Ziegel, 1962].

[5] (NL) *The Money Lenders Act, 1907*, SNL 1907, c 5; (NS) *An Act relating to Loan Corporations*, SNS 1904, c 4; (ON) *The Ontario Money-Lenders Act*, SO 1912, c 30; *The Loan Corporations Act,* SO 1897, c 38; (QC) *An Act to amend the Quebec License Law*, SQ 1905, c 13. For pawnbroking legislation see *infra*, note 36.

[6] (MB) *An Act to amend "The Mercantile Law Amendment Act"*, SM 1932 c 27, s 2 adding *The Mercantile Law Amendment Act*, SM 1931, c 34, s 8; (NL) *The Money Lenders Act, 1907, supra* note 5, s 3; (NS) *The Nova Scota Money-Lenders Act*, SNS 1938, c 7, s 3; (ON) *The Ontario Money-Lenders Act*, *supra* note 5, ss 5–6.

interest provincial legislation dealing specifically with interest, money lending and lender's credit was initially considered *ultra vires* provincial jurisdiction.[7]

Despite these constitutional issues, Québec enacted legislation regulating consumer credit in 1947. Similar to previous wartime federal consumer credit regulations,[8] the main provisions of the *Instalment Sales Act*[9] included limited disclosure requirements, a minimum down payment of 15% for consumer goods with a period of 6 to 24 months to repay depending upon the amount of the unpaid balance as well as a maximum interest rate of three quarters of one per cent of the total of the deferred balance each month of the contract term.[10] Following Québec's lead, other provinces such as Alberta, Manitoba and New Brunswick enacted similar legislation prior to 1963 relating to conditional sales and instalment sales, otherwise known as time sale agreements.[11]

Considering the ineffectiveness of federal legislation and that efforts made to persuade the government to increase the monetary ceiling had failed following the 1956 reform of the federal *Small Loans Act*, provinces were forced to intervene for debtors of loans above $1,500 by adopting new forms of consumer protection measures to provide relief against unconscionable transactions.[12]

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[7] *Lynch v The Canada North-West Land Co* (1891), 19 SCR 204 at 212, 1891 CanLII 60 [*Lynch*]; *Board of Trustees of Lethbridge Northern Irrigation District v Independent Order of Foresters*, [1940] AC 513 at paras 7–8, [1940] UKPC 8; *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan*, 1947 CanLII 32 at 399, 414, [1947] SCR 394 [*Reference Farm Security Act*].

[8] *War Measures Act*, RSC 1927, c 206; *Wartime Prices and Trade Board Regulations*, PC 1941-6834, (28 August 1941) C Gaz Extra (4 September 1941), s 4(1)(g), Canada, Wartime Prices and Trade Board. Until the regulations were revoked in 1947 following the World War II, the Board regularly refined and extended the wartime federal consumer credit regulations. See also during the Korean War: *The Consumer Credit (Temporary Provisions) Act*, SC 1950-1951, c 3, as amended by SC 1951, c 14, expired on 31 July 1953, SOR/52-222, as repealed by *Miscellaneous Statute Repeal Act*, SC 1980-81-82-83, c 159.

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

[10] Canada, Royal Commission on Prices, *Minutes of Proceedings and Evidence, No 35* (Ottawa: King's Printer, 1948) at 1875 [*Minutes of Proceedings and Evidence, No 35, 1948*]; Ziegel, 1962, *supra* note 4 at 154–55.

[11] (AB) *The Credit and Loan Agreement Act*, SA 1954, c 19; *The Credit and Loan Agreements Act,* RSA 1955, c 66; (MB*) The Time Sale Agreement Act*, SM 1962, c 76, as amended by SM 1963, c 87; (NB) *An Act to Amend Chapter 152 of the Revised Statutes, 1927, The Conditional Sales Act*, SNB 1949, c 38, s 1, as repealed by SNB 1959, c 35; see also Ziegel, 1962, *supra* note 4 at 155.

[12] Jacob S Ziegel, "Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint" (1968) 68:3 Colum L Rev 488 at 496 [Ziegel, 1968].

A "veritable cornucopia"[13], as described by Jacob Ziegel, of provincial financial consumer protection legislation began to be enacted following the *Ontario (AG) v Barfried Enterprises Ltd* decision of the Supreme Court of Canada, as discussed in Chapter 4.[14] Notwithstanding the existence of federal legislation on consumer credit since Confederation, the Supreme Court of Canada restrictively interpreted Parliament's exclusive constitutional jurisdiction over interest and concluded, in 1963, that "interest" was not synonymous with the "cost of the loan". As a result, the Ontario *Unconscionable Transactions Relief Act* providing unconscionable transactions relief for money lending contracts unrelated to any sales transaction was therefore determined to be legislation in relation to property and civil rights and the administration of justice in the province, rather than legislation in relation to interest.[15] In order to validate provincial consumer protection legislation, the majority of the Court concluded that the true nature and character of the contested statute did not relate to "interest" but rather dealt with rights arising from contract and thus were within provincial jurisdiction.

As a result, all provinces enacted, between 1965 and 1976, some form of consumer credit or consumer protection legislation as well as legislation dealing generally with business or trade practices and thus, incidentally with consumer credit.[16] These provincial statutes conferred powers almost identical to those found in existing federal legislation regulating small loans as well as other consumer protection measures such as disclosure in lending requirements.[17] Most of the provincial legislation dealt not only with money lending but

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[13] *Ibid* at 489.

[14] *Ontario (AG) v Barfried Enterprises Ltd*, [1963] SCR 570, 1963 CanLII 15 [*Barfried Enterprises*]. See a critique of this decision in chapter 4, section 4.2.4.

[15] *The Unconscionable Transactions Relief Act*, RSO 1960, c 410 [*ON-UTRA, 1960*]; *Barfried Enterprises*, *supra* note 14 at 579.

[16] Susan Kathleen Burns, *The Borrowers and Depositors Protection Act: A Case History in Legislative Failure* (MS in Business Administration, University of British Columbia, 1981) [unpublished] at 10, 59–60; Canada, Senate, *Report of the Standing Senate Committee on Banking, Trade and Commerce on the Subject-Matter of Bill C-16*, *Journals of the Senate of Canada*, 30-2 (7 July 1977), Appendix (p 775) at 23–24 (Chairman: Senator Slater A Hayden). See also Ziegel, 1966, *supra* note 1.

[17] Ziegel, 1968, *supra* note 12 at 496; Harvin Pitch, "Consumer Credit Reform: The Case for a Renewed Federal Initiative" (1971–1972) 5 Ottawa L Rev 324 at 327–28; Jacob S Ziegel, "Recent Developments in Canadian Consumer Credit Law" (1973) 36:5 Mod L Rev 479 [Ziegel, 1973].

also with the sale of goods or services involving credit transactions.[18] Still in force today, provincial legislation provides the majority of the protection given to consumer debtors, the main exceptions being federal legislation limited to federally regulated financial institutions ("FRFI") and the criminal interest rate provision.[19]

Given the variety of consumer related provincial measures, and in order to overcome internal trade barriers and harmonize commercial legislation within the country, in 1994 First Ministers signed an *Agreement on Internal Trade*, the denouement of ongoing negotiations since the 1980s.[20] In effect since July 1, 1995, the national consensus aimed to eliminate barriers to trade, investment and mobility within Canada by streamlining and harmonizing consumer-related regulations and standards while maintaining a high and effective level of consumer protection. The theory was that the reconciliation of different federal, provincial and territorial consumer protection measures would allow Canadian firms to "capitalize on economies of scale by servicing larger markets with the same products" and to benefit from fairer competition.[21]

Along with an Internal Trade Secretariat, a Consumer Measures Committee was created pursuant to this agreement to establish a forum for "national cooperation to improve the marketplace for Canadian consumers" reuniting representatives of the federal and all provincial governments.[22] With all parties agreeing to implement the principles and template provisions in their jurisdictions, the Committee has since completed five harmonization agreements dealing with collection agencies, cooperative enforcement on consumer related measures, cost of credit disclosure, direct sellers and internet sales contracts.

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[18] Pitch, *supra* note 17 at 327–28.

[19] Ziegel, 1966, *supra* note 1 at 105.

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

[21] Internal Trade Secretariat, *Committee of Ministers on Internal Trade Annual Report, The Agreement on Internal Trade, April, 1996 to March, 1997*, at 8, online: *Internal Trade Secretariat* <cfta-alec.ca/annual-reports/>.

[22] Canada, Innovation, Science and Economic Development, "Consumer Measures Committee" (last modified 7 March 2019), online: *Canada* <ised-isde.canada.ca/site/consumer-measures-committee/en> [perma.cc/UH63-Z8ED][CMC].

In addition, the Committee also serves as a research and consultative body to enhance ongoing legislative reforms in its members' respective jurisdictions. According to the annual reports published by the Internal Trade Secretariat, various working groups on consumer issues had been created to review measures relating to the alternative consumer credit market including payday loans, credit reporting, enforcement best practices and consumer awareness.[23] Other issues considered by the Committee were the regulation of gift cards and reward programs, identity theft, data-sharing and analysis of consumer complaints as well as unfair terms in consumer contracts.

With a new Canadian Free Trade Agreement, in force since July 1, 2017, and the continued recognition of the importance and necessity of enhancing existing consumer protection regulatory measures, there appeared to be support for future collaboration towards the harmonization of consumer protection legislation.[24] Unfortunately, despite early concerted efforts with fairly productive results, the Committee on Consumer-Related Measures and Standards does not seem to be active given the absence of any developments on consumer credit related matters in recent annual reports, and no consultations in progress according to its website.[25]

Given the foregoing, provincial legislation is similar in many regards but remains fragmented from province to province and divided into various consumer protection measures, always vulnerable to inconsistencies as a result of unique provincial political ideologies and objectives. Moreover, as revealed in Chapter 3, the federal government's partial abdication of its responsibilities with respect to the protection of financial consumers has meant that the financial services framework is vulnerable to "confusion and inconsistencies in rate setting and administration of the newly adopted provincial legislation."[26] Notwithstanding these ongoing challenges of governing a modern financial

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

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

[25] CMC, *supra* note 22.

[26] Jacob S Ziegel, "Consumer Insolvencies, Consumer Credit, and Responsible Lending" in Janis P Sarra, ed, *Ann Rev Insolv L 2009* (Toronto: Carswell, 2010) 343 at 388 [Ziegel, 2010]; Mary Anne Waldron,

industry within a federalist framework, it is important to note the scope and extent of provincial legislation.

Although provincial statutes clearly apply to provincially incorporated entities such as retailers, credit unions, mutual funds and securities dealers, as well as insurance and trust and loan companies,[27] the issue remained whether provincial consumer protection legislation also applied to federally regulated financial institutions. This issue was conclusively resolved by the Supreme Court of Canada in *Bank of Montreal v Marcotte*[28] where the Court considered whether conversion charges imposed by several federal banking institutions on credit card purchases made in foreign currencies violated Québec's *Consumer Protection Act.*[29] The Court rejected the financial institutions' arguments that the provincial statute did not apply to them based on interjurisdictional immunity and federal paramountcy of federal legislation enacted pursuant to the federal head of power relating to Banks.[30] Rather, the Court concluded that the provincial disclosure provision did not impair the core of the federal banking power and confirmed the applicability of provincial legislation to FRFIs since "general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme."[31]

The importance of provincial legislation regulating consumer credit cannot be overstated considering the vast array of consumer protection measures found in provincial legislation applicable to federally and provincially incorporated creditors. Furthermore, the alternative financial services market is almost entirely regulated by provincial regulation, which aims to protect vulnerable financial consumers who are marginalized by FRFIs and often

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"The Federal Interest Act: It Sure is Broke, But is It Worth Fixin'?" (1997) 29:2 Can Bus LJ 161 at 161 [Waldron, 1997]. See also Micheline Gleixner, "A Canadian Financial Consumer Protection Code: Is Canada Ready for Round Three?" in Janis P Sarra et al, eds, *Ann Rev Insolv L 2018* (Toronto: Thomson Reuters, 2019) 57 [Gleixner, 2019].

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

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

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

[30] *Constitution Act, 1867*, *supra* note 2, s 91(15) ("Banking, Incorporation of Banks, and the Issue of Paper Money").

[31] *Marcotte*, *supra* note 28 at para 79.

dependent upon fringe financial services. Regulating the various types of consumer credit as well as the various actors in the consumer credit industry, provincial legislation is thus becoming increasingly important from a consumer protection perspective and deserves greater scrutiny.

5.3 Provincial Consumer Protection Legislation

Section 5.3 therefore analyzes the historical evolution of provincial consumer credit regulation and in particular consumer protection measures related to pawnbroking, unconscionable transactions relief, cost of credit disclosure, fair trade practices, payday loans and other high-cost credit products including online lending. Where relevant, issues relating to disclosure requirements, licensing requirements, limits on the terms of agreements and enforcement mechanisms are addressed throughout each subsection.

5.3.1 Pawnbroking Legislation

Since the federal statute did not require that pawnbrokers be federally licensed, several provinces including British Columbia, New Brunswick, Ontario and Québec also enacted, at the end of the 19th century, pawnbrokers legislation similar to the federal statute but with licensing requirements.[32] These early statutes also provided additional consumer protection measures such as a longer redemption period, and prohibited several unfair and abusive practices.

The pawnbroking industry also has a long history with municipalities and their power to regulate local businesses delegated to them by the provinces via local governance or municipal legislative frameworks.[33] For example, the *Act to Incorporate the City of*

[32] (BC) *Pawnbrokers Act*, RSBC 1897, c 152; (NB) *Pawnbrokers Act*, SNB 1877, c 17; 2 CSNB 1903, c 177; RSNB 1952, c 199, as repealed by *Municipalities Act*, SNB 1966, c 20, s 199 [*NB-Municipalities Act*]; (ON) *An Act respecting Pawnbrokers and Pawnbroking*, RSO 1877, c 148; *The Pawnbrokers Act,* RSO 1937, c 244; (QC) *An Act to Consolidate and Amend the Law respecting Licenses and the duties and obligations of persons bound to hold same*, SQ 1870, c 2, ss 69–105.

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

Vancouver of 1886 delegated the right to license, regulate and govern pawnbrokers or dealers in second-hand goods in the city.[34] As such, pawnbrokers in many municipalities have long been subjected to municipal by-laws and are required to obtain a licence and abide by certain conditions, not so much for the protection of consumer debtors but to prevent these establishments from becoming repositories for stolen property.[35] According to Anthony Duggan, the purpose of the pawnbroking legislation is two-fold. In addition to assisting police in recovering stolen property via statutory provisions

> governing, among other things, the licensing of pawnbrokers, the keeping of books and records, and reporting to police […] the Act also includes provisions aimed at protecting the debtor (pawner), including interest rate and other disclosure requirements, a provision requiring the pawnbroker to give the debtor a pawnticket containing specified information and provisions governing the pawner's right to redeem the goods and the consequences of failure to redeem.[36]

In New Brunswick, the power to licence businesses and regulate their dealings in personal property was delegated to municipalities in 1966.[37] A City of Moncton by-law requires pawnbrokers to obtain a licence and to keep a permanent record of information which includes descriptions of personal property held, the date and time of transactions, the debtors' information including two forms of identification, as well as a record of any sales of the personal property.[38] In addition, a pawnbroker is not permitted to sell any property pledged as security for a loan before one month has elapsed from the date the borrower was given to redeem the property. Reflecting the earlier provincial statute, property cannot

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

[35] Department of Justice, Nova Scotia, *Pawn Shop, Buy-Sell and Second-Hand Businesses Legislation Discussion Paper* (May 2006) at 1, online: *Nova Scotia* <novascotia.ca/just/publications/docs/DISCUSSION%20PAPER%20FINAL.pdf> [perma.cc/RT44-KJA9]; Ziegel, 2010, *supra* note 26 at 357; Jerry Buckland, *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada* (Toronto: University of Toronto Press, 2012) at 48–49 [Buckland, 2012].

[36] Anthony Duggan, "Pawnbroking, Priorities and the PPSA" (2022) 65 Can Bus LJ 146 at 147.

[37] *NB-Municipalities Act*, *supra* note 32, ss 112, 199; RSNB 1973, c M-22, ss 165–67.1, as repealed and replaced by *Local Governance Act*, SNB 2017, c 18, s 10(1)(h): a local government may make by-laws for municipal purposes respecting (h) businesses, business activities and persons engaged in business; and (n) the acquisition, sale, management, leasing, renting of or any other dealings in personal property, or any interest in personal property. For another example, see *Municipal Government Act*, SNS 1998, c 18, s 172(i).

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

be accepted as security for a loan from a person under the influence of alcohol or drugs, a person under the age of eighteen years, or a person failing to identify themselves or who may be offering stolen or illegally acquired property.

Until recently, provincial legislation regulating pawnbrokers was found in British Columbia, Ontario, Québec and Saskatchewan as well as the three territories.[39] Unlike provinces that rely solely on municipal regulation, provincial legislation in these jurisdictions provides for restrictions and obligations on lenders throughout the province or territory and provides additional financial consumer protection, which is often absent in municipal by-laws. For example, provincial legislation prohibits certain acts, and regulates the pawner's right of redemption, the charging of fees, the cost of credit disclosure requirements, and the recording of pawns and sales.

It has been suggested that some lenders attempt to avoid restrictive pawnbroking regulations by operating as secondhand dealers entering into "buy-sell" arrangements with consumers whereby the "pawner sells the goods to the broker subject to the right to buy the goods back within a period of time."[40] These lenders thereby avoid the requirements prescribed in British Columbia, Ontario and Yukon, where the right of redemption of the pawner expires only after one year and, in Ontario, only after notice is provided by first-class prepaid mail for loans between $15 and $30 and a subsequent final notice published in a newspaper for loans more than $30.[41]

In Ontario, the act further provides legal remedies to the debtor should a pawnbroker refuse to give the pledge back upon tender of money owing, and sets the maximum fees in addition

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[39] (BC) Pawnbrokers Act, RSBC 1996, c 350 [*BC-Pawnbrokers Act*]; (ON) *Pawnbrokers Act*, RSO 1990, c P.6 [*ON-Pawnbrokers Act*]; (QC) *QC-CPA*, *supra* note 29 (generally applicable to pawnbrokers); (SK) *Pawned Property (Recording) Act*, SS 2003, c P-4.2 [*SK-Pawnbrokers Act*]; (NT) *Pawnbrokers and Second-Hand Dealers Act*, RSNWT 1988, c P-2 [*NT-Pawnbrokers Act*]; (NU) *Pawnbrokers and Second-Hand Dealers Act*, RSNWT (Nu) 1988, c P-2 [*NU-Pawnbrokers Act*]; (YK) *Pawnbrokers and Second-Hand Dealers Act*, RSY 2002, c 167 [*YK-Pawnbrokers Act*].

[40] Iain Ramsay, "The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches" (2001) 35 Can Bus LJ 325 at 349–51 [Ramsay, 2001]; Buckland, 2012, *supra* note 35 at 149.

[41] (ON) *ON-Pawnbrokers Act*, *supra* note 39, ss 20–22; (BC) *BC-Pawnbrokers Act*, *supra* note 39, s 12; (YK) *YK-Pawnbrokers Act*, *supra* note 39, s 6.

to the interest legally payable on the sum lent.[42] Finally, provincial licensing requirements are imposed in Québec, Nunavut, Yukon and Northwest Territories, as well as in Ontario via its municipalities.[43] In Québec, pawnbrokers are licensed and regulated by the same provisions applicable to other money lenders, including consumer protection provisions against exorbitant or usurious credit costs.[44] Judicial interpretation of these statutory provisions has currently capped the non-exorbitant or non-usurious rate between 30 and 35 per cent in this province.[45]

Unfortunately, instead of increasing consumer protection and modernizing the statutes, the tendency across the country has been the repeal of provincial and territorial legislation specifically regulating pawnbrokers, beginning with British Columbia in 2002 and the Northwest Territories in 2013.[46] Opposed by the Association of Municipalities of Ontario and the Ontario Association of Chiefs of Police, albeit for enforcement and security concerns rather than consumer protection, Ontario enacted legislation in 2019 repealing its *Pawnbrokers Act* but it is not yet in force.[47]

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[42] *ON-Pawnbrokers Act*, *supra* note 39, ss 25, 28.

[43] (ON) *Ibid,* s 2; (QC) *QC-CPA*, *supra* note 29, s 321; (NT) *NT-Pawnbrokers Act, supra* note 39, s 2; (NU) *NU-Pawnbrokers Act, supra* note 39, s 2; (YK) *YK-Pawnbrokers Act*, *supra* note 39, s 2.

[44] Art 1437, CCQ; *Ibid*, s 8 (originally Art 1040c CCLC, enacted LQ 1964, c 67, s 1); *QC-CPA, supra* note 29.

[45] *Capital Corporation c Ferme Maraypier inc*, 2014 QCCS 4587 at para 43; *Riendeau c Compagnie de la Baie d'Hudson*, 20443 CanLII 40323 at para 465, aff'd 2006 QCCA 1379 (28.8% did not contravene provincial legislation); *Riopel c Gagnon*, 2009 QCCQ 2315 at para 102; *Ferlac Inc c Lemay*, 2008 QCCQ 12221; *Bégin c Marcouiller*, 2007 QCCQ 7742 at para 11; *Saviolakis c Immeubles Marai inc*, 2000 CanLII 17793 at para 82, aff'd 2002 CanLII 63348 (QCCA): "L'emploi des termes "excessif" et "exorbitant" implique que le coût du prêt dépasse la mesure, excède d'une manière exagérée la normalité ou que l'opération équivaut à un abus qui choque l'ordre public, assimilable à un prêt à un taux usuraire." Initially, the Québec Court of Appeal had held in *St-Jacques c Mantha*, 1999 CanLII 13815 (CA) at 26 that 25% was "exorbitant and usurious". See also John C Kleefeld, "Homo legislativus: Missing Link in the Evolution of 'Behaviour Modification'?" (2011) 53 SCLR (2d) 169 at para 52; Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23:3 BFLR 323 at 326.

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

[47] *Restoring Ontario's Competitiveness Act, 2019*, SO 2019, c 4, Schedule 2, s 1 (not in force); Association of Municipalities of Ontario, "Bill 66 – Restoring Ontario's Competitiveness Act, Submission to the Standing Committee on General Government" (18 March 2019), online: *AMO* <amo.on.ca/AMO-PDFs/Reports/2019/AMO-Submission-Bill-66-Restoring-Ontario-s-Competi.aspx> [perma.cc/H8WR-WX7A]; Travis Dhanraj, "Police association says repealing and not replacing Pawnbrokers Act sends 'wrong message' to thieves", *Global News* (24 January 2019), online: <globalnews.ca/news/4883939/pawnbrokers-act-bill-66-ontario/> [perma.cc/78SS-VBE8].

Despite these legislative setbacks, not all is lost for consumers. As further discussed below the emergence of new high-cost credit products has put pressure on policymakers in some provinces to enact new financial consumer protection statutes dealing with these financial services. Reversing this trend to deregulate the pawnbroking industry, new legislation in Alberta, British Columbia and Québec now regulates high-cost credit products and applies to all lenders including pawnbrokers.[48] In comparison, Manitoba excludes pawnbrokers from their high-cost credit regulation since loans "secured by any personal property pledged as collateral" are excluded from the definition of a "high-cost credit product".[49]

Like other parallel or fringe financial services, the regulatory framework relating to pawnbroking is manifestly inadequate in Canada and the absence of a national strategy to regulate pawnshops in Canada is a concern, as "[t]he inequality in their bargaining positions exposes borrowers to the potential for unfair practices by pawnshops."[50] This is especially worrisome since existing provisions, whether municipal, provincial or federal, do not seem to be consistently and actively enforced in many cases.[51]

An investigation conducted by the Saskatchewan Law Reform Commission revealed that "pawnbrokers in Saskatchewan consistently and consciously violate the law and charge rates which are much higher than are stipulated in the [federal *Pawnbrokers*] *Act*. With good justification, pawnbrokers feel that the statutory rates are totally inadequate. A

[48] See *infra*, section 5.3.6. Newfoundland and Labrador recently enacted high-cost credit legislation although it has not been proclaimed yet: *An Act to Amend the Consumer Protection and Business Practices Act*, SNL 2022, c 28, s 18.

[49] *The Consumer Protection Act*, RSM 1987, c C200, s 237 [*MB-CPA*]; *High-Cost Credit Products Regulation*, Man Reg 7/2016, s 2(2).

[50] Ziegel, 2010, *supra* note 26 at 357. See also Saskatchewan Law Reform Commission, *Tentative Proposals for a Consumer Credit Act, Part III: Secured Consumer Credit Transactions* (Saskatoon: Saskatchewan Law Reform Commission, 1981) at 3-84.

[51] Some pawnbrokers in the Moncton area want the provincial governments to start regulating the industry or at least for municipalities to better enforce current regulations. See Paul Cormier, "Moncton pawn shops seek better regulations of their industry", *Global News* (18 July 2016), online: <globalnews.ca/news/2832373/moncton-pawn-shops-seek-better-regulations-of-their-industry/> [perma.cc/JDV9-REUX]; Ramsay, 2001, *supra* note 40 at 385; Ann Cavoukian, Information and Privacy Commissioner of Ontario, Order MO-2225 (11 July 2007) at 2.

pawnbroker could not stay in business if he attempted to comply with the law."[52] Likewise, one study in Québec determined that most pawnbrokers in Montreal violated the criminal interest rate provision, the disclosure requirements in the federal *Interest Act* and the provincial disclosure and licensing requirements of the *Consumer Protection Act*.[53] Factoring in all storage and administrative fees as required by the *Criminal Code*, annual interest fees charged by pawnbrokers were between 300% and 500% and one pledge agreement charged as high as 1,000%. Published case reports dealing with the rare prosecution of a pawnbroker reveal an effective annual rate of interest charged by a pawnbroker between 473% and 542% in Saskatchewan and a pawnbroker, in Alberta, was convicted of charging illegal rates of interest as high as 1,281% and 207,981%.[54] Other cases in which a debtor sued for the replacement value of pawned goods sold by the pawnbroker concluded that the effective annual rates of interest charged by the pawnbroker were 240%, 300% and 360%.[55]

Moreover, Tom Naylor's study for Justice Canada on profit-driven crimes including loan-sharking revealed that "pawnshops in major cities routinely charge 20% per month or more, far above the legal limit" and police do not investigate the rates charged by pawnbrokers but are rather only interested if stolen goods or organized crime are involved.[56] This had been confirmed by the Supreme Court of Canada, which stated in *Garland v Consumers' Gas Co* that the federal criminal interest rate provision "has most often been applied to commercial transactions which bear no relation to traditional loan-sharking arrangements.

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[52] Saskatchewan Law Reform Commission, *supra* note 50 at 3-94. See also Edward Veitch, "The Law O'the Brass Balls or the Regulation of the Pawn" (1992–1993) 21 Can Bus LJ 49 at 59.

[53] Claude Masse, "Le prêt sur gage —qu'en est-il et comment est-il contrôlé?" (2000), online: Réseau juridique du Québec <avocat.qc.ca/public/iipretgage.htm> [perma.cc/CKY8-VW26]. See also R Tom Naylor, *A Typology af Profit-Driven Crimes* (Ottawa: Justice Canada, 2002) at 25, online : Canada <justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr02_3/rr02_3.pdf>.

[54] See also *R v Duzan*, 1992 CanLII 7905 (SKKB) aff'd 1993 CanLII 14700 (SKCA); *R v Marsy*, 2006 ABPC 371.

[55] *Kotello v Dimerman*, 2006 MBCA 77 (guitars); *Hemminger v Davies (cob Pioneer Trading Post)*, 2019 BCPC 206 (accordion); *Collington v A1-Pawn Ltd*, 2004 ABPC 216 (valuable items).

[56] Naylor, *supra* note 53 at 25. See also: Bethany Lindsay, "Court fight over pawned accordion highlights how many brokers' interest rates are illegal", CBC News (13 September 2019), online: <cbc.ca/news/canada/british-columbia/bc-pawn-shop-criminal-interest-rate-1.5281690>.

Although s. 347 is a criminal provision, the great majority of cases in which it arises are not criminal prosecutions."[57]

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

It is therefore recommended that pawnbrokers should be federally regulated, with industry-specific regulations, along with all other types of consumer credit, in a comprehensive consumer credit code.[58] The Saskatchewan Law Reform Commission justified the same recommendation, albeit at the provincial level, as follows:

> Credit obtained through pawn arrangements is used primarily by consumers who are the most vulnerable to abuse because of pressing need or the inability to obtain credit from other legitimate sources. Consumer credit laws should be designed to protect those least able to protect themselves in the marketplace. The fact that the relative amount of consumer credit which these people obtain is small does not remove the need for legislative intervention.[59]

5.3.2 Unconscionable Transactions Relief Legislation

Originally exercised by the courts of equity, the doctrine of equitable relief or unconscionability has a long judicial history protecting vulnerable parties and setting aside

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[57] *Garland v Consumers' Gas Co*, [1998] 3 SCR 112 at para 25, 1998 CanLII 766 [*Garland*].

[58] Veitch, *supra* note 52 at 53, 55, concluded that pawnbroking was "capable of abuse if left unregulated" and recommended specific provisions "with respect to time periods, the redemption of pledges and their proper disposition" as well as the requirement that surpluses on sales of pledges be remitted to the pawners; Saskatchewan Law Reform Commission, *supra* note 50 at 3–85, recommended as follows:

> Consumer credit legislation should provide for the regulation of credit granting by pawnbrokers including licensing and bonding, the form and contents of pawn, contracts and pawn receipts, records to be kept by pawnbrokers, the provision of insurance and property pledged and such other matters as may be necessary for the protection of pledgors.

[59] Saskatchewan Law Reform Commission, *supra* note 50 at 3-84.

contracts on the basis of unfairness, lack of consent, avoidance of unjust enrichment, undue influence or inequality of bargaining power.[60] In Canada, the common law test of unconscionability and the principles considered objectively by the Court governing the doctrine have been applied inconsistently.[61] Existing appellate case law in Ontario and Alberta appears to require four elements to establish unconscionability:

1. a grossly unfair and improvident transaction;

2. a victim's lack of independent legal advice or other suitable advice;

3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

4. the other party's knowingly taking advantage of this vulnerability.[62]

By comparison, the Ontario Court of Appeal[63] has recently suggested that a majority of judges of the Supreme Court of Canada in *Douez c Facebook, Inc* applied the two-prong

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[60] Stephen Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010) 49 Can Bus LJ 378 at 378–85 [Waddams, 2010]; Stephen M Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 444–561 [Waddams, 2017].

[61] Chris DL Hunt, "Unconscionability Three Ways: Unfairness, Consent and Exploitation" (2020) 96 SCLR (2d) 37.

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

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

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

[63] *Heller v Uber Technologies Inc*, 2019 ONCA 1 at 60–61.

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

> [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, *and* proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.[64]

Clarity on the applicable equitable test was provided by the Supreme Court of Canada when it recently confirmed the Ontario Court of Appeal decision in *Uber Technologies Inc v Heller*.[65] With regard to the first element, the reasons of the majority of the Court validate that the inequality of bargaining power encompasses many attributes possessed by financial consumers, including "financial desperation" and "cognitive asymmetry" rendering the consumer unable to understand the terms of the contract:

> Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be *personal* (*i.e.*, characteristics of the claimant generally) or *circumstantial* (*i.e.*, vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", so as to preclude "a worthwhile judgment as to what is in his best interest". Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person", and therefore was specially disadvantaged because of "the contingencies of the moment".[66]

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[64] *Douez v Facebook, Inc*, 2017 SCC 33 at paras 115 (Abella, J concurring), 145 (McLachlin, Moldaver and Côté JJ dissenting). See also *Morrison v Coast Finance Ltd* (1965), 55 DLR (2d) 710 at 713, 54 WWR 257 (BCCA) [emphasis added] [*Morisson*], subsequently approved in *Norberg v Wynrib*, [1992] 2 SCR 226 at 248, 256, 92 DLR (4th) 449. See also *Canadian Imperial Bank of Commerce v Ohlson*, 1997 ABCA 413 at paras 20–24; *Harrity v Kennedy*, 2009 NBCA 60 at para 30, both citing with approval *Harry v Kreutziger*, 1978 CanLII 393 (BCCA). See also John-Paul F Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 Man LJ 187; Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 986–89; Waddams, 2017, *supra* note 60 at 552.

[65] *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber Technologies*]. See also Rick Bigwood, "Strict Liability Unconscionability in the Supreme Court of Canada: Observations on Uber Technologies Inc. v. Heller" (2021) 65:2 Can Bus LJ 153.

[66] *Uber Technologies*, *supra* note 65 at paras 67–71 [Emphasis in original; footnotes omitted.], citing with approval John D McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at 525.

Improvident bargain, the second element of the doctrine of unconscionability, is measured when the contract if formed not when the improvidence of the bargain creates a hardship when the contract is executed by the parties.[67] The majority of the Court further clarified that the question whether the stronger party was unduly advantaged or the more vulnerable party unduly disadvantaged must be assessed contextually in light of the surrounding circumstances.[68] Of particular relevance for financial consumers, the Court explained as follows:

> For a person who is in desperate circumstances, for example, almost any agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.[69]

This recent confirmation and expansion of the scope of the doctrine of unconscionability may spark renewed outrage over the abusive lending practices of consumer lenders and perhaps lead to legal proceedings against the industry thereby forcing the industry to become more conscionable. In the meantime, financial consumers can also rely on existing statutory remedies.

In addition to the equitable remedy, legislative unconscionability was enacted to remedy specific contractual grievances. Following the abolition of usury legislation in England, borrowers who remained vulnerable under the common law doctrine were further protected from oppressive loans by early money lending legislation starting with *The Money-lenders Act, 1900*.[70] Protection was confined to cases involving some circumstance of harshness or unconscionability other than the excessive cost of the loan. Notably absent in Canada's money lending legislation, these consumer protection measures were nevertheless adopted

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[67] *Uber Technologies*, *supra* note 65 at para 74.
[68] *Ibid* at paras 74–75.
[69] *Ibid* at para 76.
[70] *The Money-lenders Act 1900* (UK), 63 & 64 Vict, c 51, s 1; *An Act to repeal the laws relating to usury and to the enrolment of annuities* (UK), 1854, 17 & 18 Vict, c 90; Patrick Hastings, *The Law Relating to Money-Lenders and Unconscionable Bargains* (London: Butterworth, 1905) at 11–12, 15.

by Newfoundland, Ontario, Manitoba and Nova Scotia between 1907 and 1938 in their provincial statutes regulating money lenders, as previously mentioned.[71]

Similar unconscionable transactions relief legislation was not adopted nationwide by the other provinces since its validity was uncertain given the federal constitutional jurisdiction over matters relating to Interest.[72] However, within five years of the 1963 Supreme Court of Canada's *Barfried Enterprises* decision[73] confirming the constitutional validity of the Ontario statute, most provinces had enacted similar legislation offering broad relief from unconscionable loan transactions to better protect financial consumers from unscrupulous lenders in the emerging consumer credit market.[74]

According to Ronald Cuming, "[t]hese acts give wide powers to the courts to police against usury and harsh and unconscionable results which otherwise would result from the enforcement of consumer credit contracts."[75] Judicial consideration of these statutes has confirmed that their purpose was to "provide a remedy for unfair loans"[76] and "to relieve a party to a contract from his obligations where the contract was made absent his informed

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[71] *Supra* note 6; *The Ontario Money Lenders Act*, SO 1912, c 30, ss 5–8; RSO 1914, c 175, ss 4–7; RSO 1937, c 243, title amended to *The Unconscionable Transactions Relief Act* and money lending provisions repealed by *An Act to amend the Money-Lenders Act,* SO 1946, c 58, s 1. See also Ronald CC Cuming, "The Credit Consumer in Trouble: Remedies of Canadian Consumer Creditors" (1969) 15:1 McGill LJ 48 at 69.

[72] *Ibid* at 69, n 72.

[73] *Barfried Enterprises*, *supra* note 14 at 577.

[74] (AB*) The Unconscionable Transactions Act*, SA 1964, c 99; (BC) *Consumer Protection Act*, SBC 1967, c 14, ss 17–20 [*BC-CPA 1967*]; (MB) *The Unconscionable Transactions Relief Act*, SM 1964 (2d Sess), c 13, as amended by SM 1965, c 87; (NB) *Unconscionable Transactions Relief Act*, SNB 1964, c 14; (NL) *Unconscionable Transactions Relief Act*, *1962*, SNL 1962, No 38; (NS) *Unconscionable Transactions Relief Act*, SNS 1964, c 12, as amended by SNS 1966, c 83; (ON) *ON-UTRA*, 1960*, supra* note 15; (PEI) *The Unconscionable Transactions Relief Act*, SPEI 1964, c 35; *Business Practices Act*, SPEI 1977, c 31; (QC) Art 1040c CCLC (added by *An Act to protect borrowers against certain abuses and lenders against certain privileges*, SQ 1964, c 67, s 1); Art 2332, CCQ; (SK) *The Unconscionable Transactions Relief Act, 1967*, SS 1967, c 86.

[75] Cuming, *supra* note 71 at 69.

[76] *Briones v National Money Mart Co*, 2014 MBCA 57 at para 23. See also *Trans Canada Credit Corp v Ramsay*, 1980 CanLII 3857, 27 Nfld & PEIR 144 (PESCTD) at 154:

> This legislation was obviously passed for the protection of persons urgently in need of money but not skilled in the practice of borrowing it and who are thereby more or less defenceless in the hands of lenders, professional or otherwise, who seek to take advantage of them . . . The intent and purpose of the legislation is to give relief only . . . where it is obvious that an unfair advantage has been taken of the borrower.

consent or in circumstances of unequal bargaining power."[77] As confirmed by Joseph Roach, "every province has now enacted legislation to prevent and redress unconscionable transactions by giving full powers to the courts to either cancel or modify such mortgage [or other credit] agreement where it is adjudicated that the costs of the loan are excessive, abusive or unconscionable."[78]

In Alberta, New Brunswick, Nova Scotia, Nunavut, Ontario and Prince Edward Island, when the cost of a loan is excessive and the transaction is harsh and unconscionable, courts may be called upon to review the contract between the parties. When doing so, the risk and all the circumstances of the money lending transaction must be considered, including any charge given to secure repayment.[79] As a result, both components must be established. Ronald Cuming explains that: "if the credit charge is reasonable but the other terms of the transaction, such as the provision with respect to repayment or the rights of the lender in the event of default by the borrower, are harsh and unconscionable, the court will not have power to give the necessary relief."[80]

In comparison, the statutory provision in Manitoba and Saskatchewan is disjunctive. Relief is available when the cost of a loan is excessive or the transaction is harsh or

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[77] *Milani v Banks*, (1997) 32 OR (3d) 557 at 563, 1997 CanLII 1765 (CA) [*Milani*], citing with approval *Barfried Enterprises*, *supra* note 14 at 577 (Justice Judson): "the theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent." See also *Ekstein v Jones*, 2005 CanLII 29491 (ONSC) [*Ekstein*]; *Grand Ridge Estates Ltd v Breadner Holdings Inc*, 2018 ONSC 655 [*Grand Ridge Estates*].

[78] Joseph E Roach, *The Canadian Law of Mortgages*, 3rd ed (Markham: LexisNexis, 2018) at 605–06. See recent statutes: (AB) *Unconscionable Transactions Act*, RSA 2000, c U-2 [*AB-UTA*]; (BC) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 7–10 [*BC-BPCPA*]; (MB) *The Unconscionable Transactions Relief Act*, RSM 1987, c U20 [*MB-UTRA*]; (NB) *Unconscionable Transactions Relief Act*, RSNB 2011, c 233 [*NB-UTRA*]; (NL) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, ss 8–17 [*NL-CPBPA*], replacing *Unconscionable Transactions Relief Act*, RSNL 1990, c U-1 [*NL-CPBPA*]; (NS) *Unconscionable Transactions Relief Act*, RSNS 1989, c 481 [*NS-UTRA*]; *Money-lenders Act*, RSNS 1989, c 289 [*NS Money-lenders Act*]; (Nu) *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, s 50.1–50.6 [*NU-CPA*], added by SNu 2017, c 18, s 2 [*NU-CPA*]; (ON) *Unconscionable Transactions Relief Act*, RSO 1990, c U.2 [*ON-UTRA*]; (PEI) *Unconscionable Transactions Relief Act*, RSPEI 1988, c U-2 [*PEI-UTRA*]; (QC) Arts 1437, 1623, 2332 CCQ; *QC-CPA*, *supra* note 29, s 8; (SK) *The Unconscionable Transactions Relief Act*, RSS 1978, c U-1 [*SK-UTRA*].

[79] *AB-UTA*, *supra* note 78, s 2; *NB-UTRA*, supra note 78, s 2; *NS-UTRA*, supra note 78, s 3; *NU-CPA*, *supra* note 78, s 50.2.; ON-*UTRA*, supra note 78, s 2; *PEI-UTRA*, supra note 78, s 3.

[80] Cuming, *supra* note 71 at 70–71.

unconscionable.[81] Accordingly, relief is still possible if the cost of the loan is excessive but not harsh or unconscionable. Nevertheless, in most cases, excessive interest and costs are usually sufficient in and of themselves to render a contract harsh and unconscionable unless refuted by the lender.[82] When judicially considered, "[b]oth components are cast against the risk and circumstances at the time the contract is entered."[83] In addition to a comparison with the rates in the prevailing market in the area for the same general type of loan involving a similar risk, the excessiveness of the cost of the loan is also determined by the risk associated with the loan, including an examination of the following non-exclusive risk factors for the lender:

a) where the borrower is unknown to the lender;
b) where the borrower solicited the loan;
c) where the loan is for a short period of time;
d) where there is urgency on the part of the borrower to obtain funds;
e) where the lender has to borrow funds in order to finance the loan;
f) where the borrower has a history of previous default;
g) the existence of any liens or judgments against the property used to secure the loan;
h) the security offered for the amount borrowed.[84]

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

> [T]he debtor must demonstrate both the inequality of the parties and the improvidence of the bargain, before the creditor is obligated to show that a contract freely entered into by the parties was fair, just and reasonable in the circumstances. Only then, if the creditor fails to do so, can the court set aside a valid contract in whole or in part under the Act.[85]

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[81] *MB-UTRA*, supra note 78, s 2; *SK-UTRA*, supra note 78, s 3.

[82] *Teresa McCrea Investments Inc v Conley Management Ltd*, 2012 SKQB 374 at para 64 [*Teresa McCrea*], citing *Samuel v Newbold*, [1906] UKLawRpAC 28, [1906] AC 461 (HL) at 473.

[83] *Quick Auto Lease Inc v Hogue*, 2018 MBQB 126 at paras 28–31.

[84] *Primewest Mortgage Investment Corp v Antonenko*, 2018 SKQB 259 at para 54, summarizing the first seven risk factors, citing *Teresa McCrea*, *supra* note 82; *Dassen Gold Resources Ltd v Royal Bank*, 1994 CanLII 9249, 23 Alta LR (3d) 261 (QB) [*Dassen Gold*]; *Milani*, *supra* note 77; *Ekstein*, *supra* note 77. The eighth risk factor is found in *Teresa McCrea*, *supra* note 82 at paras 41, 65; *Dassen Gold*, *supra* note 84 at para 141.

[85] *Quick Auto Lease Inc v Nordin*, 2014 MBCA 32 at paras 13–14, citing with approval *Milani*, *supra* note 77 at 564. See also *Mintage Financial Corp v Shah*, 2005 ABCA 86 at para 86 [*Mintage Financial*], leave to appeal to dismissed, [2005] SCCA No 192 (QL).

In order to overcome the significant legal obstacles encountered in earlier federal money lending legislation previously discussed, the "cost of the loan" is broadly defined in these provincial statutes to include all types of charges and fees in addition to interest costs. For example, according to the New Brunswick statute, the "cost of the loan" has been largely defined as the "whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements."[86]

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

> In the case of a loan of a sum of money, the court may pronounce the nullity of the contract, order the reduction of the obligations arising from the contract or revise the terms and conditions of the performance of the obligations to the extent that it finds that, having regard to the risk and to all the circumstances, one of the parties has suffered lesion.
>
> The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.[87]

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

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[86] *NB-UTRA*, supra note 78, s 1.

[87] Art 2332 CCQ; *QC-CPA*, *supra* note 29, s 8. According to Art 1406 CCQ, "lesion" is defined as:

> Lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties; the fact that there is a serious disproportion creates a presumption of exploitation.
>
> In cases involving a minor or a person of full age under tutorship or under a protection mandate, lesion may also result from an obligation that is considered to be excessive in view of the patrimonial situation of the person, the advantages he gains from the contract and the circumstances as a whole.

See also Union des consommateurs, *Ending Abusive Clauses in Consumer Contracts: Final Report of the Project* (Montréal: Union des consommateurs, 2011); Sébastien Grammond, "The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective" (2010) 49:3 Can Bus LJ 345; Frédéric Levesque, "La sanction par le juge des taux d'intérêt criminels et lésionnaires: réflexion sous forme de lignes directrices" (2020) 122:3 R du N 475 at 491–94.

> (*a*) reopen the transaction and take an account between the creditor and the debtor;
>
> (*b*) despite a statement or settlement of account or an agreement purporting to close previous dealings and create a new obligation, reopen an account already taken and relieve the debtor from payment of a sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
>
> (*c*) order the creditor to repay the excess if it has been paid or allowed on account by the debtor;
>
> (*d*) set aside, either wholly or in part, or revise or alter a security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order the creditor to indemnify the debtor.[88]

A notable exception to this broad power is found in Nova Scotia. In addition to a similar *Unconscionable Transactions Relief Act*, the Nova Scotia *Money-lenders Act* grants the court the above powers only when the amount of interest exceeds the "legal and valid rate in respect of the loan and is not in contravention of any Act heretofore or hereafter enacted by the Parliament of Canada", which currently stands at 17$ per $100 for payday loans in Nova Scotia and an effective annual rate of 60 per cent for all other loans.[89]

Unfortunately, the consumer seeking reparation is placed at an unfair disadvantage. In addition to financing the litigation process, the onus remains on the debtor to prove the components of the unconscionable transactions.[90] To overcome this obstacle, several provinces have reformed their statues to consolidate unconscionable transactions with unfair practices legislation. Accordingly, British Columbia, Newfoundland and Labrador and Nunavut statutes not only clarify the circumstances a court must consider, which the supplier knew or ought to have known, but transfers the burden of proof to the supplier.[91]

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[88] *NB-UTRA*, supra note 78, s 2. See also *AB-UTA*, supra note 78, s 2; *MB-UTRA*, supra note 78, s 2; *NS-UTRA*, supra note 78, s 3; *ON-UTRA*, supra note 78, s 2; *PEI-UTRA*, supra note 78, s 3; *SK-UTRA*, supra note 78, s 3.

[89] *NS Money-lenders Act*, *supra* note 78, s 4; *Consumer Protection Act*, RSNS 1989, c 92, ss 18A–18U [*NS-CPA*]; *Re Consumer Protection Act*, 2018 NSUARB 215 [NSUARB, 2018]; *Re Consumer Protection Act*, [2022] NSUARB 91 [NSUARB, 2022]; *Criminal Code*, RSC 1985, c C-46, s 347.

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

[91] *BC-BPCPA*, *supra* note 78, s 8; *NL-CPBPA*, *supra* note 78, s 8; *NU-CPA*, *supra* note 78, s 72.4(2).

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

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

More importantly, the British Columbia and Newfoundland and Labrador statutes provide stronger remedies for financial consumers for an unconscionable act or practice by a financial services supplier. With the exception of a mortgage loan to which judicial powers resemble the powers found in the other provinces as described above, the British Columbia statute provides that "if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor."[92] Moreover, the Newfoundland and Labrador statute grants the Court the discretion to make a declaratory or injunctive order, award damages including exemplary or punitive damages, to make an order rescinding or reopening the transaction, or to make any other order the Court deems appropriate.[93] One wonders whether these new legal remedies, should they be judicially enforced, will deter abusive and unconscionable practices by consumer lenders.

Although this type of provincial legislation has been enacted throughout the country for more than fifty years and should be part of a debtor's arsenal against creditor abuse, the fact that it has not been used extensively to curb predatory or criminal lending may be indicative of its ineffectiveness to protect consumers. Mary Anne Waldron has previously commented that "although many provinces adopted general unconscionable transaction

[92] *BC-BPCPA*, *supra* note 78, s 10.
[93] *NL-CPBPA*, *supra* note 78, s 10.

legislation, litigation under those provisions does not appear to have been frequent, leading one to question whether expecting a consumer to launch a court action in a small loan situation was realistic."[94] Recourse to litigation along with the delays and the expense involved most likely represent significant obstacles to a debtor, already burdened by previous indebtedness, who could seek relief in the Courts against the lender.

Another factor may be the uncertainty created by the perceived reluctance of the courts to review the substance of contracts and to set aside such transactions in "the absence of evidence of some form of defect of consent."[95] For example, Justice LeBel in *Miglin v Miglin* explained, in his dissenting opinion, the necessity of judicial restraint as follows:

> The stringency of the test for unconscionability reflects the strong presumption that individuals act rationally, autonomously and in their own best interests when they form private agreements. Non-enforcement of the parties' bargain is only justified where the transaction is so distorted by unequal bargaining power that this presumption is displaced.[96]

To address these constraints, Union des Consommateurs recommended, following a thorough review of abusive clauses in consumer contracts, that consumer organizations and associations should be allowed to seek collective legal redress before the courts on behalf of consumers as is currently permitted in British Columbia and Manitoba.[97] Likewise, some provinces have delegated the authority to bring an action against a person who has contravened the Act to the Director and request any redress for any damage or loss suffered by the debtor. As Iain Ramsay observed in 2001, however, "[e]ven where such provisions

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[94] Mary Anne Waldron, "A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past" (2011) 50 Can Bus LJ 300 at 304 [Waldron, 2011]; Ziegel, 1968, *supra* note 12 at 514–15. See also Ramsay, 2001, *supra* note 40 at 378; Halsbury's Laws of Canada (online), *Contracts*, "Excuses for Contractual Obligations: Techniques of Control: Unconscionability and the Protection of Vulnerable Parties: Specific Methods: Unconscionability in Transactions" (IX.2(3)(b)(i)) at HCO-144 "Legislation" (2017 Reissue). See also Cuming, *supra* note 71 at 71.

[95] Grammond, *supra* note 87 at 377.

[96] *Miglin v Miglin*, 2003 SCC 24 at para 208. See also Grammond, *supra* note 87 at 353; *Grand Ridge Estates*, *supra* note 77; *Mintage Financial*, *supra* note 85 at para 86; Waddams, 2010, *supra* note 60 at 392; *Titus*, *supra* note 62 at para 36: "A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party."

[97] Union des consommateurs, *supra* note 87 at 28–31, 102; *BC-BPCPA*, *supra* note 78, s 172; *MB-CPA*, *supra* note 49, s 136.1.

may be enforced by public agencies, in Canada these agencies have shown little enthusiasm for testing the boundaries of unconscionability legislation."[98] A review of Canadian case law reveals that nothing much has changed.

Given the foregoing, a recommended solution, as proposed by Jacob Ziegel, would be that "[i]n the interests of certainty and predictability, the intervention should preferably come from the legislature (Parliament and the provincial legislatures, in Canada's case), and not be left to the courts to fashion *ex post* in the guise of an unconscionability doctrine."[99]

5.3.3 Cost of Credit Disclosure Legislation[100]

In addition to unconscionable transaction relief provisions, protection of financial consumers from oppressive creditors was further strengthened by cost of credit disclosure legislation enabling consumers to make better financial decisions. As explained by Robert Kerton in his study on consumers in the financial services sector, "[t]he proliferation of complex new differentiated financial services, combined with the transformation of traditional sellers, has led to enough noise in the marketplace to confuse all but the most sophisticated of consumers."[101]

Although minimum disclosure requirements of the annual interest rate in credit agreements were first introduced in 1897 when Parliament enacted section 2 of the *Interest Act, 1897*,[102] additional disclosure and transparency requirements followed in the 1967 reforms of the *Bank Act* in response to the explosion of consumer credit and federal banks entering

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[98] *Consumer Protection Act*, RSA 2000, c C-26.3, s 159 [*AB-CPA*]; *BC-BPCPA*, *supra* note 78, s 171; Ramsay, 2001, *supra* note 40 at 378.

[99] Ziegel, 2010, *supra* note 26 at 377.

[100] See generally: Halsbury's Laws of Canada (online), *Commercial Law II* (*Consumer Protection)*, "Financing Protection" (II) at HCP-29–31, HCP-33–34 (2020 Reissue).

[101] Robert R Kerton, Task Force on the Future of the Canadian Financial Services Sector, "Principles: Transparency and Redress – Essential Components of Consumer Protection Policy" in Robert R Kerton, ed, *Consumers in the Financial Services Sector*, vol 1: *Principles, Practice and Policy – the Canadian Experience*, Catalogue No F21-6/1998-8-1E-PDF (Ottawa: Task Force of the Future of the Canadian Financial Services Sector, September 1998) 5 at 30.

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

the consumer credit market.[103] At that time, many provinces had already regulated disclosure provisions for sales transactions and by 1971, most provinces had also enacted various consumer protection measures to ensure that consumers were informed of the true cost of credit in lending transactions.[104]

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

> a) to ensure that, before making a credit-purchasing decision, consumers receive fair, accurate and comparable information about the cost of credit;
> b) to ensure that, with respect to non-mortgage credit, consumers are entitled to repay their loans at any time and, in that event, to pay only those finance charges that have been earned at the time the loans are repaid; and
> c) to ensure that the disclosure is as clear and as simple as possible, taking into account the inherent complexity of disclosure issues related to any form of credit.[105]

The harmonization template formalized by the Committee on Consumer Related Measures and Standards was to guide jurisdictions in implementing the agreed upon principles in

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[103] *Bank Act*, SC 1966-1967, c 87, s 92; *Bank of Cost of Borrowing Disclosure Regulations*, SOR/67-504; Pitch, *supra* note 17 at 327. See also *Consumer Credit Protection Act*, 15 USC § 1601 (1968) [*Truth in Lending Act*]; Bill S-2, *An Act to Make Provision for the Disclosure of Information in Respect of Finance Charges*, 5th Sess, 24th Parl, 1962, reintroduced as Bill S-3, 1st Sess, 25th Parl, 1962 (second reading 6 December 1962).

[104] (AB) *The Credit and Loan Agreements Act*, SA 1967, c 11; Alta Reg 310/67, Alta Reg 407/67; (BC) *BC-CPA 1967*, *supra* note 78, Part III, ss 11–16; BC Reg 219/67, BC Reg 251/67, BC Reg 15/68; (MB) *The Consumer Protection Act*, SM 1969, c 4, Part 1, ss 4–27; (NB) *The Cost of Credit Disclosure Act*, SNB 1967, c 6; (NS) *Consumer Protection Act, 1966*, SNS 1966, c 5, as amended by SNS 1967, c 98; NS Reg 8/1966; (ON) *The Consumer Protection Act*, SO 1966, c 23, as amended by SO 1967, c 13; O Reg 207/67, O Reg 265/67; (PEI) *Consumer Protection Act, 1967*, SPEI 1967, c 16; (QC) *Consumer Protection Act*, SQ 1971, c 74, ss 11, 21, 24, 28, 30; (SK) *The Cost of Credit Disclosure Act*, SS 1967, c 85; Sask Reg 273/67, Sask Reg 316/67, Sask Reg 357/67. But see: Richard H Bowes, "Annual Percentage Rate Disclosure in Canadian Cost of Credit Disclosure Laws, Symposium: Revision of the Federal Interest Act and Harmonization of Federal Provincial Consumer Credit Disclosure Legislation" (1998) 29 Can Bus LJ 183 at 188, n 16: "None of the statutes were 'pure disclosure' statutes"; Ziegel, 1968, *supra* note 12 at 507–08.

[105] Consumer Measures Committee, "Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada: Drafting Template," (1 June 1998) at 3, online: *Canada* <ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Cost_of_Credit_Disclosure.pdf/$file/Cost_of_Credit_Disclosure.pdf> [perma.cc/YX4C-KBKH] [*CMC Draft Template*]. See also Bowes, *supra* note 104.

their respective laws with respect to the cost of borrowing disclosure rules.[106] At that time, all parties agreed that the harmonized cost of credit disclosure legislation must apply to all forms of consumer credit, including fixed credit such as loans for a fixed sum to be repaid in instalments; open credit such as lines of credit and credit cards; loans secured by mortgage of real property; supplier credit such as conditional sale agreements; and long-term leases of consumer goods. At the federal level, similar cost of credit disclosure provisions found in the *Bank Act* and the federal cost of borrowing regulations were initially applicable only to federal banks but are now applicable to all federally incorporated financial institutions.[107]

Accordingly, all provincial and territorial jurisdictions now impose disclosure requirements on credit grantors who extend credit in the ordinary course of carrying on their business. The cost of credit may include interest, arrangement fees and other charges, as prescribed by legislation that varies by jurisdiction. In Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, Québec, Northwest Territories, Nunavut and Yukon, the cost of credit disclosure requirements are currently governed by provisions of consumer protection legislation, while New Brunswick, Newfoundland and Labrador and Saskatchewan have separate cost of credit legislation.[108]

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[106] Internal Trade Secretariat, *AIT*, *supra* note 20 at Annex 807.1, s 7; *CMC Draft Template*, *supra* note 105. See also Bowes, *supra* note 104.

[107] *Bank Act*, SC 1991, c 46, ss 449–54; *Cost of Borrowing Federal Regulations, infra* note 227. See also recent amendments *An Act to amend the law governing financial institutions and to provide for related and consequential matters*, SC 2007, c 6, ss 33, 91, 167, 365.

[108] (AB) *AB-CPA*, *supra* note 98, Part 9. See also *Ibid*, s 59(4), (5); *Cost of Credit Disclosure Regulation*, Alta Reg 198/400, ss 2–8 [AB-*CCDR*]; (BC) *BC-BPCPA*, *supra* note 78, Part 5; *Disclosure of the Cost of Consumer Credit Regulation*, BC Reg 273/2004; (MB) *MB-CPA*, *supra* note 49, ss 1, 6–35.9; *Consumer Protection Regulation*, Man Reg 227/2006, ss 4.1–19; (NB) *Cost of Credit Disclosure and Payday Loans Act*, SNB 2002, c C-28.3 [*NB-CCDPLA*]; *General*, NB Reg 2010-104; (NL) *NL-CPBPA*, *supra* note 78, ss 45–71; *Cost of Consumer Credit Disclosure Regulations*, NLR 74/10; (NS) *NS-CPA*, *supra* note 89, ss 17–18; *Consumer Protection Act Regulations*, NS Reg 2000/160, NS Reg 160/2000, as amended by NS Reg 72/2018; (NT) *Cost of Credit Disclosure Act*, SNWT 2011, c 23, ss 6–11; *Cost of Credit Disclosure Regulations*, NWT Reg 014-12; (NU) *NU-CPA*, *supra* note 78, Part 1; *Consumer Protection Regulations*, RRNWT 1990, c C-16, ss 6–8; (ON) *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, ss 66–81 [*ON-CPA*]*; General Regulation*, O Reg 17/05, ss 55–69, 85 [*ON-CP Regulation*]; (PEI) *Consumer Protection Act*, RSPEI 1988, c C-19; *Cost of Borrowing Disclosure Regulations*, PEI Reg EC1987-16; (QC) *QC-CPA*, *supra* note 29, ss 66–150; *Regulation respecting the application of the Consumer Protection Act*, CQLR c P-40.1, r 3, ss 26–86. [*QC-CP Regulation*]; (SK) *Cost of Credit Disclosure Act, 2002*, SS 2002, c C-41.01, s 3; *Cost of Credit Disclosure Regulations*, 2006, RRS c C-41.01, Reg 1, s 5; (YT) *Consumers Protection Act*, RSY 2002, c 40; *Regulations Respecting the Protection of Consumers*, YOIC 1972.

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

Additional measures specifically apply to credit cards.[109] Provincial legislation generally focuses on three main consumer protection measures. First, unsolicited credit cards are prohibited. However, in some provinces such as Ontario and Nova Scotia, even if a consumer has not requested the credit card, use of the card will be deemed to constitute written acceptance of the credit agreement.[110] Likewise, while a card may have been solicited without signing an application, the debtor is deemed to have entered into a credit agreement upon first use of the card. Second, provincial legislation regulates the card issuer's disclosure requirements. In most provinces, disclosure of prescribed information is required either when the individual applies for a credit card or in an initial disclosure statement provided to the consumer. Finally, all provinces with credit card legislation provide that a card holder is not liable for a debt incurred through the unauthorized use of a lost or stolen credit card after the credit card issuer has been given notice of the loss or theft. Most provinces limit the maximum total liability before the credit card issuer receives notice to $50 or a lesser amount set by the credit agreement, except Nova Scotia and Prince Edward Island who appear to leave the consumer's liability to the credit card issuer's discretion.[111]

[109] See Appendix A for citations to statutory provisions.
[110] *NS-CPA*, *supra* note 89, s 23; *ON-CPA*, *supra* note 108, s 68.
[111] See e.g. *NB-CCDPLA*, *supra* note 108, s 46(2).

Although the effectiveness of cost of credit disclosure requirements has been questioned and labelled "ineffective and largely a waste of money",[112] a recent study has confirmed that for highly educated consumers, disclosure regulations and the introduction of plain-language contracts have achieved the desired outcome that consumers have a "fairly complete understanding" of the credit agreements they enter into and are "aware of the risks they are taking."[113]

Despite these positive findings, the Financial Consumer Agency of Canada recently confirmed that the results of the research undertaken to date reveal that "many consumers lacked the basic financial knowledge needed to make sound decisions about their money."[114] Understanding the consequences of interest compounding, the justification for credit life and disability insurance, the importance of comparison shopping and looking beyond the amount of the finance charge or the instalments are outside the grasp or interest of many vulnerable consumers.[115] Moreover, "literature on behavioural economics suggests that consumers tend to underestimate risks such as unemployment and be overoptimistic about their repayment abilities."[116]

Aggravating their plight, consumers are also faced with disparate, complex and at times conflicting information relating to financial consumer protection and are thus unable to

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[112] Anthony Duggan, "Law, Economics and Public Policy: Essays in Honour of Michael Trebilcock: VIII Consumer Law and Policy: Consumer Credit Redux" (2010) 60:2 UTLJ 687 at 699 [Duggan, 2010], citing Ronald Mann, *Charging Ahead: The Growth and Regulation of Payment Card Markets* (Cambridge: Cambridge University Press, 2006). See also Micheline Gleixner, "Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency" in Janis Sarra, ed, *Ann Rev Insolv L 2013* (Toronto: Carswell, 2014) 587 at 598–600 [Gleixner, 2014]; Saul Schwartz, "The Canadian Task Force on Financial Literacy: Consulting Without Listening" (2011) 51:3 Can Bus LJ 338 at 352; Mary Anne Waldron, "Unanswered Questions about Canada's Financial Literacy Strategy: A Comment on the Report of the Federal Task Force Symposium: Financial Literacy for Canadians and Reactions to the Federal Task Force Report" (2011) 51:3 Can Bus LJ 361 at 373–74.

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

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

[115] Iain Ramsay, "Overindebtedness and Regulation of Consumer Credit" in Thierry Bourgoignie, ed, *Regards croisés sur les enjeux contemporains du droit de la consommation* (Cowansville, QC: Yvon Blais, 2006) 35 at 39 [Ramsay, 2006]; Duggan, 2010, *supra* note 112 at 702.

[116] Ramsay, 2006, *supra* note 115 at 39. See also Bramley, *supra* note 114 at 716–17; Waldron, 2011, *supra* note 94 at 318.

protect their interests when initially choosing a financial service or when they realize the negative consequences of their financial choices. One simply has to compare the provincial cost of credit disclosure requirements prescribing the disclosure of the annual percentage rate when communicating cost of borrowing with the criminal interest rate provisions prescribing a 60 per cent effective annual rate. According to a recent study on high-cost credit in Canada, "[m]ost lenders cap rates at 46.9% Annual Percentage Rate ("APR") the equivalent of 60% Effective Annual Rate ("EAR") set in the federal Criminal Code."[117] Regardless, most financial consumers do not understand either.

The fact remains, therefore, that for many Canadians struggling with financial literacy, cost of credit disclosure requirements are insufficient to enable them to make proper financial decisions and fails to prevent irresponsible and financially dangerous use of high credit products as well as consumer abuse and predatory lending practices. Given the foregoing, cost of credit disclosure legislation remains largely ineffective for consumers who need the most protection. Iain Ramsay's conclusion in 2006 remains true to this day: "Canada has in general not attempted to use disclosure law as a method of addressing potential overindebtedness."[118] Furthermore, existing credit disclosure provisions will not remedy consumer exploitation and increased regulatory intervention in the marketplace is thus justified to protect financial consumers.[119]

5.3.4 Fair Trade Practices Legislation[120]

Following disclosure requirements and relief for unconscionable credit transactions, many provinces enacted legislation that protected consumers from unfair or deceptive business

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[117] Denise Barrett Consulting, *Consumers' Experience with Higher Cost Credit* (Toronto: Consumers Council of Canada, 2018) at 4, 216, online: CCC <cccshop.consumerscouncil.com/ca/Financial-Services/c/3205/Consumers-Experience-with-Higher-Cost-Credit-[EPUB]/p/139982> [Barrett, 2018].

[118] Ramsay, 2006, *supra* note 115 at 38.

[119] Robert R Kerton & Idris Ademuyiwa, "Financial Consumer Protection in Canada: Triumphs and Tribulations" in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection*, 1st ed (Singapore: Springer, 2018) 85 at 105–07; Waldron, 2011, *supra* note 94 at 320.

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

practices undertaken before, during or after a consumer transaction relatively quickly.[121] Although initially enacted as separate statutes, most provinces have now incorporated them in their general consumer protection legislation.[122]

Explaining the objectives of fair trade practices legislation, the Alberta Government indicates that the *Consumer Protection Act* "[e]nhances consumer protection through remedies, enforcement tools and tougher penalties intended to discourage unfair practices in the marketplace. The Act simplifies procedures for business, providing clearer standards to ensure a more level playing field."[123] Uniquely and interestingly, the Alberta statute's preamble further clarifies the policy objectives targeted by this type of legislation:

> WHEREAS all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed;
>
> WHEREAS businesses thrive when a balanced marketplace is promoted and when consumers have confidence that they will be treated fairly and ethically by members of an industry;
>
> WHEREAS businesses that comply with legal rules should not be disadvantaged by competing against those that do not; and

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

[122] (AB) *Fair Trading Act*, RSA 2000, c F-2, Part 9 (name and chapter number changed to *AB-CPA*, *supra* note 98 by SA 2017, c 18, s 1(2), effective 15 December 2017); *Consumer Transaction Cancellation and Recovery Notice Regulation*, Alta Reg 287/2006; (BC) *BC-BPCPA*, *supra* note 78, Part 2, Division I; (MB) *The Business Practices Act*, SM 1990-1991, c 6; (NB) Unfair practices provisions are found throughout various legislation applicable to specific industries, products or services; (NL) *NL-CPBPA*, *supra* note 78, ss 7, 9–10.; (NS) generally *Consumer Services Act*, *supra* note 121; *NS-CPA*, *supra* note 89, s 33; No regulation adopted to date specifically on unfair practices; (NU) *NU-CPA*, *supra* note 78, s 72.1-72.5., as added by SNu 2017, c 18, s 3; (ON) *ON-CPA*, *supra* note 108, ss 14–19.; (PEI) *Business Practices Act*, RSPEI 1988, c B-7, s 2; *Conduct of Creditors Regulations*, *supra* note 121; *QC-CPA*, *supra* note 29, ss 219–22, 229.; (SK) *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, ss 6–9. See generally: Halsbury's Laws of Canada, *supra* note 100.

[123] Alberta Government, "Consumer Protection Act", online: <open.alberta.ca/dataset/c26p3> [perma.cc/9M49-KFLK]. See also *AB-CPA*, *supra* note 98, as modified by SA 2017, c 18 and SA 2018, c 11.

> WHEREAS the Government of Alberta is committed to protecting consumers and businesses from unfair practices to support a prosperous and vibrant economy.[124]

Generally, an unfair or deceptive practice takes the form of a claim, representation or advertisement that would likely mislead or deceive a consumer or be unconscionable and take advantage of a person's inability to protect their interests during negotiations. Although terminology varies from province to province, consumer protection legislation applicable to consumer credit transactions expressly prohibits certain practices by suppliers of consumer products and providers of financial services and governs practices within the consumer credit industry. Indeed, many distinct unfair practices, usually more than twenty, are specifically enumerated in the provincial statutes and these lists are generally non-exhaustive. In many provincial statutes, the list of unfair practices is classified in two categories: false, misleading or deceptive practices, or unconscionable practices.[125] Another categorization distinguishes practices pertaining to the content of the contract of sale of goods and services from other practices relating to the process that resulted in the contract.[126]

Although not yet in force, reforms enacted in 2017 to the Alberta *Consumer Protection Act* further prohibit unilateral changes to a "substantive term" unless the consumer consents or the change is permitted in the consumer contract and notice is given to the consumer as prescribed by the Act.[127] In the latter event, the consumer retains the right to "cancel the ongoing consumer transaction by providing the supplier with a written notice of cancellation" without any penalties.

Many provincial statutes further provide that an unfair practice may occur whether or not it resulted in a consumer transaction. For example, the Ontario *Consumer Protection Act, 2002* provides simply that it is an unfair practice for a person to make a false,

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[124] *AB-CPA*, *supra* note 98, Preamble.

[125] See in-depth analysis of unfair practices legislation in Edward P Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977) 15:2 Osgoode Hall LJ 327 at 345–56.

[126] Union des consommateurs, *supra* note 87 at 40.

[127] *AB-CPA*, *supra* note 98, s 6.1-6.2, as added by SA 2017, c 18 (not in force).

misleading, deceptive or an unconscionable representation and as a result any agreement may be rescinded and the consumer entitled to a remedy.[128] Unlike the earlier *Business Practices Act*, the new provisions no longer require that the consumer be induced to enter into the agreement by the misrepresentation.[129] Confirmed by the Ontario Court of Appeal, "a claim under the *Consumer Protection Act* based on an agreement entered into following an unfair practice does not require any reliance on or even knowledge of the unfair practice."[130] This is in contrast to several provinces that still require either that the consumer was induced to enter into the contract by the unfair practice or that damages were caused by the unfair practice.

Several provinces grant the consumer the right to rescind an agreement, or the courts the power to set aside agreements whether written, oral or implied, when a supplier or creditor has engaged in an unfair practice.[131] However, the right to rescission or to damages is dependent in some jurisdictions upon notice being provided to the supplier within a certain time frame. When a supplier has engaged in an unfair practice, a consumer may be entitled to various remedies including damages, the recovery of the amount paid by the consumer which exceeds the value of the goods or services received, and even exemplary or punitive damages.

In addition, some provincial statutes grant the Court the power to make a declaratory or an injunctive order and to impose a criminal sanction against the supplier. Both these private and public enforcement provisions are "designed to achieve a combination of sanctions and procedures calculated to maximize the objectives of deterrence, compensation and efficiency."[132] The effectiveness of these consumer protection provisions were, however,

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[128] *ON-CPA*, *supra* note 108, Part III, ss 14–18.

[129] Thomas R Lipton, "Consumer Protection Act 2002: Case Law Updates" (2018) 61:1 Can Bus LJ 109 at 118.

[130] *Ramdath v George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at paras 39, 86–87.

[131] See Appendix B for citations to statutory provisions. See also Belobaba, *supra* note 125 at 356–74; Union des consommateurs, *supra* note 87 at 42–43; Ziegel, 2010, *supra* note 26 at 387.

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

quickly disputed. William Neilson's research on the public administrative remedies in provincial trade practices legislation revealed, in 1981, the "prevailing failure to administer the trade practices statutes in an accessible, comprehensive and regular fashion. […] Accountability has taken on a very muted and sporadic meaning."[133] According to Jacob Ziegel, private enforcement cases are also limited given two main obstacles consumers must surmount to benefit from the legislative remedies enacted to protect them.[134] Not only must an aggrieved consumer prove that the creditor made a "representation", but also they must personally finance the litigation costs involved in the process.

Although a recent conviction in Ontario against a contracting company has "resulted in one of the largest fines and longest jail terms imposed under the *Consumer Protection Act*",[135] the Province's website lists only seven conviction notices for the last 27 months. In comparison, there were 387 records at the end of 2019 on the Consumer Beware List of businesses that have either been convicted or have not responded to the ministry about a consumer complaint. In 2023, 300 businesses remain on the list.[136] Regrettably, a list of convictions notices no longer appears on the government website. Given the number of complaints, the actual enforcement measures seem quite inconsequential and raise the issue of whether consumer protection measures have ever been effectively enforced.

5.3.5 Payday Loans Legislation

The emergence of new forms of consumer credit such as payday loans has recently prompted renewed lobbying efforts aimed at provincial governments to combat predatory lending and better protect financial consumers. Although their presence in the United States can be traced back to the 1980s, the payday loan industry emerged in Canada in the early

[133] *Ibid* at 164–65.
[134] Ziegel, 2010, *supra* note 26 at 387.
[135] Ontario, Ministry of Government and Consumer Services, "Toronto Contracting Company and Owner Each Convicted for 11 Counts of Engaging in an Unfair Practice" (9 August 2019), online: *Ontario Newsroom* <news.ontario.ca/mgs/en/2019/08/toronto-contracting-company-and-owner-each-convicted-for-11-counts-of-engaging-in-an-unfair-practice.html> [perma.cc/3H49-SES8]. The contracting company was fined a total of $1.125 million and its director was sentenced to 731 days in jail.
[136] Ontario, "Consumer Beware List", online: *Ontario* <consumerbewarelist.mgs.gov.on.ca/en/cbl/search> (consulted 21 December 2019 and 17 September 2023).

to mid-1990s.[137] Less than twenty years later, payday lenders became the most visible and important service provider in the alternative consumer credit market offering small short-term unsecured loans. Provided that the borrower has an identity card, a bank account and a source of income, payday lenders will make the loan without checking the consumer's credit report nor the borrower's outstanding indebtedness and even promote this "flexibility" to potential consumers and "guarantee" approval.[138] Many lenders do, however, evaluate to some extent the borrower's ability to repay based on the value of the loan relative to the client's expected future income in order to determine the associated risk with the loan.[139]

Since payday loans are intended primarily for individuals unable to access other forms of credit, the industry is often criticized and described as predatory, but is also considered by many as a form of microlending filling a gap in the consumer credit market to alleviate short term financial distress.[140] Jacob Ziegel explains, however, that "borrowing costs are

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

[138] Ben-Ishai, *supra* note 45 at 331; ACORN Canada, "A Conflict of Interest: How Canada's Largest Banks Support Predatory Lending," (March 2007) at 4, online: *ACORN Canada* <acorncanada.org/resource/conflict-interest-how-canadas-largest-banks-support-predatory-lending> [perma.cc/3AEB-MWKX] [ACORN Canada, 2007]; Brian Dijkema & Rhys McKendry, *Banking on the Margins: Finding Ways to Build and Enabling Small-Dollar Credit Market* (Hamilton: Cardus, 2016) at 35, online: *Cardus* <cardus.ca/research/work-economics/reports/banking-on-the-margins/> [perma.cc/J36P-P55Q]; Denise Barrett Consulting, *Consumer Experiences with Online Payday Loans* (Toronto: Consumers Council of Canada, 2015) at 35, online: *CCFA* <canadiancfa.com/wp-content/uploads/2016/10/consumers-council-canada-online-loans_2015-study.pdf> [perma.cc/QK4G-2LV4] [Barrett, 2015]; Consumer Measures Committee, *Stakeholder Consultation Document on a Proposed Consumer Protection Framework for the Alternative Consumer Credit Market* (Ottawa: Office of Consumer Affairs, Industry Canada, 2004) at 8 [CMC, 2004].

[139] Barrett, 2018, *supra* note 117 at 50; Dijkema & McKendry, *supra* note 138 at 35.

[140] Ferya Kodar, "Conceptions of Borrowers and Lenders in the Canadian Payday Loan Regulatory Process: The Evidence from Manitoba and Nova Scotia" (2011) 34 DAL LJ 443; Ruth E Berry & Karen A Duncan, "The Importance of Payday Loans in Canadian Consumer Insolvency," (31 October 2007) at 3, online: *OSB* <ised-isde.canada.ca/site/office-superintendent-bankruptcy/sites/default/files/attachments/2022/Payday_EN.pdf> [perma.cc/LQ34-E3F6]; Jerry Buckland, "Payday Lending Literature Review" (3 May 2013) at 14, online: *Manitoba Public Utilities Board* <pub.gov.mb.ca/payday_loan/buckland_payday_literature_review_may%203_13.pdf> [perma.cc/4MYE-MDAK]; Janis P Sarra, "At What Cost? Access to Consumer Credit in a Post-Financial Crisis Canada" in Janis P Sarra, ed, *Ann Rev Insolv L 2011* (Toronto: Thomson Reuters, 2012) 409 at 419; Ben-Ishai, *supra* note 45 at 325–30. For an in-depth description of these two types of customer segments see: Sabrina Bond, *Filling the Gap: Canada's Payday Lenders* (Ottawa: Conference Board of Canada, 2016) at 27–31, online: *CCFA* <canadiancfa.com/wp-content/uploads/2016/11/cboc-filling-the-gap_final-nov-2016.pdf> [perma.cc/3NZF-LXG2].

too high and may often leave the borrowers worse off than they were before the loan."[141] Indeed, a Manitoba study estimated in 2007 that a $250 payday loan with a twelve-day maturity would carry an average annual interest rate of 778% instead of regular lines of credit and credit card with interest rates of ten to 36 per cent.[142] Moreover, the annual rates charged by payday lenders increased by 42.5% between 2002 and 2007. An ACORN Canada report further indicated that same year that payday lenders were charging interest rates between 380 and 900%, thus violating section 347 of the *Criminal Code*, which sets the criminal interest rate at 60%.[143]

In addition to the high costs involved, the critical issue with payday loans is the short-term nature of the loan. In order to limit their risk, lenders usually structure the repayment period according to the consumer's next inflow of funds such as a paycheque and require a pre-authorized debit or a post-dated cheque for the total loan amount including fees.[144] It is imperative to understand, however, that the consumers targeted by this type of loan often do not have the necessary surplus in their budget to repay the loan since, if they did, they would never have resorted to it in the first place. More importantly, a recent study has confirmed that the majority of these loans are used for recurring or necessary expenses,[145] which signifies that the consumer is most likely already financially distressed or living

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[141] Ziegel, 2010, *supra* note 26 at 368.

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

[143] *Criminal Code*, *supra* note 89, s 347; ACORN Canada, 2007, *supra* note 138 at 4.

[144] Dijkema & McKendry, *supra* note 138 at 35; Canada, "Payday Loans" (modified 12 November 2019), online: *Canada* <canada.ca/en/financial-consumer-agency/services/loans/payday-loans.html> [perma.cc/28JZ-TDH8].

[145] Financial Consumer Agency of Canada, "Payday Loans: Market Trends," (2016) at 1, online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/payday-loans-market-trends.html> [/perma.cc/6S2Y-EFJG] [FCAC, 2016]. See also Manitoba Public Utilities Board, "Report on 2016 Payday Loans Review" (17 June 2016) at 38, online: *Manitoba* <https://www.pubmanitoba.ca/payday_loan/2016_payday_loans_review_report.pdf> [perma.cc/7KL5-SVW5] [Manitoba Public Utilities Board, 2016]; Jerry Buckland & Brenda Spotton Visano, "Introduction" in Jerry Buckland, Chris Robinson & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context: A Mature Industry with Chronic Challenges* (Cham, Switzerland: Springer International Publishing AG, 2018) 1 at 2; Jerry Buckland, "A Socio-economic Examination of Payday Loan Clients: Why and How People Use Payday Loans" in Buckland, Robinson & Spotton Visano, *supra* note 145, 65 at 75 [Buckland, 2018].

paycheque to paycheque. As a result, the nature of a payday loan and the two-week repayment period represents a short period of time to recover the amount needed.

Repayment of the payday loan along with additional costs not only delays the consumer's burden of illiquidity to the next paycheque but also increases the consumer's overall indebtedness. Additional loans are therefore required to stay financially afloat or may even be required to repay the initial loan and thus continues to add to a borrower's financial hardship. "For consumers who are never able to get completely ahead of the deficit left by a loan payment in their cash-flow cycle, the result can be a crippling cycle of debt that lasts until the individual receives a large-enough influx of cash such as a tax return."[146]

The obvious potential for profits explains why payday loan companies encourage their customers to extend the term of the loan or to take out another loan to repay the first, rather than encouraging borrowers to pay their debts. According to a recent study on payday loans, "the business model of the payday loan industry requires repeat borrows, not one-time customers" and, prior to recent legislative reforms prohibiting the practice, loans were regularly rolled over into new loans (on average 15 times as reported by Ernst & Young in 2004).[147] According to the Nova Scotia Utility and Review Board's analysis of 2017 statistics,[148] repeat loans represented 56 per cent of total payday loan borrowing in the province. In addition, almost 50 per cent of borrowers had five or more payday loans in one year and 32 per cent had eight or more.

There are several factors that can make a person opt for this type of credit. "Borrowers find payday loans attractive because of the accessibility of the payday loan outlets, the privacy of the transactions, the absence of credit checks, and non-requirement of security for

[146] Dijkema & McKendry, *supra* note 138 at 35. See also Ben-Ishai, *supra* note 45 at 327, citing Carmen Butler & Niloufar Park, "Mayday Payday: Can Corporate Social Responsibility Save Payday Lenders?" (2005) 3:1 Rutgers JL & Urban Pol'y 119 at 122; Manitoba Public Utilities Board, 2016, *supra* note 145 at 61; Buckland & Spotton Visano, *supra* note 145 at 11; NSUARB, 2022, *supra* note 89 at paras 127, 129.

[147] Chris Robinson, "A Business Analysis of The Payday Loan Industry" in Buckland, Robinson & Spotton Visano, *supra* note 145, 83 at 95; ACORN Canada, 2007, *supra* note 138 at 4.

[148] NSUARB, 2018, *supra* note 89 at para 102.

repayment of the loan."[149] For financial consumers "concerned about their ability to manage the more open-ended commitment associated with credit card cash advances", payday loans provide a highly structured short-term loan.[150] Payday lenders seem to be "non-judgmental" and friendlier, especially with the proactive offer of services in the language of the dominant ethnic group in the neighborhood, and more accessible both in terms of hours of operation and location.[151] For example, in many Canadian cities, banks tend to close their branches in low-income or rural neighborhoods, while payday lenders take the opportunity to move into these areas.[152]

In 2008, there were approximately 1,450 payday lenders in Canada, with an estimated turnover of $2 billion, most of them in low-income neighborhoods.[153] It was contemplated at that time that the payday loan industry could double in size when it would reach maturity.[154] Although the use of payday loans by consumers has more than doubled in Canada between 2009 and 2016 to more than four per cent of Canadian households or two million Canadians each year,[155] the number of lenders has not increased significantly. The number of payday lenders peaked in 2011 with 1,778 lenders but recent provincial regulatory reforms beginning in 2009 has transformed the industry. The business analysis

[149] Ziegel, 2010, *supra* note 26 at 367; Buckland, 2012, *supra* note 35 at 100–17; Margaret Craig-Bourdi, "High-Interest Loans: Why Canadian Borrowers Are Still Taking on the Steep Commitment" (13 August 2018), online: *CPA* <cpacanada.ca/en/news/canada/2018-08-13-high-interest-loans-why-canadian-borrowers-are-still-taking-on-the-steep-commitment> [perma.cc/8YFS-V34F]. See also Buckland, 2018, *supra* note 145 at 75–76.

[150] Iain Ramsay, "Of Payday Loans and Usury: Further Thoughts" (2003) 38:3 Can Bus LJ 386 at 389 [Ramsay, 2003].

[151] Ben-Ishai, *supra* note 45 at 330.

[152] ACORN Canada, 2007, *supra* note 138 at 2. In 2004, it was reported that that more than 700 bank branches were closed in Canada between 2001 and 2003, most in low-income neighbourhoods; Buckland, 2012, *supra* note 35 at 152.

[153] Finn Poschmann, "An Assessment of Payday Lending: Markets and Regulatory Responses," (October 2016) at 14, online: *Atlantic Provinces Economic Council* <apec-econ.ca/files/documents/Payday%20Lending%20Report.pdf> [perma.cc/6EE9-YJJG] [*Poschmann*]; Ziegel, 2010, *supra* note 26 at 367; Buckland, 2012, *supra* note 35 at 148–49; Buckland & Spotton Visano, *supra* note 145 at 3–4. For in-depth analysis of payday loan industry see Robinson, *supra* note 147 at 83–125.

[154] *The Cash Store*, *supra* note 137 at para 3.

[155] FCAC, 2016, *supra* note 145 at 1–2.

of the payday loan industry, completed by Chris Robinson in 2018, revealed that the industry, estimated at 1,431 lenders, had consolidated and returned to previous levels.[156]

Initially, Québec's consumer protection legislative framework with its relatively low interest rate restrictions, as previously explained in Section 5.3.1 on pawnbrokers, discouraged this specific industry from developing in the province.[157] A recent study seems, however, to paint a different picture and clearly demonstrates that illegal payday loans are, in fact, available in the province. Saul Schwartz and Stephanie Ben-Ishai's analysis of the Office of the Superintendent in Bankruptcy's 2019 insolvency data confirmed that "about 50 percent of the high-cost loans among the liabilities of Quebecers filing for bankruptcy in 2019 were payday loans".[158] The existence of these illegal credit products offered by both licensed and unlicensed lenders is explained by 1) the indifference towards such low-priority violations and resulting absence of any effective law enforcement of the applicable consumer protection provisions, 2) the assumption that consumers unable to get credit from financial institution "need" payday loans, and 3) the intangible nature of the financial service, offered generally by internet and e-mail, thus avoiding physical storefront locations.[159] It is important to note, however, that stricter regulation does offer some consumer protection since the proportion of bankruptcies with at least one high-cost loan in the province are less than half the average proportion in the remaining Canadian provinces.[160] Nonetheless, it can be conclusively stated that payday lenders are now found in all provinces in Canada.

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[156] Robinson, *supra* note 147 at 86. See also Poschmann, *supra* note 153 at 13–18; Bond, *supra* note 140 at 5–8.

[157] For further details, see *supra*, notes 48–49. NSUARB, 2022, *supra* note 89 at para 59: The maximum annual interest rate of 35% imposed on all lenders, including for payday loans, has "curtailed the operation of payday lenders in the province" of Québec. See also: Barrett, 2015, *supra* note 138 at 14; Saul Schwartz & Stephanie Ben-Ishai, "Prevalence of High-Cost Loans among the Debts of Canadian Insolvency Filers" (2023) 49:1 Can Pub Pol'y 62 at 68.

[158] Schwartz & Ben-Ishai, *supra* note 157 at 68–71.

[159] Bertrand Rainville, *Les prêteurs sur salaire: l'exploitation du malheur d'autrui* (Trois-Rivières: Centre d'intervention budgétaire et sociale de la Mauricie, 2017) at 1, 10.

[160] Schwartz & Ben-Ishai, *supra* note 157 at 69; Stephanie Ben-Ishai et al, "Bankruptcy Lessons for Payday Lending Regulation" (2021) 72 UNBLJ 173 at 182 [Ben-Ishai et al, 2021].

Amidst calls for the outright prohibition of payday loans, the federal, provincial and territorial governments began in 2000 to address the exploitation of vulnerable customers and the charging of exorbitant rates and fees by payday lenders. However, instead of banning payday loans, governments tailored their response to legalize the industry, which was threatened as a result of numerous class actions brought against payday loan companies in Canada.[161] Claiming violations of section 347 of the *Criminal Code*, some thirty class action lawsuits had been filed by 2008 in British Columbia, Alberta and Ontario against payday lenders in Canada. Many suits were settled giving millions in restitution to customers of payday lenders.[162] Despite research on the payday loan industry in the 2000s revealing borrowing costs averaging an APR of 551% and as high as 1,200% in Canada,[163] which confirmed these litigious allegations, there had been few prosecutions under this criminal provision and these were essentially focused on organized crime or "the most egregious of violations."[164] According to the federal Department of Justice, the criminal interest rate was a means to target loan sharking and was "not intended to act as a consumer protection tool."[165]

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[161] Nathan Irving, "The Consumer Protection Amendment Act (Payday Loans)" (2001) 34:3 Man LJ 159 at 160–63.

[162] Ziegel, 2010, *supra* note 26 at 368.

[163] Andrew Kitching, Sheena Starky & Philippe Bergevin, *Bill C-26: An Act to amend the Criminal Code (criminal interest rate)*, Library of Parliament, Ottawa: 22 November 2006) Parliamentary Information and Research Service at 2, online: *Library of Parliament* <lop.parl.ca/Content/LOP/LegislativeSummaries/39/1/c26-e.pdf>; Berry & Duncan, *supra* note 140 at 6; Andrew Kitching & Sheena Starky, *Payday Loan Companies in Canada: Determining the Public Interest*, PRB 05-81E, Parliamentary Information and Research Service (Library of Parliament, Ottawa: 26 January 2006), online: *Library of Parliament* <lop.parl.ca/Content/LOP/ResearchPublications/prb0581-e.html>.

[164] Consumer Measures Committee, ACCM Working Group, *Consultation Paper on Framework Options for Addressing Concerns with the Alternative Consumer Credit Market* (2002) at 4, online: *FedDev Ontario* <feddevontario.gc.ca/eic/site/cmc-cmc.nsf/vwapj/CMC_credit_e.pdf/$FILE/CMC_credit_e.pdf> [perma.cc/G5RS-W73H]:

> Section 347 is not well suited to enforcement within the ACCM, despite many ACCM credit products being sold at arguably criminal interest rates. Enforcement difficulties include a lack of victims willing to aid prosecutions, a low level of harm done in relation to each individual ACCM loan, costly evidentiary requirements, and the uncommon requirement for specific Attorney General consent for actions (taken by some prosecutors to mean that this section is to be applied only in special circumstances).

See also CMC, 2004, *supra* note 138 at 2; Mary Anne Waldron, "What is to Be Done with Section 347?" (2003) 38 Can Bus LJ 367 at 368 [Waldron, 2003]; *Tracy v Instaloans Financial Solutions Centres*, 2009 BCCA 110 at para 4.

[165] Barrett, 2018, *supra* note 117 at 218; CMC, 2004, *supra* note 138 at 2.

Considering the regulation of payday loans "a consumer-protection issue", Parliament authorized the provinces in 2007 to regulate the payday lending industry and to set their own limits on the cost of payday loans.[166] Since then, almost every province in Canada has decided to regulate and tighten rules governing the payday loan industry and, in particular, loans for $1,500 or less with a term of 62 days or less as defined in the *Criminal Code*.[167]

With the exception of Québec, which regulates all high-cost credit generally, all provinces have enacted legislative schemes designed to protect borrowers of payday loans by requiring payday lenders to be licensed and by regulating the payday lending industry.[168] As detailed in Appendix C, legislation in most provinces prescribes the contents of a payday loan agreement ensuring disclosure of all relevant information in clear and

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[166] Buckland, 2012, *supra* note 35 at 50–51; *Criminal Code*, *supra* note 89, s 347.1; *Order Designating Alberta for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2010-21; *Order Designating British Columbia for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2009-278; *Order Designating Manitoba for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2008-212; *Order Designating New Brunswick for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2017-40; *Order Designating Nova Scotia for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2009-177; *Order Designating Ontario for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2009-277; *Order Designating Prince Edward Island for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2014-277; *Order Designating Saskatchewan for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2011-204. See in-depth analysis of the transition to provincial regulation in Olena Kobzar, "Perils of Governance through Networks: The Case of Regulating Payday Lending in Canada" (2012) 34:1 Law & Pol'y 32. See also critiques of this decision: Waldron, 2011, *supra* note 94 at 315; Waldron, 2003, *supra* note 164; Jacob Ziegel, "Does Section 347 Deserve a Second Chance? A Comment" (2003) 38 Can Bus LJ 394; *Garland*, *supra* note 57.

[167] *Criminal Code*, *supra* note 89, s 347.1(2).

[168] (AB) *An Act to End Predatory Lending*, SA 2016, c E-9.5 (CIF May 27, 2016) [*Predatory Lending Act*]; *AB-CPA*, *supra* note 98, s 124.1-124.91, as amended by *Predatory Lending Act*, s 8; *Payday Loans Regulation*, Alta Reg 157/2009 [*AB-PL Regulation*]; (BC) *BC-BPCPA*, *supra* note 78, Part 6.1; *Payday Loans Regulation*, BC Reg 57/2009 [*BC-PL Regulation*]; (MB) *MB-CPA*, *supra* note 49, Part XVIII; *Payday Loans Regulation*, Man Reg 99/2007 [*MB-PL Regulation*]; (NB) *NB-CCDPLA*, *supra* note 108; *Payday Lending*, NB Reg 2017-23 [*NB-PL Regulation*] (CIF 1 January 2018); (NL) *NL-CPBPA*, *supra* note 78, ss 83.1–83.11, as amended by *An Act to Amend the Consumer Protection and Business Practices Act*, SNL 2016, c 46 (CIF 1 April 2019); *Payday Loans Regulations*, NLR 10/19 [*NL-PL Regulation*]; *Payday Loans Licensing Regulations*, NLR 11/19 [*NL-PLL Regulations*]; (NS) *NS-CPA*, *supra* note 89, ss 18A–18U; *Payday Lenders Regulations*, NS Reg 2009/248, s 9 [*NS-PL Regulations*]; (ON) *Payday Loans Act, 2008*, SO 2008, c 9 [*ON-PLA*]; *General Regulation*, O Reg 98/09 [*ON-PL Regulation*]; (PEI) *Payday Loans Act*, RSPEI 1988, c P-2.1 [*PEI-PLA*]; *Payday Loans Act Regulations*, PEI Reg EC67-13 [*PEI-PL Regulations*]; (SK) *The Payday Loans Act*, SS 2007, c P-4.3 [*SK-PLA*]; *The Payday Loans Regulations*, RRS c P-4.3 Reg 1 [*SK-PL Regulations*]. See also (QC) *QC-CPA*, *supra* note 29, ss 66–117, 150, 321b, 322; *QC-CP Regulation*, *supra* note 108, chapter 5 applicable to all money lenders in Québec. See generally: Halsbury's Laws of Canada (online), *Commercial Law II (Consumer Protection)*, "Financing Protection: High-Cost Credit" (II.6) at HCP-39 "Definitions" (2020 Reissue).

comprehensible terms including loan principal, duration in days, maturity, total cost of credit and annual percentage rate, a statement that the loan is a high-cost loan and the details of the fees, commissions, penalties, interest, charges and other amounts required in respect of the loan. Likewise, specific information must be posted prominently showing the total cost of credit and all other prescribed information. Legislation also provides for a "cooling off" period, meaning consumers are permitted to change their minds and cancel a payday loan within 1 to 2 days depending on the jurisdiction, without paying any charges.
Regulation of payday loans further enumerates acceptable debt collection practices and prohibited practices for lenders such as requesting or requiring any assignment of wages or other security for the payment of the loan and tied selling other products or services. If a payday lender fails to comply with a number of provisions on prohibited practices, the borrower is not liable to pay any amount that exceeds the principal of the payday loan.

In addition to the general maximum cap of $1,500, provincial legislation also restricts the principal amount borrowed by the consumer and sets additional maximums on the total cost of borrowing that payday lenders can charge consumers with the amount varying with each province. Since 2015, the tendency has been to lower the maximum total cost of credit allowed which currently stands, in Alberta, British Columbia, New Brunswick, Ontario and Prince Edward Island, at $15 per $100 advanced under the payday loan including all charges and fees.[169] Newfoundland and Nova Scotia recently lowered their maximum total cost of borrowing to $14 and $15 per $100 borrowed, respectively.[170] Prior to these reforms, limits placed on borrowing costs have ranged from $17 to $31 for every $100. Although this low-price cap at $15 may seem reasonable when represented in a dollar amount, the calculation of the APR for such loans at one of the lowest rates in Canada is at

[169] *AB-CPA*, *supra* note 98, s 124.61; (BC) *BC-PL Regulation*, *supra* note 168, s 17, as amended by BC Reg 126/2018 (effective 1 September 2018); (NB) *NB-PL Regulation*, *supra* note 168, s 3; (ON) *ON-PL Regulation*, *supra* note 168, s 18(1), as amended by O Reg 489/17 (15% after 1 January 2018); (PEI) *PEI-PLA Regulations*, *supra* note 168, as amended by PEI Reg EC2020-390 (CIF 31 July 2020).

[170] (NL) *NL-PL Regulations*, *supra* note 168, s 7, as amended by *Payday Loans Regulations (Amendment)*, NLR 71/22, s 1 (CIF 15 December 2022); (NS) *In the matter of the Consumer Protection Act and in the matter of a hearing respecting certain aspects of the consumer protection act relating to payday loans*, 2022 NSUARB 91 (effective 1 January 2024).

least 88% for a loan for the maximum term of 62 days and almost 392% for a standard two-week loan.[171]

A few recent legislative reforms include further restrictions on the allowable amount of a payday loan. As a result, the maximum amount of a payday loan in British Columbia, Newfoundland and Labrador, Ontario and Saskatchewan is 50% of the borrower's net pay while it is only 30% in Manitoba and New Brunswick.[172] In addition, new provisions enacted in most provinces prohibit rollovers or concurrent loans by a single lender. Undoubtedly improving consumer protection, these new consumer protection measures nevertheless contain glaring loopholes: borrowers may still be granted several succeeding loans by a single lender or can have many concurrent loans from multiple lenders. Despite the harm caused to vulnerable consumers and a favourable recommendation from the Utility and Review Board, Nova Scotia has refused to amend current regulation since enforcing restrictions on repeat or concurrent loans from multiple lenders would require loan-tracking databases which would not be "feasible because of privacy implications and cost."[173]

Rather than tracking loans and restricting the availability of credit, four provinces have recently enacted new provisions to reduce the financial hardship caused by these recurring high-cost loans. Payday lenders must now allow a borrower who has taken out two or more loans in a 62-day period to repay any subsequent loans over a longer period of at least 42 days and no more than 62 days regardless of any other term stated in the payday loan

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

[172] (BC) *BC-BPCPA*, *supra* note 78, s 112.02, 112.08; *BC-PL Regulation*, *supra* note 168, s 18.; (MB) *MB-CPA*, *supra* note 49, s 151.1; *MB-PL Regulation*, *supra* note 168, s 15.2; (NL) *NL-PL Regulations*, *supra* note 168, s 3(1)g).; (ON) *ON-PLA*, *supra* note 168; *ON-PL Regulation*, *supra* note 168, s 16.2; (SK) *SK-PL Regulations*, *supra* note 168, s 15.

[173] NSUARB, 2018, *supra* note 89 at paras 99–106, 122. See also the lack of consensus of the Payday Lending Panel in Ontario on the issue: Ontario, Payday Lending Panel, "Strengthening Ontario's Payday Loans Act: Payday Lending Panel Findings and Recommendations Report," (May 2014) at 26–27, online: <ontariocanada.com/registry/showAttachment.do?postingId=17182&attachmentId=26292> [perma.cc/Q273-UZU9] [Ontario, 2014].

agreement.[174] This prescribed instalment plan allows the borrower to repay the loan over a longer period time and numerous pay periods thus reducing the financial burden of repaying the debt especially on a fixed income.

Although these new provisions represent good news for consumers, they also represent significant financial constraints on lenders in the payday loan industry. According to a research report prepared for the Atlantic Provinces Economic Council, the combined effect of the lower cost and longer borrowing time "will increase the quantity of financial capital required to fund a given loan volume, and raise operating costs per loan issued. This will decrease the number of loans that are issued, and loans issued will become more costly to provide."[175]

As a result, many provinces such as Alberta and Ontario have seen a noticeable reduction in the number of licensed lenders in the province as well as a consolidation and corporatization of existing lenders with Money Mart capturing in 2019 approximately 50% of the entire payday lending market.[176] As noted by the Nova Scotia Utility and Review Board, these lenders have either left the payday loan industry altogether thereby reducing the number of storefront outlets, or have developed "new short term credit products like longer term lines of credit and installment loans", which are excluded from payday loan regulation and therefore the object of fewer regulatory constraints.[177] To regulate these new high-cost credit products, some provinces have enacted new legislation specifically regulating these new types of lenders, as is discussed in the following subsection. In

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[174] (AB) *AB-CPA*, *supra* note 98, s 124.3; (BC) *BC-PL Regulation*, *supra* note 168, s 23; (NL) *NL-PL Regulations*, *supra* note 168, s 5(2); (ON) *ON-PLA*, *supra* note 168, s 36; *ON-PL Regulation*, *supra* note 168, s 25.1.

[175] *Poschmann*, *supra* note 153 at 3.

[176] Brian Dijkema, *Banking on the Margins, The Changing Face of Payday Lending in Canada* (Hamilton, ON: Cardus, 2019) at 11–12, online: <cardus.ca/research/work-economics/reports/the-changing-face-of-payday-lending-in-canada/> [perma.cc/4AFF-3HZ6]; Robinson, *supra* note 147 at 112–13. See also Ian Bickis, "Alberta Payday Loan Regulations Has Lenders Starting to Feel Pinch," *CBC News* (14 May 2017), online: *CBC* <cbc.ca/news/canada/calgary/alberta-payday-lenders-suffering-bill-15-1.4114628> [perma.cc/ZX7B-2Q9E]; Reid Southwick, "Alberta payday loan crackdown shrinks industry," *CBC News* (16 January 2018), online: *CBC* <cbc.ca/news/canada/calgary/alberta-payday-loan-crackdown-1.4488925> [perma.cc/B9WR-EQCD]. *Contra* Manitoba Public Utilities Board, 2016, *supra* note 145 at 35.

[177] NSUARB, 2018, *supra* note 89 at paras 80–81; Dijkema, *supra* note 176 at 12–13.

comparison, New Brunswick has simply prohibited payday lenders from extending credit other than payday loans.[178]

To assess the impact of increasingly stringent provincial regulation, one need only compare previous studies on the payday loan industry to current licensed payday lenders in Ontario and New Brunswick. Whereas Chris Robinson determined that these provinces had 813 (in 2015) and 35 (in 2016) registered payday lenders, respectively, current provincial registries list 585 and 6 licensed payday lenders, which represents a decrease of 30% and 83%, respectively.[179] The New Brunswick's restriction on a payday lender's ability to offer high-cost loans for larger amounts has clearly reduced consumers' access to smaller payday loans.[180] It is worthy of note that Money Mart, which dominated the Canadian payday lending industry in 2020,[181] ceased operating in New Brunswick as a payday lender and closed more than half its stores. Money Mart still has five stores in the province, one in each of the largest metropolitan areas, ostensibly offering "installment loans" according to its website, i.e. other types of unregulated high-cost loans.

This is precisely the result predicted by the Nova Scotia Utility and Review Board in 2018 when it concluded that these legislative reforms "will deter compliant payday lenders that wish to participate in the regulated market, and create an environment where unregulated and unlicensed lenders will enter to fill the void."[182]

Interestingly, Parliament has amended section 347.1 of the *Criminal Code* in 2023, to authorize "the Governor in Council, by regulation, to fix a limit on the total cost of borrowing under a payday loan agreement".[183] Although not yet in force, the federal

[178] *NB-CCDPLA*, *supra* note 108, s 37.381.
[179] Robinson, *supra* note 147 at 86.
[180] See also Canadian Consumer Finance Association's Final Arguments to the Nova Scotia Utility and Review Board: NSUARB, 2022, *supra* note 89 at para 60.
[181] Schwartz & Ben-Ishai, *supra* note 157 at 64–65: Table 1 indicates 12 Money Mart storefront operations in New Brunswick in 2020.
[182] NSUARB, 2018, *supra* note 89 at para 77. See also Poschmann, *supra* note 153 at 30; Barrett, 2015, *supra* note 138 at 38; Katherine Dilay & Byron Willams, "Payday Lending Regulations" in Buckland, Robinson & Spotton Visano, *supra* note 145, 177 at 206.
[183] "Summary", *Budget Implementation Act, 2023, No 1*, SC 2023, c 26, s 612 adding *Criminal Code*, *supra* note 89, s 347.01(2)a.1).

government has affirmed its intention to "require payday lenders to charge no more than $14 per $100 borrowed".[184] Should this legislative reform come in force, it will demonstrate and confirm the power of Parliament to better protect financial consumers by harmonizing and centralizing the regulatory framework of the payday loan industry and all other high-cost credit products.

5.3.6 Other High-Cost Credit Products Legislation

As previously mentioned, the consumer credit industry has continued to innovate to avoid stringent new regulatory constraints enacted in recent payday legislation. The emergence and growth of unregulated financial services providers offering various lender and vendor credit products such as unsecured lines of credit, instalment loans, title loans, subprime vehicle loans, pawnbroker loans, buy now, pay later loans and rent-to-own sales all but confirm that additional regulation governing these high-cost credit products is long overdue.[185]

Although rent-to-own stores have been operated in Canada since the 1960s, they have not been regulated given the relatively low numbers of consumers of these types of financial services and their categorization as vendor credit renders many consumer protection provisions previously canvassed in this chapter inapplicable.[186] These transactions involve the sale of personal property to a consumer without a down payment or credit check and

[184] Canada, "Consultation on Cracking Down on Predatory Lending by Further Lowering the Criminal Rate of Interest and Increasing Access to Low-Cost Credit," (10 May 2023), online: <canada.ca/en/department-finance/programs/consultations/2023/consultation-on-cracking-down-on-predatory-lending-faster-by-further-lowering-the-criminal-rate-of-interest-and-increasing-access-to-low-cost-credit.html> [Canada, 2023 Consultation].

[185] Ontario, 2014, *supra* note 173 at 7. See also Joe Fantauzzi, *Predatory Lending: A Survey of High Interest Alternative Financial Service Users* (Toronto: Canadian Centre for Policy Alternatives Ontario Office and ACORN Canada, 2016), online: *CCPA* <policyalternatives.ca/publications/reports/predatory-lending> [perma.cc/NEG8-PYKW].

[186] Gail E Henderson & Lauren L Malatesta, "Protecting Low Income Consumers: The Regulation of Rent-To-Own Stores" (2018–2019) 61:3 Can Bus LJ 354 at 358–59, 363. See also Denise Barrett Consulting, *Consumer Experiences with Rent-to-Own* (Toronto: Consumers Council of Canada, 2016) at 10, online: *CCC* <consumerscouncil.com/research-reports> [perma.cc/7NV7-FTL8] [Barrett, 2016].

conclude with the transfer of ownership to the consumer upon the final instalment in a long-term payment plan.[187] A 2016 study elucidates the high cost nature of these products:

> rent-to-own consumers who acquire merchandise through the completion of all their periodic payments typically pay 2.0 to 3.4 times the cost of purchasing the same merchandise at conventional retailers. This reflects two factors. First, consumers typically pay 40 to 100 per cent more through periodic payments than if they purchased the item at the outset. Second, rent-to-own "buy it today" prices are also typically higher than prices at conventional retailers – from 20 per cent higher for refrigerators to 150 per cent higher for laptop computers.[188]

While initial costs and financial charges often by themselves exceed the criminal interest rate of 60%, the total cost to consumers of the transactions is often unknown given the hidden cost reflected in the increased price of the good sold in comparison to similar goods on the market. Other concerns with these agreements are the immediate repossession rights of the creditor upon default of the debtor, violation of privacy rights and aggressive collection tactics.[189]

In the alternative financial services market, legitimate lenders complying with payday lending regulations are compelled to offer more profitable products to answer to consumer demand for credit. "According to credit reporting agencies, instalment loans are the fastest-growing type of credit in Canada."[190] A recent study of these higher-cost credit products has also confirmed that the interest charged on these loans are usually set just below the criminal interest rate with some financial providers lending above the legal limits.[191]

The increased use of consumer credit and the widening range of high-cost credit products, such as title loans secured by previously acquired personal property, are raising new policy concerns about financial consumer protection. Additional measures are therefore

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[187] Barrett, 2016, *supra* note 186 at 5.
[188] *Ibid* at 6.
[189] Henderson & Malatesta, *supra* note 186 at 362, citing Momentum, "High-Cost Alternative Financial Services: Issues and Impact" (June 2017) at 3–4, online: *Momentum* <momentum.org/wp-content/uploads/2018/02/Part-1-High-Cost-Alternative-Financial-Services_1.pdf> [perma.cc/5VRP-VALE] [Momentum, 2017 "Issues and Impact"]; Barrett, 2016, *supra* note 186 at 19, 57–58.
[190] Barrett, 2018, *supra* note 117 at 3; Robinson, *supra* note 147 at 102–03.
[191] Barrett, 2018, *supra* note 117 at 4.

undoubtedly required considering the potential exploitation of vulnerable consumers and the unavailability of immediate short-term loans from traditional financial institutions.[192] Despite recent legislation governing payday lenders, "[o]nce a product is beyond the scope of the payday loan legislation, protections in the legislation are not available to consumers."[193]

The Government of Ontario recently recognized in 2021 that alternative high-cost financial services such as payday loans, instalment loans, lines of credit, and auto title loans are "growing in popularity and use among borrowers".[194] Theses new types of consumer credit are for larger terms and larger amounts and therefore "pose risks to borrowers that are comparable to and may exceed the risks posed by payday loans. The high cumulative costs of these products can lead borrowers into cycles of debt that are difficult to escape from and can cause long-lasting harm to their economic, health and social development."[195] The federal government recently recognized that "[h]igh-cost installment loans appear to be the most widely held high-cost lending product in Canada. In a recent study conducted by the Financial Consumer Agency of Canada (FCAC), 44 per cent of consumers who had taken out high-cost credit reported taking a high-cost installment loan in 2020."[196] According to the federal government, Cash Money, MoneyMart, Easy Financial and Fairstone Financial are among the largest alternative lenders in Canada.

> These installment loans have advertised interest rates as high as 47 per cent per year. Once the ancillary non-interest fees and charges associated with loans are included, and with frequent interest compounding, many installment loans have effective annual interest rates of just below or almost equal to the criminal rate of interest of 60 per cent.
>
> In addition, some high-cost installment loans are similar to payday loans, where there are shorter repayment periods (such as 90 to 150 days), but are

[192] Momentum, 2017 "Issues and Impact" *supra* note 189; Fantauzzi, *supra* note 185 at 5–6.
[193] Ontario, 2014, *supra* note 173 at 15.
[194] *Ibid* at 2.
[195] *Ibid* at 6, 10–11.
[196] Department of Finance Canada, "Consultation on Fighting Predatory Lending by Lowering the Criminal Rate of Interest," (9 August 2022), online: <canada.ca/en/department-finance/programs/consultations/2022/fighting-predatory-lending/consultation-criminal-rate-interest.html> [Canada, 2022 Consultation].

> for amounts greater than $1,500, which is the maximum allowable amount for a payday loan that can be exempt from the criminal rate of interest.[197]

As a result, the provinces of Alberta, British Columbia, Manitoba, Newfoundland and Labrador and Québec have strengthened regulatory oversight by enacting new forms of consumer credit legislation regulating other high-cost credit products. Although Ontario has recently completed three consultations with stakeholders on high-cost alternative financial services in 2015, 2017 and 2021, limited legislative reforms have resulted from the consultations to date and many reforms to payday legislation or rent-to-own legislation aiming to better protect financial consumers are not yet in force.[198] Specific regulatory reforms are proposed in the 2021 consultation paper and are included in the following analysis where relevant.

Similar to the licensing requirements for payday lenders, several provinces such as New Brunswick, Nova Scotia, Québec and Saskatchewan have also enacted licensing regimes for other types of money lenders.[199] While legislation in New Brunswick and Nova Scotia covers lenders as well as sellers who want to extend credit or provide financing to consumers in these provinces, the regulatory framework in Saskatchewan limits licensing

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[197] *Ibid*.

[198] Ontario, Ministry of Government and Consumer Services, *Strengthening Consumer Financial Protection: A discussion of potential approaches to strengthening consumer protection for consumers of alternative financial services and consumers with debts in collections*, (2015), online: Ontario <ontariocanada.com/registry/showAttachment.do?postingId=18882&attachmentId=28331>; Ontario, Ministry of Government and Consumer Services, *Strengthening Protection for Consumers of Alternative Financial Services – Phase One* 2017) (7 July 2017) [Ontario, 2017]; Ontario, "High-Cost Credit in Ontario: Strengthening Protections for Ontario Consumers, Consultation Paper," (January 2021), online: *Ontario* <ontariocanada.com/registry/showAttachment.do?postingId=36067&attachmentId=47536> [Ontario, 2021]; *Putting Consumers First Act (Consumer Protection Statute Law Amendment), 2017*, SO 2017, c 5, s 20(3),(5); Henderson & Malatesta, *supra* note 186 at 363–66. See also British Columbia, Ministry of Public Safety and Solicitor General, *High-Cost Alternative Financial Services Stakeholder Consultation* (September 2016), online: *British Columbia* <forms.gov.bc.ca/app/uploads/sites/291/2016/09/high-cost-alt-fin-serv-consult.pdf> [perma.cc/P5B4-XYAZ].

[199] (NB) *NB-CCDPLA*, *supra* note 108, s 6; (NS) *NS-CPA*, *supra* note 89, s 11(1); (QC) *QC-CPA*, *supra* note 29, s 321; (SK) *Trust and Loan Corporations Act*, SS 1997, c T-22.2, s 17(1). See also Momentum, Brief to Senate Standing Committee on Banking, Trade and Commerce, regarding Bill S-237, "High-Cost Alternative Financial Services: Policy Options," (September 2017), online: *Canada Senate* <sencanada.ca/content/sen/committee/421/BANC/Briefs/BANC_S-237_Momentum_e.pdf> [perma.cc/88BW-STKD] [Momentum, 2017 "Policy Options"].

requirements to lenders of money, credit grantors of revolving credit or purchasers of various types of securities. In the remaining provinces and territories, the compliance of other money lenders to existing provincial legislation is not supervised by a general licensing regime and specific legislation is therefore required.

To better protect financial consumers turning to high-cost credit lenders, Alberta, British Columbia, Manitoba, Newfoundland and Labrador and Québec have therefore enacted specific legislation amending their consumer protection statutes to establish new regimes for high-cost credit which include new licensing requirements for high-cost lenders.[200] High-cost financial products are defined in Alberta, British Columbia and Manitoba as a credit agreement that provides for a rate of 32% or more, including the interest rate and all mandatory fees and costs involved with the high-cost credit agreement.[201] The Newfoundland and Labrador statute is not in force and regulations defining "high-cost credit product" have not yet been adopted.

The Government of Alberta confirms on their website that its wide-ranging statute applies to fixed high-cost credit products, also referred to as "instalment" lending, and can include instalment loans, mortgage loans, car loans, vehicle title loans, rent-to-own products, leases and pawn loans.[202] Open high-cost credit products, or "revolving" lending, such as lines of credit, revolving loans, home equity lines of credit, credit cards and retail cards are also regulated. In comparison, Manitoba restricted the new provisions in its consumer protection statute to various types of unsecured loans with a term not exceeding 2 years

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[200] (AB) *A Better Deal for Consumers and Businesses Act*, SA 2017, c 18; *High-Cost Credit Regulation*, Alta Reg 132/2018 (CIF 1 January 2019) [*AB-HCC Regulation*]; (BC) *Business Practices and Consumer Protection Amendment Act, 2019*, SBC 2019, c 22 (CIF 1 May 2022); *High-Cost Credit Products Regulation*, BC Reg 290/2021 [*AB-HCC Regulation*]; (MB) *The Consumer Protection Amendment Act (High-Cost Credit Products)*, SM 2014, c 12 (CIF 1 September 2016); (NL) *An Act to Amend the Consumer Protection and Business Practices Act*, SNL 2022, c 28, s 18 (not in force); (QC) *An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs*, SQ 2017, c 24 (CIF 1 August 2019). See also Dilay & Willams, *supra* note 182 at 207–08.

[201] *AB-CPA*, *supra* note 98, at 124.01(a); *BC-HCCP Regulation*, *supra* note 200, s 9; *MB-HCCP Regulation*, *supra* note 49, s 2.

[202] Alberta, "High-Cost Credit Business Licence" (2019), online: *Alberta* <alberta.ca/high-cost-credit-business-licence.aspx> [perma.cc/L3MU-Q9QV].

and a maximum amount of $5,000 as well as loans secured by personal property which were not purchased with the funds advanced.

Furthermore, high-cost credit legislation in Manitoba does not apply to regulated payday loans, mortgages, credit cards, margin loans or credit extended by banks or credit unions; whereas public utilities, life insurance companies, credit unions, municipalities and certain other financial institutions are exempt in Alberta.[203] In British Columbia, savings institutions like banks, credit unions, and extra-provincial trust corporations are exempt as well payday and margin loans and, in Newfoundland and Labrador, payday loans and other products which might be prescribed by regulation are excluded.[204] Likewise, in Québec, financial services cooperatives and FRFIs are exempt from new high-cost consumer protection measures since they must already "adhere to sound and prudent management practices or sound commercial practices in consumer credit matters" pursuant to their respective regulatory frameworks.[205]

In contrast to the other common law jurisdictions, Québec's regulations provide that the new high-cost credit regime is triggered by a floating rate when a lender charges a rate which is 22% higher than the Bank Rate of the Bank of Canada at the time the parties enter into the credit agreement.[206] At the end of the third quarter 2023, the Bank Rate of the Bank of Canada was 5.25% rendering a credit contract high-cost if charging more than 27.25%. Significantly lower, it will capture a larger subset of lenders including many credit card issuers, many of whom were considered high-cost lenders when the Bank Rate varied between 0.5 and 2% for many years prior to July 2022.[207] Ontario has proposed a similar

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[203] *AB-HCC Regulation*, *supra* note 200, s 13; *MB-CPA*, *supra* note 49, ss 237–38.

[204] *BC-BPCPA*, *supra* note 78, s 112.32; *BC-HCCP Regulation*, *supra* note 200, ss 8–9.

[205] *QC-CPA*, *supra* note 29, s 103.2.

[206] *QC-CP Regulation*, *supra* note 108, s 61.0.3. It also seems that in 2020, Québec's Office de la protection du consommateur (Office of Consumer Protection) "refuse[d] as a matter of policy to grant permits to lenders whose rates are above 35%": Peter Aziz et al, "Federal Government Opens Consultation on Fighting Predatory Lending by Lowering the Criminal Rate of Interest" (October 2022) 41:5 Nat BL Rev 53 at 55.

[207] Bank of Canada, "Canadian interest rates and monetary policy variables: 10-year lookup", online: Bank of Canada <bankofcanada.ca/rates/interest-rates/canadian-interest-rates/>.

floating rate set at 25% or more and would exclude banks, credit unions and payday lenders.[208]

Most interestingly, legislative reform in Québec, in force since August 1, 2019, requires a merchant, including "any person doing business or extending credit in the course of his business", to complete an assessment of a consumer's capacity to repay the credit requested before entering into a credit contract with the consumer or before granting a credit limit increase.[209] If the credit grantor fails to carry out the assessment as prescribed, the right to the credit charges is forfeited and must be refunded to the consumer. Moreover, before entering into a high-cost credit agreement, a credit grantor must provide the consumer with a written copy of the assessment of the consumer's debt ratio and capacity to repay the credit. Finally, a new provision clarifies that a "consumer who enters into a high-cost credit contract while his debt ratio exceeds the ratio determined by regulation is presumed to have contracted an excessive, harsh or unconscionable obligation within the meaning of section 8" of the *Consumer Protection Act*, granting the Court the power to nullify a contract to reduce a consumer's obligations. High-cost lenders will be obligated to refute such a presumption in the event a debtor's obligations pursuant to a high-cost credit agreement are contested in court.

Likewise, unproclaimed reforms enacted in Ontario include the power to adopt regulations requiring lenders to assess the borrowers' ability to repay the loan and "prohibiting lenders from entering into a credit agreement with a borrower if the amount of the credit to be extended or money to be lent under the agreement exceeds the prescribed amount."[210] A lender will also be required to provide to the borrower, before entering into the agreement, a copy of the lender's assessment of the prescribed factors. Should the lender not comply with these new responsible lending provisions, "the borrower is not liable to pay the lender the cost of borrowing under the agreement". The Government of Ontario explained in 2017

[208] Ontario, 2021, *supra* note 198 at 8.

[209] *QC-CPA*, *supra* note 29, ss 1, 103.2–03.5; *QC-CP Regulation*, *supra* note 108, Division II.1, Assessment of Consumer's Capacity to Repay Credit or Perform Obligations (CIF 1 August 2019).

[210] *ON-CPA*, *supra* note 108, s 123(8), Schedule A, as amended by *Putting Consumers First Act (Consumer Protection Statute Law Amendment), 2017*, *supra* note 198, Schedule 2, s 20(3) (not in force).

that "if too much money is lent to a consumer, repaying the loan may be unaffordable, regardless of the cost of borrowing" and despite any rollbacks in the cost of credit.[211] As further discussed in Chapter 7, these new types of responsible lending requirements ensure that vulnerable financial consumers do not overextend themselves with a high-cost loan leading to further indebtedness and usually to an inevitable bankruptcy.

Recent provincial regulatory frameworks further protect consumers by providing a cooling-off period and the right to cancel a credit agreement within the prescribed time or to pay back a loan early without a fee or penalty.[212] Specific disclosure requirements include in-store and online disclosures as well as mandatory forms and content of the credit agreement.[213] These requirements may create additional administrative obstacles for a national lender, given the relatively harmonized previous cost of credit disclosure requirements throughout the country. A "statement that the high-cost credit product is high-cost credit" must be included in the credit agreements in British Columbia and Newfoundland and Labrador, and in Québec if the consumer's debt ratio is above 45%.[214] Although not found in all four provinces, some regulations include prohibitions against various enticements to enter into a high-cost agreement, assignment of wages, early payment collection and direct access to a borrower's bank account.[215]

Lastly, Alberta's *High-Cost Credit Regulation* requires a high-cost credit business operator to provide to the Director of Fair Trading information on the total value of all high-cost

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[211] Ontario, 2017, *supra* note 198 at 5.

[212] (AB) *AB-CPA*, *supra* note 98, s 68; *AB-HCC Regulation*, *supra* note 200, s 14(1); *AB-CCDR*, *supra* note 108; (BC) *BC-BPCPA*, *supra* note 78, s 112.20, 112.25; *BC-HCCP Regulation*, *supra* note 200, s 19; (MB) *MB-CPA*, *supra* note 49, ss 252–53; (NL) *NL-CPBPA*, *supra* note 78, s 83.16-83.20 (not in force); (QC) *QC-CPA*, *supra* note 29, s 73; *QC-CP Regulation*, *supra* note 108, s 31.2, 33, 38–39; (ON) Ontario, 2017, *supra* note 198 at 14–15.

[213] (AB) *AB-HCC Regulation*, *supra* note 200, ss 14, 16; (BC) *BC-BPCPA*, *supra* note 78, s 112.21; (MB) *MB-CPA*, *supra* note 49, s 249; *MB-HCCP Regulation*, *supra* note 49, ss 9–11; (NL) *NL-CPBPA*, *supra* note 78, s 83.17-83.21 (not in force); (QC) *QC-CPA*, *supra* note 29, s 103.4; *QC-CP Regulation*, *supra* note 108, s 61.0.5. See also Ontario, 2017, *supra* note 198 at 12–13, 19–20.

[214] (BC) *BC-BPCPA*, *supra* note 78, s 112.21(2)d); (NL) *NL-CPBPA*, *supra* note 78, s 83.17(2)d), 83.21 (not in force); (QC) *QC-CPA*, *supra* note 29, s 103.4; *QC-CP Regulation*, *supra* note 108, s 61.0.5-61.0.6.

[215] (AB) *AB-CPA*, *supra* note 98, s 53; *AB-HCC Regulation*, *supra* note 200, s 24(a), 24(l); (BC) *BC-BPCPA*, *supra* note 78, s 112.22–112.23, 112.26, 112.28; (MB) *MB-HCCP Regulation*, *supra* note 49, s 15e); (NL) *NL-CPBPA*, *supra* note 78, s 83.15 (not in force).

credit agreements, the number of agreements, the number of repeat agreements, the average size and term as well as the total value of agreements that have been defaulted by borrowers and that have been written off.[216] Information such as this will provide valuable statistics with which to assess the advantages and disadvantages of these types of products in the upcoming years and should be requested in every province to enlighten future reforms.

These new provincial legislative developments are positive developments for financial consumers in those provinces. Considering it took more than ten years before the last province enacted payday loans legislation, expectations for a national regulatory framework for high-cost credit products must be tempered and adjusted to the realities of provincial legislative reform. As with other consumer credit legislation, early enactments of high-cost credit regulation are characterized by a lack of uniformity and consistency. The hope remains, however, that the trend to improve financial consumer protection will not only spread into all other jurisdictions, but also that all high-cost lenders in addition to payday lenders will be uniformly regulated and licensed across the country.[217]

Given the objective of this chapter to provide a detailed analysis of the evolution of Canada's provincial consumer credit regulatory framework, it would not be complete without a section on recent statutory reforms regulating online lending.

5.3.7 Online Lending Legislation

As previously discussed, the growth of the consumer credit industry and the introduction of new consumer credit products have compelled provincial governments to progressively expand their consumer credit legislation to better protect vulnerable financial consumers. In turn, increasingly stringent regulatory requirements imposed on the industry continues

[216] (AB) *AB-HCC Regulation*, *supra* note 200, s 21. See also Nova Scotia and British Colombia requirements to provide annual data to regulators: (BC) *BC-PL Regulation*, *supra* note 168, s 4(2)b), 4(3); (NS) *NS-PL Regulations*, *supra* note 168, s 5; Dilay & Willams, *supra* note 182 at 194–95.
[217] Momentum, 2017 "Policy Options", *supra* note 199.

to spur further innovation enabling lenders to evade new restrictions on their capacity to maximize profits.[218]

Among these innovations, several reports have noted the increased access to online high-cost loans and the unfortunate growth of online illegal lenders in Canada and globally.[219] In 2014, the Ontario Payday Lending Panel was mandated to review payday legislation "to strengthen consumer protection in the context of Ontario's changing payday loan market."[220] At that time, the Panel noted that "online and mobile payday loans ha[d] become a more prominent feature of the market".[221] While some panel members estimated that online lenders might account for 10% of Ontario's market, "stakeholders agree[d] that payday loans are increasingly moving online and that this trend is likely to continue".[222]

It is not surprising, therefore, that "[m]ost, if not all, […] provinces that have regulated the payday loan industry have included provisions in their legislation with respect to online lenders" as observed by the Nova Scotia Utility and Review Board in 2018.[223] A review of existing legislation reveals, however, that the current regulatory framework for online loans, whether payday loans or other high-cost loans, provided through the internet is quite rudimentary with inconsistent and patchy results. First and foremost, only Alberta, British Columbia, Manitoba and Québec regulate all online high-cost loans. The remaining Provinces have limited their statutory reforms to online payday loans.

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[218] See e.g. Ontario, 2014, *supra* note 173 at 7:

> Another issue that recently surfaced in Ontario is the development of new loan products to avoid government regulation. One major Ontario lender began offering a line of credit product that appeared to resemble a payday loan. The Ontario Superior Court of Justice subsequently ruled that the line of credit product constituted a payday loan. In 2013, Ontario amended the general regulation under the Act to broaden the scope of loan products covered by the Act to protect consumers against harms from other potential high-interest loan products.

[219] See Bond, *supra* note 140 at 24–25; Ontario, 2014, *supra* note 173 at 7, 9–14; Buckland & Spotton Visano, *supra* note 145 at 17–21; Robinson, *supra* note 147 at 99–100.

[220] Ontario, 2014, *supra* note 173 at 1.

[221] *Ibid* at 7.

[222] *Ibid*.

[223] NSUARB, 2018, *supra* note 89 at para 43; *Re certain aspects of the Consumer Protection Act relating to payday loans*, (2015) NSUARB 64 at para 41 [NSUARB, 2015].

In Nova Scotia, an internet payday loan to a resident of the province can only be offered by a licensed lender actively providing payday loans from a brick-and-mortar storefront location.[224] Should the lender cease to "offer, arrange or provide payday loans, other than Internet payday loans, from the location specified in the permit", it risks losing its lender's permit.[225] Explaining this unique requirement, the Nova Scotia Utility and Review Board noted that since

> the presence of actual "bricks and mortar" payday lender locations in Nova Scotia will serve to provide a disincentive to unregulated lenders from entering the jurisdiction, or from borrowers seeking out such unregulated lenders, be they online or otherwise […] maintaining Nova Scotia's "place-of-business" requirement for all payday lenders, including those operating online or via Fintech applications, strengthens consumer protections.[226]

Likewise, several provinces such as British Columbia, Manitoba and Québec require high-cost lending licensees to identify a physical location or establishment in the province, thereby prohibiting exclusively online lenders from offering their services in the province.[227] Whereas Alberta requires licenses for online lenders granting payday loans or high-cost credit, New Brunswick, Newfoundland, Ontario and Prince Edward Island require that only lenders offering payday loans online obtain a licence.[228] Some Provinces have display of license requirements for online lenders while others such as Prince Edward Island and Ontario require that a "licensee must immediately send a borrower upon contact information that is required to be on the certificate of licence".[229]

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[224] *NS-CPA*, *supra* note 89, s 18C.

[225] *Ibid*, s 18H.

[226] NSUARB, 2018, *supra* note 89 at paras 75–76.

[227] (BC) *BC-PL Regulation*, *supra* note 168, s 5; *BC-HCCP Regulation*, *supra* note 200, s 11; (MB) *MB-CPA*, *supra* note 49, s 139(1); *MB-PL Regulation*, *supra* note 168, s 9(4); (QC) *QC-CPA*, *supra* note 29, ss 321, 330.

[228] (AB) *AB-HCC Regulation*, *supra* note 200, s 2(1); *AB-PL Regulation*, *supra* note 168, s 1; (NB) *NB-CCDPLA*, *supra* note 108, s 37.12(2), 37.13; (NL) *NL-CPBPA*, *supra* note 78, s 83.2; (ON) *ON-PL Regulation*, *supra* note 168, ss 1, 4; (PEI) *PEI-PLA Regulations*, *supra* note 168, s 1c), 4. Ontario and Prince Edward Island regulate "remote payday loan agreements" and require that a lender that offers to make a remote payday loan agreement with a borrower must be licensed.

[229] (AB) *AB-HCC Regulation*, *supra* note 200, s 6(2); *AB-PL Regulation*, *supra* note 168, s 4(3); (BC) *BC-PL Regulation*, *supra* note 168, s 7(2); *BC-HCCP Regulation*, *supra* note 200, s 13(2); (MB) *MB-PL Regulation*, *supra* note 168, s 9.1(3); *MB-HCCP Regulation*, *supra* note 49, s 24; (NL) *NL-PLL Regulations*, *supra* note 168, s 3(3); (NS) *NS-PL Regulations*, *supra* note 168, s 8C; (ON) *ON-PL Regulation*, *supra* note 168, ss 1, 4(5); (PEI) *PEI-PLA Regulations*, *supra* note 168, ss 4, 5b).

In order to ensure "that online borrowers have the information they need to make informed decisions", as recommended by the Ontario Payday Lending Panel in 2014, many Provinces require that online lenders display prescribed information on their website prior to the payday loan application.[230] In comparison, Ontario and Prince Edward Island required that a licensee must immediately send a borrower, upon contact, prescribed information and educational materials "before discussing with the borrower anything about payday loans" whereas Nova Scotia simply requires that the online lender "display" such information on the website without any further requirements.[231] Although Ontario and Manitoba are the only provinces to specifically require online lenders to indicate their APR, all seven Provinces, prescribing specific information online, require that the cost of borrowing in dollar amount per $100 and/or a specific example of the cost of borrowing a specific amount for a specific number of days be indicated on the lender's website.

Furthering the legislative objectives of ensuring informed decisions, some provinces regulate specific website design requirements for payday lenders such as Manitoba and Nova Scotia.[232] Specific statements must be included in online payday loan agreements in Ontario and Prince Edward Island and the borrower must be able to print the agreement according to these Provinces as well as Manitoba.[233] Finally, in some provinces, online lenders must "ensure that the borrower has consented to entering into the agreement, and must make a record evidencing that consent."[234]

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[230] Ontario, 2014, *supra* note 173 at 13; (AB) *AB-CPA*, *supra* note 98, s 124.8(4)-(5); (MB) *MB-PL Regulation*, *supra* note 168, s 16.1; *MB-CPA*, *supra* note 49, s 251(3); *MB-HCCP Regulation*, *supra* note 49, s 25(1); (NL) *NL-PL Regulations*, *supra* note 168, s 8(5); (SK) *SK-PL Regulations*, *supra* note 168, s 13(3).

[231] (NS) *NS-CPA*, *supra* note 89, s 18O; *NS-PL Regulations*, *supra* note 168, s 18A; (ON) *ON-PL Regulation*, *supra* note 168, ss 1, 4(5), 5, 14(5); (PEI) *PEI-PLA Regulations*, *supra* note 168, ss 4, 5b), 14b).

[232] (MB) *MB-PL Regulation*, *supra* note 168, s 14; *MB-HCCP Regulation*, *supra* note 49, s 25; (NS) *NS-CPA*, *supra* note 89, s 18HA; *NS-PL Regulations*, *supra* note 168, s 8A.

[233] (MB) *MB-PL Regulation*, *supra* note 168, s 14.0.1; *MB-HCCP Regulation*, *supra* note 49, s 26; (ON) *ON-PL Regulation*, *supra* note 168, s 18; (PEI) *PEI-PLA Regulations*, *supra* note 168, s 19.

[234] (MB) *MB-PL Regulation*, *supra* note 168, s 14.0.1(3); *MB-HCCP Regulation*, *supra* note 49, s 27; (NS) *NS-CPA*, *supra* note 89, s 18HB; (ON) *ON-PL Regulation*, *supra* note 168, s 18(5); (PEI) *PEI-PLA Regulations*, *supra* note 168, s 19(5).

Despite these tentative efforts to regulate online lenders, current regulation as not stemmed the influx of illegal online lenders into the Canadian consumer credit market. Undertaken by the Consumers Council of Canada to evaluate consumer experiences with online payday loans, a 2015 study's principal conclusion was that "Canadians are more likely to encounter an unlicensed, non-compliant, payday lender online than a licensed, compliant one."[235] Comparing compliance levels between licensed and illegal lenders, the study further concluded that while "[l]icensed lenders show[ed] a high level of compliance with regulations", "[u]nlicensed lenders show[ed] virtually no compliance with regulations."[236] Most importantly, in "provinces without regulation, consumers who seek a payday loan online are likely to encounter only the least compliant and least consumer-friendly lenders."[237]

Both the Manitoba Public Utilities Board and the Nova Scotia Utility and Review Board commented on the presence of "unscrupulous lenders using the internet with impunity" despite provincial legislation and licensing requirements as well as "the unfortunate consequences of innocent borrowers accessing such unregulated loans from the internet".[238] This is further exemplified by the warning of the New Brunswick Financial and Consumer Services Commission to financial consumers of the risks involved in borrowing from unlicensed online payday lenders.[239] These illegal lenders are not only charging criminal interest rates but are also indulging in abusive and illegal practices such as collection practices involving threats and contacting debtors at their place of employment or up to 50 times a day.[240] In addition, despite regulatory prohibitions, many

[235] Barrett, 2015, *supra* note 138 at 5.
[236] *Ibid* at 6.
[237] *Ibid*.
[238] Manitoba Public Utilities Board, "Report of the Public Utilities Board of Manitoba in respect of the 2013 Payday Loans Review," (23 September 2013), online: <pubmanitoba.ca/payday_loan/final_payday_loans_triennial_report_sep_23_2013.pdf> at 56 [Manitoba Public Utilities Board, 2013]; NSUARB, 2022, *supra* note 89 at paras 71–72.
[239] FCNB, 2018, *supra* note 171. According to the FCNB, the following businesses are not licensed in New Brunswick and some are not licensed in any Canadian province: truepaydayloan.ca, cash2gonow.com, cashbuddy500.com, cashflow500.ca, cashflow500payday.com, creditmontreal500.com, fastmoneyloans.ca, nationalpaydayloan.ca, paydayking500.com, pretsohben.com, rapidpaydayloans.net, royalfinances.ca, solutions500.com, speedypayloans.ca.
[240] *Ibid*.

unlicensed online lenders structure loans to automatically renew[241] and it has been reported that illegal lenders often ask for fees upfront or direct access to a consumer's bank account, including "account numbers, online passwords and answers to security questions".[242] With this information, unscrupulous illegal lenders can therefore cause greater harm to financially vulnerable consumers than the financial consequences of the original loan.

With most licensed lenders generally complying with existing, albeit limited, regulation, the most severe abusive and predatory online lending practices are exploited by illegal lenders. Unfortunately, it has been reported that enforcement initiatives against illegal online lenders are difficult, as these companies are hard to find, are often located outside the provincial authority's jurisdiction, and may even operate offshore.[243] Questions raised in the Consumer Council of Canada's 2015 report demonstrate the inherent complexity with the enforcement of provincial legislation against illegal activities of unlicensed lenders.

> What if the borrower and lender are not in the same province? What if they are not in the same country? What if the borrower does not know who the lender is, having dealt only with a [loan broker]?
>
> How effective is consumer protection legislation when the vendor is unknown? What if there is a dispute over payment, and the lender takes extra money from the borrower's bank account? Can provincial consumer protection legislation adequately protect a consumer from overseas lenders' collection practices [and the harassment of the borrower's friends, family and employer]? Where does the consumer turn? To local law enforcement? Provincial? Federal? Civil courts?[244]

The response to many of these questions is beyond the scope of this dissertation. However, recent Supreme Court of Canada decisions have recognized various equitable remedies that may be applicable to better protect consumers in the context of abusive and illegal online lending practices. First, in *Douez v Facebook*, a majority of the Supreme Court of Canada used public policy principles to find the forum selection clause unenforceable in

[241] Bond, *supra* note 140 at 25–26.
[242] Barrett, 2015, *supra* note 138 at 6, 35.
[243] Ontario, 2014, *supra* note 173 at 12; Barrett, 2015, *supra* note 138 at 18–19, 47–48; Dilay & Willams, *supra* note 182 at 206.
[244] Barrett, 2015, *supra* note 138 at 23, 44.

Facebook's online terms of use.[245] The Court curtailed the principle of the freedom of contract in favour of the need to protect the public interest. Second, the Court attracted global attention in 2017 when it decided, in *Google v Equustek Solutions*, to uphold a worldwide injunction against Google requiring it to remove internet search results referencing websites of a company in breach of several court orders unlawfully selling the intellectual property of a small Canadian technology company.[246] The extraterritorial order was necessary to prevent *Equustek Solutions* from suffering irreparable harm due to the illegal activities of the infringer.[247] Third, in the recent *Sharp v Autorité des marchés financiers* decision, a majority of court justices applied judicial precedents and confirmed three legal principles and tests relevant to online illegal lending activities:[248]

First, provincial regulatory schemes could constitutionally apply to out-of-province defendants pursuant to the test set out in *Unifund Assurance Co v Insurance Corp of British Columbia*.[249] Second, federal regulatory legislation applies to matters involving international elements if the test requiring a "sufficient connection" between the lender's illegal activities and Canada is met as required in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*.[250] Third, illegal online lenders in foreign jurisdictions could be criminally prosecuted in Canada when there is a "real and substantial link" between the offence and Canada as confirmed in *Libman v The Queen*.[251] Further research on these complicated questions is recommended to inform enforcement authorities of their options when dealing with illegal online lenders operating out of jurisdiction.

Presuming provincial authorities have jurisdiction, remaining obstacles include the identification of illegal lenders and the resources required to supervise online lending

[245] *Douez v Facebook, Inc*, 2017 SCC 33 [*Douez v Facebook*].
[246] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google v Equustek Solutions*].
[247] *Ibid* at para 41–44. See also Matthew Marinett, "The Race to the Bottom: Comity and Cooperation in Global Internet Takedown Orders" (2020) 53 UBC L Rev 464 at paras 13–22.
[248] *Sharp v Autorité des marchés financiers*, 2023 SCC 29 at paras 103–21.
[249] *Unifund Assurance Co v Insurance Corp. of British Columbia*, 2003 SCC 40.
[250] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45.
[251] *Libman v The Queen*, [1985] 2 SCR 178, 1985 CanLII 51.

activities and enforce provincial legislation. With regards to the first barrier to enforcement, provincial representatives have blamed the lack of consumer and industry complaints, which would enable them to identify violators.[252] In response to this problem, the Ontario Payday Lending Panel first recommended that consumer awareness is essential and that government databases of licensed lenders should be more user-friendly and promoted.[253] In addition, "[l]icensed lenders and loan brokers should be encouraged to report unlicensed lenders and loan brokers and noncompliant activity, but the reporting mechanism must preserve the anonymity of "whistleblowers" and ensure that they cannot be held liable for damages to any businesses that they report."[254] A final obstacle, without resolution, is the fact that even if an illegal lender was identified and shut down, a new website and online lending business can be quickly set up again under a different name.[255] Determined predatory lenders can therefore easily evade enforcement measures.

In order to better protection financial consumers, it has also been recommended that

> [r]egulators should explore criminal charges against lenders who behave criminally and have been identified through complaints procedures. Lenders who request personal banking information are of particular concern, as well as those that claim to be compliant with provincial legislation when they are not. They pose a risk not only to a would-be borrower but also to the banking and systems of payments.[256]

Although some may agree with this is a laudable objective, but history informs us otherwise. These remarks are reminiscent of the absence of any enforcement of the criminal interest rate when payday lenders initially entered the consumer credit market as previously discussed in Section 5.3.5. The lack of provincial appetite to monitor illegal lending was further revealed when the Royal Newfoundland Constabulary and the RCMP completed a three-year probe on illegal lending in the province in 2013. Unsurprisingly, yet regrettably, the Department of Justice and Public Safety of Newfoundland and Labrador announced that "[p]ublic prosecutions concluded that while there was a reasonable prospect of

[252] Ontario, 2014, *supra* note 173 at 12; Barrett, 2015, *supra* note 138 at 18–19.
[253] Ontario, 2014, *supra* note 173 at 10. See also Barrett, 2015, *supra* note 138 at 47.
[254] Ontario, 2014, *supra* note 173 at 10.
[255] Barrett, 2015, *supra* note 138 at 24.
[256] *Ibid* at 48.

conviction in regards to some of the potential offences identified by the police, the prosecution of those offences was not in the public interest".[257] In other words, it was in the public interest to prioritize public funds for enforcement measures taken against other types of illegal activities instead of protecting vulnerable financial consumers.

In addition, some provincial representatives have responded to industry complaints that there is a lack of resources allocated to enforcement measures against illegal online lending.[258] In 2023, provincial consumer organizations asserted in a news release that the illegal alternative lending market is thriving in Québec despite the province having the most robust consumer protection regime in the country.[259] They lobbied for a reduction of the federal criminal interest rate as well as a major reinvestment of public funds into the Office de la protection du consommateur and an expansion of its powers so that it can adequately play its role of monitoring and intervening against predatory lenders. If physical lenders can lend illegally, seemingly without impunity, without or without a licensing regime, online illegal lenders have most likely slipped under the radar of most provincial authorities.

Finally, any further reform to financial consumer protection legislation should be guided by the recommendation of the Consumers Council of Canada that the "consumer protection elements of legislation and support need to be reimagined for a world in which borrowers may far more readily encounter unlicensed lenders, because of the existence of the Internet." [260] A report commissioned for the Tony Blair Institute for Global Change recommended in 2022 that a framework for internet regulation must fully protect consumers in "digital markets as they are in other environments."[261] Statutory reforms are

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[257] Rob Antle, "Prosecutors opt against N.L. payday loan criminal charges", CBC News (22 December 2014) online: <cbc.ca/news/canada/newfoundland-labrador/prosecutors-opt-against-n-l-payday-loan-criminal-charges-1.2873424>.

[258] Barrett, 2015, *supra* note 138 at 24.

[259] Union des consommateurs, News Release "Sortir de l'étau infernal de l'endettement : mettons fin aux prêts abusifs", (16 mai 2023), online: <uniondesconsommateurs.ca/manifestation-prets-abusifs/>.

[260] Barrett, 2015, *supra* note 138 at 7.

[261] Liz Coll, "Consumer Protection as a Framework for Internet Regulation," (2022) at 10, online: <assets.ctfassets.net/75ila1cntaeh/trmi7HNqYpEnWjCbZ3ccw/8c6b6223a04350190210b2cb729b6541/Liz_Coll_Report_2022.pdf>.

essential given the power dynamic between consumers and providers in the financial market resulting in a "digital asymmetry" representing by an imbalance in power, knowledge and agency, thereby "placing people in a permanent state of vulnerability in the digital market".[262]

5.4 Conclusion

The preceding critical review of provincial legislation relating to consumer credit highlights the extent of provincial regulation on consumer credit and the importance it has played in the past and will continue to play in the future with respect to the protection of financial consumers. Provinces and territories demonstrably stepped in when the federal government clearly abdicated its responsibility to regulate consumer credit in Canada. Notwithstanding the vast arsenal of provincial consumer protection measures, the preceding analysis further reveals a clear lack of uniformity and various discrepancies, limitations, inefficiencies and legislative voids. It further confirms that some consumers are better protected than others despite the federal government's recognition that "the fundamental interests and needs of consumers do not vary from jurisdiction to jurisdiction."[263]

Notwithstanding the existence of the criminal interest rate since 1980 as well as various provincial sanctions for violations of their consumer credit regulations,[264] the question remains whether provincial authorities have the appetite and resources to enforce their regulations and prosecute non-compliant licenced lenders as well as the increasing number of illegal lenders in Canada. Recent examples of provincial authorities indifferent to the

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[262] *Ibid*; Tony Blair Institute for Global Change, "Sixty Years On, Consumer Rights Needs a Digital Revamp" (15 March 2022), online: <institute.global/insights/tech-and-digitalisation/sixty-years-consumer-rights-needs-digital-revamp>.

[263] Canada, 1999, *supra* note 27 at 66; Dilay & Willams, *supra* note 182 at 188.

[264] See e.g. (AB) *Predatory Lending Act*, *supra* note 168, s 6, which prescribes a fine of no less than $300,000, or 3 times the amount obtained by the defendant as a result of the offence, or imprisonment for a term of not more than 2 years; (NB) *NB-CCDPLA*, *supra* note 108, s 51.6(1), whereby a person is "liable on conviction, for each offence, if an individual, to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, and if a person other than an individual, to a fine of not more than $250,000."

plight of vulnerable financial consumers in Newfoundland and Québec mentioned in the previous section seem to indicate otherwise. What is clear, however, is the imperative necessity for public enforcement action to protect financial consumers, which is confirmed when provincial legislation is actively enforced. For example, active investigations by the provincial authority, Consumer Protection BC, have uncovered illegal practices relating to aggressive and deceptive sales of credit insurance, lack of disclosure, misleading representations and repayment restrictions; and have resulted in consumer refunds totalling close to $900,000 at the end of 2018.[265]

With the expansion of the consumer credit industry and the inherent vulnerability of consumers, this chapter confirms the need and urgency of strengthening financial consumer protection. With high-cost lenders increasingly operating on regional, national and international levels, the scarcity of resources and lack of harmonization of provincial regulation render interprovincial enforcement difficult.[266] Moreover, the Ontario Payday Lending Panel concluded that although inter-jurisdictional cooperation could improve enforcement of payday loan regulations is would not be "time- or cost-effective" and recommended that the "Province should continue to work collaboratively with other provincial governments and with the federal government to establish and execute a joint strategy for cracking down on unlicensed, offshore lenders." [267]

It is now evident that provincial consumer protection legislation is unable to adequately protect vulnerable consumers and that a national consumer credit regulatory framework regulating all lenders, whether provincially or federally regulated, is required as the founders of the Confederation intended when they assigned the head of power over interest to Parliament. Additional possible avenues for reform mentioned in this chapter are also further discussed in Chapter 7.

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[265] Consumer Protection BC, "Consumer Protection BC Uncovered Illegal Practices Relating to Aggressive and Deceptive Sales of Credit" (6 December 2018), online: *Consumer Protection BC* <consumerprotectionbc.ca/news/bc-payday-lending-regulator-follows-data-trail-to-uncover-widespread-issues-in-sector-returns-nearly-900000-to-borrowers/> [perma.cc/9BHA-STZX]. Another example of public enforcement is found at: *Ontario* (*Director, Ministry of Consumer and Business Services Act) v Cash Store Financial Services Inc*, 2014 ONSC 980.

[266] Barrett, 2015, *supra* note 138 at 7.

[267] Ontario, 2014, *supra* note 173 at 12–13.

It bears noting that federal regulation has also substantially expanded during the last sixty years and now covers all forms of consumer credit and other financial services provided by all federally regulated financial institutions.[268] It is the critical and contextualized analysis of this legislative history which is the subject of Chapter 6.

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

CHAPTER 6: Federal Regulatory Framework on Consumer Credit in Canada*

6.1 Introduction

Without an overview of the consumer credit legislative framework currently shared by three levels of government, establishing the foundations, justification and impact of future reform by the federal government would be challenging at best. Chapter 5 has provided an in-depth analysis of provincial and municipal regulatory measures protection financial consumers.

In order to complete the historical analysis of Canada's consumer credit regulatory framework, this chapter's objective is to continue from where we left off in Chapter 3 and review the historical background of Canada's current federal legislative framework of the regulation of consumer credit.[1] Following its partial retreat in 1980 with the repeal of the *Smalls Loans Act* as discussed at the end of Chapter 3, Chapter 6 aims to continue the chronological evolution and analysis of federal financial consumer protection legislative framework.

Notwithstanding the federal government's two unsuccessful attempts to reform this framework, recent legislative reforms and the adoption of a new federal *Financial Consumer Protection Framework* are a positive step towards a better protection of financial consumers. Initially proposed in 2016, the new framework was only enacted in 2018 and along with new regulations came progressively into force in 2020 and 2022.

6.2 *Borrowers and Depositors Protection Act*

* Developments and legislative reforms related to consumer credit are being implemented at a rapid pace recently and the information contained in this chapter article is current up to November 1, 2023.

[1] Although proposed consumer protection legislative frameworks have in the past included other banking activities and regulations relating to access to banking services and deposit-type instruments, this chapter is written with the objective of reforming consumer credit legislation and will therefore not include an analysis of consumer protection provisions for depositors.

As discussed in Chapter 3, the Royal Commission on Banking and Finance and Parliament's Special Joint Committee on Consumer Credit both recommended reforms to the consumer credit regulatory framework in 1964 and in 1967, respectively. In response to these government reports and mounting public pressure, proposed legislation was being drafted, reviewed and discussed at all levels of government and across the country. Chapter 5 has already explained that Provinces became decidedly involved in the regulation of consumer credit following the 1963 *Ontario (AG) v Barfried Enterprises Ltd*[2] decision of the Supreme Court of Canada, which confirmed the provincial constitutional jurisdiction to enact unconscionable transactions relief for money lending contracts notwithstanding the exclusive federal constitutional jurisdiction over interest. Consequently, the main issue discussed at Federal-Provincial Conferences of Ministers of Consumer and Corporate Affairs in 1967 and 1968 was "consumer credit".[3]

In 1970, the federal Cabinet agreed, to review the *Interest Act* "with a view of transforming it into an up-to-date statute governing the disclosure of interest in the broadest sense of the term", the *Small Loans Act* to modernize the statute in response to "current practices in the field of consumer credit" and the *Criminal Code* to add provisions to combat loan-sharking.[4] This review was to be undertaken in consultation with the provinces "to obtain maximum coordination of the administration of consumer credit laws."[5]

Prior to the 1974 federal elections, reform of "credit legislation switched from an undeveloped discussion document issued from within the bureaucracy to a full-blown Liberal Party platform policy used to garner vote[, which] set a new course for credit legislation in Canada."[6] As a result, with the election of a majority liberal government and

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[2] *Ontario (AG) v Barfried Enterprises Ltd*, [1963] SCR 570 at 579, 1963 CanLII 15 [*Barfried Enterprises*]. See author's critique of this decision in Micheline Gleixner, "Reconsidering Legislative Competence over Consumer Credit in Canada" in Janis P Sarra, ed, *Ann Rev Insolv L 2016* (Toronto: Thomson Reuters, 2017) 153 at 248–64 [Gleixner, 2017].

[3] Susan Kathleen Burns, *The Borrowers and Depositors Protection Act: A Case History in Legislative Failure* (MS in Business Administration, University of British Columbia, 1981) [unpublished] at 58.

[4] Archives Canada, *Cabinet Conclusions* (9 July 1970) RG2, Privy Council Office, Series A-5-a, Volume 6359, Access Code 90 at 10-11, online: Canada <recherche-collection-search.bac-lac.gc.ca/eng/home/record?app=cabcon&IdNumber=756&q=%22consumer%20credit%22>.

[5] *Ibid* at 11.

[6] Burns, *supra* note 3 at 79.

a clear mandate to pursue reforms, the first Speech from the Throne promised to protect consumers and enact "a comprehensive overhaul of consumer credit legislation, including disclosure by all lending institutions at effective rates of interest on all loans".[7]

On October 27, 1976, Bill C-16 entitled *Borrowers and Depositors Protection Act* received first reading in the House of Commons.[8] This proposed legislation represented the most ambitious harmonization initiative made by the federal government to date on the subject of consumer credit.

According to the Standing Senate Committee on Banking, Trade and Commerce, the objectives of Bill C-16 were as follows:

> (a) to upgrade the quality and increase the quantity of information on consumer credit available to borrowers;
> (b) to eliminate unnecessary complexities in consumer credit;
> (c) to protect borrowers against excessive interest rates;
> (d) to rationalize federal legislation and define strong and uniform consumer credit rules.[9]

Concerned about the inconsistency of provincial legislation with respect to consumer protection, national standards were proposed dealing with the rates of interest and other credit charges. Bill C-16 further encompassed offences with some liable to criminal prosecution, civil remedies when the credit charge rate was unwarranted or legislation contravened. Additional provisions regulated payments and penalties under lending

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[7] *Ibid* at 80.

[8] Bill C-16, *Borrowers and Depositors Protection Act*, 2nd Sess, 30th Parl, 25 Eliz 11, 1976 (long title was *An Act to provide for the protection of borrowers and depositors, to regulate interest on judgment debts, to repeal the Interest Act, the Pawnbrokers Act and the Small Loans Act and to amend certain other statutes in consequence thereof*) [Bill C-16].

[9] Canada, Senate, *Report of the Standing Senate Committee on Banking, Trade and Commerce on the Subject-Matter of Bill C-16*, Journals of the Senate of Canada, 30-2, 1976-77, Appendix (p 775) at 8 (7 July 1977) (Chairman: Slater A Hayden) [Canada, Standing Senate Committee on Banking, 1977]; Burns, *supra* note 3 at 118. See also: *House of Commons Debates*, 30-2, 1976 at 634 (Antony Abbott). During the second reading of Bill C-16, the *Borrowers and Depositors Protection Act,* on1 November 1976, the Honourable Antony Abbott spoke to the House of Commons describing three policy objectives:

> 1) to impose uniformity in calculating, crediting, describing and disclosing interest for both borrowers and depositors;
> 2) to facilitate the proper functioning of the market, by encouraging more vigorous competition and by providing consumers with avenues of recourse; and
> 3) deter loansharking by establishing a clear and easily provable criminal offence".

transactions including the calculation of a credit charge, variable-rate mortgage transactions, disclosure and recording requirements as well as prohibition of oppressing, harassing or abusive conduct, unreasonable publication or communication of information and use of false, deceptive or misleading representations or means.

Unfortunately, despite the ineffectiveness of previous legislation and the adoption of modern standards, the bill did not have the unqualified support of consumer organizations, and certain of its provisions were strongly opposed by credit grantors. "The change from virtually no effective control to the statutory recognition of unconscionability, a reverse onus of proof and a maximum (although high) rate for legal transactions, did not find favour in the industry."[10] In addition, as previously mentioned in Chapter 4, provincial objections were raised against the bill on the "time-honoured principle of turf-protection".[11]

Although the Government proposed 75 amendments to the Bill in 1977, the Standing Senate Committee on Banking, Trade and Commerce made 23 recommendations, including that the amended Bill be abandoned and a new Bill introduced along with a new consultative process.[12] Given the lack of unqualified support from consumer advocates, the strong opposition from other stakeholders and the delays incurred, it is not too surprising that the bill died in Committee after second reading.[13] This result is further explained by Richard Owens:

> The federal government failed, however, to consult the provinces and financial institutions to a sufficient extent, and the bill was ultimately withdrawn as a result of severe criticism from those who felt that the bill intruded excessively on provincial jurisdiction, created duplication and confusion, and was not based on adequate consultation.[14]

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[10] Mary Anne Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at 17 [Waldron, 1992].

[11] See *supra*, chapter 4, note 327: Richard H Bowes, "Annual Percentage Rate Disclosure in Canadian Cost of Credit Disclosure Laws, Symposium: Revision of the Federal Interest Act and Harmonization of Federal Provincial Consumer Credit Disclosure Legislation" (1998) 29 Can Bus LJ 183 at 188–89.

[12] Canada, Standing Senate Committee on Banking, 1977, *supra* note 9 at 5–6.

[13] Bowes, *supra* note 11 at 188–89; Waldron, 1992, *supra* note 10 at 16–17; Burns, *supra* note 3 at 139–50.

[14] Richard C Owens, *Privacy and Financial Services in Canada*, Research Paper prepared for the Task Force on the Future of the Canadian Financial Services Sector (September 1998) at 129, online: Canada <publications.gc.ca/collections/Collection/F21-6-1998-11E.pdf>. See also William AW Neilson, "Interjurisdictional Harmonization of Consumer Protection Laws and Administration in Canada" in Ronald CC Cuming, ed, *Perspectives on the Harmonization of Law in Canada: Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada* (Toronto, 1985) at 76–82.

Resulting from the federal government's gradual abandonment of consumer credit regulation and the demise of the Bill C-16, a vast array of consumer protection legislation was subsequently adopted by the provinces as reviewed in Chapter 5. In response to the gradual encroachment of provincial financial consumer protection legislation and given its unsuccessful attempt to regulate consumer credit, Parliament hastily repealed the *Small Loans Act* in 1980 without any debate or plan to protect consumers on a national level as previously discussed in Chapter 3.

Notwithstanding these legislative setbacks, Parliament nevertheless enacted disclosure requirements, a criminal interest rate provision as well as legislation regulating federally regulated financial institutions ("FRFI"). The starting point of the historical evolution of these numerous federal financial consumer provisions, which are examined in Section 6.4 of this chapter, is the year 1967, where Chapter 3 concluded. Prior to this analysis, however, the following section describes the events leading to the most significant legislative reforms to the federal regulation of consumer credit this country has ever known.

6.3 Renewed Federal Legislative Reform: Financial Consumer Protection Framework

Since the Global Financial Crisis and the related risks to the Canadian economy, financial consumer protection has become a priority in Canada for policy-makers and regulators. In 2013, the Government of Canada committed in its *Economic Action Plan 2013* to develop a comprehensive financial consumer protection code and launched a nationwide consultation to seek public input on the appropriate elements of the new framework.[15] The government intended to create a code that would:

- better protect consumers of financial products and ensure that they have the necessary tools to make responsible financial decisions;
- be adaptable to suit the needs of consumers of today and tomorrow in a rapidly evolving and innovative financial marketplace;

[15] Canada, Department of Finance, "Canada's Financial Consumer Protection Framework: Consultation Paper," (3 December 2013), online: *Canada* <web.archive.org/web/20131210103735/www.fin.gc.ca/activty/consult/fcpf-cpcpsf-eng.asp> [Canada, 2013 Consultation].

- respond to the realities of a digital and remote banking environment and the needs of vulnerable Canadians;
- provide the exclusive and comprehensive consumer protection regime that applies to products and services offered by banks, and be the basis for consumer protection for federally regulated financial institutions that offer similar products and services, replacing a currently dispersed mix of legislation and regulations;
- be simple and clear in providing expectations for the accountability of financial institutions; and
- be enforceable and provide criteria by which actions can be assessed.[16]

Following the 2015 Canadian election, the new federal government moved ahead with its intention to consolidate existing consumer protection provisions currently dispersed throughout existing federal legislation regulating financial institutions. It reinitiated consultations on Canada's federal financial sector's legislative and regulatory framework as required by the sunset provisions in the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*.[17] Responses "emphasized the need for the framework to do more to serve the interests of Canadians" and "called for the framework to provide a high level of consumer protection in the context of a rapidly changing landscape of financial products and services."[18]

Concluding that financial consumer protection must be strengthened to effectively support the economy and individual Canadians, the federal government developed a financial consumer protection framework which was included in the budget implementation bill introduced in Parliament on October 25, 2015 ("Bill C-29"), 35 years since its retreat from the regulation of consumer credit.[19]

> Comprehensive reforms were proposed in Budget 2016 to modernize the financial consumer protection framework by clarifying and enhancing consumer protection in the *Bank Act*, and to work with stakeholders to support the implementation of the framework. These reforms will reaffirm

[16] *Ibid*.
[17] *Bank Act*, SC 1991, c 46, s 21; *Cooperative Credit Associations Act*, SC 1991, c 48, s 22; *Insurance Companies Act*, SC 1991, c 47, s 21; *Trust and Loan Companies Act*, SC 1991, c 45, s 20.
[18] Canada, "Potential Policy Measures to Support a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future," (11 August 2017) at 4, online: <canada.ca/content/dam/fin/migration/activty/consult/pssge-psefc-eng.pdf>.
[19] Bill C-29, *Budget Implementation Act, 2016, No. 2*, 1st Sess, 42nd Parl, 2015 (first reading 25 October 2015).

> the federal government's intent to have a system of exclusive rules to ensure an efficient national banking system from coast to coast to coast.[20]

This legislative reform was also, in part, the government's response to the Supreme Court of Canada's decision in *Bank of Montreal v Marcotte* previously discussed in Chapter 4.[21] Contrary to the position defended by the federal government and the financial institutions involved, the Court concluded that consumer protection provincial legislation also applied to FRFIs since the provincial provisions did not create an operational conflict with federal legislation nor undermine a federal purpose.[22] The constitutional doctrine of paramountcy applicable to subsection 91(15) of the *Constitution Act, 1867* dealing with matters related to "Banking" was therefore not engaged.

Containing explicit statutory declarations of its purpose, the new proposed division in the *Bank Act* established a comprehensive and exclusive regime to regulate a financial institution's dealings with its customers and the public in relation to banking products and services intended to be paramount to any provincial legislation relating "to the protection of consumers or to business practices with respect to consumers".[23] The legislative reforms undertaken by Bill C-29 were specific to the *Bank Act* and the federal financial institution it regulates, and did not amend the comparable consumer provisions under the *Insurance Companies Act* or the *Trust and Loan Companies Act*. The new legislative framework aimed to

> (a) provide those customers and the public with uniform protection on a national level;
> (b) allow the institution to carry on the business of banking, consistently and efficiently on a national level; and

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[20] Canada, Department of Finance, "Supporting a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future," (26 August 2016) at 32, online: *Canada* [perma.cc/786E-54TN] [Canada, 2016 Consultation].

[21] *Bank of Montreal v Marcotte*, 2014 SCC 55 [*Marcotte*]. For an in-depth analysis and critique of this decision see Bradley Crawford, "Provincial Consumer Protection, Market Conduct, and Contract Damages Laws and the Banks" (2015) 30:3 Banking & Finance Law Review 559; Bradley Crawford, "Bank of Montreal v. Marcotte: 'Exclusive' Federal Financial Consumer Protection Law and the Role of the Law of Contract" (2015) 30:2 BFLR 346 [Crawford, 2015]; Bradley Crawford, "Bill C-29: Mission Impossible?" (2017) 60 CBLJ 61 [Crawford, 2017]; *Of Banks, Federalism and Clear Statement Rules: Bank of Montreal v Marcotte*, [2015] 71:1 SCLR: Osgoode's Annual Constitutional Cases Conference 191.

[22] *Marcotte*, *supra* note 21 at paras 80, 84.

[23] Bill C-29, *supra* note 19, s 131. See *Bank Act*, *supra* note 17, s 627.03.

(c) ensure the uniform supervision of institutions and enforcement of provisions relating to the protection of their customers and of the public.[24]

To achieve this purpose, five principles were included to guide the interpretation of the framework as well as measures taken by a bank in its dealings with its customers and the public:

(a) basic banking services should be accessible;
(b) disclosure should enable an institution's customers and the public to make informed financial decisions;
(c) an institution's customers and the public should be treated fairly;
(d) complaints processes should be impartial, transparent and responsive; and
(e) an institution should act responsibly, considering its customers and the public as well as the efficiency of its business operations.[25]

Unfortunately, this second attempt of the Government of Canada to enact a financial consumer protection code was unsuccessful. To expedite the passage of the Bill C-29, both Houses ultimately deleted Division 5 from the bill before it was passed by Parliament in response to the initial unfavourable reaction and issues raised by the Premier of Québec, the Standing Senate Committee on National Finance and other stakeholders.[26] During the proceedings of the Senate Committee, members of the Committee were informed that "the government will remove from Bill C-29 and later reintroduce the federal consumer

[24] *Ibid*.

[25] Bill C-29, *supra* note 19, s 120, 131. See *Bank Act*, *supra* note 17, s 195.1, 627.02, 27.91. (Section 195.1 clarifies Bank directors' duties with regard to compliance with the financial consumer protection framework and section 627.91 requires that Banks provide yearly public accountability statements which includes "(ii) a description of the measures taken by the bank to be consistent with the principles set out in section 627.02 in its dealings with its customers and the public").

[26] *Budget Implementation Act, 2016, No 2*, SC 2016, c 12 (assented to 15 December 2016); Crawford, 2017, *supra* note 21; Canada, Senate, Standing Committee on National Finance, *Evidence*, 42-1, No 23 (12 December 2016) (Senator Peter Harder, on behalf of the Government of Canada) [Canada, Senate, Standing Committee on National Finance, 2016]; Bill Curry, "Morneau pulls Bank Act changes from budget bill after objections from Quebec, Senate" Globe and Mail (12 December 2016), online: <theglobeandmail.com/news/politics/morneau-pulls-bank-act-changes-from-budget-bill-after-objections-from-quebec-senate/article33303437/>; Radio-Canada, "Québec refuse « l'amputation » par Ottawa de sa *Loi sur la protection du consommateur*" (7 December 2016), online: <ici.radio-canada.ca/nouvelle/1004428/loi-banque-protection-consommateurs-canada-quebec-notaires-couillard-lisee>.

protection framework for banks to ensure the highest level of consumer protection is adopted in the financial sector across Canada."[27]

According to the evidence submitted by members of the Québec Bar to the Standing Senate Committee on National Finance studying Bill C-29, three issues were raised in opposition to the enactment of the new consumer protection framework.[28] First, since the provisions were part of an omnibus budget bill, Canadians had not been consulted on the specific content of Bill C-29 and how it would affect them. Indeed, a letter from the New Brunswick Financial and Consumer Services Commission read during the proceedings of the Committee further confirmed that provincial regulators of financial services had not been consulted on Bill C-29.

Second, the new proposed subsection 627.03(2) of the *Bank Act* creating a legislative paramountcy excluding all applicable "law or regulation of a province that relates to the protection of consumers or to business practices with respect to consumers" was contrary to the principles of modern constitutional interpretation. It was argued that cooperative federalism "must be reflected for the coexistence of shared jurisdictions" and thus protected the provincial jurisdiction over consumer protection.[29] Third, the comprehensiveness and exclusiveness of the financial consumer protection code violated consumer rights by the exclusion of existing provincial civil remedies against financial institutions such as class-action lawsuits and punitive damages available in Québec.

In response to the lack of consultation, the Department of Finance launched the second stage of consultations in 2017 on "the renewal of the federal financial sector legislative and regulatory framework prior to the statutory sunset date of March 29, 2019" including the previously proposed measures of the financial consumer protection framework.[30]

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[27] Canada, Senate, Standing Committee on National Finance, 2016, *supra* note 26.
[28] *Ibid* (Luc Thibaudeau, Chair of the Committee on Consumer Protection, Barreau du Québec). Some of the members of the bar before the Committee where lawyers involved in previous consumers protection class actions in Québec.
[29] *Ibid* (Yves Lauzon, a member of the Committee on Consumer Protection, Barreau du Québec).
[30] Canada, *Department of Finance Canada Launches Second Stage of Consultations on Federal Financial Sector Framework* (11 August 2017), online: *Canada* <fin.gc.ca/n17/17-074-eng.asp>.

According to the Department of Finance's website, the federal government received 137 submissions from various individuals, associations, organizations, financial institutions and other stakeholders.

In addition, at the government's request, the Financial Consumer Agency of Canada ("FCAC") published in 2018 its *Report on Best Practices in Financial Consumer Protection*.[31] It recommended that a regulator be specifically responsible for overseeing financial consumer protection and that the financial services industry be regulated by a standalone legal framework establishing clear minimum standards to protect financial consumers and providing for the fair treatment of financial consumers at all stages of their relationship with a financial service provider. It further recommended that regulators be provided with statutory powers to compel compliance as well as access for financial consumers to affordable, independent and impartial redress mechanisms and different remedies in the event of non-compliance by financial institutions.

With favourable responses, Bill C-86[32] proposing a new federal "comprehensive financial consumer protection code" as recommended by the FCAC was introduced in Parliament on October 29, 2018 and received Royal Assent on December 13, 2018.[33] These consumer protection measures are now enshrined in a new Part XII.2 of the *Bank Act* entitled "Dealing with Customers and the Public". Given that regulations were required to implement many of the provisions, the new Financial Consumer Protection Framework ("Framework") in the *Bank Act* and the *Financial Consumer Protection Framework Regulations* ("*FCPF Regulations*") (collectively: "FCPF Requirements") came into force in two stages, with modifications to the *Financial Consumer Agency of Canada Act* in 2020

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[31] Financial Consumer Agency of Canada, "Report on Best Practices in Financial Consumer Protection," (31 May 2018), online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/best-practices-financial-consumer-protection.html> [FCAC*, Report on Best Practices*]; Financial Consumer Agency of Canada, News Release, FCAC publishes Report on Best Practices in Financial Consumer Protection (14 May 2018), online: *FCAC* <canada.ca/en/financial-consumer-agency/news/2018/05/fcac-publishes-report-on-best-practices-in-financial-consumer-protection.html>.

[32] Bill C-86, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018, and other measures*, 1st Sess, 42nd Parl, 2018 [Bill C-86].

[33] *Budget Implementation Act, 2018, No 2*, SC 2018, c 27 [*Budget Implementation Act, 2018*]; FCAC*, Report on Best Practices*, *supra* note 31 at 4.

and the *Bank Act* in 2022.[34] A notable exception is the elimination of the position of the Financial Literacy Leader on April 10, 2019, whose responsibilities reverted to the Commissioner of the Financial Consumer Agency of Canada pursuant to the *FCAC Act*.[35] "By embedding financial literacy directly into FCAC's mandate through legislative changes in December 2018, the Government of Canada has ensured greater continuity and sustainability of the financial literacy program, and its long-term success."[36]

The Framework consolidates, streamlines, enhances and modernizes existing consumer provisions scattered throughout the *Bank Act* and in over 20 subject-specific regulations. It applies to banks, federal credit unions and authorized foreign banks, which are collectively named "Banks" when discussing the FCPF Requirements.[37] Generally, the Legislative Summary accompanying *Budget Implementation Act, 2018* summarized the new Framework as follows:

> Division 10 of Part 4 amends the *Bank Act* to strengthen provisions that apply to a bank or an authorized foreign bank in relation to the protection of customers and the public. It implements enhancements in the areas of corporate governance, responsible business conduct, disclosure and transparency, and redress. It also amends the *Financial Consumer Agency of Canada Act* to strengthen the mandate of the Financial Consumer Agency of Canada and grant additional powers to that Agency.[38]

Although the preamble of the *Bank Act* still declares that "it is desirable and is in the national interest to provide for clear, comprehensive, exclusive, national standards applicable to banking products and banking services offered by banks", the previously proposed explicit federal paramountcy clause excluding all provincial provisions related to

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[34] *Budget Implementation Act, 2018*, *supra* note 33, ss 31, 332, 337–38, 342(2), 344–47, 350, amending *Bank Act*, *supra* note 17; *Financial Consumer Agency of Canada Act*, SC 2001, c 9 [*FCAC Act*]; SI/2020-35 (CIF 30 April 2020); *Budget Implementation Act, 2018*, *supra* note 33, ss 315–30, 333–35, amending the *Bank Act*, *supra* note 17, SI/2021-42 (CIF 30 June 2022); *Financial Consumer Protection Framework Regulations*, SOR/2021-181 [*FCPF Regulations*].

[35] *Budget Implementation Act, 2018*, *supra* note 33, s 336(1), 339–41, 342(1), 343, 348–49, amending *FCAC Act*, *supra* note 34 (CIF 10 April 2019).

[36] Financial Consumer Agency of Canada, "Financial Literacy Leader" (11 April 2019), online: *Canada* <canada.ca/en/financial-consumer-agency/programs/financial-literacy/financial-literacy-leader.html>.

[37] *Bank Act*, *supra* note 17, ss 2, Schedule I-III.

[38] *Budget Implementation Act, 2018*, *supra* note 33, online: *Canada* <laws-lois.justice.gc.ca/eng/annualstatutes/2018_27/page-1.html?wbdisable=false>.

"the protection of consumers or to business practices with respect to consumers" is notably absent in the 2018 reforms.[39]

Avoiding for now the constitutional question raised by Québec in 2016, the Minister of Finance stated before the members of the Senate that provincial consumer protection legislation complements the national approach adopted in the new Framework and that both regimes can co-exist.[40] In addition, the Department of Finance Canada confirmed before the Standing Senate Committee on Banking, Trade and Commerce that "Division 10 does not contain an exclusive assertion of federal jurisdiction and is not intended to affect the provinces' ability to regulate in the area of consumer protection or the rights of consumers under provincial legislation".[41]

Bank customers will therefore "continue to be able to avail themselves of the greater rights and remedies afforded by [provincial legislation]" if they do not create an operational conflict with a provision of the *Bank Act* nor undermine a federal purpose pursuant to the doctrine of federal paramountcy.[42] Considering this possibility and the confusion that duplicative legislation may create for consumers, it is not surprising that the Québec National Assembly unanimously voted to ask that the Financial Consumer Protection Framework not apply when a province already has similar legislative measures in place designed to protect consumers.[43] Such an exemption was not included in the *Budget Implementation Act, 2018* and the constitutional question is therefore postponed once again to another day.

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[39] Bill C-29, *supra* note 19, s 131 proposing *Bank Act*, *supra* note 17, s 627.03(2).

[40] "Bill C-86, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018, and other measures*", 2nd reading*, Senate Debates*, Vol 150:256 (4 December 2018) (Hon Bill Morneau), online: *Senate* <sencanada.ca/en/content/sen/chamber/421/debates/256db_2018-12-04-e#40> [Canada, *Senate Debates*, 2018].

[41] Canada, Senate, *Twenty-Sixth Report of the Standing Senate Committee on Banking, Trade and Commerce* (4 December 2018), online: <sencanada.ca/content/sen/committee/421/BANC/Reports/BANC_SM-C-86_FinalReport_e.pdf>.

[42] Canada, *Senate Debates*, 2018, *supra* note 40 (Hon Senator Marc Gold).

[43] Québec, Press Release, "Mesures sur le crédit à la consommation et les contrats d'assurance - Le gouvernement du Québec exprime ses préoccupations sur le projet de loi fédéral C-86" (4 November 2018). See also Option consommateurs, Presse Release, "Projet de loi C-86 : les clients des banques canadiennes seront insuffisamment protégés" (6 December 2018), online: *Option consommateurs* <option-consommateurs.org/projet-loi-c-86-clientss-banques-canadiennes-seront-insuffisamment-proteges/>.

As previously mentioned, prior to the 2018 reforms, Parliament did progressively enact, since 1967, many various types of consumer protection provisions with most being applicable to FRFIs. Completing the historical analysis of Canada's consumer credit regulatory framework, the evolution of these federal provisions along with the latest reforms are analyzed in the next section.

6.4 Current Federal Regulation of Consumer Credit

6.4.1 Disclosure and Transparency Requirements

With federal banks entering the consumer credit market and the creation of new financial services and products, the federal government initially prioritized the need for disclosure and transparency regulations and in 1967 introduced new provisions in the *Bank Act*[44] requiring the disclosure of the cost of consumer credit.[45] Plain language in documents and contractual agreements followed by detailed disclosure of financial information by the lenders were the chosen methods to enable consumers to make responsible financial decisions.

According to these new provisions in the *Bank Act* and the *Bank Cost of Borrowing Disclosure Regulations*,[46] "cost of borrowing" included any interest or discount thereon, and any other charges payable by the borrower to the bank directly or indirectly through a third party. The total cost of borrowing had to be calculated as prescribed and expressed as a nominal annual percentage rate, and as an amount in dollars and cents when the loan and the cost of borrowing were to be repaid in equal instalments within a period of five years.

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[44] *An Act respecting Banks*, SC 1867, c 11; *The Bank Act*, RCS 1886, c 120 [*Bank Act, 1886*], as repealed and replaced by SC 1890, c 32, s 104; RSC 1906, c 29; RSC 1927, c 12; RSC 1952, c 12; *Bank Act*, RSC 1970, c B-1; SC 1980-81-82-83 c 40 [*Bank Act, 1980*]; RSC 1985, c B-1; *Bank Act*, *supra* note 17 [*Bank Act*].

[45] *Bank Act*, SC 1966, c 87, s 92 [*Bank Act, 1966-67*]; Harvin Pitch, "Consumer Credit Reform: The Case for a Renewed Federal Initiative" (1971–1972) 5 Ottawa L Rev 324 at 327. See also Bill S-2, *An Act to Make Provision for the Disclosure of Information in respect of Finance Charges*, 5th Sess, 24th Parl, 1962, reintroduced as Bill S-3, 1st Sess, 25th Parl, 1962 (second reading 6 December 1962).

[46] *Bank Cost of Borrowing Disclosure Regulations*, Can Reg 67-504 (1967); CRC 1978, c 367.

The calculated cost of borrowing by the bank had to be disclosed in a statement given to the borrower at the time when the credit was granted or the loan or advance was made as part of the contract. The regulation excluded specific forms of borrowing, including a loan exceeding $25,000, secured by a mortgage or real property, advanced pursuant to a letter of credit or resulting from the discount or negotiation of a bill of exchange, a promissory note or other instrument payable by a third party.[47]

These early consumer protection provisions further included restrictions on advertising by financial institutions by requiring the disclosure of the cost of borrowing along with the annual percentage rate or the dollar cost of interest. In addition, except by express agreement with a customer, a bank could not charge or receive any sum for the keeping of an account nor make a loan or advance subject to a condition that the borrower maintain a minimum credit balance with the bank.

These disclosure requirements of the cost of borrowing have been expanded through regular amendments and revisions of the legislation pertaining to the financial industry sector. The 1980 *Bank Act* revision clarified that commercial transactions, such as loans to a corporation or partnership or to an individual for business purposes, were excluded from these consumer protection provisions.[48] Individuals acquired a right to prepay partially or in full a loan that was not secured by a mortgage on real property nor in excess of $50,000 or such greater amount as was prescribed by the regulations.[49] Banks had to disclose to the borrower whether the borrower had the right to repay the loan prior to the maturity of the loan contract, and, if applicable, the particulars of the circumstances in which the borrower may exercise such right as well as the calculation of the rebate to the borrower or any additional charge or penalty imposed on the borrower.[50]

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[47] *Ibid*, s 10.
[48] *Banks and Banking Law Revision Act, 1980*, SC 1980-81-82-83 c 40, s 2, adding *Bank Act, 1980*, *supra* note 44, s 174(5).
[49] *Banks and Banking Law Revision Act, 1980*, *supra* note 48, s 2, adding *Bank Act, 1980*, *supra* note 44, s 202(5). See also *Cost of Borrowing Disclosure Regulations*, SOR/83-103 at 553.
[50] *Banks and Banking Law Revision Act, 1980*, *supra* note 48, s 2, adding *Bank Act, 1980*, *supra* note 44, s 202(5).

With the emergence and subsequent proliferation of credit cards in the 1970s, the *Bank Act* was also amended to include a new provision to address consumer complaints regarding this new innovative financial product. As such, when a bank issued a payment, credit or charge card in Canada to an individual, it had to disclose particulars of the consumer's rights and obligations and any charges incurred by reason of accepting or using the payment, credit or charge card.[51] In addition, in the event of default by the borrower on any loan or advance, including through the use of such payment, credit or charge card, particulars of the charges or penalties to be paid by the borrower also had to be disclosed in the manner prescribed. Finally, an offence was included in 1980 that a bank found guilty of contravening these new consumer protection provisions would be liable on summary conviction to a fine not exceeding one thousand dollars.[52]

The 1991 regulatory reform of the financial services industry[53] expanded banking disclosure and transparency legislative and regulatory requirements to insurance companies as well as loan and trust companies.[54] New harmonized consumer protection regulations were also adopted for each category of financial institutions. Adding to previously described provisions, *Disclosure of Interest Regulations*[55] restricted advertisements in respect of debt obligations and the calculation of the cost of interest and new *Cost of Borrowing Regulations* limited charges exigible upon borrower default to interest, legal costs incurred to collect upon the loan and costs incurred to protect or realize upon the security of a loan. [56]

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[51] *Banks and Banking Law Revision Act, 1980*, *supra* note 48, s 2, adding *Bank Act, 1980*, *supra* note 44, s 202(6).

[52] *Banks and Banking Law Revision Act, 1980*, *supra* note 48, s 2, adding *Bank Act, 1980*, *supra* note 44, s 204. The current *Bank Act*, *supra* note 17, ss 980, 985, provide that every entity who is guilty of an offence is "liable (i) on summary conviction, to a fine of not more than $500,000, or (ii) on conviction on indictment, to a fine of not more than $5,000,000".

[53] See generally Christopher C Nicholls, "The Regulation of Financial Institutions: A Reflective but Selective Retrospective" (2011) 50 Can Bus LJ 129.

[54] *Insurance Companies Act*, *supra* note 17, ss 479–88; *Trust and Loan Companies Act*, *supra* note 17, ss 435–43. These provisions were eventually added to the *Cooperative Credit Associations Act*, *supra* note 17, in 2001 by the *FCAC Act*, *supra* note 34, s 313.

[55] *Disclosure of Interest (Banks) Regulations*, SOR/92-321, *Disclosure of Interest (Trust and Loan Companies) Regulations*, SOR/92-322 [*Disclosure of Interest Regulations*].

[56] *Cost of Borrowing (Banks) Regulations*, SOR/92-320, s 11; *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/92-318, s 11; *Cost of Borrowing (Canadian Insurance Companies) Regulations*, SOR/92-319, s 11 [*Cost of Borrowing Regulations*].

Incremental changes continued in 1997 with disclosure requirements in credit card applications and loan renewals as well as enlarging the types of loans regulated most notably by including lines of credit.[57] Disclosure in advertising requirements were also broadened to include credit cards, payment and charge cards. Notwithstanding these reforms, the Canadian government concluded in 1999 that the "level of transparency and disclosure in many financial service consumer contracts and marketing documents in Canada falls short of what Canadian consumers have a right to expect and what industry is capable of delivering."[58] It also recognized that additional transparency and disclosure regulations were necessary for consumers to understand the nature of financial service sales documents and contracts they are entering into, to negotiate and defend their interests, to comparison shop and to benefit from a competitive financial services marketplace.[59]

In response, new *Cost of Borrowing Regulations 2001*[60] were adopted and required the lender to disclose to the consumer the cost of borrowing for a loan under a credit agreement such as credit cards, fixed or variable-rate loans, or lines of credit. With the enactment of the *Financial Consumer Agency of Canada Act* in 2001, the modernized disclosure requirements expanded to all FRFIs, including financial cooperatives governed under the *Cooperative Credit Associations Act*.[61]

With the objective of enhancing the interests of consumers, all FRFIs are prohibited since 2007 from "directly or indirectly, charg[ing] or receiv[ing] any sum for the provision of

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[57] *An Act to Amend Certain Laws Relating to Financial Institutions*, SC 1997, c 15, s 50-55 (CIF 30 September 1998) [*Act to Amend Financial Institutions*, 1997].

[58] Canada, Department of Finance, *Reforming Canada's Financial Services Sector: A Framework for the Future* (Ottawa: Department of Finance, 1999) at 58, online: *Canada* <publications.gc.ca/collections/Collection/F2-136-1999E.pdf> [Canada, 1999].

[59] *Ibid* at 57–58.

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

[61] *FCAC Act*, *supra* note 34, s 313, adding *Cooperative Credit Associations Act*, *supra* note 17, s 385.14-85.21.

any prescribed products or services unless the charge is made by express agreement between it and a customer or by order of a court."[62] In addition, the *Bank Act*, the *Cooperative Credit Associations Act* and the *Trust and Loan Companies Act* were amended in 2007 by adding disclosure requirements concerning all prescribed registered products.[63] FRFIs are thus required to provide, in the prescribed manner, to customers requesting the opening of a new account or entering into an agreement for a prescribed product or service, information about all charges applicable to the registered product, how the customer will be notified of any increase in those charges and of any new charges applicable to the registered product, the institution's procedures relating to complaints about the application of any charge applicable to the registered product, as well as any another other information that may be prescribed by regulation.

Following the financial turmoil caused by the Global Financial Crisis, the federal government adopted new measures to help financial consumers by limiting certain business practices and improving clarity of credit applications and contracts.[64] Similar to provincial legislation, schedules have been added that prescribe a summary information box with standardized information which must be included in disclosure statements or credit agreements and applications for credit cards, fixed and variable-rate loans and lines of credit.[65] This disclosure allows consumers to assess and compare the cost of different financial products and services to make responsible financial decisions. Amendments to the *Cost of Borrowing Regulations 2001* also direct credit card issuers to make additional disclosures to users, including notice of an increase in interest rates when a upon the end

[62] *An Act to amend the law governing financial institutions and to provide for related and consequential matters*, SC 2007, c 6, ss 33, 91, 167, 365 [*Act to Amend Financial Institutions, 2007*].
[63] *Ibid*, ss 31, 165, 363
[64] Regulatory Impact Analysis Statement, (2009) Gaz 1, 1534 at 1534–35. See also *Regulations Amending the Cost of Borrowing (Banks) Regulations*, SOR/2009-258; *Regulations Amending the Cost of Borrowing (Authorized Foreign Banks) Regulations*, SOR/2009-259; *Regulations Amending the Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2009-260; *Regulations Amending the Cost of Borrowing (Retail Associations) Regulations*, SOR/2009-26; *Regulations Amending the Cost of Borrowing (Canadian Insurance Companies) Regulations*, SOR/2009-262; *Regulations Amending the Cost of Borrowing (Foreign Insurance Companies) Regulations*, SOR/2009-263.
[65] *Regulations Amending the Cost of Borrowing (Banks) Regulations*, *supra* note 64, s 2(1) adding *Cost of Borrowing (Banks) Regulations 2001*, *supra* note 60, ss 6(2.1)–(2.3).

of promotional introductory rates.[66] Disclosure is now required of the estimated time in years and months of repayment if only the minimum payment were to be made on the outstanding credit card debt on the monthly due dates.[67]

During the last 55 years, disclosure and transparency regulations have become more rigorous and offer better protection to financial consumers.[68] Up from 2½ pages in length in 1967 to 32 pages in 2018, the last specific regulation on the cost of borrowing, prior to the 2018 reforms, had expanded, to better protect consumers, to all types of credit agreements, such as credit cards, fixed or variable-rate loans, as well as lines of credit and to all FRFIs. Not surprisingly, the calculation of the total cost of borrowing has also evolved since 1967 and has streamlined which costs are to be included or excluded from the total amount.

Last amended in 2020, these regulations 1) establish how the cost of borrowing must be calculated; 2) specify the information the FRFI must disclose to consumers; and 3) specify how, when and under what circumstances those financial institutions must provide disclosure to consumers.[69] In addition, the regulations prescribe the timing of initial disclosure, the intended recipients, the specific content for the various types of consumer credit, the requirements regarding any amendments to or renewals of the credit agreement and the cancellation of optional services. Finally, waiver of payments, prepayment of loans, default charges, interest-free periods and advertising were also regulated by the existing framework. The *Cost of Borrowing (Banks) [and (Foreign Banks)] Regulations* were repealed with the coming into force of the new FCPF Requirements on June 29, 2022. The remaining *Cost of Borrowing Regulations* and other disclosure regulations applicable to trust and loan companies, retail associations and insurance companies all remain in force.

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[66] *Regulations Amending the Cost of Borrowing (Banks) Regulations*, *supra* note 64, s 7(5) adding *Cost of Borrowing (Banks) Regulations 2001*, *supra* note 60, ss 12(5)e). See also Canada, "Regulations Amending the Cost of Borrowing Regulations", (21 May 2009), online: *Canada* <fin.gc.ca/n08/data/09-048_2.pdf>.

[67] *Regulations Amending the Cost of Borrowing (Banks) Regulations*, *supra* note 64, s 7(5) adding *Cost of Borrowing (Banks) Regulations 2001*, *supra* note 60, ss 12(5)d).

[68] Canada, 2013 Consultation, *supra* note 15.

[69] Financial Consumer Agency of Canada, "Frequently asked questions: Regulations", (last modified 8 December 2023), online: *FCAC* <canada.ca/en/financial-consumer-agency/services/industry/laws-regulations/faqs-regulations.html> [FCAC, "Frequently asked questions: Regulations"].

Disclosure and transparency requirements are now consolidated in the new Framework with consumer protection measures relating to a bank's disclosure of information for the issuance of deposit-type instruments and principal-protected notes, as well as information on specific features of products and services, charges and penalties, rates of interest and applicable deadlines, customers' rights and obligations and complaints procedure. Use of past market performance in advertising, prepaid products and promotional offers are also regulated.[70] New measures in the *Bank Act* include 1) advance notice of impending renewal to provide customers time to decide whether to renew or cancel their products or services; 2) electronic alerts to their customers to help them avoid going into overdraft or spending over their credit limit and incurring fees; and 3) "separate agreements for each product and service so customers understand what they are buying, how much it will cost, and how to cancel an agreement".[71] Complementing the numerous disclosure and transparency consumer provisions in Part XII.2 of the Act, Division 3 "Disclosure and Transparency for Informed Decisions", the *FCFP Regulations* includes 70 additional regulatory provisions.[72]

Although financial consumers may seem better protected, the question remains whether these disclosure provisions are sufficient to enable consumers to make better financial decisions considering their sustained presence in the market for more than 55 years and the corelated rise in overindebtedness and insolvency rates in Canada. As corroborated by Mary Anne Waldron in 2011, "the success of legislation mandating particular kinds and forms of disclosure, if measured by the behaviour of consumers, has also failed. It has not

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[70] Library of Parliament, *Legislative Summary of Bill C-29: A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures*, 42-1-C29-E, (Ottawa: Library of Parliament, 16 December 2016) at Appendix pp iii-iv, online: *Library of Parliament* <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/c29-e.pdf >.

[71] *Bank Act*, *supra* note 17, s 627.6, 627.13, 627.41. See Canada, News Release, "New and enhanced protections for bank customers" (30 June 2022), online: *Canada* <canada.ca/en/financial-consumer-agency/news/2022/06/new-and-enhanced-protections-for-bank-customers-protections-take-effect-june-30-as-part-of-canadas-new-financial-consumer-protection-framework.html >.

[72] *Bank Act*, *supra* note 17, s 627.55–27.992; *FCPF Regulations*, *supra* note 34, ss 18–88.

reduced consumer bankruptcies nor has it evidently improved consumer financial choices about saving or spending."[73]

In addition to the inability of consumers to easily compare different credit products and services given the lack of harmonization with provision legislation, another explanation of this failure may be that consumers simply do not understand the financial information that is disclosed by lenders or fail to consider the impact of their financial decisions. This hypothesis would therefore confirm the importance of complementary federal initiatives to increase financial education and supervise credit counselling under the purview of the Financial Consumer Agency of Canada and the Office of the Superintendent of Bankruptcy,[74] respectively. Additional responsibility placed upon the shoulders of the consumer credit industry for the financial well-being of their consumers by imposing responsible lending requirements are also recommended in Chapter 7.

6.4.2 Criminal Interest Rate and Payday Loans

In addition to disclosure and transparency regulations, Canada enacted in 1980 a criminal interest rate which is defined as an "effective annual rate of interest" that exceeds 60% on a credit advanced under an agreement.[75] In comparison, this rate is equivalent to an annual percentage rate ("APR") of 47%.[76] As previously mentioned in Chapter 3, instead of being enacted as part of a general act amending the *Criminal Code*, section 305.1 was added in substitution of the *Small Loans Act* which was repealed by the same statute.[77]

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[73] Mary Anne Waldron, "Unanswered Questions about Canada's Financial Literacy Strategy: A Comment on the Report of the Federal Task Force Symposium" (2011) 51:3 Can Bus LJ at 373–74.

[74] See Office of the Superintendent of Bankruptcy, *Directive No. 1R4 Counselling in Insolvency Matters* (2018), online: *OSB* <ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03864.html>.

[75] *Criminal Code*, RSC 1985, c C–46, s 347.

[76] Canada, "Consultation on Cracking Down on Predatory Lending by Further Lowering the Criminal Rate of Interest and Increasing Access to Low-Cost Credit," (10 May 2023), online: <canada.ca/en/department-finance/programs/consultations/2023/consultation-on-cracking-down-on-predatory-lending-faster-by-further-lowering-the-criminal-rate-of-interest-and-increasing-access-to-low-cost-credit.html> [Canada, 2023 Consultation].

[77] *An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code*, SC 1980-81-82-83 c 43 (CIF 1 April 1981) [*An Act to repeal the Small Loans Act*] (adding *Criminal Code*, RSC 1970, c C-34, s 305.1, currently *Criminal Code*, *supra* note 75, at 347, where it has been repeated with only inconsequential editing changes).

Given the increasing competition in the consumer credit market and the availability of small loans from banks, credit unions and other financial institutions, the 1980 reforms shifted the attention from "the necessitous borrower who really did not have any source or any defence" but now somewhat protected by the increased competition in the industry and limited disclosure requirements to the criminal enforcement of new measures against the problem of loan-sharking, which it would seem was not conquered by the two previous money lending legislative initiatives.[78] The federal government recently explained the purpose of the new criminal provision as follows:

> The criminal rate of interest in Section 347 of the *Criminal Code* was first introduced in 1980. The rate was not established with the intent of being a financial consumer protection measure to combat the growth of high-interest loans; rather, the provision was meant to deter loan-sharking and other predatory practices where lenders offer credit at high interest rates and employ intimidation, violence, or threats of violence to enforce repayment. A fixed interest rate of 60 per cent was included in the offence to provide a level of certainty; an objective standard was expected to be easier to prove, rather than the prosecution having to prove that there was violence or intimidation associated with the loan.[79]

This new criminal provision creates two criminal offences by making it an offence to (a) enter into an agreement or arrangement to receive interest at a criminal rate, and (b) receive a payment or partial payment of interest at a criminal rate. The criminal rate of interest is prescribed as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement". The definition of "interest" is more comprehensive than previous legislation. All-inclusive, it "covers charges of any kind or in any form paid or payable under an agreement or arrangement for the advancing of credit" as well as "the 'aggregate' of all such charges," including not only the interest specified in the agreement but also any additional penalties, commissions and fees such as facility and

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[78] Canada, *Proceedings Standing Senate Committee on Banking, Trade and Commerce*, 32-1, vol 1 (29 October 1980) at 21:9-21:10 (Superintendent of Insurance) [Canada, Standing Senate Committee on Banking, 1980].

[79] Department of Finance Canada, "Consultation on Fighting Predatory Lending by Lowering the Criminal Rate of Interest," (9 August 2022), online: <canada.ca/en/department-finance/programs/consultations/2022/fighting-predatory-lending/consultation-criminal-rate-interest.html> [Canada, 2022 Consultation].

legal fees.[80] Subsection 347(2) specifically excludes, however, "any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes".

The Ontario Court of Appeal confirmed that "[t]he definition of 'interest' includes fees and charges of every kind, however they may be described or disguised" and declared that "[c]ourts cannot permit any erosion of the protection of the public from usurious charges which Parliament manifestly intended to provide" as previously discussed in Chapter 4.[81] The public was thus protected by the broad language of section 347 that was "presumably intended (as it was in the *Small Loans Act*) to prevent creditors from avoiding the statute simply by manipulating the form of payment exacted from the debtors" as affirmed by the Supreme Court of Canada in *Garland v Consumers' Gas Co*.[82]

The previous chapter further explained that, despite the new criminal interest rate provision, a payday loan industry emerged in the early to mid-1990s in Canada[83] responding to the apparent need of consumers for short-term small loans, such as salary advances. With the risk involved in this type of lending instrument, customers are required to pay exorbitant interest rates, fees, charges and penalties making these loans the "most expensive source of consumer credit available."[84]

Given that the criminal interest rate was set at 60% (47% APR) with the intended objective to counter loan-sharking associated with the criminal underworld with rates as high as "100 or 200 percent a year,"[85] public pressure intensified to regulate the new payday loan

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[80] *William E Thomson Associates v Carpenter*, 1989 CanLII 185 at para 11, 69 OR (2d) 545 (CA) [*Thomson Associates*], leave to appeal refused [1989] SCCA No 398.
[81] *Ibid* at para 12.
[82] *Garland v Consumers' Gas Co*, [1998] 3 SCR 112 at paras 24–25, 1998 CanLII 766 [*Garland*]. See also *Roy c Lacombe*, 2017 QCCA 253.
[83] *Re The Cash Store Financial Services Inc*, 2009 MBCA 1 at para 3 [*The Cash Store*].
[84] Ruth E Berry & Karen A Duncan, "The Importance of Payday Loans in Canadian Consumer Insolvency," (31 October 2007), online: *OSB* <ised-isde.canada.ca/site/office-superintendent-bankruptcy/sites/default/files/attachments/2022/Payday_EN.pdf> at 3. See also Janis P Sarra, "At What Cost? Access to Consumer Credit in a Post-Financial Crisis Canada" in Janis P Sarra, ed, *Ann Rev Insolv L 2011* (Toronto: Thomson Reuters, 2012) 409 at 457–67.
[85] Canada, Standing Senate Committee on Banking, 1980, *supra* note 78.

industry. Although self-regulation had been the initial option, the payday loan industry quickly established the Canadian Payday Loan Association, which successfully lobbied the federal government to delegate the regulatory framework of the payday lending industry to the provinces.[86] As a result, rather than amending the current usury provision to effectively regulate payday lending in Canada, Parliament simply excluded payday loans from the *Criminal Code* and turned over authority to regulate the new industry to the provinces. The Legislative Summary that accompanied Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*,[87] justified the amendments as follows:

> [t]he expanding presence of payday loan companies suggests that some Canadians are willing to pay rates of interest in excess of those permitted under the *Criminal Code* for their payday loans. Bill C-26 is designed to exempt payday loans from criminal sanctions in order to facilitate provincial regulation of the industry. Thus, the exemption applies to payday loan companies licensed by any province that has legislative measures in place designed to protect consumers and limit the overall cost of the loans.[88]

Despite charging consumers interest rates that were previously considered criminal, payday lenders were not only exempt from criminal sanctions in respect of agreements for small, short-term loans but also attained, in the result, a newly acquired legitimacy similar to money lending companies at the beginning of the 20th century. Section 347.1 exempts a person who makes a payday loan from criminal prosecution if 1) the loan is for $1,500 or less and the term of the agreement lasts for 62 days or less; 2) the person is licensed by the province to enter into the agreement; and 3) the province has been designated by the Governor in Council.[89] Since 2007, all provinces have enacted legislation designed to

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[86] Olena Kobzar, *Networking on the Margins: The Regulation of Payday Lending in Canada* (PhD Dissertation, University of Toronto, 2012) [unpublished] at 144–51.

[87] Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, 39th Parl, 1st Sess, assented to 3 May 2007 (CIF 3 May 2007).

[88] *Criminal Code*, *supra* note 75, s 347.1; Andrew Kitching and Sheena Starky, *Bill C-26: An Act to amend the Criminal Code (criminal interest rate)*, Parliamentary Information and Research Service (Ottawa: Library of Parliament, 22 November 2006) at 1, online: *Canada* <publications.gc.ca/collections/collection_2007/lop-bdp/ls/391-541-2E.pdf> as cited in *The Cash Store*, *supra* note 83 at para 8; *An Act to amend the Criminal Code (criminal interest rate)*, SC 2007, c 9.

[89] *Criminal Code*, *supra* note 75, s 347.1; *Order Designating Alberta for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2010-21; *Order Designating British Columbia for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2009-278; *Order Designating Manitoba for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2008-212; *Order Designating New Brunswick for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code*, SOR/2017-40; *Order Designating Nova Scotia for the Purposes of the*

protect borrowers of payday loans by requiring payday lenders to be licensed and by regulating the payday lending industry which has been discussed in detail in Chapter 5.[90]

Considering that the criminal interest rate was enacted without any debate and has prompted unanimous criticism[91] and considering its clear ineffectiveness to protect consumers from abusive high-cost and pawnbroking lending practices, whose protection has been relegated to provincial and local governments, one wonders what purpose it serves in the current legislative framework. During the last ten years, legislative reform was proposed to lower the criminal interest rate without success by means of four bills sponsored by Senator Pierrette Ringuette and one private member's bill.[92]

Criminal Interest Rate Provisions of the Criminal Code, SOR/2009-177; *Order Designating Ontario for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2009-277; *Order Designating Prince Edward Island for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2014-277; *Order Designating Saskatchewan for the Purposes of the Criminal Interest Rate Provisions of the Criminal Code,* SOR/2011-204.

[90] (AB) *An Act to End Predatory Lending*, SA 2016, c E-9.5, s 8 amending *Fair Trading Act*, RSA 2000, c. F-2; *Payday Loans Regulation*, Alta Reg 157/2009; (BC) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, Part 6.1 [*BC-BPCPA*]; *Payday Loans Regulation*, BC Reg 57/2009; (MB) *Consumer Protection Act*, CCSM, c C200 [*MB-CPA*]; *Payday Loans Regulation*, Man Reg 99/2007; (NB) *Cost of Credit Disclosure and Payday Loans Act*, NB 2002, c C-28.3; *Payday Lending Regulation – Cost of Credit Disclosure and Payday Loans Act*, NB Reg 2017-23 (CIF 1 January 2018); (NL) *An Act to Amend the Consumer Protection and Business Practices Act*, SNL 2016, c 46 (Newfoundland and Labrador amended its *Consumer Protection and Business Practices Act*, SNL, C-31.1 assented to 14 December 2016 but not yet been proclaimed); (NS) *Consumer Protection Act,* RSNS 1989, c 92; *Payday Lenders Regulations*, NS Reg 248/2009, s 9; (ON) *Payday Loans Act, 2008*, SO 2008, c 9; *General Regulation*, O Reg 98/09; (SK) *Payday Loans Act*, SS 2007, P-4.3; *The Payday Loan Regulations*, RRS, c P-4.3 Reg 1 as amended by Sask Reg 84/2012 and 105/2013. See also (QC) *Consumer Protection Act*, CQLR, c P-40.1, ss 66-117, 150, 321b, 322; *Regulation respecting the application of the Consumer Protection Act*, c P-40.1, r 3, c 5 applicable to all money lenders in Québec.

[91] See e.g. Jacob Ziegel, "Does Section 347 Deserve a Second Chance? A Comment" (2003) 38 Can Bus LJ 394 [Ziegel, 2003]; Mary Anne Waldron, "What is to Be Done with Section 347?" (2003) 38 Can Bus LJ 367 [Waldron, 2003]; Jacob Ziegel, "Bill C-44: Repeal of Small Loans Act and Enactment of a New Usury Law" in "Comments on Legislation and Judicial Decisions" (1981) 59 Can Bar Rev 188 [Ziegel, 1981]; Mary Anne Waldron, "A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past" (2011) 50 Can Bus LJ 300 [Waldron, 2011]; Stephanie Ben-Ishai & Emily Han, "We Don't Talk About Section 347: An Analysis From a Commercial Perspective" (2022) 20 Ann Rev of Insolv L, 2022 CanLIIDocs 4298.

[92] Bill S-210, *An Act to amend the Criminal Code (criminal interest rate)*, 41st Parl, 2nd Sess (second reading 29 May 2014) (sponsor Hon Pierrette Ringuette); Bill S-237, *An Act to amend the Criminal Code (criminal interest rate)*, 42nd Parl, 1st Sess (committee report 19 April 2018) at 3067 (sponsor Hon Pierrette Ringuette); Bill S-233, *An Act to amend the Criminal Code (criminal interest rate)*, 43rd Parl, 2 Sess, (first reading 4 May 2021) at 2012 (sponsor Hon Pierrette Ringuette); Bill C-274, *An Act to amend the Criminal Code (criminal interest rate)*, 2nd Sess, 43rd Parl, 2021, (first reading 11 March 2021) (sponsor Peter Julian); Bill S-239, An Act to amend the Criminal Code (criminal interest rate), 1st Sess, 44th Parl, 2022, cl 1 (first reading 22 March 2022) (Hon Pierrette Ringuette). For an analysis of proposed bills see Ben-Ishai & Han, *supra* note 91 at 9–15.

In 2021, the federal government finally decided to review the effectiveness of section 347 when it recognized that "[m]any lower and modest-income Canadians rely on high-interest short-term loans to make ends meet, such as paying for everyday living expenses, or for unanticipated emergencies. This leaves some Canadians living in a cycle of debt."[93] It therefore announced a public consultation to help fight predatory lending by "lowering the criminal rate of interest in the Criminal Code of Canada applicable to, among other things, installment loans offered by payday lenders."[94]

On August 9, 2022, the consultation[95] was launched and sought feedback from stakeholders on several questions related to the reasons consumers request high-cost instalment loans, the impact of these loans on the financial well-being and financial resilience of consumers and the lowering of the criminal interest rate including the impact a lower rate might have on the accessibility of high-cost instalment loans and on other credit products. Finally, the government asked "[h]ow could the Government of Canada, including the FCAC, improve financial education and awareness regarding high-cost installment loans to further empower and protect Canadians as they make informed financial decisions?"

Most recently in the 2023 Budget, the federal government renewed its commitment to better protect financial consumers from predatory lenders[96] and on June 22, 2023 legislation was enacted to lower the criminal interest rate from 60%, equivalent to a 47% APR, to an APR of 35% on a credit advance.[97] This legislative amendment would finally resolve the difference between the criminal provision's "effective annual rate of interest" and the APR commonly advertised by lenders and disclosed to borrowers pursuant to regulatory disclosure provisions.

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[93] Canada, House of Commons, *Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience*, online: Canada <budget.canada.ca/2021/home-accueil-en.html> (19 April 2021) at 123

[94] *Ibid*.

[95] Canada, 2022 Consultation, *supra* note 79.

[96] Canada, *2023 Budget: Statement and Impacts Report on Gender, Equality, Diversity and Quality of Life* (Ottawa: Finance Canada, 28 March 2023) at 32, online: Canada <budget.canada.ca/2023/pdf/gdql-egdqv-2023-en.pdf>.

[97] *Budget Implementation Act, 2023, No 1*, SC 2023, c 26, ss 610-616, amending *Criminal Code*, *supra* note 75, ss 347-347.1 and adding s 347.01.

In addition, the new provisions further authorize regulations to fix a limit on the total cost of borrowing under a payday loan agreement.[98] The federal government's intention is to "adjust the Criminal Code's payday lending exemption to require payday lenders to charge no more than $14 per $100 borrowed."[99] It bears repeating that although provincial regulation and the new federal proposal may seem reasonable when represented in a dollar amount, the calculation of the APR for a 14-day payday loan at the lowest regulated rate in Canada of $14 per $100 borrowed with a single repayment on the 14th day of the term will still have an APR of 365%, while the criminal interest rate is currently equivalent to a 47% APR and similarly lowered to 35% in 2023.

With these legislative amendments not yet in force and with new regulations needing to be drafted, the federal government launched on October 5, 2023, a second *Consultation on Cracking Down on Predatory Lending Faster by Further Lowering the Criminal Rate of Interest and Increasing Access to Low-Cost Credit*. With comments on the consultation due on November 30, 2023, the government recognized that, based on the first 2022 consultation, additional steps may be required

> to crack down on predatory lending faster by exploring further lowering the criminal rate of interest, increasing access to low-cost, small-value credit in Canada, and on additional revisions to the payday lending exemption. These consultations also explore steps to protect Canadians from unfair marketing schemes and high credit fees.[100]

With these public consultations and recent legislative reforms, the federal government has clearly recognized the deficiencies and limits to the current consumer credit regulatory framework and has demonstrated its willingness and intent on increasing financial consumer protection. Perhaps the recommendations in the concluding chapter of this dissertation will provide the additional inspiration and encouragement required to complete the necessary legislative reforms.

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[98] *Budget Implementation Act, 2023, No 1*, *supra* note 97, ss 610–16 amending *Criminal Code*, *supra* note 75, s 347(2), (4) and adding s 347.1(2)(a.1), 347.01(2.1).
[99] Canada, 2023 Consultation, *supra* note 76.
[100] *Ibid*.

In addition to these criminal provisions protecting financial consumers, Parliament also continued its legislative reform of the financial services industry, which began in the 1990s and continues to this day. Not only has the financial services industry itself evolved, but also the federal supervision framework of FRFIs.

6.4.3 Recent Reforms of the Financial Services Industry

In recent years, the Canadian financial sector has witnessed a rapidly evolving market in the types and methods of delivering products and services, as well as a changing and more concentrated competitive landscape. With consultations beginning in 1985, the urgency to reform existing legislation was recognized by the federal government:

> [g]iven the increasing diversification of the activities of financial institutions, the introduction of new financial products and the rapid growth of technology, the existing financial services legislation had become badly outdated and did not provide sufficient flexibility to adapt to a constantly changing financial environment. This resulted in unwarranted restrictions on legitimate and acceptable financial activities, and increased the difficulty of ensuring adequate regulation.[101]

Moreover, the financial services industry has experienced a consolidation "driven by a number of factors, including the search for economies of scale, mergers and acquisitions, large domestic conglomerates expanding their offerings, and foreign financial institutions exiting or reducing their presence in the Canadian market."[102] Several commentators have also observed the increasing competition in the Canadian financial sector and the fusion of provincial financial institutions within the ambit of chartered banks since the banking legislative reforms of 1954 and 1967.[103]

Although provincial legislation still applies to provincially incorporated institutions such as credit unions, mutual funds and securities dealers, as well as provincial insurance

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[101] Preliminary Notice (Office of the Superintendent of Financial Institutions), (1992) C Gaz I, 423 (Vol 126, no 8) [*Canada Gazette*].

[102] Canada, 2016 Consultation, *supra* note 20 at 23.

[103] Toronto-Dominion (TD) Economics, "Canadian Household Debt: A Cause for Concern, Special Report," (20 October 2010), online: *TD* <td.com/document/PDF/economics/special/td-economics-special-dp1010-household-di3.pdf> at 2–3; Poonam Puri & Andrew Nichols, "Developments in Financial Services Regulation: A Comparative Perspective" (2014) 55 Can Bus LJ 454 at 456.

companies and trust and loan companies, statistics confirm the tendency of financial institutions to migrate towards a federal incorporation or an amalgamation of services under one national or regional umbrella. In fact, in addition to banks, over 90% of assets in the trust and loan and insurance sectors were held in 1999 by FRFIs in Canada.[104] In addition, "the six largest banks [had] 93 per cent of assets in the banking sub-sector" in 2016.[105]

Some provinces have even ceased to incorporate trust companies and are "encouraging companies that wish to provide fiduciary services nationally to establish a federal trust company."[106] Canadian credit unions and caisses populaires have also been steadily consolidating and the legislative framework has been implemented since 2012 allowing credit unions to be federally regulated, allowing them to grow regionally or nationally.[107] On July 1, 2016, Caisse populaire acadienne ltée of New Brunswick became the first federal credit union.

The following overview of the regulatory framework of FRFIs will further confirm this consolidation and the new tendency to adopt similar consumer protection measures to all FRFIs whether they are incorporated under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*. The 1991 regulatory reform of the financial services industry was described as the "most comprehensive and significant initiative in the history of financial institution legislation in Canada."[108] According to the Regulatory Impact Analysis Statement, the primary objectives of the new legislation were as follows:

- benefit consumers by increasing competition and the variety of services offered by financial institutions;
- enhance protection for depositors and policyholders;
- strengthen the ability of Canadian financial institutions to compete at home and abroad; and

[104] Canada, 1999, *supra* note 58 at 65–66.
[105] Canada, 2016 Consultation, *supra* note 20 at 10, 23.
[106] *Ibid* at 12.
[107] *Ibid* at 10, 18; Koker Christensen, Craig Bellefontaine and Tom Peters, "Current Trends in the Canadian Credit Union Sector" (December 2017) 33 BFLR 73.
[108] Nicholls, *supra* note 53 at 141, citing the federal Minister of State Gilles Loiselle quoted in "Reform Legislation for Canadian Financial Institutions" (1992), 99 *Can Banker* 14.

- lay the groundwork for discussions on harmonization with the provinces.[109]

In addition to updating and streamlining the regulatory framework of FRFIs, the legislative reforms aimed to facilitate the integration of financial services, "remove unnecessary regulatory barriers and allow common ownership of firms" from the traditional "four pillars" representing banks, trust and loan companies, insurance companies and securities dealers.[110]

> This diet of financial institutions legislation provides for substantially identical corporate governance provisions for federally regulated financial institutions, with differences among the four Acts reflecting the businesses specific or exclusive to each of the respective financial services industries. Once (as is expected) further integration, if not complete assimilation, of business is permitted in the future, it might be expected that a single financial services act would be sufficient, as is increasingly the case in the countries of the European Community.[111]

According to the Supreme Court of Canada's analysis of the industry in 2007, "there has been a blurring of the traditional 'four pillars' of the Canadian financial services industry, which formerly were neatly divided into banks, trust companies, insurance companies, and security dealers, the first under federal regulation and the last three regulated by the provinces".[112] Although provincial and federal legislation still cohabitate to regulate this industry, the four traditional pillars have been largely integrated under the supervision of the Superintendent of Financial Institutions of Canada.[113]

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[109] *Canada Gazette*, *supra* note 101 at 424.

[110] Canada, *Executive Summary: New Directions for the Financial Sector* (Ottawa: Department of Finance, 1986) at 2, online: <publications.gc.ca/collections/collection_2016/fin/F2-74-1986-1-eng.pdf> [Canada, *New Directions for the Financial Sector*, 1986].

[111] M H Ogilvie, "What's Really New in the New Bank Act" (1993) 25:2 Ottawa L Rev 385 at 387.

[112] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 1 [*Canadian Western Bank*]. See also *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan,* 1979 CanLII 180, [1980] 1 SCR 433 at 499–50: Justice Beetz affirms that the meaning of:

> "Banking" has evolved considerably over the centuries. Finally, because of the expansion of credit and the development of competition between banks and other types of institutions sometimes called near banks, such as trust companies, the latter have entered certain fields of activities previously carried on by banks while banks have begun operations which were not traditionally considered to appertain to the business of banking, leading to considerable overlapping of functions.

[113] Halsbury's Laws of Canada (online), *Banking and Finance*, "Introduction" (I.3) at HBF-5 "Legislative and Regulatory Framework".

In the past, federal-provincial discussions were held to ensure that overlapping provincial legislation regulating financial institutions, other than banks, were brought into line with federal legislation to achieve a unified and national approach to the regulation of Canadian financial institutions.[114] Mechanisms still exist for "collaboration among federal and provincial-territorial regulatory agencies and ministries responsible for financial sector policy" and clarification of responsibilities for the prudential oversight and management of stability risks arising in institutions under their own jurisdictions.[115]

Reforms to the financial services industry and its regulatory framework were also necessary given the evolving financial marketplace for consumers.[116] Driven in part by weaker business investment, low interest rates and increasing leverage by Canadian households, the "overall composition of lending has shifted over time, as total lending to households has increased relative to total business lending."[117] Moreover, Canadians interact with financial institutions in a rapidly evolving environment wherein most financial transactions are conducted electronically. Branches are primarily used by consumers to seek advice on more complex services such as mortgages, credit and investment products and services, as well as other value-added services.[118]

Along with new technologies such as online and mobile banking offering different ways to interact with their financial institution as well as increased access to financial services, financial consumers "can choose from hundreds of different chequing and savings accounts and credit cards, with a mix of fees and features to meet their needs."[119]

6.4.4 Recent reforms to federal regulatory and consumer protection agencies

As a result of these technological advances facilitating the development of innovative new financial services and credit products and the transformation of the industry, the framework

[114] Ogilvie, *supra* note 111 at 387.
[115] Canada, 2016 Consultation, *supra* note 20 at 20.
[116] *Ibid* at 26.
[117] *Ibid* at 10.
[118] *Ibid* at 26.
[119] *Ibid*: "99 per cent of Canadians above the age of 15 have an account at a financial institution".

which has been in place since Confederation is no longer appropriate. It is therefore expected that the recent regulatory reforms will naturally lead to a single financial services act to implement a unified and national approach to the regulation of Canadian financial institutions in the near future. New national governing bodies have already been created to uphold the regulatory framework of financial institutions and are endowed with annual contributions from the financial services industry to undertake informational, monitoring, research and enforcement functions.

6.4.4.1 Office of the Superintendent of Financial Institutions Canada

Public confidence in the Canadian financial system is safeguarded by the Office of the Superintendent of Financial Institutions Canada ("OSFI"), the primary regulator and supervisor of federally regulated deposit-taking institutions, insurance companies, and federally regulated private pension plans. Consistent with the integration of the financial services industry, the Office of the Inspector General of Banks and the Department of Insurance, which supervised the federally regulated trust, loan and insurance companies along with financial cooperatives registered under the *Cooperative Credit Associations Act*, were consolidated into the OSFI.[120]

Established in 1987 by the *Office of the Superintendent of Financial Institutions Act*[121], the OSFI regulates and supervises more than 400 FRFIs "in order to determine whether they are in sound financial condition and are complying with their governing statute law and supervisory requirements under that law."[122] The OSFI also monitors and evaluates systemwide or sectoral events or issues that may have a negative impact on the financial condition of financial institutions. Although OSFI plays an essential prudential oversight role in the Canadian financial system, it does not include consumer-related issues or the

[120] Canada, *New Directions for the Financial Sector*, 1986, *supra* note 110 at 6.
[121] *Office of the Superintendent of Financial Institutions Act*, RSC, 1985, c 18 (3rd Supp), Part I [*OSFI Act*].
[122] *Ibid*, s 4(2)a); OSFI, *Who We Regulate*, online: *OSFI* <osfi-bsif.gc.ca/Eng/wt-ow/Pages/wwr-er.aspx> (86 Banks; 44 Trust Companies; 18 Loan Companies; 68 Life Insurance Companies; 13 Fraternal Benefit Societies; 153 Property & Casualty Insurance Companies; 21 Foreign Bank Representative Offices).

securities industry, which is carried on by other agencies, both federal and provincial.[123] Nevertheless, the integration of all FRFIs under the auspices of the OSFI confirms the recent tendency to consolidate and centralize supervision of financial institutions including the protection of financial consumers.

Recognizing that Canada's financial services sector was undergoing rapid change, the federal government established in 1996 the Task Force on the Future of the Canadian Financial Services Sector to provide advice on the future of the sector. After two years of study and consultation, the Task Force made 124 recommendations and concluded as follows:

> [i]t is the responsibility of both financial institutions and the government to establish the conditions that create a marketplace of well-informed consumers and a sufficient number of competitive suppliers. Adequate information and range of choice, backed by strong regulatory oversight and an effective redress process, will ensure a relative balance of power between the consumer and the provider and justify consumer confidence in their financial institutions. This, in turn, will deliver the best results for consumers, firms and the economy as a whole.[124]

To this end, in 2001 the federal government introduced a new framework to further promote consumer interests in the financial sector including the establishment of two new agencies, the Ombudsman for Banking Services and Investments and the Financial Consumer Agency of Canada.[125]

6.4.4.2 Ombudsman for Banking Services and Investments

To provide effective redress to financial consumers, the federal government collaborated with FRFIs to establish a Canadian ombudsperson offering impartial, non-legalistic dispute resolution services to all financial institutions.[126] As a result, the Canadian Banking

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[123] OSFI, *Annual Report 2016-2017* at 9–10, online: *OSFI* <osfi-bsif.gc.ca/Eng/Docs/ar-ra/1617/eng/ar1617.pdf>; *OSFI Act*, *supra* note 121, s 6(1).

[124] Canada, Task Force on the Future of the Canadian Financial Services Sector, *Change, Challenge, Opportunity: Report of the Task Force* (Ottawa: Department of Finance, 1998) at 15; Canada, 1999, *supra* note 58 at 46.

[125] Canada, 1999, *supra* note 58 at 54–57.

[126] *Ibid* at 46.

Ombudsman created in 1996 changed its name to the Ombudsman for Banking Services and Investments ("OBSI") when its mandate was enlarged in 2001. The same year, Parliament amended the *Bank Act* to enable the Minister to designate a not-for-profit corporation to deal with "complaints, made by persons having requested or received products or services from its member financial institutions, that have not been resolved to the satisfaction of those persons under procedures established by those financial institutions".[127] Although these reforms further required Banks to be a member of the designated complaints body,[128] the OBSI was never designated and therefore the Banks were never required to have their customers complaints handled by the OBSI.[129]

Operating independently of government and financial institutions, the OBSI remains a not-for-profit organization with the objective of ensuring fair and impartial complaints resolution for financial consumers when they have been unable to obtain satisfaction following the internal dispute settlement process of the approximately 1,500 participating financial institutions in 2022.[130] In addition to banks, participating firms included trust and loan companies, foreign-owned banks, credit unions and member firms of the Investment Dealers Association of Canada, the Mutual Fund Dealers Association of Canada and the Investment Funds Institute of Canada.[131]

In 2006, the Standing Senate Committee on Banking, Trade and Commerce was mandated to review "the impact of federal legislation and initiatives designed to protect consumers

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[127] *FCAC Act*, *supra* note 34, s 121, adding *Bank Act*, *supra* note 17, s 455.1.
[128] *FCAC Act*, *supra* note 34, s 121, adding *Bank Act*, *supra* note 17, s 455.1(2).
[129] Public Interest Advocacy Centre, "PIAC representations concerning the proposed Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations," (13 August 2011) at 2, online: *PIAC* <piac.ca/wp-content/uploads/2014/11/piac_comments_external_complaints_bodies_bank.pdf>.
[130] Bradley Crawford, "Financial-Consumer Complaint Agencies Commentary" (2013) 54:1 Can Bus LJ 68 at 74; Ombudsman for Banking Services and Investments, "Inspiring confidence in the Canadian financial services sector, Annual Report 2017," (2018) at 19, online: <obsi.ca/en/news-and-publications/resources/AnnualReports-English/AR2017_EN.pdf> [OBSI*, Annual Report 2017*]. See also Jacqueline J Williams, "Canadian Financial Services Ombudsmen: The Role of Reputational Persuasion" (October 2014) 20 *BFLR* 41 for historical overview and analysis. The number of participating firms has increased to 1,500, including 109 banks and 84 credit unions: Ombudsman for Banking Services and Investments, "Fair Effective Trusted, Annual Report 2022" at 20, online: <obsi.ca/en/news-and-publications/resources/AnnualReports-English/Annual-Report-2022_EN_AODA.pdf> [OBSI*, Annual Report 2022*].
[131] Ombudsman for Banking Services and Investments, *Annual Report 2002* at 2, online: OBSI <obsi.ca/en/news-and-publications/resources/AnnualReports-English/Annual-Review-2002.pdf>.

within the financial services sector" and the role various actors could play "with respect to consumer protection and the supervision of the financial services sector".[132] Similar to the recommendation of the federal Task Force on the Future of the Canadian Financial Services Sector, the Senate Committee endorsed the appointment of a single Financial Services Ombudsperson, independent of government and the financial services industry, to replace existing agencies, including the OBSI, to ensure independence, transparency, accessibility and efficiency.[133] Although this new office would provide "a single point of access for consumer complaints regarding any financial service provided by a federally regulated financial institution" it was recommended that its decisions, including for restitution and compensation, remain non-binding.[134]

Instead of following these previous recommendations, Parliament amended the *Bank Act* in 2010 to establish a multi-External Complaint Body ("ECB") model to resolve consumer complaints permitting the firms to choose who adjudicated the complaints of their customers.[135] In 2015, the Finance Minister approved two ECBs for complaints under several federal statutes such as the *Bank Act*: the not-for-profit OBSI and the privately owned ADR Chambers Banking Ombuds Office ("ADRBO").[136] Pursuant to its new mandate, the OBSI "operates according to regulatory criteria established by the federal Department of Finance and overseen by the Financial Consumer Agency of Canada ("FCAC")."[137] Any regulated firm providing banking or investment services was eligible to join.

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[132] Canada, Standing Senate Committee on Banking, Trade and Commerce, "Consumer Protection in the Financial Services Sector: The Unfinished Agenda" (June 2006) at "Order of Reference", online: *Canada* <publications.gc.ca/collections/collection_2007/sen/YC11-391-1-02E.pdf>.

[133] *Ibid* at i-ii.

[134] *Ibid* at ii.

[135] *Sustaining Canada's Economic Recovery Act*, SC 2010, c 25, 2 146–48 amending *Bank Act*, *supra* note 17, ss 455–56 (Procedures for dealing with complaints) (CIF 2 September 2013), repealed and replaced by *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 627.43–27.54 (Complaints Process and External Complaints Body); Ombudsman for Banking Services and Investments, "OBSI Response to External Review Recommendations," (26 October 2022) at 2, online: *OBSI* <obsi.ca/en/about-us/resources/Documents/Public-Response-to-2021-Review-Recommendations_EN.pdf>.

[136] *Notice (Ombudsman for Banking Services and Investments)*, (2015) C Gaz I, 1104; *Notice (ADR Chambers Banking Ombuds Office)*, (2015) C Gaz I, 1103.

[137] OBSI, "Banking Regulation" (last visited 22 August 2018), online: *OBSI* <obsi.ca/en/about-us/banking-regulation.aspx>; *Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies)*

Despite its title, the OBSI was thereafter best described as a voluntary dispute resolution service rather than a true industry ombudsperson.[138] Contrary to the requirement of the Canadian Securities Administrators ("CSA") representing all provincial and territorial securities regulators that all registered dealers and advisers except in Québec use the OBSI as their common dispute resolution service,[139] the *Bank Act* permitted financial institutions to choose their approved ECB.[140] With the Bank of Nova Scotia's decision in 2018 to use ADRBO, only two of Canada's five largest banks remain registered with the OBSI.[141] Indeed, Sarah Bradley, the Ombudsman and Chief Executive Officer of the OBSI, indicated, in 2018, that consumer protection in the banking sector was at a "tipping point" and that "round 70 per cent of Canadians are not going to have access to a non-profit, public-service-oriented ombudsman to help if they've got a problem with the banks that they can't solve for themselves."[142]

Already confusing and obscure for many financial consumers,[143] the absence of a national and universal ombudsperson for all financial consumer complaints has been criticized by

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Regulations, SOR/2013-48 repealed by SOR/2021-181, s 122 and replaced by *Bank Act*, *supra* note 17, s 627.471–27.54 (External Complaints Body). Since 2023, the website states: "operates according to standards set out in section 627.49 of the *Bank Act* and is overseen by the Financial Consumer Agency of Canada (FCAC)."

[138] Deborah Battell & Nikki Pender, "Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate," (May 2016) at 2, online: *OBSI* <obsi.ca/en/news-and-publications/resources/PresentationsandSubmissions/2016-Independent-Evaluation-Investment-Mandate.pdf>.

[139] Canadian Securities Administrators, "National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations" which has been adopted by CSA members (except in Québec where the mediation regime is administered by the Autorité des marchés financiers); Canadian Securities Administrators, *News Release*, "Canadian securities regulators mandate OBSI's dispute resolution service for registered dealers and advisers" (19 December 2013), online: CSA <securities-administrators.ca/aboutcsa.aspx?id=1205&terms=OBSI>.

[140] *Bank Act*, *supra* note 17, s 455.01.

[141] Pete Evans, "Scotiabank to stop using consumer dispute body OBSI in November," (9 July 2018), online: *CBC News* <cbc.ca/news/business/scotiabank-obsi-1.4815023>; *OBSI, Annual Report 2022*, *supra* note 130 at 32–34.

[142] Geoff Zochodne, "Possible expansion of OBSI's role in investigating complaints set off alarm bells in financial industry: filing" Financial Post (13 September 2018), online: *Financial Post* <business.financialpost.com/news/fp-street/possible-expansion-of-obsis-role-in-investigating-complaints-set-off-alarm-bells-in-financial-industry-filing>.

[143] Investor Advisory Panel of the Ontario Securities Commission, *Letter to OSC Chair Howard Wetston* (1 February 2012), online: *OSC* <osc.gov.on.ca/documents/en/Investors/iap_20120201_obsi-letter.pdf> [Investor Advisory Panel of the Ontario Securities Commission, *2012 Letter*].

many including the Canadian Association of Retired Persons, Canada's largest advocacy association for older Canadians, the Public Interest Advocacy Centre and the Canadian Foundation for the Advancement of Investor Rights ("FAIR Canada").[144] According to these consumer organizations, the banks' ability to choose their own arbitrator favours institutional interests, creates one-sided competition and undermines independence and impartiality resulting in "unfairness to consumers and prevents there from being an adequate consumer protection framework."[145] Several concerns have also been raised about the alternative dispute resolution service offered by ADRBO such as conflicts of interests, misaligned incentives, inadequate levels of transparency and accountability as well as severe risks to independence and impartiality.[146]

Although no bank chose to ignore the OBSI's recommendations in 2017, a serious obstacle to the effectiveness of the OBSI is that the OBSI's decisions are advisory only and the awards non-binding upon the complainant and the financial institution.[147] Contrary to most other countries with a comparable financial sector ombudsperson, the OBSI's inability to enforce its decisions "drives its operating model and prevents it from fulfilling the fundamental role of an ombudsman, securing redress for all consumers who have been wronged."[148]

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[144] Battell & Pender, *supra* note 138 at 2; Canadian Association of Retired Persons (CARP), "OBSI and the National Securities Regulator's Demise" (23 March 2012), online: *CARP* <carp.ca/2012/03/23/obsi-and-the-national-securities-regulators-demise/>; Public Interest Advocacy Centre (PIAC), "Financial Consumers Betrayed by Finance Minister's OBSI Decision" (1 May 2012), online: *PIAC* <piac.ca/our-specialities/financial-consumers-betrayed-by-finance-ministers-obsi-decision-2/>.

[145] FAIR Canada, "FAIR Canada Calls on the Government to Ensure Consumer Protection in Banking," (10 September 2018), online: *FAIR Canada* <faircanada.ca/category/whats-new/>.

[146] CARP, *supra* note 144; PIAC, *supra* note 144.

[147] OBSI*, Annual Report 2017*, *supra* note 130 at 4, 41.

[148] Battell & Pender, *supra* note 138 at 2; Financial Stability Board, "Consumer Finance Protection with particular focus on credit" (Basel, Switzerland, 26 October 2011), online: *Financial Stability Board* <financialstabilityboard.org/publications/r_111026a.pdf>: "The decisions of the ADR bodies are usually binding on the consumer credit provider, but not on the consumer who is able to seek alternative means of recourse if he/she is not satisfied with the outcome.". See also World Bank, "Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman" (January 2012) at 38, 43, online: *World Bank* <siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Financial_Ombudsmen_Vol1_Fundamentals.pdf>:

> So there is a growing trend towards bringing the sectors together in a single financial ombudsman. An ombudsman scheme that covers all financial services offers economies of scale and flexibility when workload swings between different financial sectors. It is also

According to the 2016 independent evaluation of the OBSI, the playing field was tilted in favour of firms and the OBSI's operating model was "overly focused on resolution through negotiated settlements rather than judicious use of determinations" resulting in longer resolution times and potential for future backlogs.[149] In addition, given the absence of any financial penalties imposed by the OBSI, financial institutions tend to offer lower settlements to complainants.[150] Rather than fulfilling an ombudsperson's role in the prevention of future complaints as well as the improvement of the financial services industry and consumer confidence, the OBSI with its "currently limited mandate-and therefore limited effectiveness, efficiency and value" was unable to secure effective redress for all financial consumers.[151]

In addition to concluding that "ADRBO is not meeting FCAC's expectations in terms of implementing the policies and procedures necessary to demonstrate an organizational commitment to effectiveness", many of the concerns raised by consumer advocacy groups have been confirmed by the FCAC's recent review in 2020 of the operation of external complaint bodies:

> FCAC's review has validated some of the broader concerns raised about the multiple-ECB model by consumers and consumer groups. The multiple-ECB model is not consistent with international standards. It introduces inefficiencies and increases the complexity of the external dispute resolution system for consumers. FCAC also has concerns about how allowing banks to choose the ECB negatively affects consumers' perceptions of the fairness and impartiality of the system. Finally, the Agency questions whether the one-sided competition between ECBs for member banks is accruing benefits to consumers.[152]

> simpler for consumers to understand. […] The ombudsman should have to power to issue a decision that can bind the financial business – or a recommendation that there is a reasonable expectation the financial business will follow, with any failure to follow the recommendation being published by the ombudsman.

[149] Battell & Pender, *supra* note 138 at 2.

[150] FAIR Canada, PIAC, CARP, Kenmar Associates, "Open Letter to OBSI Joint Regulators Committee" (21 February 2018), online: <s3.amazonaws.com/zweb-s3.uploads/carp/2018/02/180221-Final-letter-to-JRC.pdf>.

[151] Battell & Pender, *supra* note 138 at 2.

[152] Financial Consumer Agency of Canada, "The Operations of External Complaints Bodies: Industry Review," (February 2020) at 1–2, online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/operations-external-complaints-bodies.html> [FCAC, *Operations of External Complaints Bodies*].

Although it recognized the *G20 High-Level Principles on Financial Consumer Protection*, endorsed by G20 finance ministers and central bank governors, Canada had failed, until very recently, to implement a truly national, universal, "independent, impartial, and financially accessible body that provides Canadians with an effective way to resolve disputes with their banks and financial institutions."[153] Despite its intention to strengthen financial consumer protection and adhere to international standards, the current federal government has until very recently refused to modify the multiple-ECB model handling the complaints against Banks. Finally, new legislative reforms to the *Bank Act*, enacted in 2023, aim to increase transparency and accountability and permit the Minister to designate a single not-for-profit body corporate to be an ECB to handle complaints against Banks, replacing previously approved ECBs, and requiring all Banks to be a member.[154] In designating the OBSI as the ECB designated under the *Bank Act*, the federal government acknowledged as follows:

> For too long, banks have been able to choose who adjudicated complaints that Canadians have had with their bank. Canadians deserve an impartial advocate that will work on their behalf. Over the next year, OBSI will transition to better serve Canadians in dealing with their complaints in a timely, effective, and fair manner. Starting November 1, 2024, the strengthened OBSI will have jurisdiction to resolve complaints at all Canadian banks.[155]

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[153] OECD, "G20 High-Level Principles on Financial Consumer Protection," (October 2011), online: *OECD* <oecd.org/regreform/sectors/48892010.pdf> at 4 [*OECD, High-Level Principles, 2011*]; OECD Council, "G20/OECD High-Level Principles on Financial Consumer Protection," (updated 12 December 2022), online: *OECD* <oecd.org/daf/fin/financial-education/G20_OECD%20FCP%20Principles.pdf>; FAIR Canada, PIAC, CARP, Kenmar Associates, *supra* note 150 ; FAIR Canada, *supra* note 145; Investor Advisory Panel of the Ontario Securities Commission, *2012 Letter*, *supra* note 143, referring to Phil Khoury, "2011 Independent Review of the Ombudsman for Banking Services and Investments" The Navigator Company (2011) at 84-88; Investor Advisory Panel of the Ontario Securities Commission, Letter to OSC Chair Ursula Menke (18 February 2016), online: *OSC* <osc.gov.on.ca/documents/en/Investors/iap_20160218_evaluation-banking-services.pdf>.

[154] *Budget Implementation Act, 2023, No 1*, *supra* note 97, ss 128–47, amending *Bank Act*, *supra* note 17, s 627.48–27.49 and adding 627.471. See generally *Bank Act*, *supra* note 17, s 627.471–27.54.

[155] Canada, Deputy Prime Minister, "Government introduces measures to ensure Canadians are treated fairly by their banks," (17 October 2023), online: *Deputy Prime Minister of Canada* <deputypm.canada.ca/en/news/news-releases/2023/10/17/government-introduces-measures-ensure-canadians-are-treated-fairly>; *Notice (Ombudsman for Banking Services and Investments)*, (2023) C Gaz I, 3126 (10 October 2023).

From an operational perspective, the "FCAC estimates that consumers brought over 5 million complaints to banks in 2018" with most complaints being resolved internally.[156] In 2017, the OBSI opened 370 files related to banking services.[157] In comparison, 686 cases were opened in 2022 which represented a 33% increase from the previous year and a 185% increase since 2017.[158] In addition to e-transfers, "[c]redit cards, mortgage loans and personal transaction accounts, such as chequing and savings accounts, continue to be among the top bank products consumers complained about."[159] The OBSI reported that, in 2022, 21% of banking complaints ended with a monetary compensation totalling $398,668 and the average compensation being $3,241.[160] Other non-monetary compensation includes a "letter of apology, restoring a product or service, correcting a credit bureau record, or sending explanatory letters to a consumer's creditors." [161]

Operating on a cost-recovery basis of fees paid by the participating firm, expenses amounting to more than $8.2 and $10.4 million were paid in 2017 and 2022, respectively, according to the principle that registrants "each pay for the costs associated with resolving their group's complaints only."[162] The OBSI's budget for the upcoming years will undoubtedly increase given its new mandate as the single national ombud service for customers of all federally regulated Banks.

Notwithstanding these recent reinforcements to consumer protection and the overall positive reviews of the OBSI by the FCAC and in its most recent independent evaluation, important limitations remain on the powers and efficiency of the OBSI. Multiple evaluators have recommended that the OBSI review and improve its systemic issue reporting system to the Commissioner of the FCAC as required under the new Framework. [163] Although

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[156] FCAC, *Operations of External Complaints Bodies*, *supra* note 152 at 1.
[157] OBSI*, Annual Report 2017*, *supra* note 130 at 7, 18; OBSI*, Annual Report 2022*, *supra* note 130 at 27.
[158] OBSI*, Annual Report 2022*, *supra* note 130 at 26.
[159] OBSI*, Annual Report 2017*, *supra* note 130 at 25.
[160] OBSI*, Annual Report 2022*, *supra* note 130 at 26, 45.
[161] *Ibid* at 45.
[162] OBSI*, Annual Report 2017*, *supra* note 130 at 23, 54.
[163] *Bank Act*, *supra* note 17, s 627.49(d); FCAC, *Operations of External Complaints Bodies*, *supra* note 152 at 24, 27; Ombudsman for Banking Services and Investments, "Independent Evaluation of the Ombudsman for Banking Services and Investments' (OBSI) Banking Mandate," (1 September 2022) at

"there has not been an instance to date where a bank has refused to comply with the ECB's final recommendation concerning a complaint about banking products and services"[164] according to the FCAC, the effectiveness of the OBSI's power to grant consumer redress is limited by the lack of binding authority of its decisions. Independent evaluators recently confirmed these concerns as follows:

> We found that OBSI's inability to universally secure redress for consumers through the name and shame system continues to limit its effectiveness, as it provides an economic incentive for both parties to settle for amounts below OBSI's recommendation. As a result, we believe that OBSI should be given authority to render decisions that are binding on the parties to its process. This is consistent with international best practices and would bring more legitimacy to the system.[165]

With the coming into force of the new Framework on June 29, 2022, the OBSI must now publish on their website a summary of the final recommendation on a complaint including a description of the nature of the complaint, the name of the financial institution, a description of any compensation provided to the complainants, the reasons for the final recommendation, and any other prescribed information.[166] This requirement should provide additional leverage to better protect financial consumers. While the OBSI remains unable to enforce its final recommendations, it must now "without delay, inform the Commissioner [of the FCAC] in writing of cases in which an institution does not comply with a final recommendation". [167]

These recent legislative reforms provide clearer responsibilities and obligations on financial institutions and on the OBSI relating to the financial consumers complaints process and aim to empower and enable the OSBI to achieve its intended purpose as newly described in the *Bank Act*: "to enhance the process for dealing with complaints by establishing a regime comprised of a sole external complaints body that discharges its

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39–41, online: *OBSI* <obsi.ca/en/about-us/resources/Documents/Independent-External-Review---OBSI-Banking-Mandate---Final_EN.pdf> [OBSI, *Independent Evaluation*].

[164] FCAC, *Operations of External Complaints Bodies*, *supra* note 152 at 8.

[165] OBSI, *Independent Evaluation*, *supra* note 163 at 10, 52–54; FCAC, *Operations of External Complaints Bodies*, *supra* note 152 at 21.

[166] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 627.49(i).

[167] *Budget Implementation Act, 2023, No 1*, *supra* note 97, s 130, adding *Bank Act*, *supra* note 17, s 627.49(h.1).

functions and performs its activities in a transparent, effective, timely and fair manner based on the principles of accessibility, accountability, impartiality and independence".[168]

6.4.4.3 Financial Consumer Agency of Canada

Alongside the OBSI, the FCAC was established in 2001 "to consolidate and strengthen existing oversight activities currently dispersed among various federal entities" and "to strengthen oversight of new and existing consumer protection measures and expand consumer education activities."[169] This new federal government agency has been touted as "the Federal Government's most valuable contribution in the protection of consumer interests."[170]

Deriving its mandate from the *FCAC Act*, the FCAC supervises the market conduct of the three different types of federally regulated entities subject to federal legislation: 1) all FRFIs, including banks, insurance companies, trust and loan companies and financial cooperatives; 2) external complaints bodies, such as the OBSI handling escalated consumer complaints related to financial products and services; and 3) payment card network operators that establish the rules and controls governing the participants of the credit and debit card networks.[171] Contrary to most provincial and territorial jurisdictions where consumer protection authorities have broad mandates and oversee generally consumer protection in a wide range of industry sectors, the FCAC is specifically mandated to oversee the financial sector and explicitly responsible for overseeing financial consumer protection measures. Recent legislative reforms have consolidated these measures, which are now embodied in the definition of "consumer provision" in the *FCAC Act* and include provisions from every piece of legislation regulating FRFIs in Canada.[172]

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[168] *Bank Act*, *supra* note 17, s 627.471.
[169] Canada, 1999, *supra* note 58 at 46, 54–55.
[170] Jacob S Ziegel, "Consumer Insolvencies, Consumer Credit, and Responsible Lending" in Janis P Sarra, ed, *Ann Rev Insolv L 2009* (Toronto: Carswell, 2010) 343 at 389 [Ziegel, 2010].
[171] Financial Consumer Agency of Canada, *Supervision Framework* (April 2017) at 2, online: *FCAC* <canada.ca/content/dam/fcac-acfc/documents/services/industry/supervision-framework.pdf>.
[172] *Bank Act*, *supra* note 17, ss 2, 157(2)e), 195.1, 273.1, 627.02–27.998, 979.1–79.4, 992–1003; *Cooperative Credit Associations Act*, *supra* note 17, s 167(2)f)–g), 382.2(3), 385.05–85.28, 487.01–87.12; *Insurance Companies Act*, *supra* note 17, s 469.1(3), 479–89.3, 542.061(3), 598–607.2, 1034–1045; *Trust and Loan Companies Act*, *supra* note 17, s 161(2e)-f), 418.1(3), 425.1–44.3, 539.01–39.12.

Supervision of these federally regulated entities entails monitoring compliance with applicable consumer protection provisions, as well as all terms, conditions and undertakings imposed by the Minister of Finance and monitoring the implementation of voluntary codes of conduct adopted and public commitments made by financial institutions designed to protect the interests of customers.[173] In addition, the FCAC promotes consumer and public awareness about the obligations of federally regulated entities and "about all matters connected with the protection of consumers of financial products and services".[174]

Finally, the FCAC is responsible for monitoring and evaluating "trends and emerging issues that may have an impact on consumers of financial products and services," as well as playing a central role in consumer financial education by collaborating with stakeholders to "contribute to and support initiatives to strengthen the financial literacy of Canadians".[175] In order to fulfill its mandate in the monitoring of the market conduct of FRFIs, the FCAC relies on the OSBI and direct consumer complaints to prioritize internal resources by gathering information on emerging trends and issues. In 2022-2023, the FCAC received 6,294 direct consumer complaints with almost 50% relating to regulated entities' complaint-handling procedures and unsolicited credit cards.[176]

Typically, the majority of the FCAC operations are funded by an annual levy imposed on federally regulated entities and in 2017 represented over $13.6 million out of an operation budget of more than $17.6 million.[177] In comparison, assessments levied in 2022-2023 to pay for expenses for or in connection with the administration of the *FCAC Act* and the

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[173] *FCAC Act*, *supra* note 34, s 3; *Financial Consumer Agency of Canada Designated Violations Regulations*, SOR/2002-101, s 2 [FCAC, *Designated Violations Regulations*].
[174] *FCAC Act*, *supra* note 34, s 3(2)d), 3(3)d).
[175] *Ibid*, s 3(2)f)–g); Canada, 1999, *supra* note 58 at 54.
[176] Financial Consumer Agency of Canada, "Annual Report 2022-2023" (October 2023) at 20, online: *FCAC* <canada.ca/en/financial-consumer-agency/corporate/planning/annual-reports/annual-report-2022-2023.html> [FCAC, *Annual Report 2022-2023*].
[177] Financial Consumer Agency of Canada, "Annual Report 2016-2017" (10 June 2017) at 46, online: *FCAC* <canada.ca/en/financial-consumer-agency/corporate/planning/annual-reports/annual-report-2016-2017.html> [FCAC*, Annual Report 2016-2017*]; *FCAC Act*, *supra* note 34, at 13(2), 18; *Financial Consumer Agency of Canada Assessment of Financial Institutions Regulations*, SOR/2001-474.

protection of financial consumers totalled $44,8 million representing 90% of the FCAC's total expenses.[178]

A comparison of the FCAC's last annual report with its report five year prior for 2016-2017 reveals that expenses related to supervision and promotion of responsible market conduct more than doubled in 2022-2023 to $9,49 million.[179] While half of the FCAC's budget went to financial literacy in 2016-2017, related expenses represented only 7.3% in 2022-2023. Finally, expenses for internal services increased from one quarter to two thirds of the FCAC's total expenses.

A simple review of the FCAC website reveals that the FCAC has contributed significantly to the consolidation and the development of financial education tools and information available to financial consumers, which was sparse before the establishment of the FCAC. With the priority given to this mandate and the funding allocated since 2001, it is no surprise that Canadians have benefitted as revealed by the latest OECD study on the levels of financial literacy of adults that Canada, with an average point score of 14.6 out of 21 points for knowledge, behaviour and attitudes, ranks third among the G20 countries with comparable statistics.[180]

Notwithstanding these positive comparative findings, the FCAC's ongoing focus and concern about the financial literacy of Canadians confirm its initial assessment that "many consumers lacked the basic financial knowledge needed to make sound decisions about their money."[181] As a result and given the inherent complexity of financial products and

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[178] Financial Consumer Agency of Canada, "Financial Statements of Financial Consumer Agency of Canada," (31 March 2023) at 5, online: *FCAC* <canada.ca/content/dam/fcac-acfc/documents/corporate/planning/annual-reports/financial-statements-2022-2023.pdf>.

[179] FCAC*, Annual Report 2016-2017*, *supra* note 177 at 31–36; FCAC*, Annual Report 2022-2023*, *supra* note 176 at 21.

[180] OECD, *G20/OECD INFE report on adult financial literacy in G20 countries*, (July 8, 2017) at 8, online: *OECD* <oecd.org/daf/fin/financial-education/G20-OECD-INFE-report-adult-financial-literacy-in-G20-countries.pdf>.

[181] Financial Consumer Agency of Canada, "Financial literacy background," (14 July 2021), online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/financial-literacy/financial-literacy-history.html>. See also various reports on the FCAC's website including Boris Palameta, Cam Nguyen, Taylor Shek-wai Hui & David Gyarmati, "The Link Between Financial Confidence and Financial Outcomes Among

services, consumer empowerment can only go so far. Supervision and enforcement of the financial consumer protection framework are essential to protect consumers and provide some type of dissuasion against unethical behaviour, fraud, abuse and misconduct.

As a regulatory agency, the FCAC first notifies the FRFI of the contravention of or non-compliance with federal financial consumer provisions, codes of conduct and public commitments.[182] "[D]epending on the severity and frequency of the problem," the FCAC also had the authority to impose administrative monetary penalties on federally regulated entities for non-compliance with regulatory designated violations, including any consumer provision.[183] Prior to the recent reforms, the penalty amount could be as high as $50,000 for an individual and $500,000 for a financial institution or a payment card network operator.[184] In the year ending March 31, 2017, the FCAC levied $460,000 in administrative monetary penalties compared to none in 2016 and 2015, and to $775,000 in 2014, $280,000 in 2013 and $212,500 in 2012.[185] Although it did not have the power to enforce its recommendations nor the authority to compel compliance or redress, the FCAC "led financial institutions to reimburse consumers approximately $10.5 million to approximately 1.2 million accounts" in 2016-2017.[186] In addition to possible monetary penalties and criminal sanctions as well as the possible public shaming by naming the non-compliant financial institution, the FCAC may also encourage a financial institution to make a public commitment to remedy an issue.[187] The implementation of these commitments could thereafter be monitored by the FCAC.

Working-aged Canadians – Executive Summary (May 2016), online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research.html>.

[182] Financial Consumer Agency of Canada, *Financial Consumer Agency of Canada's mandate*, (2018) online: *FCAC* <canada.ca/en/financial-consumer-agency/corporate/mandate.html> [*FCAC Mandate*].

[183] *Ibid*; *FCAC Act*, *supra* note 34, ss 19–20; FCAC, *Designated Violations Regulations*, *supra* note 173.

[184] *FCAC Act*, *supra* note 34, s 19(2).

[185] FCAC*, Annual Report 2016-2017*, *supra* note 177 at 58, 70. See Financial Consumer Agency of Canada, "Annual reports," (last modified 20 November 2023), online: *FCAC* <canada.ca/en/financial-consumer-agency/corporate/planning/annual-reports.html> [FCAC, *Annual Reports*].

[186] FCAC*, Annual Report 2016-2017*, *supra* note 177 at 32; FCAC*, Report on Best Practices*, *supra* note 31 at 40, 43.

[187] *FCAC Act*, *supra* note 34, s 3(2)(b.1)–(c), 3(3)–(4).

Although these results were signs of the FCAC's increasing effectiveness in its supervisory and regulatory role, "there [was] solid evidence showing triumph with prudential regulation in Canada's financial services sector [… but] [m]arket conduct regulation [remained] a source of tribulation".[188] Following their review of financial consumer protection in Canada, Robert Kerton and Idris Ademuyiwa recommended in 2018 that additional regulation should be adopted that "reduces rewards for harmful innovations and make it easier for positive innovations to enter the financial market".[189]

Complementing the new Framework, the FCAC's mandate has been strengthened since 2020 with statutory enhancements to the supervisory role and enforcement powers of the FCAC. The objective of the legislative reforms was "to introduce legislation that would strengthen the Financial Consumer Agency of Canada's tools and mandate and continue to advance consumers' rights and interests when dealing with their banks".[190] The broadening and strengthening of the FCAC's mandate is certainly reflected in the significant increase of the FCAC's total expenses from $17,63 million in 2016-2017 to $49.8 million in 2022-2023.[191] The *FCAC Act* now enshrines the purpose and mandate of the agency relating to the supervision and protection of consumer provisions:

> The purpose of this Act is to ensure that financial institutions, the external complaints body and payment card network operators are supervised by an agency of the Government of Canada so as to contribute to the protection of consumers of financial products and services and the public, including by strengthening the financial literacy of Canadians. [192]

The FCAC's mandate is further clarified in the statutory objects prescribed in the Act requiring the FCAC to "tak[e] into account the need of financial institutions to efficiently

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[188] Robert R Kerton & Idris Ademuyiwa, "Financial Consumer Protection in Canada: Triumphs and Tribulations" in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection*, 1st ed (Singapore: Springer, 2018) 85 at 117.

[189] *Ibid*.

[190] House of Commons, "Equality + Growth: A Strong Middle Class" by William Morneau (Minister of Finance), Sessional Paper, 42-1, No 8570-421-19 (27 February 2018) at 356, online: Canada <budget.canada.ca/2018/docs/plan/toc-tdm-en.html> [Canada, *Budget 2018*].

[191] See FCAC, *Annual Reports*, *supra* note 185.

[192] *Budget Implementation Act, 2018*, *supra* note 33, ss 337–38, adding *FCAC Act*, *supra* note 34, s 2.1 and modifying s 3, amended by *Budget Implementation Act, 2023, No 1*, *supra* note 97, s 140.

manage their business operations" when it "strive[s] to protect the rights and interests of consumers of financial products and services and the public".[193]

The FCAC published a new framework governing the agency's procedure to determine administrative monetary penalties, which have increased significantly from $50,000 to $1,000,000 in the case of a violation that is committed by a natural person, and from $500,000 to $10,000,000 in the case of a violation that is committed by a financial institution or a payment card network operator.[194] Once a Notice of Violation is issued and the regulated entity makes their representations, the agency determines responsibility and the appropriate penalty. The *FCAC Act* now clarifies that the purpose of a penalty is to promote compliance with the consumer provisions, compliance agreements, any terms and conditions, undertakings or directions and "not to punish".[195] The *FCAC Administrative Monetary Penalties Framework*[196] guides the FCAC in its review of the prescribed criteria to determine the amount of the penalty: the degree of intention or negligence, the harm done by the violation, the duration of the violation, the ability of the person to pay the penalty and the history of any prior violations within the five-year period before the violation.[197] During the last three years, the FCAC imposed penalties totalling $2.725 million in 2020-2021, $650,000 in 2021-2022 and $5.6 million in 2022-2023 on federally regulated financial entities and ECBs according to FCAC's *Annual Reports*.

Prior to this legislative reform, the *Bank Act* did not provide the FCAC with powers to enforce its recommendations nor the authority to compel compliance or redress. The 2018 reforms now authorize the Commissioner of the FCAC to "direct" a bank to comply or to perform any act if a bank fails to comply with a compliance agreement or FCFP Requirements and has a reasonable opportunity to make representations.[198] Moreover, the

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[193] *Budget Implementation Act, 2018*, *supra* note 33, s 338, adding *FCAC Act*, *supra* note 34, s 3(2)b).
[194] *Budget Implementation Act, 2018*, *supra* note 33, s 344, adding *FCAC Act*, *supra* note 34, s 19(2).
[195] *Budget Implementation Act, 2018*, *supra* note 33, s 346, adding *FCAC Act*, *supra* note 34, s 20.1.
[196] Financial Consumer Agency of Canada, *FCAC Administrative Monetary Penalties Framework* (10 August 2023), online: *FCAC* <canada.ca/en/financial-consumer-agency/services/industry/commissioner-decisions/administrative-monetary-penalties-framework.html>. (first published on 15 June 2021).
[197] *Budget Implementation Act, 2018*, *supra* note 33, s 345, amending *FCAC Act*, *supra* note 34, s 20.
[198] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 661.1.

Commissioner may "apply to a court for an order requiring the bank, authorized foreign bank or person to comply with the compliance agreement or the direction, cease the contravention or do anything that is required to be done, and on the application the court may so order and make any other order it thinks fit".[199] Previously optional, the Framework now requires that the FCAC name and shame the offending bank by making public "the nature of a violation, the name of the person who committed it and the amount of the penalty imposed".[200] Finally, amendments to the *Bank Act* further strengthen the FCAC's supervisory powers of regulated entities. In addition to the FCAC's responsibility to inquire yearly whether Banks are compliant with the applicable consumer provisions and reporting the results to the Minister, the FCAC is empowered to direct a special audit of a bank, an authorized foreign bank or the OBSI if required for the purposes of the administration of the *FCAC Act* and the consumer provisions of the *Bank Act*.[201] The FCAC may appoint a firm of accountants to carry out the audit at the expense of the regulated entity.

6.4.5 Credit Business Practices Regulations

Along with the establishment of the aforementioned national regulatory and consumer protection agencies, further efforts have been expended to better protect financial consumers. In 1997, the federal government recognized that "the special nature of the relationship between financial institutions and their customers renders customers particularly vulnerable to coercion"[202] and imposed restrictions on coercive tied selling, which occurs when a bank uses coercion to require a customer to purchase another financial product or service as a condition of obtaining a loan.[203] Believing that "concerns about coercive tied selling are justified in light of conditions in today's marketplace" the government broadened the scope of the coercive tied selling provision in 2001 to any type of financial product or service, rather than just loans, and required "banks to disclose to

[199] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 661.2.
[200] *Budget Implementation Act, 2018*, *supra* note 33, s 347, adding *FCAC Act*, *supra* note 34, s 31.
[201] *Budget Implementation Act, 2018*, *supra* note 33, s 331, adding *Bank Act*, *supra* note 17, s 659.
[202] Canada, 1999, *supra* note 58 at 59–60.
[203] *Bank Act*, *supra* note 17, s 459.1, as amended by *Act to Amend Financial Institutions*, 1997, *supra* note 57, s 55; SC 1999, c 28, s 24.1(F); SC 2001, c 9, s 124; SC 2007, c 6, s 35; SC 2012, c 5, s 48.

consumers the fact that coercive tied selling is illegal, prior to entering into a combination of financial transactions."[204]

Another attempt from a policy perspective to help people manage credit card debt better was the development of new regulations to limit "business practices that are not beneficial to consumers and to provide clear and timely information to Canadians about credit cards."[205] Accordingly, the *Credit Business Practices Regulations*[206] introduced, in 2009, several reforms related to credit cards. Minimum grace periods are now required on new purchases for consumers who pay their balances in full each month and fees cannot be charged for reaching credit limits based solely on merchant holds. Credit card issuers are further required to allocate payments to high-interest items first, or proportionally, to the benefit of the consumer and to obtain consent to raise consumer's credit limits.

These new regulations also included national standards for debt collection practices comparable to existing provincial regulations but applicable to the collection of outstanding credit agreements with FRFIs. These financial institutions, including any collection agencies or other agents acting on their behalf, are required when collecting a debt to disclose specific information to a debtor, such as the details of the debt, the amount owed and the type of debt, as well as the identity of any person who is attempting to collect the payment on behalf of the institution and their relationship with the institution. Regulation further prohibits practices such as false or misleading statements and restricts the manner in which collection services are executed as well as communications with the debtor, his or her family and any relative, neighbour, friend, acquaintance and employer.

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[204] Canada, 1999, *supra* note 58 at 59–60; *FCAC Act*, *supra* note 34, s 124, adding *Bank Act*, *supra* note 17, s 459.1(4.1): "A bank shall disclose the prohibition on coercive tied selling set out in subsection (1) in a statement in plain language that is clear and concise, displayed and available to customers and the public at all of its branches and at all prescribed points of service in Canada."

[205] Canada, Department of Finance, *Canada's Economic Action Plan*, A Third Report to Canadians (September 2009) at 141, online: *Canada* <fin.gc.ca/pub/report-rapport/2009-3/index-eng.asp>.

[206] *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies, and Foreign Insurance Companies) Regulations*, SOR/2009-257 (CIF 2010).

These regulations were followed in 2012 with the *Negative Option Billings Regulation*,[207] which mandates FRFIs to obtain a consumer's express consent before providing that consumer with a new primary or optional financial product or service. It also requires disclosure about the optional financial product or service and the manner in which a refund or credit must be given to the consumer in the event an optional financial product or service is cancelled. In addition, when an optional product or service is provided on an ongoing basis, the borrower must be informed of their right to cancel the product or service in every disclosure statement.[208]

Finally, before reviewing measures regulating home lines of credit, it is worth noting that according to the FCAC, FRFIs are expected to "establish policies and procedures to ensure compliance with these regulations."[209]

With the recent reforms, the consumer protection provisions found in the *Credit Business Practices Regulations* and the *Negative Option Billings Regulation* applicable to Banks have been repealed and consolidated in the FCPF Requirements. Previous regulations now only apply to trust and loan companies, retail associations as well as Canadian and foreign insurance companies.[210]

In addition to implementing enhancements in the areas of corporate governance, access to basic banking services and public reporting, new provisions in the FCPF Requirements related to consumer credit included the consolidation of business practices regarding businesses' advertisements, requirements of the terms of agreement, requirement of obtaining the express consent of consumers, the cancellation of products and services, maximum liability of unauthorized use of credit cards and prepayment and renewal of loans and mortgages. Previously existing market conduct consumer provisions are also now found in the Framework such as the prohibitions against false or misleading information

[207] *Negative Option Billings Regulations*, SOR/2012-23 (CIF 2012).
[208] *Ibid*, s 7, as amended by *Regulations Amending Certain Department of Finance Regulations (Miscellaneous Program)*, SOR/2020-47, s 21.
[209] FCAC, "Frequently asked questions: Regulations", *supra* note 67.
[210] *FCPF Regulations*, *supra* note 34, ss 106–07, 116–17.

and coercive sales practices such as imposing undue pressure on a person, or coercing a person, for any purpose including to obtain a product or service, as a condition for obtaining another product or service from the institution.[211]

The new Framework increases a bank's accountability to the FCAC for its internal complaints process, which will need to be satisfactory to the Commissioner, including a new complaint management framework as well as additional administrative and disclosure requirements.[212] The new FCAC's *Guideline on Complaint-Handling Procedures for Banks and Authorized Foreign Banks* provides additional clarifications on the establishment and implementation of complaint-handling policies and procedures.[213] The *Bank Act* now requires Banks to designate a new committee of the board of directors to ensure compliance with their internal procedures and with the new consumer provisions.[214] For the first time, Banks will be required to deal with customer complaints within 56 days and must provide a substantive written response.[215] If the bank is unable to resolve the complaint to the satisfaction of the complainant, the bank must close it, thereby enabling the person to address the complaint to the OSBI. The Guideline further directs Banks to redress and reimburse consumers for financial and non-financial impacts when appropriate. Finally, "[w]here a recurring or systemic issue has been identified, complaint-handling Policies and Procedures should ensure that the Bank provides redress and reimbursement to all affected Consumers."[216]

Along with an increase monitoring of complaints made to Banks, whistleblowing is another mechanism provided to the FCAC to uncover any wrongdoing or misconduct including a

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[211] *Budget Implementation Act, 2018*, *supra* note 33, s 329. adding *Bank Act*, *supra* note 17, s 627.03–27.04.

[212] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 627.43–27.47.

[213] Financial Consumer Agency of Canada, *Guideline on Complaint-Handling Procedures for Banks and Authorized Foreign Banks* (27 January 2022) (CIF 30 June 2022), online: <canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/complaint-handling-procedures-banks.html> [FCAC, *Guideline on Complaint-Handling Procedures*].

[214] *Budget Implementation Act, 2018*, *supra* note 33, ss 316–19, adding *Bank Act*, *supra* note 17, s 195.1 and modifying ss 157(2)(e), 330(1). See generally *Bank Act*, *supra* note 17, s 627.43–27.47; *FCPF Regulations*, *supra* note 34, ss 14–17.

[215] *Bank Act*, *supra* note 17, s 627.43(1)(a); *FCPF Regulations*, *supra* note 34, s 14.

[216] FCAC, *Guideline on Complaint-Handling Procedures*, *supra* note 213.

contravention of any provision of the *Bank Act* or the regulations, of a voluntary code of conduct or a policy or procedure that a bank has adopted.[217] Pursuant to Part XVI.1 of the *Bank Act*, any employee

> who has reasonable grounds to believe that the bank, authorized foreign bank or any person has committed or intends to commit a wrongdoing may report the particulars of the matter to the bank or authorized foreign bank or to the Commissioner, the Superintendent, a government agency or body that regulates or supervises financial institutions or a law enforcement agency.[218]

The identity of the whistleblower shall be kept confidential, with some exceptions, and the bank is prohibited from taking any adverse action against the person. The FCAC published a new *Guideline on Whistleblowing Procedures for Banks and Authorized Foreign Banks* which requires Banks to establish and implement internal procedures and policies to enable employees to report wrongdoing defined in the Act as any provisions of *Bank Act* or the regulations, a voluntary code of conduct or a public commitment, and a policy or procedure established by a bank.[219] According to the Guideline, Banks must investigate the reports of wrongdoing "appropriately and in a timely manner" requiring the allocation of "adequate financial, technical and human resources". The FCAC has also created a "whistleblower program for bank employees who want to report a wrongdoing [directly] to FCAC in accordance with the *Bank Act*".[220]

Similar to the new affordability test imposed on mortgage lenders and the suitability assessment for investment products and services, the *Bank Act* now includes a new test requiring a bank to "establish and implement policies and procedures to ensure that the products or services in Canada that it offers or sells to a natural person other than for business purposes are appropriate for the person having regard to their circumstances,

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[217] *Budget Implementation Act, 2018*, *supra* note 33, s 334, adding *Bank Act*, *supra* note 17, s 979.1-979.4.
[218] *Bank Act*, *supra* note 17, s 979.2(1).
[219] Financial Consumer Agency of Canada, *Guideline on Whistleblowing Procedures for Banks and Authorized Foreign Banks* (18 March 2022) (CIF 30 June 2022), online: <canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/whistleblowing-procedures.html>; *Bank Act*, *supra* note 17, s 979.1.
[220] Financial Consumer Agency of Canada, "Financial Consumer Agency of Canada's whistleblower program for employees of federally regulated banks" (15 August 2023), online: <canada.ca/en/financial-consumer-agency/corporate/contact-us/whistleblower-program.html#toc4>.

including their financial needs".[221] Given that Banks had opposed a fair treatment requirement or a fairness regime during the first consultations[222], the new provision seems to be a precursory suitability test of financial products and services providing initial flexibility and permitting the Banks to develop policies and procedures, which will not be unduly restrictive to their operations.

In its *Report on Best Practices* and *Domestic Bank Retail Sales Practices Review*, the FCAC concluded, in 2018, that the Banks' predominant focus on selling products and services and current practices rewarding sales success increase "the risk that consumers' interests are not always given the appropriate priority" and "the risk of mis-selling and breaching market conduct obligations".[223] Although the FCAC did not find "widespread mis-selling during its review" of banking sales practices, existing governance frameworks and controls were insufficient to mitigate these risks. To better protect financial consumers, the *Bank Act* now requires Banks to ensure that remuneration, payments or other benefits offered to its officers and employees do "not interfere with the person's ability to comply with the policies and procedures" implementing the suitability test.[224] Additional new provisions further clarify various prohibited conduct, such as taking advantage of a person, imposing undue pressure or coercing a person for any purpose thus enlarging current prohibitions against coercive tied selling.[225]

6.4.6 Home Equity Lines of Credit ("HELOC")

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[221] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 627.06. See also Financial Consumer Agency of Canada, *Guideline on Appropriate Products and Services for Banks and Authorized Foreign Banks* (24 February 2022) (CIF 30 June 2022), online: <canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/guideline-appropriate-products-services-banks.html>.

[222] Canadian Bankers Association, *Canada's Financial Consumer Protection Framework: Consultation Paper* (February 28, 2014) at 9–10, online: *CBA* <cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/sub_20140227_consumerprotection_en.pdf>.

[223] FCAC*, Report on Best Practices*, *supra* note 31; Financial Consumer Agency of Canada, *Domestic Bank Retail Sales Practices Review* (March 20, 2018) at 1-2, online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/bank-sales-practices.html>.

[224] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 627.07.

[225] *Budget Implementation Act, 2018*, *supra* note 33, s 329, adding *Bank Act*, *supra* note 17, s 627.04.

In addition to previously mentioned consumer credit products and services, another financial product innovation of financial institutions is the ability of borrowers to secure additional consumer credit with real property. First appearing in the late 1970s, the accessibility and use of home-equity lines of credit ("HELOC") grew substantially during the mid-1990s but experienced a rapid expansion in the new millennium.[226] Typically, HELOCs are revolving, non-amortized credit products secured indefinitely by a lien on the borrower's residential property in the form of a standalone product or a readvanceable mortgage.[227] Although more complex, the latter product gives the financial consumer access to the increasing equity of the residential property by increasing the available revolving credit as the principal on the amortized mortgage is paid down. This revolving relatively low-interest credit is easily accessible for most homeowners, offers flexible repayment options usually requiring interest-only payments and are often the "default options at the large majority of federally regulated lenders."[228]

Primarily driven by low interest rates, rising house prices, product innovation, favourable lending terms and increased marketing,

> HELOC balances grew from approximately $35 billion in 2000 to approximately $186 billion by 2010, for an average annual growth rate of 20 percent. During this period, HELOCs emerged as the largest and most important form of non-mortgage consumer debt, growing from just over 10 percent of non-mortgage consumer debt in 2000 to nearly 40 percent of non-mortgage consumer debt in 2010. In comparison, credit cards have consistently represented around 15 percent of non-mortgage consumer debt.[229]

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[226] Financial Consumer Agency of Canada, "Home equity lines of credit: Market trends and consumer issues," (6 July 2017) at 1, online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/home-equity-lines-credit-trends-issues.html> [FCAC*,* "Home equity lines of credit"].

[227] *Ibid* at 1, 4: "FCAC found that 80 percent of the approximately 3 million HELOC accounts were held under readvanceable mortgages in 2016". See also DBRS, *Rating Canadian residential mortgages, home equity lines of credit and reverse mortgages*, Toronto, (November 2014), online: *DBRS* <dbrs.com/research/318820/rating-canadian-residential-mortgages-home-equity-lines-of-credit-and-reverse-mortgages>.

[228] FCAC, "Home equity lines of credit", *supra* note 226 at 6. See also Leila Al-Mqbali, "Reassessing the Growth of HELOCs in Canada Using New Regulatory Data," (May 2019), online: <bankofcanada.ca/2019/05/staff-analytical-note-2019-14/> at 1.

[229] FCAC, "Home equity lines of credit", *supra* note 226 at 2.

Noting a similar increase, recent analysis by Statistics Canada revealed that "HELOCs as a proportion of non-mortgage debt grew from 10.5% in January 2000, to 32% by January 2021 and accounted in 2021 for nearly 44% of outstanding non-mortgage debt loaned by chartered banks.[230] According to the Bank of Canada calculations of regulatory data, the "[g]rowth of HELOCs has recently outpaced growth of mortgages".[231]

The attractiveness and accessibility of this lending product were further increased in 2007 by regulatory reform aimed at loosening limits imposed on lending institutions by increasing the maximum loan-to-value ratio from 75 per cent to 80 per cent of the value of the property at the time of the loan.[232] As a result, HELOCs became an important driver behind the expansion of household debt. According to a FCAC study, in 2017, debt and household income had previously increased at a similar rate and the ratio between them was relatively stable.[233] However, recent statistics confirm the increasing ratio of debt to disposable income, with growing HELOC balances contributing to a larger expansion of consumer credit. With the Canadian recession of 2008-2009, the COVID-19 pandemic and the introduction of new regulations and guidelines, the growth of the HELOC market has stabilized with outstanding HELOC balances in Canada reducing from $211 billion in 2016 to $152 billion in 2023.[234]

In response to evolving risks for debtors and lenders alike and concern about the potential overuse of revolving mortgage products, the federal government has increased the regulation of Canadian residential mortgage lending by FRFIs in recent years. Since 2008, the federal government has implemented several changes to the rules for government-backed insured mortgages, insured through the Canadian Mortgage and Housing Corporation ("CMHC") and private sector mortgage insurers. To curb borrower appetites, Parliament enacted the *Protection of Residential Mortgage or Hypothecary Insurance Act*

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[230] Michael Daoust & Matthew Hoffarth, *Trends in household non-mortgage loans: The evolution of Canadian household debt before and during COVID-19* (Ottawa: Statistics Canada, 2021) at 16.
[231] Al-Mqbali, *supra* note 228 at 2.
[232] *Act to Amend Financial Institutions, 2007*, *supra* note 62, ss 27, 161, 227, 359.
[233] FCAC, "Home equity lines of credit", *supra* note 226 at 2.
[234] *Ibid* at 3; Bank of Canada, "Chartered banks: Home equity lines of credit (HELOCs)," (last visited 3 October 2023), online: *Bank of Canada* <bankofcanada.ca/rates/banking-and-financial-statistics/chartered-banks-home-equity-lines-of-credit-helocs/>.

and adopted the *Eligible Mortgage Loan Regulations* and the *Housing Loan (Insurance, Guarantee and Protection) Regulations*, which outlined the criteria that a mortgage must meet to be eligible for insurance by an approved mortgage insurer.[235]

New mortgage rules eliminate mortgage insurance on secured lines of credit, reduce the maximum amortization period of mortgages as well as the maximum loan-to-value allowed for mortgages, thus reducing the amounts available for HELOCs. Theses restrictions to homeowners' ability to leverage their residential property through HELOCs are found in the OSFI's guideline on *Residential Mortgage Underwriting Practices and Procedures* issued in 2014 and modified in October 2017, which "sets out OSFI's expectations for prudent residential mortgage underwriting, and is applicable to all federally regulated financial institutions that are engaged in residential mortgage underwriting and/or the acquisition of residential mortgage loan assets in Canada," including HELOCs.[236] FRFIs are therefore required to assess and mitigate the associated risks of HELOCs.[237] According to the FCAC,

> OSFI's B-20 Guideline lowered the maximum loan-to-value (LTV) ratio for HELOCs offered by federally regulated lenders from 80 to 65 percent of the residential real estate used as security. This limits the amount of potentially more persistent debt that consumers can borrow against their home. Consumers can increase their leverage by another 15 percent, but they must use an amortized mortgage product to increase their LTV ratio to 80 percent.[238]

In 2014, the Guideline required that "FRFIs should ensure that they make a reasonable enquiry into the background, credit history, and borrowing behaviour of a prospective residential mortgage loan borrower as a means to establish an assessment of the borrower's

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[235] *Protection of Residential Mortgage or Hypothecary Insurance Act*, SC 2011, c 15, s 20 (CIF 1 January 2013); *Eligible Mortgage Loan Regulations*, SOR/2012-281; *Housing Loan (Insurance, Guarantee and Protection) Regulations*, SOR/2012-232. See also *Regulatory Impact Analysis Statement*, (2012) C Gaz II, 2967: "The regulations also reflect the changes the Government made to the rules for government-backed insured mortgages in 2008, 2010, 2011, and […] in June 2012."

[236] Office of the Superintendent of Financial Institutions Canada, *Guideline on Residential Mortgage Underwriting Practices and Procedures: B-20* OSFI, 2014) [OSFI, *B-20 Guideline, 2014*].

[237] *Ibid* at 13.

[238] FCAC, "Home equity lines of credit", *supra* note 226 at 1. According to the OSFI, *B-20 Guideline, 2014*, *supra* note 236 at n 16 "[a]dditional mortgage credit (beyond the LTV ratio limit of 65 percent for HELOCs) can be extended to a borrower. However, the loan portion over the 65 percent LTV ratio threshold should be amortized."

reliability to repay a mortgage loan."[239] It further tightened lending rules for homes worth more than $500,000 and prescribed a new stress test in 2016 to ensure that borrowers are able to withstand changing economic circumstances, such as a rise in interest rates or a loss of income.[240] Since 2021, the qualifying rate is "the greater of the mortgage contractual rate plus 2% or 5.25%".[241]

Accordingly, the eligibility criteria for government-backed insured mortgages now include an assessment of the credit score, the gross debt service ratio and the total debt ratio, as well as a new affordability test requiring the mortgage lender to determine whether it is "reasonably likely to be repaid, having regard to the borrower's capacity to make the loan payments while paying their other debts and meeting their other obligations over the term of the loan, based on reasonable assumptions as to what the highest loan payment over the term of the loan will be".[242] Stephanie Ben-Ishai aptly summarized the criteria of these new requirements as follows:

> Borrowers are also restricted from having a gross debt service (GDS) ratio of 39% or higher, or a total debt service (TDS) ratio of 44% or more. The GDS ratio is calculated by adding the carrying costs of the home, including the mortgage payment, property taxes, condo fees, and heating costs, relative to borrowers' income. The TDS ratio takes a wider view of borrowers' commitments, looking at the carrying costs of the home and all other debt payments relative to borrowers' income.[243]

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[239] OSFI, *B-20 Guideline, 2014*, *supra* note 236.

[240] See generally: *supra* note 234; Dawn Jetten, Paul Belanger & Salome Fernandez, *New Federal Rules for the Residential Mortgage Market*, (13 January 2016), online: *Blakes* <blakes.com/mobile/bulletins/Pages/Details.aspx?BulletinID=2255>.

[241] Office of the Superintendent of Financial lnstitutions, "Residential Mortgage Underwriting Practices and Procedures Guideline (B-20)," (12 January 2023), online: <osfi-bsif.gc.ca/en/guidance/guidance-library/infosheet-residential-mortgage-underwriting-practices-procedures-guideline-b-20> [OSFI, *B-20 Guideline, 2023*].

[242] *Eligible Mortgage Loan Regulations*, *supra* note 235, ss 5(1)(g)–(j), 6(1)(j)–(m).

[243] Stephanie Ben-Ishai, "Home Capital and Cross-Border Lessons in Mortgage Regulation" in *Dangerous Opportunities: The Future of Financial Institutions, Housing Policy, and Governance* (Toronto: University of Toronto Press, 2021) 58 at 63, referencing Department of Finance Canada, News Release, "Technical Backgrounder: Mortgage Insurance Rules and Income Tax Proposals" (14 October 2016), online: <canada.ca/en/department-finance/news/2016/10/technical-backgrounder-mortgage-insurance-rules-income-proposals-revised-october-14-2016.html>.

According to the OSFI, this new requirement has "created room to absorb the impact of the recent increases in mortgage interest rates".[244] In 2017, the Minister of Finance promoted and justified the most recent restrictions on mortgage lending as follows:

> [t]he Canadian economy faces ongoing vulnerabilities associated with elevated house prices and high household debt levels. The announced changes will improve the resiliency of the Canadian housing market, financial system and economy over the long term, while reducing taxpayers' exposure to losses associated with potential mortgage defaults.[245]

Although restrictions may have dampened consumer interest and access to HELOCs, the FCAC study confirmed the increased risk consumers expose themselves to when using these financial products. Described as a "home equity extraction debt spiral," the FCAC explained that less disciplined consumers may use their line of credit to pay for expected and ordinary expenses.[246] During periods of financial distress, this type of overborrowing can increase the consumer's vulnerability and eliminate any advantage provided by the line of credit. Moreover, the additional risk associated with these credit products can further reduce the equity built in the property. "Given that the loan-to-value ratio moves with a local house price index, borrowers accumulating large amounts of debt secured by housing may find themselves with minimal (or even negative) housing equity if the value of their house falls."[247]

Since 40% of consumers do not make regular payments towards their HELOC principal and 25% pay only the interest or make the minimum payment, the continuing use of this type of credit, eventually leads to debt persistence where a large majority does not repay their HELOC in full until they sell their home.[248] With the complexity of HELOCs, the lack of disclosure requirements[249] and the level of financial literacy of Canadians, it is of no surprise that financial consumers are making uninformed decisions. In comparison,

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[244] OSFI, *B-20 Guideline, 2023*, *supra* note 241.
[245] *Regulations Amending the Eligible Mortgage Loan Regulations*, SOR/2017-270 (CIF 17 October 2016); Canada, *Regulatory Impact Analysis Statement-Regulations Amending the Eligible Mortgage Loan Regulations*, (2017) Gaz Part II, Vol 151:26 [*Regulatory Impact Analysis Statement, 2017*].
[246] FCAC, "Home equity lines of credit", *supra* note 226 at 6.
[247] Al-Mqbali, *supra* note 228 at 4.
[248] FCAC, "Home equity lines of credit", *supra* note 226 at 7.
[249] *Ibid* at 9. See *Cost of Borrowing (Banks) Regulations 2001*, *supra* note 60, s 10 and Schedule 3 which provide the disclosure requirements for lines of credit, including HELOCs.

traditional mortgages tend to nudge the property owner to save by down paying the mortgage secured on the property and represented in the past a type of "forced saving vehicle" and part of the average household's retirement strategy.[250]

Although temporarily tempered by the increase in house prices, wealth erosion of Canadian financial consumers remains a real and immediate risk, especially given the aging population and the lack of retirement savings.[251] Indeed, in 2023, only 1 in 3 mortgage holders say "they can meet their financial commitments without difficulty" and almost 40% already "need to borrow to meet their daily expenses".[252]

The FCAC has also highlighted the macroeconomic risks to which the Canadian society is exposed.[253] Similar to the role HELOCs played in the US financial crisis, the ever-increasing household debt level in Canada increases the vulnerability of consumers to a payment shock in the event of rising interest rates leading to a drastic reduction in consumption, insolvency or even mortgage defaults. The negative impact on the country's economy would therefore be lengthier and more severe, which can in turn curtail investments and increase unemployment. Although recent regulatory reforms may have reduced the risk, a housing market correction could also have a significant shock to the well-being of the average financial consumer and the economy in general.

In order to "address the risk of persistent, outstanding consumer debt that can make lenders more vulnerable to negative economic shocks", the OSFI further restricted lending requirements for three innovative credit products linked to uninsured mortgages: combined

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[250] *Ibid* at 7.

[251] Sarra, *supra* note 84 at 438–39.

[252] Financial Consumer Agency of Canada, "FCAC Report: The financial well-being of Canadian homeowners with mortgages," (June 2023) at 3, online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/financial-well-being-mortgages.html>.

[253] FCAC, "Home equity lines of credit", *supra* note 226 at 10–12. See also Stephen S Poloz, Bank of Canada, "Canada's Economy and Household Debt: How Big is the Problem?" (Remarks delivered at the Yellowknife Chamber of Commerce, 1 May 2018), online: *Bank of Canada* <bankofcanada.ca/2018/05/canada-economy-household-debt-how-big-the-problem/>; *Regulatory Impact Analysis Statement, 2017*, *supra* note 245; OSFI, *B-20 Guideline, 2023*, *supra* note 241.

loan plans, mortgages with shared equity features and reverse mortgages.[254] As a result, borrowers renewing their mortgages with these types of products are limited to the same 65 percent loan-to-value limit as other types of HELOCs. With the heightened risk resulting from an unprecedented housing price increase, inflation and an increase in interest rates, the federal government recently launched a public consultation, ending on April 14, 2023, to determine whether additional restrictions are necessary to mitigate the high debt service of financial consumers.[255] In response, the FCAC has published a new *Guideline on Existing Consumer Mortgage Loans in Exceptional Circumstances*, which "set out its expectations for federally regulated financial institutions (FRFIs) to contribute to the protection of consumers of financial products and services by providing tailored support to consumers at risk."[256] Given the reality of high household indebtedness, higher interest rates and the increased cost of living, financial institutions are expected to establish and implement effective policies and procedures to help consumers at risk who are experiencing several financial distress. Such measures include the proactive identification of these consumers at risk, the assessment and offering of appropriate mortgage relief measures available such as "waiving prepayment penalties, waiving internal fees and costs, not charging interest on interest, and extending amortization".

6.5 Conclusion

[254] Office of the Superintendent of Financial Institutions, "OSFI takes focused action to reduce systemic banking system risk," (28 June 2022), online: *OSFI* <osfi-bsif.gc.ca:443/Eng/osfi-bsif/med/Pages/b20_adv_nr.aspx>; Office of the Superintendent of Financial Institutions, "Clarification on the Treatment of Innovative Real Estate Secured Lending Products under Guideline B-20," (6 July 2022), online: *OSFI* <osfi-bsif.gc.ca:443/Eng/fi-if/rg-ro/gdn-ort/adv-prv/Pages/b20_adv.aspx>.

[255] Office of the Superintendent of Financial Institutions, "Public consultation on guideline B-20: Residential Mortgage Underwriting," (January 2023), online: *OSFI* <osfi-bsif.gc.ca:443/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/b20-cd.aspx>. The OSFI proposed the following measures:

- Loan-to-income (LTI) and debt-to-income (DTI) restrictions – i.e., measures that restrict mortgage debt or total indebtedness as a multiple, or percentage, of borrower income.
- Debt service coverage restrictions – i.e., measures that restrict ongoing debt service (principal, interest and other related expenses) obligations as a percentage of borrower income.
- Interest rate affordability stress tests – i.e., a minimum interest rate that is applied in debt service coverage calculations to test a borrower's ability to afford higher debt payments in the event of negative financial shocks.

[256] Financial Consumer Agency of Canada, *Guideline on Existing Consumer Mortgage Loans in Exceptional Circumstances* (5 July 2023), online: <canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/mortgage-loans-exceptional-circumstances.html>.

Since its abandonment of general consumer credit regulation in 1980, this chapter has revealed that Parliament gradually reoccupied the field of consumer credit regulation pursuant to the responsibility conferred by the Canadian Constitution to protect financial consumers. Now that the new Financial Consumer Protection Framework has been enacted, the rights and interests of financial consumers in every province in Canada will be better protected.

This protection remains limited, however, to consumer credit offered by FRFIs, with most consumer provisions currently applicable only to Banks. According to Schedules I, II and III of the *Bank Act*, 50 banks and federal credit unions and 32 authorized foreign banks are currently regulated by the *Bank Act* and the new FCPF Requirements. Given their share of the consumer credit industry, these recent reforms are therefore a significant step, rather stride, in the right direction. Moreover, if past tendencies to harmonize legislation related to all FRFIs are indicative, the Framework will most likely be adapted and become applicable to federally regulated insurance companies and trust and loan companies. The FCAC is already supervising the compliance of these financial entities regarding their disclosure requirements and limited complaint-handling responsibilities and is encouraging them to comply with other consumer provisions and to review existing Guidelines to "develop and implement or improve their Policies and Procedures" with respect to appropriate products and services, whistleblowing and improved complaint-handling procedures.[257]

The impact of the new reforms may also be quite larger than perceived upon an initial review of the Framework. The new FCPF Requirements are also applicable to any prescribed affiliate of a regulated financial institution, and any representative, agent or other intermediary of an affiliate, involved in selling or furthering the sale of a financial

[257] Financial Consumer Agency of Canada, "Guidelines", online: *Canada* <canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance.html>.

product or service ("Third Parties").[258] According to the FCAC's *Regulatory Reporting Guide for Banks and Authorized Foreign Banks*, prescribed affiliates are either:

- an entity that engages in a business that includes:
  - issuing payment, credit or charge cards and, in cooperation with others including financial institutions, operating a payment, credit, or charge card plan, or
  - making or refinancing loans or entering into any other similar arrangements for advancing funds or credit
- a financial institution with equity of less than $1 billion, other than foreign institutions that carry on business exclusively outside of Canada.[259]

Banks can only enter into arrangements or otherwise cooperate with a Third Party to provide a financial product or a service if it "complies, with respect to the product or service, with the consumer provisions that apply to institutions, as if it were an institution, to the extent that those provisions are applicable to its activities."[260] Important consumer provisions including market conduct requirements prohibiting conducts such coercive behaviour, disclosure and transparency provisions as well as whistleblowing and consumer complaints are essentially applicable to all providers of consumer credit cooperating with a Bank. Compliance of these Third Parties with the consumer provisions must therefore be monitored by the Banks, which must ensure that Third Parties have policies and procedures that comply with these consumer protection provisions.

Expansion of the FCAC's and the OSBI's mandates to supervise all FRFIs and ensure regulatory compliance and enforcement are long overdue and should inevitably lead to positive outcomes for consumers and the Canadian economy in general. Absent from these reforms is the authority of these federal agencies to award appropriate sums of compensatory damages resulting from systemic violations for distribution to financial consumers in addition to, or in replacement of, existing monetary penalties.[261]

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[258] *Bank Act*, *supra* note 17, s 627.15–27.16.
[259] Financial Consumer Agency of Canada, "Regulatory reporting guide for banks and authorized foreign banks," (11 July 2023), online: *FCAC* <canada.ca/en/financial-consumer-agency/services/industry/forms-guides/reporting-guide-banks.html>.
[260] *Bank Act*, *supra* note 17, s 627.15.
[261] FCAC*, Report on Best Practices*, *supra* note 31 at 34:

Unfortunately, the Framework is deemed weaker than consumer protection legislation existing in some provinces with regards to private consumer redress, as argued by the province of Québec in 2016. This deficiency is discussed along with other recommendations in the concluding chapter of this dissertation.

Nevertheless, now that violations and systemic issues are made public, the effectiveness of the recent legislative reforms will be monitored along with the extent of the banking industry's compliance with the new consumer protection Framework. "Ultimately, the success of the interpretation and compliance approaches adopted by the banks will only be tested in the months and years to come as the FCAC examines each bank's compliance with the Framework."[262]

Finally, recent legislative consultations and reforms to the criminal interest rate are perhaps signs of a renewed federal interest to better protect financial consumers by strengthening other federal consumer credit consumer provisions and expanding the current regulatory framework. Chapter 7 will hopefully provide the inspiration for further reforms.

> FCAC's main role is to ensure banks comply with their consumer protection obligations. While it may use moral suasion to persuade banks when they have breached their obligations to compensate consumers, it is neither authorized to resolve individual consumer complaints, nor to order remediation. Despite not having formal redress powers, FCAC has been generally successful in obtaining redress for consumers by persuading banks to remedy breaches and make affected consumers whole.

[262] Brigitte Goulard et al, "Lessons Learned from the New Financial Consumer Protection Framework" (August 2022) 41:4 Nat BL Rev 45 at 47

CHAPTER 7: Conclusion

> "Rapid financial market development and innovation, unregulated or inadequately regulated and/or supervised financial services providers, and misaligned incentives for financial services providers can increase the risk that consumers face fraud, abuse and misconduct."[1]

This quote from the *OECD/G20 High-Level Principles on Financial Consumer Protection* was written in 2011 and represented the harm that this dissertation aimed to prevent in 2014 when the thesis topic was first proposed. Since then, the consumer credit industry has continued to evolve as have the products and services offered to financial consumers. In response, governments in Canada have recognized, especially since the Global Financial Crisis, the harm and risk to consumers and have enacted legislative reforms with the objective to better protect consumers.

Pursuing the same objective, this dissertation provides three novel contributions to the literature on consumer credit regulation and consumer protection legislation:

1) The first inventory, review and critical analysis of consumer credit regulation in Canada from three levels of government since Confederation. Chapters 3, 5 and 6 confirm the research hypothesis that the current consumer credit regulatory framework is a fragmented patchwork characterized by inefficiency and ineffectiveness in the protection of financial consumers.

2) The first legal analysis and interpretation of Parliament's constitutional jurisdiction to regulate consumer credit. Contrary to past misconstruals, Chapters 4 and 7 validate Parliament's extensive and exclusive constitutional jurisdiction over all matters relating to consumer credit pursuant to several federal heads of power and its resulting control of the financial services industry.

[1] OECD, "G20 High-Level Principles on Financial Consumer Protection," (October 2011) at 4, online: *OECD* <oecd.org/regreform/sectors/48892010.pdf> [perma.cc/CNG8-TK6P] [OECD*, High-Level Principles, 2011*].

3) Several key recommendations to better protect financial consumers based on the research findings and the current regulatory deficiencies and voids. Urgent reforms to Canada's financial consumer protection framework are required to better protect individual consumers from abusive and negligent lending practices and to reduce our collective economic vulnerabilities and risks. A new comprehensive national legal framework regulating the entire consumer credit industry is recommended along with specific consumer protection provisions and regulatory mechanisms.

As mentioned in Chapter 1, prior to this dissertation, a history of the regulation of the consumer credit industry in Canada has never been chronicled nor critically analyzed to provide a contextual legal foundation for future reforms. Inspired by previous research, the hypothesis that the current regulatory framework was fragmented, complicated, confusing and inefficient was confirmed by the research results in Chapters 3, 5 and 6. The federal government has also recently recognized this regulatory patchwork when it launched a national consultation on predatory lending: "Given that each province and territory has its own consumer protection measures for lending products and practices, consumer protections related to business practices, disclosure of information, maximum interest rates, and complaint handling procedures, may vary across the country."[2]

Differing and diverse regulations are found in multiple statutes and typically in numerous subject-specific regulations at the federal level and in each one of the provinces and territories. Consumer credit legislation has been appropriately described as "one of the most fascinating but complex pieces of legislation."[3] The social and legal acceptance of this complexity, however, is morally and legally questionable given the regulatory framework consumer protection focus and resulting inaccessibility to vulnerable consumers. If the task of inventorying and analyzing the various legal instruments was challenging for a doctoral student and law professor, how can a vulnerable consumer,

[2] Department of Finance Canada, "Consultation on Fighting Predatory Lending by Lowering the Criminal Rate of Interest," (9 August 2022), online: <canada.ca/en/department-finance/programs/consultations/2022/fighting-predatory-lending/consultation-criminal-rate-interest.html> [Canada, 2022 Consultation].
[3] Russell J Kelsall, *Consumer credit: law, practice and precedents* (London: The Law Society, 2011) at 1.

having fallen prey to abusive or predatory lending practices, find any sort of assistance and redress?

Until recently, this state of affairs existed at both levels of government. As discussed in Chapter 6, federal consumer credit regulation has recently been consolidated, streamlined and enhanced in the new Financial Consumer Protection Framework ("Framework") in force since 2022. Although justification for these reforms has been confirmed by this dissertation, the applicability of the Framework is unfortunately limited to federally regulated financial institutions ("FRFI"). With the exception of a few consumer provisions applicable to insurance and trust and loan companies, the Framework is, essentially, only applicable to banks, authorized foreign banks and federal credit unions. As a result, all other consumer lenders, most being alternative high-cost lenders, remain regulated by fragmented provincial legislation or simply unregulated and only limited by the criminal interest rate provision, which currently remains at 60% (equivalent to an annual percentage rate ("APR") of 47%).

Parliament's hesitation to occupy the entire field related to the federal head of power over interest comes as no surprise given the state of federal-provincial relations, the ignorance of past federal legislation and the uncertainty over Parliament's constitutional jurisdiction to regulate consumer credit. This dissertation aims to fill this void and dispel misconceptions with the research in Chapters 3 and 4. Research results confirm that past federal legislation during the first one hundred years following Confederation regulated all small loans and established licensing schemes for all small loan companies and money lenders, whether the companies were federally or provincially regulated, pursuant to the federal head of power over interest. Chapter 3 further confirmed that in order to be effective, legislation on matters relating to interest must prioritize the substance of the agreement not the form preventing lenders from escaping the stricture through new designations as another type of consumer lender, an excluded charge or cost of the loan or a different legal form of agreement or transaction.

Moreover, the constitutionality of the *Small Loans Act* enacting a broad definition of interest or the entire "cost of the loan", including any type of fees, charges or penalties paid by a borrower was confirmed by the Manitoba Court of Appeal in 1963 as discussed in Chapter 4. A legal analysis of Parliament's constitutional jurisdiction to enact a national regulatory scheme to regulate the entire consumer credit industry confirms that Parliament should be allowed to legislate to the full extent of its powers on all matters relating to interest, including the cost of the loan under any type of credit agreement or financial transaction. As a result, in order to prevent the purpose of the statute from being defeated, this dissertation concludes that the *Constitution Act, 1867* has assigned Parliament with the power to regulate the entire consumer credit industry, including provincially regulated lenders, as recommended in this final chapter.

These research results provide the analytical and contextual foundations clearing the evolutionary path of Canada's regulatory framework towards a national consumer credit code. This dissertation further concludes that financial consumers will only be fully protected when Parliament decides to regulate the entire consumer credit field, closing existing loopholes lenders exploit to avoid specific regulations, ensuring compliance and enforcement, and strengthening financial consumer protection in Canada. The recommendation for a truly national consumer credit regulatory framework and additional arguments raised against such reforms are further discussed in Section 7.2.

The historical analysis of past and current consumer credit regulation also aimed to identify regulatory mechanisms to reduce our collective vulnerabilities and protect individual consumers from abusive and predatory lending practices as well as from overindebtedness and insolvency, as mentioned in Chapter 1. With a new understanding of past and existing legislative and regulatory failures, deficiencies and inadequacies, potential solutions are recommended in section 7.3 as well as the legal, social and moral exhortations justifying such legislative reforms.

7.1 Reforms Focused on Consumer Well-being

Before elaborating on specific recommendations, a return to the dissertation's theoretical consumer protection framework is necessary as context. The analysis of past and current legislation in Chapters 3, 5 and 6 confirms that consumer protection has historically been an ideological justification to regulate consumer credit. Protecting the financial consumer from the abusive and predatory lending practices of lenders was and remains at the forefront of policy objectives. Chapters 1 and 2 lay the foundation that the prevention of microeconomic and macroeconomic consequences has also been a priority of governments and international organizations. Since the Global Financial Crisis, the OECD, the G20, the World Bank, the International Monetary Fund have also recognized the importance of financial consumer protection and promoted the strengthening of regulation based on high-level principles as cited were relevant throughout the dissertation. As mentioned in Chapters 3 and 6, the Royal Commission on Banking and Finance of Canada recognized, almost 60 years ago, the important role of the consumer credit industry and the consequential impact consumer credit has on the financial and economic stability and growth of the country. Likewise, the Governor of the Bank of Canada as repeatedly warned during recent years that the increasing vulnerability to Canadian households, given their high levels of indebtedness, must also be regarded as a vulnerability of our national economy to adverse shocks, such as rising interest rates or an economic downturn.

The theoretical framework explained in Chapter 2 justified the decision to embrace consumer protection as a core concept guiding the analysis and the suggested solutions offered in this dissertation. Lack of knowledge and resources of borrowers and the inequality of bargaining power have also been raised by legislators and commentators to justify additional regulation. The power and structural asymmetries between borrowers and lenders and the prevention of harm against unfair, deceptive, abusive and predatory practices remain pressing concerns. Finally, the resounding failure of governments to enforce past and current regulatory instruments and remedial measures and the ease with which lenders were and remain able to circumvent the intent of consumer protection legislation have also instigated the proposed recommendations.

An historical perspective on evolving legislation and regulation provides insight into other contributing factors motivating policymakers responsible for the regulation of consumer credit in Canada. Although the objective typically relates to consumer protection, public policy on consumer credit historically assumed that restricting access to high-cost credit would create more harm than protection for consumers and thus the continued availability of these products and services, even at extortionate rates, remained an ongoing concern.[4] As such, the legal constraints on the industry and the financial consequences on the overall profitability of the industry remain important considerations when evaluating legislative reform. As a result, most research, government initiatives and legislative reforms have primarily focused on lenders, their practices, their products and services as well as their industry and its governance. In response, this dissertation's research results have not only rebutted this reasoning but have also demonstrated that regulation promotes innovation in the consumer credit industry, which has continued to prosper despite being subject to sporadic, fragmented and diverse regulation by three levels of governments.

To complement these industry-driven consumer protection measures and to encourage consumers' responsibility for their own financial well-being, recent financial literacy initiatives and regulatory emphasis on transparency and disclosure requirements have sought to empower consumers for self-protection.[5] However, research conducted by the Financial Consumer Agency of Canada indicated that despite the concerted efforts of governments in Canada, these consumer protection measures do not seem to be achieving anticipated results since "[m]any payday loan users were unaware of the high costs of payday loans compared to their alternatives."[6] These findings are reminiscent of the Royal

[4] Katherine Dilay & Byron Willams, "Payday Lending Regulations" in Jerry Buckland, Chris Robinson & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context: A Mature Industry with Chronic Challenges* (Cham, Switzerland: Springer International Publishing AG, 2018) 177 at 185–87.

[5] Robert R Kerton & Idris Ademuyiwa, "Financial Consumer Protection in Canada: Triumphs and Tribulations" in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection*, 1st ed (Singapore: Springer, 2018) 85 at 102–03; Mary Anne Waldron, "A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past" (2011) 50 Can Bus LJ 300 at 320 [Waldron, 2011].

[6] Financial Consumer Agency of Canada, "Home equity lines of credit: Market trends and consumer issues," (6 July 2017), online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/home-equity-lines-credit-trends-issues.html> at 1 [FCAC, "Home equity lines of credit"].

Commission on Price's report which concluded almost 75 years ago in 1949 that "[t]here is little doubt that the consumer is not aware of the interest cost equivalent of the alternative credit services offered to him."[7]

Furthermore, dependency on high-cost financial services is expensive and, while not leading to insolvency for all borrowers, these loans do not help to improve a credit record nor promote financial stability. The federal government once again recognized this year that high-cost loans, including payday loans, are predatory lending services which predominantly pray on "low-income Canadians, including those who are experiencing poverty or are at risk of poverty."[8] Instead of helping financial consumers who find themselves in financial constraints, high-cost credit products usually "perpetuat[e] a cycle of debt", ultimately leading to insolvency.[9]

The proposed recommendations resulting from the research undertaken to support this dissertation therefore strive to protect consumer well-being instead of protecting their unlimited access to consumer credit by lowering the regulatory threshold applicable to lenders. Protection of financial consumers leads to the protection of the economy and the public interest in general. The objectives of consumer credit regulation were succinctly summarized by Iain Ramsay as follows: "Contemporary regulation of consumer credit is intended to make credit markets more competitive, to promote confidence in the use of consumer credit, to ensure fairness throughout the contract and to prevent and treat overindebtedness."[10]

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[7] Canada, Royal Commission on Prices, *Report* (Ottawa: King's Printer, 1949) at 306.

[8] Canada, "Consultation on Cracking Down on Predatory Lending by Further Lowering the Criminal Rate of Interest and Increasing Access to Low-Cost Credit," (10 May 2023), online: <canada.ca/en/department-finance/programs/consultations/2023/consultation-on-cracking-down-on-predatory-lending-faster-by-further-lowering-the-criminal-rate-of-interest-and-increasing-access-to-low-cost-credit.html> [Canada, 2023 Consultation].

[9] *Ibid*.

[10] Iain Ramsay, "Regulation of Consumer Credit" in Geraint Howells et al, eds, *Handbook of Research on International Consumer Law* (Cheltenham, UK: Edward Elgar Publishing, 2010) 340 at 370. See also Iain Ramsay, "Globalization, the Third Way and Consumer Law: The Case of the U.K." in Jane K Winn, ed, *Consumer Protection in the Age of the "Information Economy"* (London; New York: Routledge, 2006) 59 [Ramsay, 2006]; *Final Report of the Select Committee of the Ontario Legislature on Consumer Credit*, Sessional Paper (No 85) (Toronto, Ontario: 1965) at 287 [Ontario*, Final Report on Consumer Credit, 1965*]; Jacob S Ziegel, "Consumer Credit Regulation: A Canadian Consumer-

7.2 A New Federal Consumer Credit Regulatory Framework

With the primary focus placed on consumer protection and well-being, the first recommendation is the necessity to harmonize, consolidate, streamline and strengthen consumer credit regulation in Canada by enacting a new federal statute regulating the entire consumer credit industry. Despite recent reforms, the most vulnerable financial consumers remain exposed to the risk and harm caused by high-cost credit given their exclusion from the new federal Framework.

7.2.1 A National Framework Regulating the Entire Consumer Credit Industry

Given the absence of a national cohesive strategy addressing consumer overindebtedness and the correlated rise in insolvency,[11] it is recommended that Parliament reassert its paramount federal jurisdiction over interest to implement a national comprehensive consumer credit framework, to promote a consumer credit industry that is both sustainable and responsible, while ensuring that Canadian consumers are not only better protected from abusive and predatory lending practices but also better equipped to increase their financial health and well-being.

In a "rapidly evolving and innovative financial marketplace" responding to technological advances including internet-based services and transactions, consumer credit is now offered across provincial boundaries by federally and provincially regulated lenders as well as by unregulated lenders and foreign entities online.[12] Considering that funds are moving

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Oriented Viewpoint" (1968) 68:3 Colum L Rev 488 at 490 [Ziegel, 1968]; Dilay & Willams, *supra* note 4 at 188.

[11] Office of the Superintendent of Bankruptcy, "Annual Consumer Insolvency Rates by Province and Economic Region" (last modified 8 September 2023), online: *OSB* <ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html> (according to the OSB statistics, consumer insolvencies have continued their upward trend since 1989 when we disregard the impact of the Global Financial Crisis and the impact of temporary income support and credit relief measures during the COVID-19 pandemic).

[12] Canada, Department of Finance, "Canada's Financial Consumer Protection Framework: Consultation Paper," (3 December 2013), online: *Canada* <web.archive.org/web/20131210103735/www.fin.gc.ca/activty/consult/fcpf-cpcpsf-eng.asp> [Canada,

through the Canadian economy at a faster pace than ever before, across provincial and national boundaries, these financial services are no longer purely local matters and must be considered a national issue to protect all vulnerable financial consumers and the Canadian economy in general. The increasingly complex financial services legislative framework creates unnecessary confusion and misinterpretation of existing regulations, especially for the most vulnerable consumers excluded from traditional FRFIs.[13] "In Canada consumers must also pay for any burden from lost scale economies or duplicate compliance in competing provincial jurisdictions. All of these developments point to the need to abandon the old 'line of service' approach to regulation to achieve something more general." [14]

Reform at the federal level is already underway as revealed in Chapter 6. In addition to federal cost of credit disclosure and transparency regulations applicable to all federally regulated financial institutions, the federal government has gradually reformed, during the last 30 years, the regulatory framework of the financial services industry in Canada. These reforms were undertaken in response to the consolidation and concentration of the financial services sector and its evolution towards larger domestic conglomerates expanding their services and products on a national level.[15] With the harmonization, consolidation and strengthening of all consumer provisions in the newly enacted Financial Consumer Protection Framework, Parliament has further strengthened the protection of financial consumers of FRFIs.

Although provincial legislation still applies exclusively to provincially incorporated institutions, statistics confirm the tendency of financial institutions to migrate towards federal incorporation. As previously mentioned, some provinces have ceased to incorporate

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2013 Consultation]; Canada, Department of Finance, "Supporting a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future," (26 August 2016), online: *Canada* [perma.cc/786E-54TN] at 26 [Canada, 2016 Consultation]; Donald JS Brean, "Financial Liberalization in Canada: Historical, Institutional and Economic Perspectives" in Albert Berry & Gustavo Indart, eds, Critical Issues in International Financial Reform (New Brunswick, NJ: Transaction Publishers, 2003) 125 at 150.

[13] Kerton & Ademuyiwa, *supra* note 5 at 110; Robert R Kerton & Task Force on the Future of the Canadian Financial Services Sector, *Consumers in the financial services sector* (Ottawa: Task Force on the Future of the Canadian Financial Services Sector, 1998) at 247.

[14] Kerton & Task Force on the Future of the Canadian Financial Services Sector, *supra* note 13 at 259–60.

[15] Canada, 2016 Consultation, *supra* note 12 at 23.

trust companies and the framework has been implemented allowing credit unions to be federally regulated.[16] In fact, at the start of the new millennium, over 90 percent of assets in the trust and loan, insurance and banking sectors were already held by federally regulated financial institutions in Canada.[17] With the exception of credit unions, the remaining provincial lenders are essentially companies operating in the alternative financial services market. Recent studies indicate, however, that many, if not most, high-cost credit lenders, including payday lenders, have corporatized and consolidated, as a natural progression of the industry and in response to new regulations.[18] Licensing and supervision on a national level, especially with modern information technology in the digital era, should, therefore, no longer represent issues of concern for public enforcement requiring provincial involvement in consumer credit regulation.

Given the foregoing, provincial legislation is becoming less relevant and less likely to better protect financial consumers. The framework, which has gradually evolved since Confederation, is no longer appropriate, and recent regulatory reforms might be a precursor to a single federal financial services act to implement a unified and national approach to the regulation of Canadian financial institutions large and small in the near future.

Despite provincial jurisdiction over provincial companies and property and civil rights, the Canadian Constitution clearly assigned Parliament the power to regulate matters related to consumer credit and the prevention of consumer insolvency. Canadian financial consumers deserve to be better protected by national standards as the founders of Confederation

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

[17] Canada, Department of Finance, *Reforming Canada's Financial Services Sector: A Framework for the Future* (Ottawa: Department of Finance, 1999) at 65–66.

[18] Manitoba Public Utilities Board, "Report on 2016 Payday Loans Review," (17 June 2016) at 34–35, online: *Manitoba* <https://www.pubmanitoba.ca/payday_loan/2016_payday_loans_review_report.pdf> [perma.cc/7KL5-SVW5] [Manitoba Public Utilities Board, 2016]; Jerry Buckland & Brenda Spotton Visano, "Introduction" in Buckland, Robinson & Spotton Visano, *supra* note 4, 1 at 17. See also Canadian Consumer Finance Association, online: *CCFA* <canadiancfa.com/> (last visited 21 December 2023): The Canadian Consumer Finance Association has 8 members companies operating a "total of 870 licensed stores and online businesses across the country" representing "961 retail financial services outlets providing almost two million Canadians each year with various forms of small-sum, short-term credit, including installment loans, term loans, payday loans and/or cheque cashing services".

intended in the *Constitution Act, 1867*.[19] This is further confirmed, as discussed in Chapter 4, by the powers assigned to Parliament to regulate the majority of financial matters which are found exclusively within the federal heads of power such as "Currency and Coinage", "Banking, Incorporation of Banks, and the Issue of Paper Money", "Savings Banks", "Bills of Exchange and Promissory Notes", "Legal Tender", "Bankruptcy and Insolvency" as well as "The Regulation of Trade and Commerce".[20]

Consumer credit legislation should therefore be considered a matter within Parliament's jurisdiction, as it was for more than a hundred years. Consumer credit must no longer be viewed as solely a consumer protection issue and therefore a provincial matter but also a financial issue including the financial stability of Canadians on both a microeconomic and a macroeconomic level.[21] As recommended by the Royal Commission on Banking and Finance in 1964, comprehensive consumer protection legislation under federal jurisdiction universally applicable to all money lenders, including small loan companies and banks should be prioritized.[22] According to the Consumers Council of Canada: "[t]he code needs to be comprehensive across the entire financial sector and all financial products at federal, provincial and local levels and cover similar products in the same fashion."[23] To regulate all financial products, Parliament must regulate interest for all purposes, representing the entire cost of a loan as recognized in both federal and provincial legislation and be applicable to all forms of loan transactions, including vendor's credit.

A national and centralized legislative framework would impose greater uniformity, offer greater protection for financial consumers, provide clear directives to the consumer credit industry and eliminate the unnecessary administrative duplication of public services as well

[19] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(19), 92(11), 92(13), reprinted in RSC 1985, Appendix II, No 5.
[20] *Ibid*, s 91(2), (14)–(16), (18)–(21).
[21] Jerry Buckland, *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada* (Toronto: University of Toronto Press, 2012) at 169 [Buckland, 2012].
[22] Canada, Royal Commission on Banking and Finance, *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 382.
[23] Consumers Council of Canada, *Submission to Finance Canada re: Canada's Financial Consumer Protection Framework* (28 February 2014) at 7, online: *Canada* <canada.ca/content/dam/fin/migration/consultresp/fcpf-cpcpsf/082-fcpf-cpcpsf.pdf> [perma.cc/F9VG-EAEK]. See also Kerton & Ademuyiwa, *supra* note 5 at 95.

as internal trade barriers, thereby fostering economic growth and prosperity for the industry and the country. Finally, only a national centralized regulatory agency such as the Financial Consumer Agency of Canada ("FCAC") will be able to impose a uniform regulatory framework to address predatory lending in Canada and enforce compliance to better protect consumers. This new role would be consistent with the FCAC's current mandate "to contribute to the protection of consumers of financial products and services and the public, including by strengthening the financial literacy of Canadians".[24] Under the purview of the FCAC, the consolidation of provincial and federal initiatives regarding financial literacy and the enforcement of universal standards, rules and regulations, would further improve the effectiveness and efficiency of public resources.[25]

Acting in the best interest of all Canadian financial consumers, the federal government should therefore not abdicate its responsibility to enact a truly national comprehensive financial consumer protection regime governing all types of consumer credit offered by all types of financial services providers whether they are federally or provincially regulated. Understandably, the federal government is wary to introduce again comprehensive legislation only to be contested by provincial governments and possibly struck down by the judiciary. Although the Supreme Court of Canada has strengthened the principle of cooperative federalism and restrained the constitutional doctrines of federal paramountcy and interjurisdictional immunity in favour of valid provincial legislation, it cannot and should not prohibit the exercise of valid federal legislative competence.

As a result, Parliament should not abandon, like it has in the past, or shy away from its responsibility to protect all financial consumers equally across the entire country. With the unsustainable growth of consumer indebtedness and insolvency, and the proliferation of various and recently conflicting federal and provincial consumer credit regulations, a comprehensive national financial consumer protection code regulating an increasingly national financial industry must be enacted forthwith to better protect consumers and to

[24] *Financial Consumer Agency of Canada Act*, SC 2001, c 9, s 2.1 [*FCAC Act*].
[25] Kerton & Task Force on the Future of the Canadian Financial Services Sector, *supra* note 13 at 259–60; Jacob S Ziegel, "Consumer Insolvencies, Consumer Credit, and Responsible Lending" in Janis P Sarra, ed, *Ann Rev Insolv L 2009* (Toronto: Carswell, 2010) 343 at 390 [Ziegel, 2010].

support a strong and growing economy based on a stable, efficient and well-functioning financial services sector.[26]

Before elaborating on this dissertation's recommendations relating to specific consumer provisions, it is important to address the lingering constitutional issues and arguments raised, particularly from Québec, against the above recommendation as mentioned in Chapter 6.

7.2.2 Federal Exclusive Jurisdiction vs. Cooperative Federalism

Contrary to submissions made to the Senate Committee in 2016, the constitutional doctrine of cooperative federalism should not constrain the ability of Parliament to regulate federal financial institutions. Admittedly, the Supreme Court of Canada concluded in *Canadian Western Bank* that the principle of cooperative federalism protects, where possible, valid legislation within both fields of provincial and federal jurisdiction. However, the Court clarified that:

> [t]he "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.[27]

Similarly, the Supreme Court noted that to impute to Parliament an intention to occupy the field "in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy" previously undertaken by the Court in favour of cooperative federalism.[28]

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[26] Canada, 2016 Consultation, *supra* note 12 at 7.

[27] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37 [emphasis added] [*Canadian Western Bank*]. See also *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 63 [*Marcotte*].

[28] *Canadian Western Bank*, *supra* note 27 at para 74, citing *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] SCC 13 at para 21 [emphasis added] [*Rothmans*].

Constitutional doctrines therefore require that concurrent powers of legislation can only be exercised by a province in the absence of valid conflicting federal legislation. When applying these limits on the principle of cooperative federalism, "clear statutory language" which excludes all provincial regulation related to business practices and consumer protection from a new regulatory framework and clearly states the federal purpose of creating a national comprehensive and exclusive consumer protection code would necessarily engage the constitutional doctrine of paramountcy.[29] As prohibited by both branches of the doctrine, provincial legislation would become conflicting enactments as well as undermine the federal purpose. The contrary would mark a significant shift in the constitutional division of powers in Canada and represent, arguably, the unconstitutional usurpation of clear federal powers in favour of provincial legislation.

Although the Court recognized that the principle of cooperative federalism should provide "flexibility for the interpretation and application of constitutional doctrines" and apply to "facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action",[30] it refused to extend the principle to protect provincial interest by impairing Parliament's sovereignty and constitutional jurisdiction.[31] The principle of cooperative federalism cannot be used to "distort a measure's pith and substance at the risk of restricting significantly an exclusive power granted to Parliament" but rather used as a principle of statutory interpretation and applied to "avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation"[32] Moreover, the Supreme Court of Canada has repeatedly confirmed

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[29] *Of Banks, Federalism and Clear Statement Rules: Bank of Montreal v Marcotte*, [2015] 71:1 SCLR: Osgoode's Annual Constitutional Cases Conference 191 at 67–76.

[30] *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 17; *Rogers Communications Inc v Châteauguay (City)*, [2016] SCC 23 at para 39 [*Rogers Communications*].

[31] See e.g. *Quebec (AG) v Canada (AG)*, *supra* note 30 at para 16; *Ending of the Long-gun Registry Act*, SC 2012, c 6.

[32] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 66 [*Orphan Well*]; Fenner L Stewart, "Interjurisdiction Immunity, Federal Paramountcy, Co-operative Federalism, and the Disinterested Regulator: Exploring the Elements of Canadian Energy Federalism in the Grant Thornton Case" (May 2018) 33 *BFLR* 227. The author suggested at 250–53 that the principle of cooperative federalism will be regarded as a "principle of statutory interpretation" rather than a principle further increasing provincial jurisdiction and overriding the constitutional division of powers. See also: Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016), 76 SCLR (2d) 27; Michelle Biddulph, "Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-Canadian Western Bank Era" (2014), 77 Sask L Rev 45.

that the principle cannot "be seen as imposing limits on the valid exercise of legislative authority."[33] A unanimous Court explained in *Reference re Securities Act* that:

> [w]hile flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.
>
> In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.[34]

In answering arguments in favour of protecting provincial legislation, the Court raised the possibility of the federal and provincial governments not agreeing about a particular measure of cooperative action and confirmed the importance of federalism, division of powers and parliamentary sovereignty and that the "primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework"[35]:

> In our respectful view, the principle of cooperative federalism does not assist Québec in this case. Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.[36]

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[33] *Rogers Communications*, *supra* note 30 at paras 39, 47; *Quebec (AG) v Canada (AG)*, *supra* note 30 at para 19; *Orphan Well*, *supra* note 32 at para 66; *Saskatchewan (AG) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 23 [*Lemare Lake*]; *Reference re Anti-Inflation Act*, 1976 CanLII 16, [1976] 2 SCR 373 at 421. See also Warren J Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016), 76 *SCLR* (2d) 067 at para 31.

[34] *Reference re Securities Act*, 2011 SCC 66 at paras 61–62 [emphasis in original omitted and added] [*Securities Reference 2011*], cited with approval in *Rogers Communications*, *supra* note 30 at para 39; *Quebec (AG) v Canada (AG)*, *supra* note 30 at para 19.

[35] *Quebec (AG) v Canada (AG)*, *supra* note 30 at para 18.

[36] *Ibid* at para 20. See also: *Reference Re Canada Assistance Plan (BC)*, 1991 CanLII 74, [1991] 2 SCR 525 at para 85 [emphasis added]:

> This was the argument that the "overriding principle of federalism" requires that Parliament be unable to interfere in areas of provincial jurisdiction. It was said that, in order to protect

The reasons of the majority of the Court become all the more relevant given that the federal government and the provinces have already attempted to harmonize financial consumer protection provisions in their respective statutes and regulations. In 1995, the *Agreement on Internal Trade*, an intergovernmental trade agreement signed by Canadian First Ministers came into force and provided for the creation of the Consumer Measures Committee to act as a forum for national cooperation to harmonize laws, regulations and practices across the country.

Although several agreements were completed by the Committee such as an *Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada* in 1998 and the *Harmonized List of Prohibited Collection Practices* in 2003, most working groups of the Committee have been inactive for several years.[37] A review of available information on the Consumer Measures Committee indicates that collaboration waned following the *Alberta, Québec and British Columbia dispute with Canada Panel Report regarding the federal Cost of Borrowing (Banks) Regulations* issued in 2004.[38] The Panel ruled in favour of the Provinces and a new round of consultation on the cost of credit disclosure regulations commenced in 2005 but no further agreement was achieved.[39]

Despite existing provincial consumer credit regulation, the constitutional jurisdiction assigned to Parliament pursuant to subsection 91(15) and (19) must therefore enable the federal government to develop in collaboration with the consumer credit industry and other stakeholders a comprehensive consumer credit regulatory framework that applies to all

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> the autonomy of the provinces, the Court should supervise the federal government's exercise of its spending power. But supervision of the spending power is not a separate head of judicial review. If a statute is neither ultra vires nor contrary to the Canadian Charter of Rights and Freedoms, the courts have no jurisdiction to supervise the exercise of legislative power.

[37] Canada, Consumer Measures Committee, *Annual Reports from chapter 8 of the Agreement on Internal Trade*, online: <cfta-alec.ca/annual-reports/archive/>.

[38] *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Federal Bank Act - Cost of Borrowing (Banks) Regulations*, Agreement on Internal Trade (4 June 2014), online: *Canadian Free Trade Agreement* <cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/4_eng.pdf>.

[39] Canada, Consumer Measures Committee, *Cost of Credit Disclosure - Working Group*, online: *CMC* <cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00032.html>.

products and services offered by consumer lenders to better protect financial consumers. Accordingly, Parliament must be permitted to legislate to the full extent of its powers on all matters within its constitutional jurisdiction, notwithstanding previously existing provincial legislation.

This leads us to the final argument raised against the recommended federal consumer credit regulatory framework.

7.2.3 A Complete Code Excluding Provincial Legislation

The second constitutional argument advanced in 2016 was that financial consumers who are entitled to a provincial consumer protection regime that may be more advantageous will lose and be less protected under a new federal code. At first blush, that may seem like a legitimate concern. But such an argument fails to consider the entire regulatory framework, and how it protects consumers in its entirety.

There are many different regulatory techniques and for the financial services sector to be effective the new framework may use a variety of them but, in our constitutional democracy, it should be up to Parliament to decide and legislate without Provinces imposing their own regulatory measures on a federally regulated framework. Bradley Crawford recently analyzed Parliament's power to enact exclusive financial consumer remedies and concluded it was within its constitutional jurisdiction:

> If the federal law establishing exclusive national standards of consumer protection were to provide bank customers with an exclusive right to damages in the discretion of the Commissioner or a court in that manner, there would be two strong arguments that the federal Framework satisfied the established criteria for paramountcy. Such a provision being added to the extensive substantive measures in the Bill would appear to constitute the whole a "complete code" with respect to banks' consumer protection duties. It would, at least, satisfy the prerequisite that such a code be capable of functioning to effect the federal purpose without reliance upon provincial damages laws.
>
> Alternatively, there would appear to be a second strong argument that the federal law would be paramount by reason of the doctrine of "operational

> impossibility." It would be impossible for a provincial law that provides for contract damages to be applied by the courts in any case in which a federal law provides that a consumer's rights to compensation is to be determined exclusively by administrative discretion of a federal agency.[40]

Without embarking on an in-depth and exhaustive analysis of all relevant case law and the evolution of constitutional doctrines, it suffices to say that the Supreme Court of Canada has indeed repeatedly confirmed Parliament's authority to enact a "complete code" or "comprehensive framework"[41] as suggested by Bradley Crawford. A sample of a few notable decisions of the Supreme Court of Canada serve as examples of valid federal legislation excluding the application of conflicting provincial legislation. This excludes therefore situations where overlapping statutes will not lead to an operational conflict such as duplicative federal and provincial legislation[42] or where a provincial law is more restrictive than a federal law.[43]

Comprehensive exclusive regulatory regimes relating to Canadian student loans[44], fisheries[45] and maritime law[46] have been previously recognized and protected by the Supreme Court of Canada. According to the Court in a decision relating to aeronautics, "Parliament endeavoured to create a comprehensive code applicable across the country and

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[40] Bradley Crawford, "Bill C-29: Mission Impossible?" (2017) 60 CBLJ 61 at 93 [Crawford, 2017].

[41] See also Philippe Denault, *La recherche d'unité dans l'interprétation du droit privé fédéral, Cadre juridique et fragments du discours judiciaire* (Montréal: Éditions Thémis, 2008) at 111–20; Patrick Forget et Mathieu Devinat, "La rhétorique du code complet : unir pour exclure" in *At the Forefront of Duality, Essays in Honour of Michel Bastarache*, ed Nicolas CG Lambert (Cowansville: Thomson Reuters, 2011) at 251; Jean Leclair, "L'interface entre le droit common privé provincial et les compétences fédérales "attractives"" in ALAI Canada, ed, *A Copyright Cocktail*, (Montréal: Éditions Thémis, 2007) 25 at 48.

[42] *Alberta (AG) v Moloney*, 2015 SCC 51 at para 26 [*Moloney*], referring to *Marcotte*, *supra* note 27 at para 80; *Canadian Western Bank*, *supra* note 27 at para 72; *Multiple Access v McCutcheon*, 1982 CanLII 55, [1982] 2 SCR 161 at 190; *Bank of Montreal v Hall*, [1990] 1 SCR 121 at 151, 1990 CanLII 157 [*Hall*].

[43] *Moloney*, *supra* note 42 at para 26, referring to *Lemare Lake*, *supra* note 33 at para 25; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44 at paras 76, 84; *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paras 67, 74 [*COPA*]; *Canadian Western Bank*, *supra* note 27 at para 103; *Rothmans*, *supra* note 28 at para 18 ff; *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 35*; Irwin Toy Ltd v Quebec (AG)*, 1989 CanLII 87, [1989] 1 SCR 927 at 964.

[44] *Rhine v The Queen*, [1980] 2 SCR 442 at 450, 1980 CanLII 220 [emphasis added]. See also Bradley Crawford, "Bank of Montreal v. Marcotte: 'Exclusive' Federal Financial Consumer Protection Law and the Role of the Law of Contract" (2015) 30:2 BFLR 346 at 356 [Crawford, 2015].

[45] *Gladstone v Canada (AG)*, 2005 SCC 21, [2005] 1 SCR 325 at paras 9–10, 12.

[46] *Ordon Estate v Grail*, 1998 CanLII 771, [1998] 3 SCR 437 at paras 66, 85-89.

not to vary from one province to another."[47] More relevant to the case at hand, the Supreme Court concluded in *Bank of Montreal v Hall* that provincial security interests and procedural requirements for seizure were inapplicable given they conflict with sections 178 and 179 of the *Bank Act*:

> where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation.[48]

The Court further acknowledged the inevitability of concurrent jurisdiction between the provinces and Parliament and "that there can be no hermetic division between banking as a generic activity and the domain covered by property and civil rights. A spillover effect in the operation of banking legislation on the general law of the provinces is inevitable."[49] As a result, Justice La Forest, writing on behalf of the Court, contended with the same arguments raised against the proposed financial consumer protection framework by Québec and concluded as follows:

> [t]he fact that a given aspect of federal banking legislation cannot operate without having an impact on property and civil rights in the provinces cannot ground a conclusion that that legislation is *ultra vires* as interfering with provincial law where the matter concerned constitutes an integral element of federal legislative competence.[50]

Justice La Forest's justification, analogous to the above-mentioned decisions, invokes the importance of a uniform national regime governing banks:

> [t]o sunder from the *Bank Act* the legislative provisions defining realization, and, as a consequence, to purport to oblige the banks to contend with all the idiosyncracies (sic) and variables of the various provincial schemes for realization and enforcement would, in my respectful view, be tantamount to

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[47] *Re Canada 3000 Inc*, 2006 SCC 24, [2006] 1 SCR 865 at para 79 [emphasis added]; *Civil of Code of Québec*, SQ 1991, c 64. But see *COPA*, *supra* note 43 at para 66: "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission" [emphasis added].

[48] *Hall*, *supra* note 42 at para 64 [emphasis added].

[49] *Ibid* at para 40, citing with approval *Alberta (AG) v Canada (AG) (sub nom Reference Re: Alberta Bill of Rights Act)*, [1947] AC 503 at 517, 1947 CanLII 347 (UKJCPC).

[50] *Hall*, *supra* note 42 at para 40, citing with approval *Construction Montcalm Inc v Minimum Wage Commission*, [1979] 1 SCR 754 at 768-69, 1978 CanLII 18.

> defeating the specific purpose of Parliament in creating the *Bank Act* security interest.[51]

Comparable to banking legislation, the Supreme Court also concluded that Parliament has enacted a "complete code" in the *Bankruptcy and Insolvency Act* ("*BIA*") albeit one that relies upon provincial law for its operation.[52] Justice Gonthier, on behalf of the majority of the Court, cautioned, however, as follows: "But Parliament's invitation stipulates an important limitation at the threshold of its domain, namely, that provincial law simply cannot apply when to do so would entail subverting the federal order of priorities in the *Bankruptcy Act*."[53] Pursuant to subsection 72(1) of the *BIA*, provincial substantive law relating to property and civil rights remains applicable and available to the trustee provided they "are not in conflict with this Act".[54]

The foregoing review of relevant Supreme Court of Canada decisions reveals that when the federal legislative framework clearly creates a "complete code" or "comprehensive framework" to the exclusion of provincial legislation or common law rules, the Court will protect Parliament's exclusive legislative jurisdiction. The primacy of the text of the Canadian Constitution and the principle of federalism grant Parliament the competence to enact legislation even if it excludes or conflicts with existing concurrent provincial legislation. Should a court confirm the applicability of diverse provincial consumer protection statutes to the consumer credit industry and provide financial consumers access to a wide variety of provincial civil remedies, it would "be tantamount to defeating the specific purpose of Parliament" in creating a comprehensive consumer protection framework, as the Court stated in *Bank of Montreal v Hall*, and ignoring the overriding constitutional division of powers.[55]

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[51] *Ibid* at para 43.

[52] *Husky Oil Operations Ltd v MNR*, [1995] 3 SCR 453 at para 85 [emphasis added], 1995 CanLII 69 [*Husky Oil*]. See also *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 at para 27 [*407 ETR Concession*]; *Moloney*, *supra* note 42 at paras 27, 75; *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 [*BIA*]. See Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" [2106] 58 Can Bus LJ 27.

[53] *Husky Oil*, *supra* note 52 at para 85 [emphasis added]. See also *407 ETR Concession*, *supra* note 52 at para 27; *Moloney*, *supra* note 42 at paras 27, 75: in which the Court recognized a complete code that "sets out which debts are released on the bankrupt's discharge and which debts survive the bankruptcy."

[54] *BIA*, supra note 52, s 72(1) [emphasis added].

[55] *Hall*, *supra* note 42 at para 43.

Despite the judicial recognition of the principle of cooperative federalism protecting the country's regional diversity, the Supreme Court has repeatedly recognized the "need for national unity"[56] and the importance of uniformity within the Canadian federation establishing Parliament's authority to enact a coherent, national and comprehensive legislative framework or "complete code" regulating subject matters within its constitutional jurisdiction.

7.3 The Financial Consumer Protection Framework 2.0

As mentioned throughout this dissertation, comprehensive reforms to Canada's consumer credit regulatory framework are required to address the current deficiencies in the protection of financial consumers. In addition to the consolidation, streamlining, harmonization and enhancement of consumer credit regulation at the federal level as the previous section has argued, specific consumer provisions must be included in the legal framework to strengthen consumer protection. Robert Kerton and Idris Ademuyiwa prioritized the following regulatory objectives:

> The financial consumer protection framework in Canada needs to be geared towards having a comprehensive financial consumer code which adopts basic principles such as commitment to consumers' interests; facilitating access to financial services; ensuring significant levels of transparency; responsible business conduct […] and practices by financial institutions and providing efficient avenues for redress.[57]

Potential solutions to attain these goals include new measures to regulate all financial consumer products and services, additional responsible borrowing and lending requirements as well as administrative and judicial enforcement provisions to better protect financial consumer rights and interests. These recommendations stem from the historical critical analysis of past and existing regulation as well as internationally recognized benchmarks and principles.

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[56] *Securities Reference 2011*, *supra* note 34 at para 60, citing with approval *Canadian Western Bank*, *supra* note 27 at para 24.

[57] See also Kerton & Ademuyiwa, *supra* note 5 at 95.

7.3.1 Definitions, Disclosure and Transparency and Market Conduct Requirements

Considering the evolution and progress of federal disclosure and transparency requirements since 1967 as reviewed in Chapter 6, these consumer provisions are quite robust in the new federal Framework regulating FRFIs. As a result, lenders regulated by weaker provincial regulation and unregulated vendors providing consumer financing will have to adapt to federal standards should a new federal framework be enacted as recommended. Currently, many consumers of provincially regulated lenders are generally unaware that the advised APR does not include all fees and does not take into account compound interest or the timing of the payments made by the borrower.[58] Additional fees and/or a short-term repayment may therefore significantly increase the annual rate of interest and become illegal or criminal. Uniform disclosure and transparency requirements in all consumer credit agreements are therefore essential to better inform financial consumers to enable them to make better financial decisions.

In addition, the new federal Framework provides strengthened consumer provisions relating to market conduct obligations imposed on lenders as described in Chapter 6. Prohibitions against false or misleading information or advertisements, coercive sales and tied-selling practices as well as charges for products or services and renewals without the consumer's express consent should be similarly included in the new framework and become applicable to all consumer lenders. Also recommended would be the prohibition against unfair practices such as contractual terms excluding or restricting "any legal requirement on the part of a financial service provider to act with skill, care, diligence, or professionalism toward the consumer in connection with the provision of any product or service and/or any liability for failing to do so."[59]

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[58] Alexander Schmitt, "Momentum towards lowering Canada's criminal rate of interest?" (Q4 2022) online: Norton Rose Fulbright <nortonrosefulbright.com/en/knowledge/publications/04a34d3a/canada>; Canada, 2022 Consultation, *supra* note 2.

[59] World Bank Group, *Good Practices for Financial Consumer Protection* (Washington, DC: World Bank, 2017) at 34.

Clear and comprehensive definitions are also required in the new framework to ensure that lenders do not evade the new federal regulatory scheme or circumvent new requirements. The analysis of past consumer credit legislation further reveals that the new consumer credit regulatory framework must address all types of interest and service charges. Unless the definition of "interest" or "cost" of the loan is clear and comprehensive, lenders will always attempt, as they have in the past, to circumvent legislative restrictions if a loophole provides them with the opportunity to charge additional fees. The former Superintendent of Insurance, K R MacGregor, responsible for the administration and enforcement of the *Small Loans Act*, succinctly summarized in 1964 the consequences of omitting clear, broad and general definitions: "if a lender may give compensation a name other than interest and thus get by the *Interest Act* or get by any other federal interest legislation, then the powers of Parliament to legislate in this field, although given to Parliament exclusively under the *British North America Act*, are worthless."[60]

Likewise, the legislative definition of "lenders" must include all types of lenders, including vendors providing consumer financing. Lenders will invariably innovate and adapt in response to new regulation as they have in the past. The new regulatory framework must encourage and enable lenders to adhere to new regulations instead of finding ways to circumvent them. Payday lenders offering new high-cost credit products to avoid increasingly restrictive provincial payday legislation is an example of industry innovation to circumvent existing regulation. Another adaptation is to hide consumer credit in indirect forms of consumer credit products such as vendor financing at the time of purchase. Installment loans, such as "buy now, pay later" or "rent-to-own" loans and motor vehicle leases, which enable consumers to pay the cost of a purchase along with other charges over a period of time, are financial products commonly used by vulnerable financial consumers.[61] In order to make better financial decisions, consumers must be able to compare credit instruments when purchasing consumer goods and therefore similar disclosure and transparency is required from all types of lenders.

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[60] Special Joint Committee of the Senate and House of Commons on Consumer Credit, Evidence, 26-2, No 2 (9 June 1964) at 59 (KR MacGregor).
[61] FCAC, "Pilot Study: Buy Now Pay Later Services in Canada," (18 November 2021), online: *FCAC* <publications.gc.ca/collections/collection_2021/acfc-fcac/FC5-75-2021-eng.pdf>.

These wide definitions are consistent with a recent Ontario Court of Appeal decision in which the Court warned that so-called purchase agreements "may find [their] way into other contexts where both parties are not as sophisticated, and one party may be vulnerable to exploitation by another."[62] It further confirmed that when determining if an agreement violates the criminal interest rate of 60%, a court must "give effect to the substance of the agreement", and not only the terms of the agreement, as dictated by the Supreme Court of Canada in *Garland v Consumers' Gas Co*.[63] Rather than prioritizing the substance of a credit agreement and rendering a new consumer protection framework applicable to all agreements, excluding consumer credit based on the origin of the credit or the type of lender providing the credit, such as vendors providing consumer financing, would defeat the legislative purpose of financial consumer protection legislation.

With these definitions, both broad and comprehensive, interest rate caps and clear disclosure provisions of interest charged to borrowers by lenders and vendors would provide additional protection to all financial consumers from abusive and predatory lending practices. The vulnerabilities and financial literacy rates of consumers further confirm the necessity of including all forms of consumer credit products, agreements and lenders in the new consumer credit regulatory framework.

7.3.2 Interest Rate Ceilings and the Criminal Interest Rate

With the current criminal interest rate equivalent to an APR of 47%, the lowering of the criminal provision was a priority until recently when Parliament lowered the criminal interest rate to an APR of 35% as discussed in Chapter 6. Although the statutory provision is not yet in force, the federal government seems quite intent on delivering on its promises

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[62] *Hybrid Financial Ltd v Flow Capital Corp*, 2022 ONCA 820 at para 45.

[63] *Ibid* at paras 28, 45; *Garland v Consumers' Gas Co*, [1998] 3 SCR 112 at para 51, 1998 CanLII 766, citing *Mira Design Co Ltd v Seascape Holdings Ltd*, 1981 CanLII 721 at para 16 (BCSC):

> The thrust of the definitions of "credit advanced" and "interest" is to cover all possible aspects of any transaction to ensure that the cost of using someone else's money never exceeds the criminal rate. [...] Clearly the intention of the legislature was to concentrate on the substance of the transaction, not on its mechanics or form".

to regulate high-cost lenders at a national level. It stated when it launched its second consultation on predatory lending that "[l]owering the criminal rate of interest is an important first step in safeguarding Canadians from predatory lending."[64]

Unfortunately, the federal government has maintained the payday lenders' exemption from the criminal provision but lowered the permissible lending rate to $14 per $100 borrowed despite recognizing the harm payday loans cause to vulnerable consumers and that "[p]redatory lenders can take advantage of some of the most vulnerable people in our communities, including low-income Canadians, newcomers, and seniors—often by extending very high interest rate loans."[65] As a result, although it lowered the criminal interest rate to 35%, payday lenders would still be permitted to lend at rates which would be considered criminal otherwise. The research undertaken for this thesis has failed to find any justification for maintaining this exemption apart from the ongoing invalid policy concern of maintain consumer access to such high-cost credit products, which the federal government has recognized as harmful and putting consumers at risk. The decision to retain this exemption is also contrary to most recommendations from academic researchers on the subject. Following an "in-depth and inter-disciplinary analysis of payday lending in Canada," Jerry Buckland, Chris Robinson & Brenda Spotton Visano recommended in 2018 that, given the unethical practices of the industry and the exploitation of repeat borrowers, payday loans should be simply banned as they are in Québec given the cost of borrowing restrictions in the Province.[66]

It is worth noting that the second federal consultation, which ended on November 30, 2023, does request comments on the further lowering of the criminal rate of interest and additional revisions to the payday lending exemption. With these recent consultations, the dissertation's conclusions and recommendations are therefore highly relevant to potential future reforms. Pursuant to our first recommendation, a comprehensive financial consumer

[64] Canada, 2023 Consultation, *supra* note 8.
[65] *Ibid*.
[66] Jerry Buckland, Chris Robinson & Brenda Spotton Visano, "Conclusion" in Buckland, Robinson & Spotton Visano, *supra* note 4, 219 at 223–24, 233 [Buckland, Robinson & Spotton Visano, "Conclusion"].

framework must include payday lenders to fully protection consumers and the exemption revoked.

In addition, the federal government is consulting Canadians on how various levels of government could increase access to "improve, promote, and support access to low-cost, small-value credit". In response, the past has informed the present that the most efficient way to protect consumers from predatory lending and increase access to low-cost credit would be to regulate the consumer credit industry. The analysis of consumer credit regulation since Confederation confirms that lenders will always adapt to a new regulatory framework requiring the industry to lower their fees charged to consumers. This is also confirmed by the response of payday lenders to evolving stricter regulations and the fact that other types of consumer credit remain available in Québec, despite the long-standing practice of the Office de la protection du consommateur to refuse to issue or renew a lender's license if the credit rate charged to borrowers is higher than 35% per annum.[67]

With the recent lowering of the criminal interest rate to a 35% APR, questions that beg to be answered are how the federal government intends to enforce this new criminal provision and what would replace the now almost pointless provincial licensing regimes on high-cost lenders, which regulate credit above 32% in most provinces.[68] The answer is clear: a new federal consumer credit regulatory framework.

Contrary to federal legislation since the repeal of the *Small Loans Act*, interest rate ceilings supervised by regulatory regimes have now been in place in several provinces and therefore offer potential best practices of legislation that could be enacted at the federal level, thereby harmonizing consumer credit law across the country.

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[67] Québec, Office the la protection du consommateur, "Prêteurs d'argent : Pratiques interdites" (6 January 2021) online: <opc.gouv.qc.ca/en/commercant/permis-certificat/preteur-argent/droit-obligation/interdictions/>; Peter Aziz et al, *Federal Government Opens Consultation on Fighting Predatory Lending by Lowering the Criminal Rate of Interest* (October 2022) 41:5 Nat BL Rev 53 at 55.

[68] For e.g. Provincial regimes licensing lenders offering high-cost credit products that exceed 32% are (AB) *Consumer Protection Act*, RSA 2000, c C-26.3, s 124.01–24.02; (BC) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, Part 6.4; *High-Cost Credit Products Regulation*, BC Reg 290/2021, s 9; (MB) *The Consumer Protection Act,* RSM 1987, c C200, s 237–56; *High-Cost Credit Products Regulation*, Man Reg 7/2016, s 2(2).

7.3.3 Role of Oversight Bodies: Supervision, Enforcement and Licensing Issues

The third recommendation derived from the analysis of past consumer credit legislation is the fundamental necessity of enforcing the new consumer credit regulatory framework by a licensing regime, stringent penalties and a dedicated regulatory enforcer supported by the judiciary.

Licensing of industry participants has long been considered a regulatory measure aiming to ensure their compliance to regulatory standards and practices. Licensing requirements also enable the government to limit access to the consumer credit market only to responsible lenders, thereby encouraging their continued regulatory compliance. Ontario has also recently proposed a licensing regime for high-cost lenders and has described its importance as follows:

> Licensing helps reduce the potential for consumer fraud and scams by providing consumers with a means of verifying whether a business operates according to standards set by the province. Both borrowers and businesses would benefit from a strong regulatory regime that controls entry into the high-cost lending sector to exclude potential or proven bad actors. By specifying prerequisites or criteria as a condition of being licensed, a licensing regime could reduce the number of businesses entering the industry who are unlikely to comply with legislation and could reduce participation by individuals with a history of misconduct.
>
> Licensing enables closer regulatory supervision of a sector and provides additional regulatory tools, other than prosecutions, that can be effective and potentially more responsive to non-compliance, such as suspending or imposing terms and conditions on a licensee.[69]

Currently, federally regulated financial institutions are licensed and the provinces have differing licensing regimes for various types of money lenders. Accordingly, under the new regulatory framework, all consumer credit lenders would be licensed by the FCAC providing uniformity, stability and coherence to the industry. One national regime, instead

[69] Ontario, "High-Cost Credit in Ontario: Strengthening Protections for Ontario Consumers, Consultation Paper," (January 2021), online: *Ontario* <ontariocanada.com/registry/showAttachment.do?postingId=36067&attachmentId=47536> at 9.

of 14 different federal, provincial and territorial regimes would enhance the industry's efficiency and effectiveness by consolidating and harmonizing standards and regulations resulting in reduced operating expenses. The elimination of these differing regulatory constraints would enable lenders to lower their fees and comply with the new regulatory framework benefiting lenders and consumers alike.

In addition, as is currently required in several provinces such as Nova Scotia and British Columbia, licensees would be required, as a licensing condition, to track and provide the FCAC aggregated data respecting their payday lending activities and their loan portfolios in addition to their audited financial statements.[70] The pooling and analysis of such information at a national level will undoubtedly increase the identification of systemic issues and the effectiveness of the FCAC's supervisory role by the monitoring of licensee compliance and the implementation of appropriate enforcement measures.

The historical review of provincial legislation relating to consumer credit further reveals a troubling tendency of provincial governments to lean on the judicial process to enforce their own regulations. Remedies and damages are provided in most statutes but are available only on the consumer's insistence to the Court that the act must be applied and enforced. Such passive enforcement of public statutes requires, however, that consumers bring the matter before the courts at their own expense to ensure that credit lenders comply with consumer protection provisions. Such an endeavour "requires a financial and educational status which many borrowers in the criminal market simply do not have."[71] Reliance upon the judicial system must be re-evaluated; giving voice to concerns about the effectiveness of remedies for financial consumers, access to justice issues, and the substantive, and not only symbolic, implementation of provincial legislation.[72]

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[70] Saul Schwartz & Stephanie Ben-Ishai, "Prevalence of High-Cost Loans among the Debts of Canadian Insolvency Filers" (2023) 49:1 Can Pub Pol'y 62 at para 71; *Re Consumer Protection Act*, 2018 NSUARB 215 at para 44.

[71] Mary Anne Waldron, "What is to Be Done with Section 347?" (2003) 38 Can Bus LJ 367 at 379 [Waldron, 2003]; Ziegel, 1968, *supra* note 10 at 492.

[72] Edward P Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977) 15:2 Osgoode Hall LJ 327 at 382.

Mary Anne Waldron previously concluded that "the rights of the most vulnerable of our society can often times only be protected by the criminal law or active governmental enforcement of consumer protection regulations."[73] With illegal lenders who flout compliance with consumer protections continuing to flood the consumer credit market, these remarks remain relevant in a rapidly evolving industry. The question remains whether existing regulatory agencies lack the legislative mandate or simply the appropriate resources to implement and enforce existing consumer protection legislation. With the refusal to prosecute illegal payday lenders at the federal level in the early 2000s and the more recent examples in Newfoundland and Québec, the answer might be both.

Moreover, current administrative enforcement is generally focused on addressing consumer complaints rather than acting upon the government's own initiative to investigate allegations of unfair, deceptive, or abusive practices in the industry. As such, administrative enforcement mechanisms relying on a complaint system are "only useful if people (1) know about the service and the regulations […] (2) know about the complaint mechanism" and are not discouraged by the length, complexity and effort involved in the process.[74] In comparison, in "some provincial-territorial jurisdictions, the regulator does not resolve individual complaints" but "[c]omplaints received are used as a main monitoring tool to inform enforcement activities."[75] Proactive investigations are conducted in some provinces predicated on the complaints received and criteria such as the number of individuals affected, the vulnerability of the consumer, an assessment of harm to the consumer or to the general public and to public confidence and the seriousness of the breach, the history of the business and criminality.[76] In Ontario, it was recommended that access to compensation for borrowers for harm resulting from statutory violations should be facilitated and that "[c]larifying and improving these processes could help consumers assert

[73] Waldron, 2003, *supra* note 71 at 379.
[74] Buckland, 2012, *supra* note 21 at 169; Ontario, Payday Lending Panel, "Strengthening Ontario's Payday Loans Act: Payday Lending Panel Findings and Recommendations Report," (May 2014), online: *Ontario* <ontariocanada.com/registry/showAttachment.do?postingId=17182&attachmentId=26292> at 24 [Ontario, 2014].
[75] Financial Consumer Agency of Canada, "Report on Best Practices in Financial Consumer Protection," (31 May 2018) at 12–14, online: *FCAC* <canada.ca/en/financial-consumer-agency/programs/research/best-practices-financial-consumer-protection.html> [perma.cc/H928-VY7P] [FCAC*, Report on Best Practices*].
[76] *Ibid* at 13.

their consumer rights and manage their financial obligations and ensure that their basic needs are met." [77]

Although the constitutional basis of Québec's arguments is questionable, the assertions and renewed protestations against the weakening of consumer protection in the Province, should a less stringent federal framework be enacted, remain valid and should nonetheless be addressed. The intent and objective of the new financial consumer framework is to increase consumer protection and should therefore provide a variety of effective consumer remedies, as recommended by the FCAC, "including contract cancellation, contract variation, damages and restitution."[78] In addition, by providing effective redress mechanisms for consumers, the federal government will have heeded the warning of Bradley Crawford that the Supreme Court of Canada is determined to protect consumers and that the enactment of "comprehensive, exclusive national rules governing the relations of banks with their customers" "will not be achieved at the expense of the civil rights of the customers" unless there are clearly conflicting provisions.[79]

It is clear, however, that the statutory remedies in a new framework should be available as part of redress mechanisms in enforcement proceedings exercised by regulators or external complaint bodies on behalf of financial consumers or be privately enforced by consumers through the judicial system or a combination of both. In the end, consumers may lose some civil remedies currently available under a few provincial regimes, but other regulatory compliance, enforcement and consumer redress measures secured by regulated entities may provide better protection for consumers without resorting to litigation before the courts.

Regulatory compliance is also enforced by stringent fines and administrative monetary penalties for all types of violations, sending a clear message to all lenders that, in addition to the potential loss of their license, they cannot benefit financially from predatory and abusive practices. Suppression of illegal lending practices will materialize only when

[77] Ontario, 2014, *supra* note 74 at 24.
[78] *FCAC, Report on Best Practices*, *supra* note 75 at 41–42.
[79] Crawford, 2017, *supra* note 40 at 63, 90.

lenders no longer gain from their exploitation. It bears repeating that monetary compensation to financial consumers worth millions had been awarded or secured in the past by the OBSI and the FCAC. Moreover, the framework should provide regulators with "access to a wide range of enforcement tools to achieve compliance"[80] and the FCAC has significantly increased its financial and human resources responsible for the supervision of regulated entities and enforcement of consumer protection measures.

To fulfill these responsibilities, the FCAC could supplement the agency's revenue by these monetary administrative penalties along with levies on the consumer credit industry similar to current levies imposed on FRFIs, instead of being solely dependent on public funds. The FCAC has already been granted the power to "assess a portion of the total amount of expenses against each financial institution".[81] Fees could also be levied partially based on a coefficient applied to a lender's total consumer lending portfolio in default as of the end of each year.[82] This type of levy would further promote responsible lending and consumer financial well-being by motivating lenders to empower and enable debtors to repay their loans, get out of their cycle of debt and improve their financial position. In essence, this legislative measure promotes responsible lending since lenders would be doubly penalized when borrowers default on their loans. In addition, with new responsible lending obligations applicable to all lenders, similar to those recently enacted in the federal *Financial Consumer Protection Framework Regulations* and several provincial statutes, as further discussed in the following subsection, consumer financial wellness would be propelled to the forefront of the consumer credit industry's priorities.[83]

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[80] FCAC*, Report on Best Practices*, *supra* note 75 at 40.

[81] *FCAC Act*, *supra* note 24, s 18(3); *Financial Consumer Agency of Canada Assessment of Financial Institutions Regulations*, SOR/2001-474.

[82] See e.g. Belgium statutes: *Loi-programme (I) du 26 décembre 2015*, MB, 30 December 2015, s 61 online: <ejustice.just.fgov.be/img_l/pdf/2015/12/26/2015205966_F.pdf>, modifying *Loi modifiant la loi du 5 juillet 1998 relative au règlement collectif de dettes et à la possibilité de vente de gré à gré des biens immeubles saisis* du 7 June 2002, MB, 7 June 2002, s 2.

[83] *Budget Implementation Act, 2018, No 2*, SC 2018, c 27, s 329 [*Budget Implementation Act, 2018*], adding *Bank Act*, SC 1991, c 46, s 627.06; *Consumer Protection Act*, CQLR c P-40.1, ss 1, 103.2-103.5; *Regulation respecting the application of the Consumer Protection Act*, CQLR c P-40.1, r 3, Division II.1, Assessment of Consumer's Capacity to Repay Credit or Perform Obligations (CIF 1 August 2019); *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, s 123(8), as amended by *Putting Consumers First Act (Consumer Protection Statute Law Amendment)*, *2017*, SO 2017, c 5, Schedule 2, s 20(3) (not in force).

Chapter 5 on the regulatory patchwork of provincial consumer credit legislation has demonstrated that the Provinces and Territories have been unable to consistently and uniformly protect financial consumers. A national agency, such as the FCAC, would consolidate current provincial and federal initiatives relating to the licensing of lenders, financial literacy initiatives and the strict enforcement of national regulations, thus improving the effectiveness and efficiency of public resources dedicated to the protection of financial consumers.

The FCAC's supervision, monitoring and enforcement responsibilities must also be supported by coercive public and private enforcement through the judiciary. Legislation, when enacted, must clearly enable the judiciary to assist not only the FCAC but also private individuals seeking judicial redress, should it be available, to better protect consumer borrowers against predatory lending.

With the mandates of the OSBI and the FCAC recently strengthened and new complaint-handling requirements imposed on regulated entities as discussed in Chapter 6, a new federal framework would be better implemented and enforced contrary to most current provincial regimes. In addition to resolving consumer complaints, the new Framework has assigned new responsibilities on regulated entities, the OSBI and the FCAC to identify systemic issues, which can thereafter be monitored by the FCAC. These new provisions along with the new whistleblowing provisions aim to address non-compliant and illegal practices without direct consumer complaints in order to prevent future consumer harm or, at the very least, minimize unfair, deceptive, and abusive practices. For an outright prevention of consumer exploitation, measures must also be in place to protect consumers prior to transactions, such as responsible lending provisions, not only after they have suffered harm caused by marketplace abuses.[84]

7.3.4 Responsible Lending: Affordability and Suitability of Products

[84] Kerton & Ademuyiwa, *supra* note 5 at 95.

As discussed in Chapter 4, the prevention of insolvency has been confirmed as a matter within the constitutional jurisdiction of Parliament. Consequently, pursuant to a broad interpretation of the heads of power bankruptcy and insolvency and interest, Parliament may enact in the new federal framework new techniques and innovative preventative measures to require consumer lenders to lend responsibly, thereby preventing the overindebtedness and insolvency of consumers.

Given the clear inequality of bargaining power and the resulting "imbalance between debtor and creditor responsibilities,"[85] new regulatory measures are recommended to ensure that creditors cease their irresponsible lending practices and become responsible for the losses incurred by their actions. As explained by Therese Wilson,

> to focus on responsible borrowing, as opposed to lending, ignores the structural causes of over-indebtedness where consumers lack choice and must accept inappropriate, high-cost credit products in order to meet their credit needs. It also ignores theories of behavioural bias, which hold that consumers will display overoptimism and overconfidence when entering into credit agreements.[86]

Irresponsible lending practices include practices whereby the consumer's financial ability to repay the debt is not assessed or worse, the lender knowingly offers or renews credit to a financially distressed individual unlikely to be able to repay the loan.

In Canada, boundaries of responsible lending are defined by limited provincial consumer protection legislative provisions and federal banking regulatory requirements augmented by industry-established codes of conduct that promote responsible lending practices as discussed in Chapters 5 and 6. Québec and Ontario have recently enacted limited responsible lending provisions requiring the lender not only to assess a borrower's debt ratio and ability to pay but also to inform the potential client of the results. Legal

[85] Ziegel, 2010, *supra* note 25 at 385; Ziegel, 1968, *supra* note 10 at 490.

[86] Therese Wilson, "The Responsible Lending Response" in Therese Wilson, ed, *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Aldershot/GB: Ashgate Publishing, 2013) at 126. See also Iain Ramsay, "Overindebtedness and Regulation of Consumer Credit" in Thierry Bourgoignie, ed, *Regards croisés sur les enjeux contemporains du droit de la consommation* (Cowansville, QC: Yvon Blais, 2006) 35 at 40 [Ramsay, 2006].

consequences are prescribed encouraging a lender to consider the consumer's financial circumstances and the impact of increasing their level of indebtedness.

At the federal level, the new Framework includes a new suitability test requiring a bank to "establish and implement policies and procedures to ensure that the products or services in Canada that it offers or sells to a natural person other than for business purposes are appropriate for the person having regard to their circumstances, including their financial needs."[87] Although these are promising developments, more stringent responsible lending requirements are essential as recommended by international benchmarks for financial consumer protection.

Initially the focus of intense international debate, responsible lending provisions are now considered best practices and high-level principles recommended by the OECD, the G20 and the World Bank. According to the *G20 High-Level Principles on Financial Consumer Protection* ("*High-Level Principles*"), financial services providers should work in the best interest of their customers and "assess the related financial capabilities, situation and needs of consumers before agreeing to provide them with a product, advice or service. They should recommend to consumers suitable products or services that aim to deliver appropriate outcomes and ultimately contribute to their financial well-being."[88] Likewise, the *Good Practices for Financial Consumer Protection* of the World Bank recommends that criteria of suitability and affordability of the credit products or services be assessed prior to a credit transaction, including micro-financing and payday loans.[89] These consumer provisions are further explained as follows:

> With respect to credit products, a key element of product suitability is the concept of responsible lending, which is centred on balancing affordability with the financing needs of the consumer. In consumer and microfinance

[87] *Budget Implementation Act, 2018*, *supra* note 83, ss 316–19, 329, adding *Bank Act*, *supra* note 151, s 627.06 (not in force yet).

[88] OECD Council, "G20/OECD High-Level Principles on Financial Consumer Protection," (12 December 2022), online: *OECD* <oecd.org/daf/fin/financial-education/G20_OECD%20FCP%20Principles.pdf> at 8. See also OECD*, High-Level Principles, 2011*, *supra* note 1 at 7.

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

> lending, providers sometimes may not assess a potential borrower's payment capacity sufficiently. Such assessments should be required, and reassessments could also be required when the product being offered increases the consumer's debt substantially.[90]

Upon entering into a credit agreement, a lender should be required to assess not only the consumer's ability to pay but also the suitability of the credit products considering the consumer's financial capacity and indebtedness as well as the object of the loan. These components of responsible lending practices should also be extended to include an evaluation of the consumer's ability to pay without undue hardship, in the sense that the increased indebtedness "does not cause undue economic hardship to a credit consumer" and "does not deprive him of the ability to support himself and his family."[91] The answer is not necessarily to refuse credit when a borrower is financially distressed but rather offer more options following an assessment of the consumer's financial situation such as "offering larger loans with more appropriate repayment schedules from the start, or by referring the consumer to another lender."[92]

Responsible lending measures can take various legislative forms and should also include economic incentives to lend responsibly.[93] These responsible lending provisions exert pressure upon the lender to exercise caution with high-risk debtors, since additional losses may be incurred should the consumer's overindebtedness lead to insolvency. In addition to fees levied by the FCAC determined by the lender's level of defaulting debtors as recommended in the previous subsection, other financial impacts of irresponsible lending should be included in insolvency legislation. Iain Ramsay and Jacob Ziegel have both advocated for legislative reforms to recognize the contribution of abusive or negligent lenders in the insolvency of their consumer debtors.[94]

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[90] World Bank Group, *supra* note 59 at 38.
[91] Ronald CC Cuming, "Consumer Credit Law" in GHL Fridman, ed, *Studies in Canadian Business Law* (Toronto: Butterworths, 1971) at 72; Cuming, *supra* note 1 at 72.
[92] World Bank Group, *supra* note 59 at 38.
[93] Micheline Gleixner, "Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency" in Janis Sarra, ed, *Ann Rev Insolv L 2013* (Toronto: Carswell, 2014) 587 at 615–37.
[94] Ziegel, 2010, *supra* note 25 at 393; Anna Lund, "Engaging Canadians in Commercial Law Reform: Insights and Lessons from the 2014 Industry Canada Consultation on Insolvency Legislation" (2016) 58:2 CBLJ 123 at 147–51 referring to Submission of Iain Ramsay to Industry Canada (July 15, 2014).

These measures would not only protect vulnerable consumers by reducing their level of indebtedness but also would act as an incentive for lenders to increase their responsible lending practices and thus prevent future consumer insolvencies. In 2014, Industry Canada also recognized the impact of irresponsible lending on consumers and other creditors:

> creditor behaviour may also contribute to financial difficulty for some Canadians. For example, credit granting practices such as extending credit on onerous terms to individuals who are unable to meet their existing financial obligations can lead to higher rates of insolvency. This may impact on existing creditors, whose recovery would likely be reduced due to the increased claims.[95]

Industry Canada further suggested the possible implementation of responsible lending regimes imposing additional requirements on lenders before extending credit and penalizing non-compliant lenders with these new provisions. Having contributed to the financial difficulties or insolvency of a debtor, new consumer provisions should include new powers to a licensed insolvency trustee or a court to disallow a creditor's claim "where credit was extended improvidently or on unconscionable terms" and new requirements on the irresponsible creditor to impeach or "disgorge payments" made by the debtor prior to the insolvency proceeding.[96] These are explained by Anna Lund as follows:

> If the trustee disallowed the creditor's claim, the creditor would not receive any distributions during the insolvency proceedings. If the trustee impeached the payments to the creditor, the creditor would be required to pay the impeached amounts to the trustee, for the benefit of other creditors."[97]

Iain Ramsay's submission to Industry Canada recommended further consumer protection provisions. Creditor misconduct and irresponsible lending practices should be supervised

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Although limited to the housing market, a consultation process was launched by the federal government on October 3, 2016, to determine whether risk of mortgagor default should be shared with mortgage lenders: Canada, Department of Finance, Backgrounder, "Ensuring a Stable Housing Market for All Canadians" (3 October 2016) online: *Canada* <canada.ca/en/department-finance/news/2016/10/backgrounder-ensuring-stable-housing-market-all-canadians.html>.

[95] Industry Canada, "Corporate, Insolvency and Competition Law Policy: Statutory Review of The Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act - Discussion Paper" (2014), online: *Canada* <publications.gc.ca/site/eng/463672/publication.html?wbdisable=true> at 11.

[96] *Ibid*.

[97] Lund, *supra* note 94 at 148.

by licensed insolvency trustees referring cases to the Office of the Superintendent of Bankruptcy ("OSB") similar to investigations into debtor misconduct. "Where the Office of the Superintendent confirmed that creditors had engaged in irresponsible lending practices, the Office of the Superintendent could then assess penalties against them or seek restitutionary payments."[98] Systemic issues identified by the OSB could thereafter be addressed by enforcement measures undertaken by the FCAC. Although there was no consensus on these consumer protection provisions in 2014, their importance is increasingly recognized. Responsible lending requirements must therefore be integrated in the new financial consumer protection framework.

Finally, an emphasis on corporate social responsibility through responsible lending requirements should stimulate financial innovation; producing new products and services designed to facilitate the repayment of loans rather than the exploitation of the gradual increase of a consumer's total indebtedness. As stated by Jacob Ziegel, "[t]he question is no longer whether lenders and credit grantors should be held responsible but how that principle can best be given legislative expression".[99] As with initial disclosure of cost requirements in the 1960s, lenders have and will undoubtedly continue to contest and raise issues with the implementation of responsible lending requirements but eventually will accept the new consumer protection standards, adapt and innovate to the benefit of financial consumers.[100]

7.4 Directions for Future Research and Action

Preventing over-indebtedness and insolvency will not only be accomplished with legislative reforms regulating the consumer credit industry. It has recently been suggested that as a society, we should rethink credit as a social provision for low income or financially

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[98] *Ibid* at 149 referring to Submission of lain Ramsay to Industry Canada (July 15, 2014).
[99] Ziegel, 2010, *supra* note 25 at 394.
[100] Ontario*, Final Report on Consumer Credit, 1965*, *supra* note 10 at 235–82. See e.g. Canadian Bankers Association, *Canada's Financial Consumer Protection Framework: Consultation Paper* (28 February 2014) at 9–10, online: *CBA* <cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/sub_20140227_consumerprotection_en.pdf> [perma.cc/P62E-E3QT].

distressed individuals.[101] Since many consumers rely on high-cost credit for some of their basic needs, causes of these persistent economic shortfalls and financial exclusion from mainstream financial services providers must not only be regarded as an economic problem but also a social, and perhaps a health, one as well.[102]

The regular exclusion of vulnerable consumers from mainstream financial institutions is a subject for which the current data is not sufficient to allow us to draw specific conclusions. Further research is therefore essential to address the needs of financial consumers[103] and to "identify determinants of overindebtedness," financial exclusion, poverty and the recent growth in consumer insolvencies in Canada.[104] Additional and different questions must therefore be raised to determine optimum and sustainable solutions. Why are consumers using these products and in what circumstances? What are the economic and social consequences on individuals, their families and their communities? Are current alternative high-cost financial services appropriate or even necessary since they reinforce inequality, indebtedness and poverty?[105] Are there alternative innovative solutions in either or both the public and the private sector?[106] Proposed alternatives are government funded low-cost loan programs and increasing access to other financial services offered by banks and credit unions such as savings accounts, small credit products and overdraft protection.[107] These recommendations are certainly worthy of further consideration by policymakers and further analysis by academic researchers. Many of these issues have been highlighted in the most recent consultation of the federal government on cracking down on predatory

[101] Abbye Atkinson, "Rethinking Credit as Social Provision" (2019) 71:5 Stan L Rev 1093.
[102] *Ibid* at 1161; Buckland, 2012, *supra* note 21 at 163; Manitoba Public Utilities Board, 2016, *supra* note 18 at 39; Buckland, Robinson & Spotton Visano, "Conclusion", *supra* note 66 at 231.
[103] Ontario, 2014, *supra* note 74 at 25.
[104] Denise Barrett Consulting, *Consumers' Experience with Higher Cost Credit* (Toronto: Consumers Council of Canada, 2018) at 100; Buckland & Spotton Visano, "Introduction", *supra* note 18 at 37; Office of the Superintendent of Bankruptcy Canada, "Annual Consumer Insolvency Rates by Province and Economic Region" online: *OSB* <ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html> [perma.cc/D2DP-BVB2]; J Douglas Hoyes, "Yes, We Have a Payday Loan Crisis" (updated for 2018), online (blog): *Hoyes* <hoyes.com/blog/yes-we-have-a-payday-loan-crisis/> [perma.cc/DVA9-M9VT].
[105] See Buckland, 2012, *supra* note 21 at 199–200.
[106] See e.g. Buckland, Robinson & Spotton Visano, *supra* note 4 at ch 6 "Mainstream Financial Institution Alternatives to the Payday Loans" 147.
[107] Buckland, 2012, *supra* note 21 at 232–33; Schwartz & Ben-Ishai, *supra* note 70 at 71–72.

lending and increasing access to low-cost credit. Hopefully, some answers and recommendations will be submitted proposing additional reforms.

Parliament has recently enacted important and positive reforms to the federal regulatory framework of FRFIs, but additional reforms are required to better protect financial consumers, especially the most vulnerable. The rise in the levels of consumer indebtedness and consumer insolvencies is unsustainable and a national strategy should be developed in Canada to combat overindebtedness as recommended by Iain Ramsay.[108] It is time that Canada recognizes this, along with the importance of financial consumer protection and the federal regulation of the entire consumer credit industry. The enactment of the new federal Framework, recent reforms to the *Criminal Code* and recent federal consultations on predatory lending might indicate a political openness to address these issues and implement this dissertation's recommendations.

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

As stated eloquently by Jacob Ziegel, "[w]e must also keep the politicians' feet to the fire and insist, often and loudly, that a sound consumer protection policy makes for a more efficient and responsible market place as well as keeping faith with traditional Western liberal and ethical values."[109] The author hopes that this dissertation will provide the

[108] Ramsay, 2006, *supra* note 10 at 69.
[109] Jacob S Ziegel, "Is Canadian Consumer Law Dead?" (1994–1995) 24:3 Can Bus LJ 417 at 423.

incentive and legal justifications to others enabling them to advocate for the implementation of further reforms to better protect the financial well-being of all consumers in Canada as recommended in this final chapter.

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APPENDICES

Appendix A – Provincial Cost of Credit Disclosure Legislation (updated to 1 October 2023)

Province	Title of Legislation and Regulations	Calculation of APR and Cost of Borrowing	Disclosure of charges and fees	Right to prepay	Cancellation of Optional Services	Notice of Changes	Credit Cards
Alberta	*Consumer Protection Act*, RSA 2000, c C-26.3; *Cost of Credit Disclosure Regulation*, Alta Reg 198/1999.	Reg, ss 21–29	ss 58–65, 74–85; Reg, ss 3–8, 11–14, 17–20	s 68	s 67	s 78; Reg, s 9	ss 86–89; Reg, ss 15–16
British Columbia	*Business Practices and Consumer Protection Act*, SBC 2004, c 2; *Disclosure of the Cost of Consumer Credit Regulation*, BC Reg 273/2004.	Reg, Part 1–2	ss 57–70, 81–93; Reg, Part 5	s 74	s 73	ss 85–86	ss 94–99
Manitoba	*The Consumer Protection Act*, CCSM, c C200, s 136.1; *Consumer Protection Regulation*, Man Reg 227/2006.	ss 1, 6; Reg ss 4.1-8, 11–12, 16, 19	ss 7–11, 13–15, 25, 34.2–34.7, 35.1, 35.3; Reg ss 9–10, 13, 17–18	ss 18–20	ss 23–24	ss 34.4–34.5	ss 35.4–35.9; Reg ss 14–15
New Brunswick	*Cost of Credit Disclosure Act*, SNB 2002, c C-28.3; *General*, NB Reg 2010-104.	ss 1, 51; Reg, ss 10–17	ss 16–20, 25, 28-32, 37–42; 47–49; Reg, ss 15–17, 20, 27–31	s 23	s 22	ss 33–35, 50; Reg, s 19	ss 43–46
Newfoundland and Labrador	*Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1; *Cost of Consumer Credit Disclosure Regulations*, NLR 74/10.	Reg ss 2–5, 7, 10	ss 46–49, 57–60, 65–74; Reg ss 9, 11–12, 14–16	s 52	s 51	ss 61–63	ss 71–74; Reg, s 17
Nova Scotia	*Consumer Protection Act*, RSNS 1989, c 92; *Consumer Protection Act Regulations*, NS Reg 160/2000 as amended by NS Reg 72/2018.	s 2; Reg s 11	ss 17–18	s 19		Reg ss 18–19	

Province	Title of Legislation and Regulations	Calculation of APR and Cost of Borrowing	Disclosure of charges and fees	Right to prepay	Cancellation of Optional Services	Notice of Changes	Credit Cards
Northwest Territories	*Cost of Credit Disclosure Act*, SNWT 2011, c 23; *Cost of Credit Disclosure Regulations*, NWT Reg 014-2012.	ss 1, 3; Reg, ss 1, 4, 20–26	ss 6–11, 16, 20–23, 27–31; Reg, ss 3, 5–14, 17–18	s 14	s 13	ss 24–25	ss 32–35; Reg, ss 15–16
Nunavut	*Consumer Protection Act*, RSNWT (Nu) 1988, c C-17; *Consumer Protection Regulations*, RRNWT 1990, c C-16.	ss 11–12; Reg, ss 6–8	ss 5–10, 13–17, 37–38	s 39		s 18	ss 13–16
Ontario	*Consumer Protection Act*, SO 2002, c 30, Sch A; *General Regulation*, O Reg 17/05.	Reg, s 55	Reg, ss 56, 61, 63–64, 68	s 76	s 73	ss 80–81; Reg, ss 65–66, 69	ss 68, 99; Reg, ss 58, 62, 85
Prince Edward Island	*Consumer Protection Act*, RSPEI 1988, c C-19; *Cost of Borrowing Disclosure Regulations*, PEI Reg EC16/87; *Conduct of Creditors Regulations*, PEI Reg EC578-83.	s 1; Reg EC16/87, ss 2–4	ss 15–16, 20; Reg EC16/87, ss 6–9; Reg EC578-83, ss 3–4	s 18		s 16	s 17
Québec	*Consumer Protection Act*, CQLR, c P-40.1; Regulation respecting the application of the *Consumer Protection Act*, c P-40.1, r 3.	ss 66–70, 91–92, 119; Reg ss 51–61, 72	ss 71, 80–81, 94, 100.1, 115, 125–126, 134, 150, 246; Reg, ss 26–29, 33–42, 65–67, 80–86	s 93	s 228.3	s 129; Reg, s 64.1	ss 120–124, 128
Saskatchewan	*Cost of Credit Disclosure Act, 2002*, SS 2002, c C-41.01; *Cost of Credit Disclosure Regulations*, 2006, RRS c C-41.01, Reg 1.	Reg, ss 11–21	ss 7–12, 21–25, 29–35, 38–44	s 17	s 16	ss 26–27	ss 35.1–37.2
Yukon	*Consumers Protection Act*, RSY 2002, c 40; *Regulations Respecting the Protection of Consumers*, YCO 1972/400.	Reg, ss 2–8	ss 4–27	ss 28–29			s 12, 24

Appendix B – Unfair Practices Remedies Legislation (updated to 1 October 2023)

Province	Title of Legislation and Regulations	Power to rescind/reopen/set aside agreement	Administrative order/penalty	Compensation to consumer	Right of action against supplier	Penalty for offences
Alberta	*Consumer Protection Act*, RSA 2000, c C-26.3; *Consumer Transaction Cancellation and Recovery Notice Regulation*, Alta Reg 287-2006.	s 7	ss 157–158.5	ss 159.1, 168	Consumer, ss 7.1–7.4, 142.1; Reg ss 1–2 Director, s 159	ss 161–164
British Columbia	*Business Practices and Consumer Protection Act*, SBC 2004, c 2.		ss 164–168	s 192	Consumer, s 171 Director or other person, s 172	s 190
Manitoba	*The Business Practices Act*, CCSM, c B120					
Newfoundland and Labrador	*Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.	s 10(2)	**s** 102		Consumer, s 10 Director, ss 103–104	s 109
Nunavut	*Consumer Protection Act*, RSNWT (Nu) 1988, c C-17.	s 72.5(2)			Consumer, s 72.5	s 111
Ontario	*Consumer Protection Act*, SO 2002, c 30, Sch A.	Right to rescind, s 18	ss 109–112	s 117	Consumer, s 18(8)	s 116
Prince Edward Island	*Business Practices Act*, RSPEI 1988, c B-7; *Conduct of Creditors Regulations*, PEI Reg EC578-83.	Reg ss 6–9	Reg ss 2–4			
Québec	*Consumer Protection Act*, CQLR, c P-40.1.	s 272	ss 315–316		Consumer, s 272 Director or advocacy group, s 316	ss 277–280
Saskatchewan	*Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.	s 93	ss 81–82; Reg, ss 11–21	s 93	Consumer, s 91 Director, s 92	ss 108–110

Appendix C – Provincial Regulation of Payday Lenders (updated to 1 October 2023)

Province	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia	Ontario	Prince Edward Island	Saskatchewan
Title of Legislation and Regulations	*Consumer Protection Act*, RSA 2000, c C-26.3; *Payday Loans Regulation*, Alta Reg 157/2009; *Cost of Credit Disclosure Regulation*, Alta Reg 198/1999	*Business Practices and Consumer Protection Act*, SBC 2004, c 2; *Payday Loans Regulation*, BC Reg 57/2009.	*The Consumer Protection Act*, CCSM, c C200, s 136.1; *Payday Loans Regulation*, Man Reg 99/2007.	*Cost of Credit Disclosure Act*, SNB 2002, c C-28.3; *Payday Lending Regulation*, NB Reg 2017-23; *General Regulation*, NB Reg 2010-104.	*Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1; *Payday Loans Regulations*, Nfld Reg 10/19; *Payday Loans Licensing Regulations*, Nfld Reg 11/19.	*Consumer Protection Act*, RSNS 1989, c 92; *Payday Lenders Regulations*, NS Reg 248/2009; *Consumer Creditors' Conduct Act*, RSNS 1989, c 91	*Payday Loans Act, 2008*, SO 2008, c 9; *General Regulation*, O Reg 98/09; *General*, O Reg 17/05.	*Payday Loans Act*, SPEI 2009, c 83; *Payday Loans Act Regulations*, PEI Reg EC67/13.	*Payday Loans Act*, SS 2007, c P-4.3; *Payday Loan Regulations*, RRS c P-4.3; *The Collection Agents Act*, RSS 1979, c C-15
Price Cap	15% of principal amount including fees for all mandatory and optional services, s 124.61	$15 per $100, s 112.03; Reg, s 17	17% of principal amount, s 147(1); reg, s 13.1(1)	$15 per $100, s 37.31; Reg, s 3	$21 per $100, s 83.3, Reg 10/19, s 7(1)	$15 per $100 including insurance fees as per 2022 NSUARB 91 at paras 105-06, s 18J	$15 per $100, s 23	$25 per $100: Reg, s 24	23% of principal amount, s 23; Reg, s 14
APR Disclosure	s 76; Reg 198/1999, ss 6, 8	Yes, s 112.06(2)k)	Yes, s 13(2); reg s 14	Yes, ss 30(2), 37.28(2)k),	Yes, s 83.6	Yes, s 18I	Yes, Reg 98/09, ss 14(3), 15(2), 18; Reg 17/05, s 55	No	Yes but it is called the "annualized borrowing rate," Reg, s 10
Borrowing Limit	$1,500	50% of borrower's net pay, ss 112.02, 112.08(1)c),d); Reg, s 18	30% of borrower's net pay or full amount of loan replaced, s 151.1(1); Reg s 15.2	30% of borrower's net pay, s 37.36; Reg, s 4	50% of borrower's net pay, Reg 10/19, s 3(1)g)	$1500, s 18N(e)	$50% of borrower's net income, Reg s 16.2	$1,500, s 30	50% of borrower's net pay, s 30; Reg, s 15

Province	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia	Ontario	Prince Edward Island	Saskatchewan
Cancellation Period	Two business days, s 124.4(1)	Next business day or anytime, i borrower not notified of cancellation rights or lender contravenes statute or regulation, s 112.05	48 hours or anytime if not notified of cancellation rights, s 149; reg, s 14.4	48 hours excluding Sundays and holidays or anytime if not notified of cancellation rights, s 37.29(2), (3)	Two business days, s 83.5	Next business day or 48 hours for Internet payday loan or anytime if not notified of cancellation rights, s 18Q	Two business days, s 30	Two business days, s 28; Reg, s 19(2)	Next business day or anytime if not notified of cancellation rights, s 22
Maximum NSF Fee	One-time $25 fee, s 124.61(3)b)	One-time $20 fee, s 112.02; Reg, s 17(2)b)	Maximum $20, Reg, s 15.5	$20 per dishonoured cheque or pre-authorized debit, s 37.31; Reg, s 5(1)b)	One-time $20 fee, 83.3, Reg 10/19, s 7(2)		"reasonable charges" reflecting costs incurred, s 33(1)b)	"reasonable charges," s 31	One-time $50 fee, s 23; Reg, s 14(2)b)
Default Charges and Maximum interest on arrears	2.5% per month, not to be compounded, s 124.61(3)	30% per annum on the outstanding principal balance, s 112.04; Reg, s 17(2)a)	2.5% of amount in default, calculated monthly and not compounded and NSF fee, s 153(1); Reg, ss 15.4, 15.5	2.5% per month of amount in default, s 37.37; Reg, s 5(1)a)	2.5% of amount in default, calculated monthly and not compounded, s 83.3, Reg 10/19, s 7(2)	Maximum penalty is $40 per payday loan and 30% maximum interest rate chargeable as per 2022 NSUARB 91 at paras 112, 119	2.5% per month, not to be compounded, reasonable charges in respect of legal costs or NSF fees, maximum $25 for dishonoured payment and no fee more than once per payday loan, s 32.1–33	No default charges except legal costs to collect and NSF fees, s 31 60% maximum interest rate chargeable	30% per annum on the outstanding principal balance, s 23; Reg, s 14(2)a)
Content of Agreement and Posted Warnings	ss 124.41–124.5, 124.8	s 112.06; Reg, ss 13–14	ss 7–13, 148; reg, s 14, 16	ss 37.28, 37.3	s 83.6, Reg 10/19, ss 8–9	ss 18I, 18O; Reg, ss 8, 9	ss 29, 37; Reg, ss 14, 18, 20	s 35; Reg, ss 14, 19	ss 18–21; Reg, ss 11–13
Advertising	s 124.2(1)x)	ss 4(3)b),c), 6	s 13(1)	s 17	Reg 10/19, ss 3(1)dd)-ee), 10	s 20; Reg, s 9A	ss 26, 53	Reg, s 15	
Tied selling Prohibition	Yes, s 124.21	Yes, Reg, s 19	Yes, unless included in cost of credit, s 154.2	Yes, s 37.33	Yes, Reg 10/19, s 4 No insurance required, Reg 10/19, 3(1)h)	Yes, Reg, s 19	Yes, Reg, s 17	Yes, Reg, s 28	Yes, s 29

Province	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia	Ontario	Prince Edward Island	Saskatchewan
Concurrent or Rollover Loans	No rollover or replacement loans except with costs limited to interest, s 124.2(1)c) No concurrent, s 124.2(1)y)	No rollover or replacement loans except with costs limited to interest, s 112.08(1)a) No concurrent, s 112.08(1)b)	Yes, but only permitted if replacement loan but additional cost limited to 5% of principal amount of new loan, s 154(1); Reg, s 13.1	No rollover or replacement loans except with costs limited to interest, s 37.34 No concurrent loans, s 37.35	No concurrent loans, Reg 10/19, s 3(1)a) No rollover loans, Reg 10/19, s 3(1)c)	No, s 18N(c), (h)	No rollovers nor concurrent, s 35; Reg, s 34	No, s 33	No concurrent loans, s 28; Reg, s 16 No rollover or replacement loans except with costs limited to prescribed interest on arrears, Reg, s 16
Cooling-off Period after a Payday Loan			7 days, if not cost limited to 5% of the principal amount, s 13.1(3)		None	None, 24 hours recommended by 2015 NSUARB 64 at para 93	7 days, s 35(1)a)	7 days, s 33	None
Extension of contract or Repeat Loans	Mandatory Instalment Plan with term of 42 to 62 days, s 124.3; Reg, ss 10.2–10.3	Automatic extended payment plan for third or subsequent loan in a 62-day period, Reg, s 23	s 152(1)	No extension, but 2.5% penalty may be charged every 30-day period, Reg, s 5(2)	Extended payment plan for third or subsequent loans, Reg 10/19, s 5(2)	Yes, may be negotiated but not required as recommended in 2015 NSUARB 64 at para 94, s 18K	Extended payment plan for third or subsequent loans but cost of borrowing must be less than 60%, s 26; Reg, s 25.1	Not allowed, s 34	Yes, but costs limited to prescribed interest on arrears, Reg, s 16
Collection practices	s 124.2(1)k)–u), w), (2)	ss 113–128	Reg, s 18.3	S 62(1)x), y); NB Reg 2010-104, s 9	Reg 10/19, s 3(1)q)–aa)	s 18L; *Consumer Creditors' Conduct Act*	Reg, s 26, 32–33	Reg, s 34	s 32; *The Collection Agents Act*
Online Lending	s 124.11, Reg, s 4(3)	Reg, s 7(2)	ss 137, 163; reg ss 14.0.1, 14.3(2), 16.1, 18.1	S 37.12	ss 83.2, 83.6(6), Reg 11/19, s 3(3)	ss 18A, 18C, 18HA–18HAC; Reg, ss 8A, 8C		Reg, ss 4(5), 5, 14(4), 19, 22	s 1, online lenders may be included in definitions of "payday lender" and "carrying on business"; Reg, s 13(3)

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And: Micheline Gleixner
87 Glastonbury Dr
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