

BANKRUPTCY LESSONS FOR PAYDAY LENDING REGULATION

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I. INTRODUCTION

More than half of Canadians were already living paycheck to paycheck before the COVID-19 pandemic, experiencing increasing amounts of financial stress and debt.¹ The federal government has offered cash transfers to those whose incomes were reduced due to the pandemic, and as that relief ends, the potential for financial distress is even greater. This vulnerability presents an opportunity that the payday loan industry is particularly primed for and has responded to, considering it has been held out to be an “essential service” with continued operation since the onset of COVID-19.²

A payday loan is an unsecured, and usually small, loan from a non-traditional lender. These loans are short-term in nature, hence the name—a borrower usually pays the loan back by their next payday.³ Payday loans can last as long as 62 days and be for up to \$1,500.⁴ Most, however, span just two weeks, and the average amount of a loan is between \$300 to \$460.⁵

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¹ BDO Canada Limited, “BDO Canada Affordability Index 2019” (30 September 2019), online: *BDO Debt Solutions* <debtssolutions.bdo.ca/our-people/bdo-in-the-news/bdo-canada-affordability-index-2019/> [perma.cc/C79N-3ZMF].

² Anne Gaviola, “Payday Lenders Are Charging Up to 780% Interest Amid Coronavirus Panic” (5 January 2020), online: *Vice News* <www.vice.com/en/article/5dmnex/payday-lenders-are-charging-up-to-780-interest-amid-coronavirus-panic> [perma.cc/Q4HA-ZT4M] [Gaviola].

³ *Smith v National Money Mart Co*, 2007 CarswellOnt 29 (WL Can) at para 6, [2007] OJ No 46.

⁴ *Criminal Code*, RSC 1985, c C-46, s 347.1 [*Criminal Code*].

⁵ Brian Dijkema & Rhys McKendry, “Banking on the Margins: Finding Ways to Build an Enabling Small-Dollar Credit Market” (22 February 2016) at 11, online (pdf): *Cardus* <www.cardus.ca/research/work-economics/reports/banking-on-the-margins/> [perma.cc/D2NW-NVAT] [Dijkema & McKendry].

Payday loans are an important source of credit—borrowers who turn to payday loans often do so because they are quick, and also because these borrowers do not otherwise have access to traditional financial institutions due to their credit history and scores.⁶ Payday lenders are also less discerning, willing to lend to borrowers without a credit check as long as there is proof of identity, proof of future income, and ownership of a chequing account.⁷ However, repayment also includes paying the lender their fees and interest, which borrowers might not always be fully aware of or capable of paying. This means that payday loans end up being a very high-cost form of credit. In fact, in 2016 a national federal survey of Canadians found that fewer than half “understood that a payday loan is more expensive than available alternatives.”⁸

Until 2007, payday loans fell within the bounds of section 347(1) of the *Criminal Code of Canada* (CCC), which set the criminal interest rate constituting usury at 60 percent per annum.⁹ In 2007, however, a carveout was introduced to allow payday lenders to charge a higher rate of interest, subject to regulation as imposed by each province.¹⁰ Regulation of payday lending now consists of province-specific statutes and regulations, each trying to find an approach that will allow for a payday loan market while also protecting consumers from the potentially harmful nature of these products.¹¹

Recognizing that “financial insecurity is the common feature of all payday loan users,” in the midst of a pandemic economy, it is important to consider how consumers can avoid “debt traps.”¹² Yet many debt relief experts anticipate that exactly this will happen, and that the number of people filing for insolvency will go

⁶ Jerry Buckland, *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada* (Toronto: University of Toronto Press, 2012) at 107, 111.

⁷ Stephanie Ben-Ishai & Saul Schwartz, “Payday Lending in Canada: 10 Years Later” in Janis P Sarra, ed, *Annual Review of Insolvency Law*, (Toronto: Carswell, 2016) 951 at 951 [Ben-Ishai & Schwartz, “Payday Lending in Canada”].

⁸ Financial Consumer Agency of Canada, “Payday Loans: Market Trends” (25 October 2016) at 1, online (pdf): *Government of Canada* <www.canada.ca/en/financial-consumer-agency/programs/research/payday-loans-market-trends.html>.

⁹ Katrine Dilay & Byron Williams, “Payday Lending Regulations” in Jerry Buckland, Chris Robinson, & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context* (Cham, Switzerland: Palgrave Macmillan, 2018) 177 at 186 [Dilay & Williams].

¹⁰ *Criminal Code*, *supra* note 4.

¹¹ Jerry Buckland & Brenda Spotton Visano, “Introduction” in Jerry Buckland, Chris Robinson, & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context*, (Cham, Switzerland: Palgrave Macmillan, 2018) 1 at 8 [Buckland & Visano]; Freya Kodar, “Conceptions of Borrowers & Lenders in the Canadian Pay Day Loan Regulatory Process: The Evidence from Manitoba & Nova Scotia” (2011) 34:2 *Dalhousie LJ* 443 at 445.

¹² Ricardo Tranjan, “Swimming with the sharks: Poverty, pandemics and payday lenders” (April 2020) at 4, 9, online (pdf): *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office%2C%20Ontario%20Office/2020/04/Swimming%20with%20the%20sharks.pdf> [perma.cc/HM2W-QFML].

up.¹³ After all, there is considerable overlap between the people who have at least one payday loan and those who file for insolvency.¹⁴ While there is mixed evidence about whether borrowing from a payday lender causes insolvency, Skiba and Tobacman present a strong case for a causal link between the two.¹⁵

In this article we summarize the existing provincial regulation of payday lending and present an original description of the prevalence of payday loans among the liabilities in Canadian insolvency filings. Our data in Part II shows that while the overall number of filings increased by 15 percent from 2011 to 2019, the proportion of those filing for insolvency who had at least one payday loan among their liabilities more than doubled during the same time period. The COVID-19 pandemic may encourage people to further turn to payday loans and then insolvency as ways to handle their debts and financial obligations.¹⁶

This article proposes to reflect on the current state of payday loan regulation in the context of those who have filed for insolvency as a means to consider how one might inform the nature of the other. The data used in this paper is drawn from an analysis of the prevalence of payday loans among those who filed for insolvency in 2011 and 2019. Data on insolvency filings for each of the years of 2011 and 2019 were obtained from the Office of the Superintendent of Bankruptcy (OSB).

In the OSB data about the liabilities of debtors, there is no category for payday loans. The identification of payday lenders was made possible by linking the names of creditors appearing on the documents filed with the OSB either to provincial lists of licensed payday lenders or to a list of firms with websites offering payday loans. Licensing lists for 2011 and 2019 were obtained, where available, from provincial consumer protection agencies either upon inquiry or through publicly available databases. Those lists do not contain unlicensed payday lenders, and the data had to be supplemented with other publicly available data.

We begin by looking at the composition of the payday loan market in terms of borrowers and lenders. As will be seen, there has been an increase in the presence of payday loans among those who filed for insolvency in almost every province, though there has also been a decrease in licensed payday lenders. The expansion of

¹³ Gaviola, *supra* note 2. The terminology used in this paper involves “insolvency” as referring to both bankruptcies (i.e., summary administrations) and proposals (i.e., Division II proposals), and “bankrupts” as referring to all insolvent individuals filing for summary administration or Division II proposals.

¹⁴ *Ibid*; Nakita Q Cuttino, “The Rise of ‘FringeTech’: Regulatory Risks in Early Wage Access” (2019) 115:6 Nw UL Rev 1 at 1505 at 1510, 1515; Ruth E Berry & Karen A Duncan, “The Importance of Payday Loans in Canadian Consumer Insolvency” (31 October 2007) at 7, online (pdf): *Office of the Superintendent of Bankruptcy* <[www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Payday_EN.pdf/\\$FILE/Payday_EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Payday_EN.pdf/$FILE/Payday_EN.pdf)> [perma.cc/PHM3-MWDJ] [Cuttino].

¹⁵ Paige Marta Skiba & Jeremy Tobacman, “Do Payday Loans Cause Bankruptcy?” (2019) 62 JL & Econ 485.

¹⁶ Cuttino, *supra* note 14 at 1510.

the online payday lending market may play a part in this, though its contours are difficult to ascertain. Next, we will review the current methods of regulation in place across Canada, and analyze regional similarities and differences. Though the structure of each province's regulatory framework is generally the same, containing caps on rates, terms of repayment, disclosure obligations, and prohibitions on lender conduct, the specific requirements can vary widely, especially with regards to online payday lending. There are some notable gaps in disclosure requirements and prohibitions that will be explored further. We conclude by offering recommendations for more effective regulation, as well as proposing ways to reconceptualize the place of payday loans and insolvency in Canadian consumers' lives.

II. EMPIRICAL VIEW OF THE PAYDAY LOAN MARKET

The Canadian payday loan industry can be said to have begun in 1996 with the emergence of Money Mart.¹⁷ After that, the industry grew “rapidly in the early and mid-2000s, though growth slowed by the early 2010s.”¹⁸ The number of stores hit its peak around 2011, and has been declining since then.¹⁹ Yet the market is still sizable, with over 1,400 stores across the country.²⁰ The Canadian payday loan market is estimated to account for a sizable “\$2.3 to \$2.7 billion face value of loans per year.”²¹

We set out to compare the frequency with which payday loans appear among the debts owed by those filing for insolvency in 2011 and 2019 and to look at the characteristics of the filers who had a payday loan among their liabilities. The OSB provided us with information about all insolvencies filed in each of those years. The primary document from which the information was recorded was Form 79, the Statement of Affairs (SOA). The SOA is filled out by a licensed insolvency trustee (LIT) in an interview with a debtor conducted early in the insolvency process.²² The SOA contains a limited range of demographic information about each debtor as well as information about each debt, including the name of the creditor.²³ The LIT

¹⁷ Olena Kobzar, *Networking on the Margins: The Regulation of Payday Lending in Canada* (PhD Dissertation, University of Toronto, 2012) [unpublished] at 60 [Kobzar]; Dijkema & McKendry, *supra* note 5 at 16.

¹⁸ Buckland & Visano, *supra* note 11 at 4.

¹⁹ Tranjan, *supra* note 12 at 10.

²⁰ Buckland & Visano, *supra* note 11 at 3.

²¹ *Ibid* at 3–4.

²² Office of the Superintendent of Bankruptcy, “Form 79—Statement of Affairs (Non-Business Bankruptcy)” (24 March 2015), online: *Government of Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01948.html> [perma.cc/VLC4-HSEW]; Jillian Taylor-Mancusi, “What is the Statement of Financial Affairs?” (last visited 13 January 2021), online: *LC Taylor* <lctaylor.com/what-is-the-statement-of-financial-affairs/> [perma.cc/J23B-THS5].

²³ *Ibid*.

categorizes each debt into one of nine categories,²⁴ records the amount of the debt, and whether the debt is secured or unsecured. Importantly, the information on the SOA is not the official record of the debt. Later in the insolvency process, the LIT will contact all of the creditors identified by the debtor and seek a proof of claim, the documentary evidence of the debt.²⁵ Differences between the information reported by the debtors and that reported by the creditor may then emerge.

There is no distinct category for payday loans on the SOA. We were therefore forced to define a payday loan as any debt for which the LIT listed a name that we could link to a payday lender. For example, if “Money Mart” was listed as the creditor, we would categorize that debt as a payday loan. To accomplish this task, we created a list of the names of all of the payday lenders in Canada. The list grew to about 300 lenders active in 2019 and about the same number in 2011, including firms that were either licensed by the provinces or that appeared during an internet search for “payday loans in Canada.”²⁶ We then searched through the approximately three million liabilities listed on the SOAs of the 2011 and 2019 insolvency filers; based on the name of the lender, we categorized each liability as either a payday loan or not.²⁷

There are clearly a number of errors that could arise from this procedure. Some errors will be the result of some small short-term loans made by lenders that do not appear on our lists. In addition, some lenders issue both payday loans and other longer-term, lower-interest loans.

This latter problem is more likely because there has been a trend in recent years for traditional payday lenders like Money Mart and Cash Money to move toward offering larger longer-term instalment loans in addition to smaller short-term payday loans.²⁸ For example, Money Mart advertises instalment loans of up to \$15,000 with loan terms from 12 to 60 months at interest rates ranging from 29.9 percent per annum to 46.9 percent per annum.²⁹ Cash Money offers “line of credit” loans, at a 46.93

²⁴ The nine categories are: (1) real property; (2) bank loans (except those for real property); (3) finance company loans; (4) credit cards from banks; (5) credit cards from other issuers; (6) taxes; (7) student loans; (8) loans from individuals; and (9) other loans.

²⁵ “Bankruptcy Frequently Asked Questions” (last visited 13 January 2021), online: *PwC* <[²⁶ These numbers are approximate. It was sometimes unclear whether different firm names referred to different firms.](http://www.pwc.com/ca/en/services/insolvency-assignments/bankruptcy-faqs.html#:~:text=In%20order%20to%20be%20eligible,the%20creditor%20by%20the%20Bankrupt.&text=Instructions%20are%20generally%20provided%20with,are%20reviewed%20by%20the%20Trustee.> [perma.cc/PKS8-BBLE].</p>
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²⁷ The SOA data is compiled by the OSB in several different files. For example, the file we used here consists of all liabilities reported on the SOAs of all those filing for bankruptcy, in any one of its forms, in 2011 and 2019. Each file contains only a few of the characteristics of each liability, including the name of the creditor.

²⁸ Dijkema & McKendry, *supra* note 5 at 13.

²⁹ “Money Mart” (2020), online: *Money Mart* <moneymart.ca/loans/loans> [perma.cc/65R8-D2GX].

percent interest rate, of up to \$10,000.³⁰ Such loans are still high cost and relatively small. We have no way of distinguishing between short-term Money Mart and Cash Money payday loans from their longer-term cousins; we therefore count all debts named as being owed to Money Mart or Cash Money as payday loans.

After identifying the liabilities that could be payday loans, we were then able to ascertain demographics of payday loan borrowers among those filing for insolvency and identify the most frequent lenders.

A. LENDERS

The payday lending industry began with physical storefronts, whose success depended on their proximity to large populations, hence their proliferation in cities across Canada.³¹ The size of the industry appears to often be measured in relation to these storefronts, leading to the notion that its peak was around 2011, as the number of physical storefronts has been decreasing since then.

Yet the growth of the online payday lending market could mean otherwise, given that online success is not bounded by physical proximity to a receptive population. Unfortunately, the exact size of the online payday lending market is also difficult to determine. Still, some estimate that online loans have a 10 percent market share in Ontario, though it could be much higher. Market share estimates in other countries range from one-third to 80 percent.³²

One thing is clear in the existing literature, and that is that “[t]he industry is dominated by large corporate chains, though many small and independently operated enterprises continue to exist in local markets.”³³ The process of corporatization is responsible for the current state of the payday lending industry, marked by “the consolidation of business operations within one large company that takes advantage of economies of scale and scope.”³⁴

An illustration of this corporatization is that “the top five chains have 65% of the outlets and a greater percentage of the loan volume.”³⁵ Apart from Money Mart,

³⁰ Jacob Stern & Stacie Hurst, “Cash Money Personal Loan” (last modified 17 December 2020), online: *Finder* <www.finder.com/ca/personal-loans/cash-money> [perma.cc/2PTJ-PKB9].

³¹ Chris Robinson, “A Business Analysis of the Payday Loan Industry” in Jerry Buckland, Chris Robinson & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context*, (Cham: Palgrave Macmillan, 2018) 83 at 86 [Robinson].

³² Buckland & Visano, *supra* note 11 at 18.

³³ Dijkema & McKendry, *supra* note 5 at 29.

³⁴ Buckland & Visano, *supra* note 11 at 17.

³⁵ *Ibid* at 4.

which is the largest in the market, other chains include Cash Money, Cash4You, Speedy Cash, and Fast Cash.³⁶

Another way to get a sense of the nature of the payday lending industry is by examining the landscape of licensed payday lenders, meaning those lenders that have registered with provincial regulators for licenses to operate. As previously mentioned, licensing lists for each of the years of 2011 and 2019 were obtained, where available, from provincial consumer protection agencies either upon inquiry or by collecting information from publicly available databases. Unlicensed lenders operate as well. The important implication of being an unlicensed lender is that provincial regulators are not able to monitor activity and therefore provide consumers with information or paths to recourse as efficiently or effectively. The presence of unlicensed lenders has to be detected proactively, or more often, by reports from consumers. Unlicensed lenders can be online or otherwise, though the online medium certainly lends itself to better evading regulatory efforts.

There has been a small decline in the industry's size in terms of the number of retail locations, starting in 2011 and noted up to 2016.³⁷ Comparing the lists of licensed payday lenders from 2011 and 2019, it is evident that there has been a decrease in their number. For example, Ontario and British Columbia boasted almost 300 payday lenders each in 2011, but declined to roughly 180 and 115 in 2019, respectively.

Interestingly, looking closer at payday lenders that appear in the bankruptcies in Ontario reveals that there was a greater presence of multiple locations for corporate chains in 2011 than in 2019. Meanwhile, there was greater observable consistency in British Columbia in this regard. Money Mart also does not dominate the market Ontario to the same extent as it dominates in British Columbia.

An event that may explain some of these observations is the closure of Cash Store Financial (a once-leading chain composed of the Cash Store and InstaLoans), which went through insolvency proceedings under the *Companies' Creditors Arrangement Act* (CCAA) to obtain creditor protection starting in 2014.³⁸

The markets in most other provinces have always been quite small according to these lists, and there tends to be at least one store in each province from one of the major corporate chains, such as Money Mart. In fact, Newfoundland and Labrador only has three licensed payday lenders, one of which is Money Mart. Such a small number of licensees in the province is unsurprising, though, given it only started to license payday lenders in 2019.

³⁶ Robinson, *supra* note 31 at 83.

³⁷ Dijkema & McKendry, *supra* note 5 at 28; Robinson, *supra* note 31 at 85.

³⁸ "The Cash Store Financial Services Inc - Status Updates" (last modified 12 November 2019), online: *FTI Consulting* <cfcanada.fticonsulting.com/cashstorefinancial/updates.htm> [perma.cc/WR4X-5L9N].

Table 1 lists the ten most common lenders for those debts that we categorize as payday loans, and the presence of corporate chains is striking. These are clearly lenders who specialize in payday lending, although some may also offer larger loans with longer repayment periods, as previously noted. Also shown in Table 1 is the percentage each lender holds of all payday loans in the insolvency data.

2011		2019	
Name of Payday Lender	Percent	Name of Payday Lender	Percent
1. Money Mart	25.1	1. Money Mart	29.8
2. Cash Store/Instaloans	23.3	2. Cash Money	25.1
3. Cash Money	13.4	3. Cash 4 You	9.4
4. CashMax	2.2	4. Pay2Day	3.3
5. Cash4You	1.7	5. Cash Canada/Cashco	3.0
6. 310 Loans	1.2	6. iCash/Finabanx/Trustnet	2.4
7. DollarDirect	1.1	7. CashMax	1.4
8. Cash Stop	0.7	8. Captain Cash	1.3
9. Red Leaf	0.6	9. 310 Loans	1.0
10. Zippy Cash	0.6	10. Speedy Cash	1.0

Source: Calculations by the authors using data provided by the Office of the Superintendent of Bankruptcy. Note: Cash Store, the second-most common payday lender in 2011, filed for insolvency in 2014 and is no longer active.³⁹

³⁹ Buckland & Visano, *supra* note 11 at 4; Madhavi Acharya-Tom Yew, “Cash Store runs out of money” (25 April 2014), online: *Toronto Star* <www.thestar.com/business/personal_finance/2014/04/25/cash_store_runs_out_of_money.html>.

A. BORROWERS

We can link each payday loan to one of the insolvency filers, thus dividing the bankrupts into a group that had at least one payday loan among their liabilities and those that did not. In 2019, just over 18.6 percent of all insolvency filings, combining bankruptcy filings with Division II proposals, had a payday loan among their liabilities (Table 2). Looking only at bankruptcy filings in 2019, 15.6 percent had a payday loan, while 21.7 percent of proposals filed had at least one payday loan. In 2011, the overall percentage of all filers with a payday loan was far lower, at 6.4 percent. The percentage of bankrupts filing a proposal with at least one payday loan was about one percentage point higher than the percentage of those filing for bankruptcy with at least one payday loan.

Table 2: Percentage of Bankrupts with Payday Loans Among their Liabilities, 2011 and 2019				
	Percent with at least one Payday Loan		Percent with more than one Payday Loan	
	2011	2019	2011	2019
Summary Administration	6.3	15.6	5.0	13.2
Division II Proposal	7.5	21.7	6.5	19.3
All Bankrupts	6.4	18.6	5.3	16.3

Source: Calculation by the authors using data provided by the Office of the Superintendent of Bankruptcy. Only creditor descriptions with more than 200 loans are included.

Given that the business model of payday lenders relies heavily on repeat borrowing, or borrowers taking out multiple loans across lenders to satisfy liquidity needs,⁴⁰ it will not be surprising that most of those with at least one payday loan had more than one. In 2011, of the 7,479 cases with at least one payday loan, 6,191 (83 percent) had more than one payday loan. In 2019, of the 24,689 cases with at least one payday loan, 21,562 (87 percent) had more than one. Similar patterns are apparent in Table 2 when we look at bankruptcies and proposals separately.

More generally, between 2011 and 2019, the number of people filing for insolvency went up by 15 percent. However, in the same span of time, the number of people who owed money to a payday lender at the time of insolvency almost tripled. In 2011, only 6.6 percent had at least one payday loan recorded on their Statement of Affairs, while in 2019 that number was roughly 19 percent. In essence, more people with payday loans are filing for insolvency than ever.

In Table 3, the provincial distribution of bankrupts with at least one payday loan is especially noteworthy, and relevant to our regulatory analysis.⁴¹ Ontario is home to the greatest percentage of bankrupts with at least one payday loan; that percentage rose from 9.2 percent in 2011 to 32 percent in 2019. British Columbia rose from 6.9 percent in 2011 to 20.2 percent in 2019, while Alberta rose from 9.8 percent to 22.5 percent. A few other provinces also saw increases, including Nova Scotia, Prince Edward Island, and New Brunswick.

Quebec experienced the most growth in this regard, albeit from a very low base. In 2011, only about 0.6 percent of bankrupts had at least one payday loan among their liabilities; by 2019, that percentage had risen to 6.6 percent. Recall that Quebec effectively made payday loans illegal in 2007 by making all lending to Quebecers at rates above 35 percent per annum illegal. Nonetheless, either because of online lending or because of imperfect enforcement, a significant amount of high interest lending continues.

Meanwhile, Newfoundland and Labrador was the only province to exhibit a decrease in the percentage of bankrupts with payday loans. It had one of the highest rates in 2011 (10.5 percent) but, by 2019, had become the lowest at 5.3 percent.

Manitoba and Saskatchewan had also led the provinces in 2011, alongside Newfoundland and Labrador, but they exhibited the slowest rates of growth. In 2011, the percentages with payday loans were 12.5 percent and 10.9 percent, respectively, and then rose to 16.5 percent and 17.6 percent by 2019.

⁴⁰ Buckland & Visano, *supra* note 11 at 11, 24.

⁴¹ As discussed later in the paper, the territories do not regulate the payday loan industry (or do they collect data regarding payday lenders), so the data is not available to produce findings regarding bankrupts with at least one payday loan, as in Table 3.

The data also provides a sense of how payday loan borrowers who are filing for insolvency have changed over time, as well as how they have stayed the same. While the overall frequency of payday loans has increased, the age distribution of bankrupts with at least one payday loan has remained consistent from 2011 until 2019. The 18-25 age category still makes up the highest percentage, followed by a decrease in each following age category up to those over 75.⁴²

⁴² This age distribution is consistent with other research, see Hoyes Michalos, “Payday Loans and Bankruptcy” (February 2019), online: *Hoyes, Michalos & Associates Inc* <www.hoyes.com/press/joe-debtor/how-insolvent-borrowers-use-payday-loans/> [perma.cc/4HB9-82F2].

Table 3: Proportion of Bankrupts with At Least One Payday Loan, by Demographic Characteristics, 2011 and 2019

Province	Percentage with at least one payday loan in 2011	Number of Insolvencies in 2011	Percentage with at least one payday loan in 2019	Number of Insolvencies in 2019
Province				
Newfoundland	10.3	2,074	4.7	3,143
Prince Edward Island	5.6	619	11.5	712
Nova Scotia	8.3	4,198	18.9	5,743
New Brunswick	5.9	3,435	11.0	4,582
Quebec	0.6	32,822	6.5	41,260
Ontario	9.1	47,411	31.0	43,645
Manitoba	12.1	2,120	16.2	2,986
Saskatchewan	10.2	2,075	17.9	3,242
Alberta	9.5	9,851	21.6	15,990
British Columbia	6.8	11,131	19.7	10,944
Canada	6.4	115,977	18.6	132,376
Age group				
18-25	11.2	3,141	27.4	4,859
25-35	9.4	22,535	24.6	26,402
35-45	7.2	31,334	20.7	34,336

45-55	5.7	30,335	18.0	29,333
55-65	3.9	17,990	13.7	21,990
65-75	3.2	7,920	9.6	11,750
Over 75	2.9	2,710	8.8	3,693
Canada	6.4	115,965	18.6	132,363

Gender

Male	6.1	64,699	18.0	70,900
Female	6.9	51,266	19.4	61,467
Canada	6.4	115,977	18.6	132,376

Marital Status

Single	8.5	32,902	22.7	48,616
Married/ Common Law	5.0	49,282	15.2	50,991
Widowed/Divorced/ Separated	6.6	33,768	18.0	32,759
Canada	6.4	115,977	18.6	132,376

Previous Insolvency

No	5.7	96,346	17.6	103,556
Yes	9.9	19,614	22.3	28,811
Canada	6.4	115,977	18.6	132,367

Source: Calculations by the authors using data provided by the Office of the Superintendent of Bankruptcy

As Table 3 indicates, the presence of payday loans among the liabilities of bankrupts was weighted toward younger people, both in 2011 and in 2019. Almost one quarter of all 25-35-year-old bankrupts in 2019 had a payday loan; the percentage falls from there, down to about 18 percent for those 45-55 years old and then down below 10 percent for those over 65. The same pattern, albeit with lower incidence levels, is apparent in 2011.

There was a fairly large change in the distribution of insolvencies across the various marital statuses. The percentage of all insolvencies filed by debtors who were single and never married rose from 29 percent to 37 percent while the percentage who were divorced, separated or widowed fell from 29 percent to 25 percent; the percentage who were either married or in common law relationships fell from 42 percent to 38 percent.⁴³ Across all marital statuses, however, the proportion with at least one payday loan among their liabilities roughly tripled, following the overall pattern.

Both in 2011 and 2019, filers who had previously been bankrupt were more likely than first-time filers to have at least one payday loan. Because the percentage having a payday loan tripled among first-time filers and doubled among repeat filers, the gap between the two groups narrowed (Table 3). The growing number of first-time bankrupts with payday loans suggests that the link between payday loans and insolvency is becoming more prominent, and is not limited to the subset of people who may be in cycles of indebtedness. This trend may only increase as many Canadians continue to be financially vulnerable, especially given the impacts of the COVID-19 pandemic.

III. THE REGULATION OF THE PAYDAY LOAN MARKET

A. FEDERAL REGULATION

For years, as set out in section 347(1) of the *CCC*, the criminal interest rate of 60 percent per annum guided the regulation (or rather, prohibition) of payday loans. To put that in perspective, payday lenders often charge interest rates on short-term loans that, when annualized, can be in the hundreds as a means to remain profitable, considering the high rates of default and operating costs.⁴⁴

⁴³ These percentages are not shown in Table 2.

⁴⁴ CBC Radio, “The Criminal Code bans interest rates above 60 per cent — so how are payday lenders legal?” (9 September 2020), online: *CBC* <www.cbc.ca/radio/costofliving/the-cost-of-living-on-the-cost-of-stuff-payday-loans-baby-formula-glasses-and-modern-monetary-theory-1.5715939/the-criminal-code-bans-interest-rates-above-60-per-cent-so-how-are-payday-lenders-legal-1.5716778> [perma.cc/WW83-MX26].

However, in 2007, a carveout in the form of section 347.1 was introduced to allow for the provision of payday loans.⁴⁵ This move came about in part because of problems with enforcement and concerns about bankrupting the industry, but also the need for regulation of the payday loan market, which had grown in response to rising demand and the absence of alternative lenders providing similar financial products in the Canadian marketplace.⁴⁶ The industry was able to grow despite the existence of section 347(1) because overall there was still a lack of coordinated federal and provincial regulation and supervision, which section 347.1 sought to address.⁴⁷

Section 347.1 allows payday lenders to provide loans of up to \$1,500 and for durations of up to 62 days, in accordance with licensing and other requirements under the relevant statutory frameworks developed by each province.

B. PROVINCIAL REGULATION

Following the 2007 reform and related provincial responses, there exists a patchwork of regulation across the country.⁴⁸ Every province has enacted payday loan legislation, or in the case of Quebec, at least addressed the matter. Quebec has set a cap of 35 percent on all loans, which is so low that payday lenders are meant to be incapable of operating in the province. Payday lenders are therefore “effectively banned,” but despite that, similar to what is present in the insolvency data, payday lenders continue to operate in the province, charging higher rates than allowed.⁴⁹

Meanwhile, the Northwest Territories, Nunavut, and Yukon, do not regulate the payday loan industry, and thus still rely on the *CCC* provision. The criminal rate is meant to serve a similar function as the 35 percent rate in Quebec to render payday lenders unprofitable and incapable of sustaining their operations.⁵⁰

In general, the information available to determine how provincial regulation has affected the market varies. Each of the provinces implemented legislation at a different time with different associated record keeping practices.⁵¹ For example, data collection on the impact of regulation was made more challenging by the fact that Saskatchewan did not start issuing licenses until 2012, and New Brunswick and

⁴⁵ *Criminal Code*, *supra* note 4.

⁴⁶ Dilay & Williams, *supra* note 9 at 177–78, 186; Dijkema & McKendry, *supra* note 5 at 17.

⁴⁷ Kobzar, *supra* note 17 at 129.

⁴⁸ Dilay & Williams, *supra* note 9 at 188.

⁴⁹ *Ibid* at 179; Bryan Daly, “Best Payday Loans Quebec (Online) January 2021” (last modified January 2021), online: *Loans Canada* <loanscanada.ca/canada/quebec/payday-loans-quebec/> [perma.cc/PHR4-WCHJ]; Claire Horwood, “Payday loans in Quebec” (19 August 2020), online: *Finder* <www.finder.com/ca/payday-loans-quebec/> [perma.cc/F4E7-2237].

⁵⁰ Dilay and Williams, *supra* note 9 at 179.

⁵¹ Robinson, *supra* note 31 at 84.

Newfoundland and Labrador did not do so until very recently in 2019. Lacking a proper regulatory framework (and associated regulator) like the territories, Quebec therefore also does not monitor or collect data about the industry.

The existence of provincial regulation is important not only for monitoring and assessing licensed payday lenders, but also evaluating the impact of unlicensed payday lenders. The challenges of legislation that is not harmonized and at different stages of maturity is magnified in light of the growth of the online payday lending market and the presence of unlicensed online payday lenders. That is, there is a patchwork of legislation in place and a range of legal and illegal lenders operating in the payday lending space. As the Consumers Council of Canada found, “Canadians are more likely to encounter an unlicensed, non-compliant, payday lender online than a licensed, compliant one.”⁵² Yet this does not necessarily mean that all online payday lenders are unlicensed. Interestingly, being an unlicensed payday lender does, however, “effectively [predict] whether the lender followed provincial regulations or not.”⁵³

As seen in the data, use of payday loans by bankrupts has increased across most provinces. A look at the regulation of the payday loan market in each of the provinces can provide context as to some of the conditions that may be responsible for these shifts, though it is certainly not conclusive.

1. PATTERNS OF REGULATION

In all the common law provinces, consumer protection or payday loan legislation and/or regulations provide at least some form of guidance as to what terms should be included in payday loan agreements.⁵⁴

All provincial payday lending regulation explicitly prohibits rollover loans (i.e., the same lender giving a second loan before the first has been paid off), tied selling, and wage assignment.⁵⁵

⁵² Denise Barrett Consulting, “Consumer Experiences in Online Payday Loans” (2015) at 5, online (pdf): *Consumers Council of Canada* <canadiancfa.com/wp-content/uploads/2016/10/consumers-council-canada-online-loans_2015-study.pdf> [perma.cc/BG89-EWHC] [Denise Barrett Consulting].

⁵³ Buckland & Visano, *supra* note 11 at 20.

⁵⁴ *Consumer Protection Act*, RSA 2000, c C-26.3, s 124.3 [*Alberta CPA*]; Alta Reg 157/2009, s 10.3 [*Alberta Regulation*]; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 112.06 [*BC BPCPA*]; BC Reg 57/2009, s 14 [*BC Regulation*]; *Consumer Protection Act*, CCSM c C200, s 148 [*Manitoba CPA*]; Man Reg 99/2007, s 14 [*Manitoba Regulation*]; *Cost of Credit Disclosure and Payday Loans Act*, SNB 2002, c C-28.3, s 37.28 [*NB CCDPLA*]; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 83.6 [*NL CPBPA*]; *Consumer Protection Act*, RSNS 1989, c 92, s 181 [*NS CPA*]; NS Reg 248/2009, s 9 [*NS Regulation*]; O Reg 98/09, s 18 [*Ontario Regulation*]; PEI Reg EC67-13, s 19 [*PEI Regulation*]; RRS c P-4.3 Reg 1, s 10 [*Saskatchewan Regulation*].

⁵⁵ *Alberta CPA*, *supra* note 54, ss 124.1(h), 124.2, 124.21; *BC BPCPA*, *supra* note 54, ss 112.01, 112.08; *BC Regulation*, *supra* note 54, s 19; *Manitoba CPA*, *supra* note 54, ss 151, 154, 154.2; *NB CCDPLA*, *supra*

Most provinces also prohibit harassment by the payday lender and limit contact between payday lenders and the partners, relatives, neighbours, friends, or acquaintances of borrowers.⁵⁶ New Brunswick and Nova Scotia have extended these protections in the case of a borrower's employer or place of employment as well.⁵⁷ Manitoba also prohibits harassment, but only limits contact between payday lenders and borrowers' employers (except in the case of a "personal investigation").⁵⁸ Interestingly, Saskatchewan is the only province whose legislation does not expressly prohibit harassment or limit contact between the lender and the borrower and/or related parties.⁵⁹

The provinces vary in their limits on the maximum total cost of borrowing. Provinces have started to converge towards \$15 per \$100 borrowed, with Prince Edward Island most recently moving to \$15 per \$100 borrowed from \$25 per \$100 borrowed.⁶⁰ Manitoba and Saskatchewan still sit at \$17 per \$100 borrowed,⁶¹ Nova Scotia at \$19 per \$100 borrowed,⁶² and the newest to regulate, Newfoundland and Labrador, at \$21 per \$100 borrowed.⁶³ In most provinces, these limits are also accompanied by a further limitation that provides the amount of the loan cannot exceed a certain percentage of the borrower's net pay. Some provinces have set the maximum ratio as the amount of a loan not exceeding 30 percent of a borrower's net pay, up to a limit of \$1,500 (a ceiling that all provinces converge upon and matches the requirement under section 347.1 of the *CCC*).⁶⁴ British Columbia, Ontario, and

note 54, ss 37.33, 37.34, 37.38; NLR 10/19, ss 2–4 [*NL Regulation*]; *NS CPA*, *supra* note 54, ss 18A, 18N; *NS Regulation*, *supra* note 54, ss 16, 19; *Payday Loans Act, 2008*, SO 2008, c 9, s 35 [*Ontario PLA*]; *Ontario Regulation*, *supra* note 54, ss 27, 28; *Payday Loans Act*, RSPEI 1988, c P-2.1, s 33 [*PEI PLA*]; *PEI Regulation*, *supra* note 54, ss 28, 29; *Saskatchewan Regulation*, *supra* note 54, s 16; *The Payday Loans Act*, SS 2007, c P-4.3, ss 29, 31 [*Saskatchewan PLA*].

⁵⁶ *Alberta CPA*, *supra* note 54, s 124.2(1)(q); *BC BPCPA*, *supra* note 54, ss 114, 117; *NL Regulation*, *supra* note 55, s 3; *Ontario Regulation*, *supra* note 54, ss 26, 32; *PEI Regulation*, *supra* note 54, ss 27, 34.

⁵⁷ NB Reg 2010-104, s 9(2); *Consumer Creditors' Conduct Act*, RSNS 1989, c 91, s 4 [*NS CCCA*].

⁵⁸ *Manitoba CPA*, *supra* note 54, ss 98(f), 98(n); *Manitoba Regulation s 18.3(3)*.

⁵⁹ *Saskatchewan Regulation*, *supra* note 54, s 16.

⁶⁰ *Alberta CPA*, *supra* note 54, s 124.61(1); *BC Regulation*, *supra* note 54, s 17(1); NB Reg 2017-23, s 3 [*NB Regulation*]; *Ontario Regulation*, *supra* note 54, s 23(c); *PEI Regulation*, *supra* note 54, s 24.

⁶¹ *Manitoba Regulation*, *supra* note 54, s 13.1; *Saskatchewan Regulation*, *supra* note 54, s 14(1).

⁶² *Re Consumer Protection Act*, 2018 NSUARB 215 (27 November 2018), online: *NS Utility and Review Board* <nsuarb.novascotia.ca/sites/default/files/Decision%20M08593%202018.pdf>.

⁶³ *NL Regulation*, *supra* note 55, s 7(1).

⁶⁴ *Alberta CPA*, *supra* note 54, s 124.1(f); *BC BPCPA*, *supra* note 54, s 112.01; *Manitoba CPA*, *supra* note 54, ss 138, 151.1(1); *NB Regulation*, *supra* note 60, s 4; *NL CPBPA*, *supra* note 54, s 83.1(h); *Ontario Regulation*, *supra* note 54, s 16.2; *Ontario PLA*, *supra* note 55, s 32(1); *PEI PLA*, *supra* note 55 s 30(1); *Saskatchewan PLA*, *supra* note 55, s 2(1). *Re Consumer Protection Act*, *supra* note 62.

Saskatchewan set this percentage at 50 percent,⁶⁵ while Alberta, Nova Scotia, and Prince Edward Island set no such limit.⁶⁶

Multiple provinces set the one-time non-repayment fee—an additional fee charged when a payday loan is not repaid—at only \$20,⁶⁷ though it is \$25 in Saskatchewan,⁶⁸ \$40 in Nova Scotia,⁶⁹ left open as being “reasonable charges” in Ontario and Prince Edward Island, and left up to the Director of Fair Trading in Alberta.⁷⁰

In the case of default, the provinces lay out the maximum interest rate in a few different ways, be it monthly or per annum. In Alberta, Manitoba, and Newfoundland and Labrador, the rate is 2.5 percent per month not to be compounded,⁷¹ and 2.5 percent per month left unspecified in New Brunswick.⁷² The rate is 30 percent per annum in British Columbia and Saskatchewan.⁷³ The rate is 60 percent per annum (the criminal interest rate under the *CCC*) in Nova Scotia and Ontario, and presumably also Prince Edward Island, though a rate is not specified.⁷⁴

In Saskatchewan, legislation prohibits payday lenders from charging, requiring or accepting a total cost of borrowing “that exceeds 60% of the principal amount of the payday loan when the cost of borrowing is calculated on an annual basis.”⁷⁵ In British Columbia, the legislation prohibits payday lenders from requiring a repayment under a loan agreement that exceeds 35 percent or 50 percent, depending on pay period frequency “of the sum of the total cost of borrowing in relation to the loan.”⁷⁶ We have not located case law to-date interpreting the language found in these provisions.

⁶⁵ *BC BPCPA*, *supra* note 54, s 112.08(1); *BC Regulation*, *supra* note 54, s 18; *Ontario Regulation*, *supra* note 54, s 16.2(3); *Ontario PLA*, *supra* note 55, s 32; *Saskatchewan Regulation*, *supra* note 54, s 15.

⁶⁶ *PEI PLA*, *supra* note 55, s 30(1).

⁶⁷ *BC Regulation*, *supra* note 54, s 17(2)(b); *Manitoba Regulation*, *supra* note 54, s 15.5; *NB Regulation*, *supra* note 60, s 5(1)(b); *NL Regulation*, *supra* note 55, s 7(2)(b).

⁶⁸ *Saskatchewan Regulation*, *supra* note 55, s 14(2)(b).

⁶⁹ See *Re Consumer Protection Act*, *supra* note 62.

⁷⁰ *Alberta CPA*, *supra* note 54, s 124.61(3)(b); *Ontario PLA*, *supra* note 55, s 33(1)(a), *PEI PLA*, *supra* note 55, s 31(1).

⁷¹ *Alberta CPA*, *supra* note 54, s 124.61(3)(a); *Manitoba Regulation*, *supra* note 54, s 15.4(1); *NL Regulation*, *supra* note 55, s 7(2)(a).

⁷² *NB Regulation*, *supra* note 60, s 5(1)(a).

⁷³ *Saskatchewan Regulation*, *supra* note 54, s 14(2)(a); *BC Regulation*, *supra* note 54, s 17(2)(a).

⁷⁴ *Ontario Regulation*, *supra* note 54, s 37.1. *Re Consumer Protection Act*, *supra* note 62.

⁷⁵ *An Act to End Predatory Lending*, SA 2016, c E-9.5, s 5.

⁷⁶ *BC Regulation*, *supra* note 54, s 23(3).

The majority of provinces also require annual percentage rate (APR) disclosure, but some, such as Alberta, Prince Edward Island, and Saskatchewan do not.⁷⁷

Most provinces allow for a cancellation period of two business days.⁷⁸ It is only one business day in Nova Scotia (though it is two business days for internet loans),⁷⁹ as well as in Saskatchewan.⁸⁰

All provinces allow for borrowers to repay all or at least part of the outstanding balance under a payday loan before the time it is due without charge or penalty.⁸¹ Nova Scotia goes further to entitle the borrower to a rebate in respect of the cost of borrowing if a sum is paid in full before the term of the agreement has expired.⁸²

All provinces except for Manitoba and New Brunswick prohibit the lender from collecting or receiving fees before they are due, meaning collecting them early.⁸³ This rule is particularized in Alberta to be before the first loan instalment payment is due, and in Saskatchewan to be before the borrower will receive their pay.⁸⁴

There are a number of other particularities to the regulation in each province that are worth noting, including with respect to online payday lending, discussed in the following sections.⁸⁵ Where the legislation addresses the question of which province's legislation should apply, we highlight the relevant provisions. Where the provincial legislation does not specifically address the issue, the basic Canadian choice of law principles for contracts will apply. That is, a Canadian court will apply the

⁷⁷ *BC Regulation*, *supra* note 54, ss 13(4)(d), 17(2)(a); *Manitoba Regulation*, *supra* note 54, s 16(2)(d); *NB CCDPLA*, *supra* note 54, s 17; *NL CPBPA*, *supra* note 54, s 83.6(2)(k); *NL Regulation*, *supra* note 55, s 10; *NS CPA*, *supra* note 54, s 17(3)(a)(i); *NS Regulation*, *supra* note 54, s 8(3)(iv); *Ontario Regulation*, *supra* note 54, ss 14(3), 15(2), 18(1).

⁷⁸ *Alberta CPA*, *supra* note 54, s 124.4(1)(a); *BC Regulation*, *supra* note 54, s 14.2(1); *Manitoba CPA*, *supra* note 54, s 149; *NB CCDPLA*, *supra* note 54, ss 37.29; *NL CPBPA*, *supra* note 54, s 83.5(1); *Ontario PLA*, *supra* note 55, s 30(1); *PEI PLA*, *supra* note 55, s 28.

⁷⁹ *NS CPA*, *supra* note 54, s 18Q.

⁸⁰ *Saskatchewan PLA*, *supra* note 55, s 22(1)(a).

⁸¹ *Alberta CPA*, *supra* note 54, s 124.3(4); *BC BPCPA*, *supra* note 54, s 112.07(1)(b); *Manitoba CPA*, *supra* note 54, ss 18–19; *NB CCDPLA*, *supra* note 54, s 23; *NL CPBPA*, *supra* note 54, s 52; *NL Regulation*, *supra* note 55, s 3(1)(d); *Ontario PLA*, *supra* note 55, s 34; *PEI PLA*, *supra* note 55, s 32; *Saskatchewan PLA*, *supra* note 55, s 26; *NS CPA*, *supra* note 54, s 18N(g).

⁸² *NS CPA*, *supra* note 54, s 19.

⁸³ *BC BPCPA*, *supra* note 54, s 112.08(1)(h); *NL Regulation*, *supra* note 55, s 3(1)(f); *NS CPA*, *supra* note 54, s 18N(g); *PEI Regulation*, *supra* note 54, s 32(1)(a).

⁸⁴ *Alberta CPA*, *supra* note 54, s 124.2(1); *Saskatchewan Regulation*, *supra* note 54, s 16(2).

⁸⁵ The following sections contain information that is adapted from another paper, see Ben-Ishai & Schwartz, "Payday Lending in Canada," *supra* note 7.

proper law of the contract.⁸⁶ The proper law is the law with which the contract has the most significant connection and in this regard the court will consider all relevant connecting factors.⁸⁷ However, if the lender's standard form contract sets out the law that will govern the relationship (which will almost always be the case), then the court will respect that choice as long as it was made in good faith, in the sense that it was not chosen deliberately to avoid the laws of a more appropriate jurisdiction.⁸⁸

i. Alberta

In Alberta, payday loans are mostly regulated according to the *Consumer Protection Act (CPA)* and *Payday Loans Regulation (Regulation)* enacted pursuant to it. The *CPA* sets out specific requirements as to what payday lenders must display in their places of business, including signs indicating the maximum total cost of borrowing permitted in Alberta and the total charges for a payday loan.⁸⁹

As far as online payday lenders are concerned, the *CPA* has provisions that apply to every payday lender who offers, arranges, or provides a payday loan to a borrower in Alberta, whether in person or online.⁹⁰ It also contains provisions related to the delivery of proceeds of the online payday loan, and requires that online payday lenders display certain information on their websites.⁹¹ Beyond that, the *Regulation* requires that online payday lenders display copies of their licences at or near the top of the introductory page of the website.⁹² Despite these specific provisions for dealing with online lenders, "online payday loan" and "online payday lender" are not explicitly defined.

ii. British Columbia

Payday loans are regulated according to the *Business Practices and Consumer Protection Act (BPCPA)* and *Payday Loans Regulation (Regulation)* enacted pursuant to it. The *Regulation* outlines what payday lenders must display, which includes the maximum charges for a payday loan, how much is charged, the total cost of borrowing for a 14-day \$300 loan, and the annual percentage rate for a 14-day \$300 loan.⁹³

⁸⁶ Halsbury's Laws of Canada (online), *Conflict of Laws*, "Obligations: Contractual Obligations: Contracts: The Proper Law of the Contract" (V.I.1.(1)(c)) at HCF-141 "Determining the proper law." (2020 Reissue).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Alberta CPA*, *supra* note 54, s 124.8.

⁹⁰ *Ibid.*, s 124.11.

⁹¹ *Ibid.*, ss 124.5(4)-(5), 124.8(4).

⁹² *Alberta Regulation*, *supra* note 54, s 4.

⁹³ *BC Regulation*, *supra* note 54, s 13.

The *BPCPA* prohibits payday lenders from selling insurance to or for a borrower, or requiring or requesting a borrower to insure a payday loan.⁹⁴

The *Regulation* also contains similar provisions related to licence display and other information with respect to online payday loans as found in the Alberta legislation, and here too no definitions for what counts as an online loan are provided.⁹⁵ The *BPCPA* applies to each loan, regardless of the number of lenders involved, and it does not specify that the borrower must be located in British Columbia.⁹⁶ However, the licence display provision requires that online payday lenders display their licence for British Columbia borrowers specifically, perhaps implying that the *BPCPA* also applies to online lenders licensed in British Columbia offering payday loans to those not in British Columbia.⁹⁷

iii. Manitoba

In Manitoba, payday loans are regulated according to the *Consumer Protection Act (CPA)* and the *Payday Loans Regulation (Regulation)* enacted pursuant to it. The *CPA* and *Regulation* outline what payday lenders must display at their places of business, including a statement that payday loans are high-cost loans, the maximum allowable charge for a payday loan, the APR, and all components of the cost of credit.⁹⁸

The *Regulation* prohibits requiring that the term of a payday loan end before the borrower's next payday.⁹⁹

Manitoba's approach to online payday lending is among the strictest in Canada. The *CPA* defines "internet payday loan" as one "formed by Internet communications or by a combination of Internet and fax communications."¹⁰⁰ The *Regulation* includes licence display requirements, as well as website design and display requirements.¹⁰¹ The *Regulation* also requires that applicants for licences have an officer or employee residing in Manitoba, making it exceedingly difficult for online payday lenders to operate in the province.¹⁰² According to the *CPA*, the provisions on

⁹⁴ *BC BPCPA*, *supra* note 54, s 112.08(1)(i).

⁹⁵ See *BC BPCA*, *supra* note 54; *BC Regulation*, *supra* note 54, ss 7, 13.

⁹⁶ *BC Regulation*, *supra* note 54, s 3.

⁹⁷ *Ibid*, s 7.

⁹⁸ *Manitoba CPA*, *supra* note 54, s 156; *Manitoba Regulation*, *supra* note 54, s 16(2).

⁹⁹ *Manitoba Regulation*, *supra* note 54, s 15.6(1)(b).

¹⁰⁰ *Manitoba CPA*, *supra* note 54, s 137.

¹⁰¹ *Manitoba Regulation*, *supra* note 54, ss 9.1, 14.0.1, 16.1.

¹⁰² *Ibid*, s 8(c).

payday loans apply to payday loans offered, arranged, or provided to borrowers in Manitoba.¹⁰³

iv. New Brunswick

In New Brunswick, the *Cost of Credit Disclosure and Payday Loans Act (CCDPLA)* and the *General Regulation (Regulation)* enacted pursuant to it are responsible for regulating payday lending in the province. The *CCDPLA* only mandates that payday lenders display signs depicting all components of the total cost of credit.¹⁰⁴ And while the *CCDPLA* allows for the *Regulation* to further mandate what must be displayed, it has not as of yet.¹⁰⁵

The *CCDPLA* defines “internet payday loan” in the same way as Manitoba.¹⁰⁶ However, the licence application requirements do not specify that the applicant must have an officer or employee residing in the province. The *CCDPLA* does require an address for service in New Brunswick.¹⁰⁷ The *CCDPLA* applies only in respect of payday loans that were made after the commencement of the subsection on payday lending. There is no stipulation that the borrower must be in New Brunswick for it to apply. Presumably, those licensed to provide payday loans online using a New Brunswick licence would fall within the purview of the *CCDPLA*.¹⁰⁸

v. Newfoundland and Labrador

Newfoundland and Labrador is the most recent and last province to have enacted payday lending legislation, having done so in April of 2019 through the *Consumer Protection and Business Practices Act (CPBPA)* and associated *Payday Loans Regulations* and *Payday Loans Licensing Regulations (Regulations)*. The *Regulations* outline what must be displayed at lenders’ places of business.¹⁰⁹

Despite their recency, the *CPBPA* and *Regulations* only regulate the timing of the delivery of the proceeds of the payday loan and the display of the licence, signs, and notices on the websites of payday lenders.¹¹⁰ The relevant parts of the *CPBPA*

¹⁰³ *Manitoba CPA*, *supra* note 54, s 138.

¹⁰⁴ *NB CCDPLA*, *supra* note 54, s 37.3(1).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, s 37.1.

¹⁰⁷ *Ibid.*, s 15.

¹⁰⁸ *Ibid.*, s 37.11.

¹⁰⁹ *NL Regulation*, *supra* note 55, s 8.

¹¹⁰ *NL CPBPA*, *supra* note 54, s 83.6; *Payday Loans Licensing Regulations*, NLR 11/19, s 3; *NL Regulation*, *supra* note 55, s 8.

apply to every payday lender who “offers, arranges or provides a payday loan to a borrower in the province, whether operating from business premises, telephone, or over the Internet.”¹¹¹

vi. Nova Scotia

In Nova Scotia, the *Consumer Protection Act (CPA)* and *Payday Lenders Regulations (Regulations)* enacted pursuant to it provide for regulation of the payday loan industry. Meanwhile, Nova Scotia’s *Consumer Creditors’ Conduct Act (CCCA)* sets out many of the prohibitions.¹¹² The *CPA* and *Regulations* also outline what payday lenders must display in their places of business, including the total costs of borrowing, the total to repay, and the APR.¹¹³

Interestingly, since the Nova Scotia Utility and Review Board (Board) is empowered under the *CPA* to set the borrowing limit, the maximum total cost of borrowing, the one-time fee for non-repayment, and the maximum interest rate in case of default, these provisions are not found anywhere in the *CPA* or *Regulations*. Instead, the Board publishes decisions periodically on its findings. At the time of writing, the decision from 2018 stands.¹¹⁴

The *Regulation* prohibits requiring that the term of a payday loan end before the borrower’s next payday.¹¹⁵

The *CPA* explicitly defines “internet payday loan” in the same way that other provinces have defined the term.¹¹⁶ Still, the *CPA* is unique because it mandates that the payday lender’s website be designed in such a way that it:

- (a) allows the prospective borrower to readily understand what action or actions will result in the prospective borrower’s acceptance of the loan agreement;
- (b) makes the agreement accessible to the prospective borrower in a manner that allows the prospective borrower to acknowledge and accept the terms and conditions of the loan agreement...¹¹⁷

The *CPA* also requires that payday lenders ensure that the borrower has consented to entering into the loan agreement before advancing the money under an

¹¹¹ *NL CPBPA*, *supra* note 54, s 83.2.

¹¹² *NS CCCA*, *supra* note 57, s 4.

¹¹³ *NS CPA*, *supra* note 54, s 180; *NS Regulation*, *supra* note 54, s 8.

¹¹⁴ *Re Consumer Protection Act*, *supra* note 62.

¹¹⁵ *NS Regulation*, *supra* note 54, s 14.

¹¹⁶ *NS CPA*, *supra* note 54, s 18A.

¹¹⁷ *Ibid*, s 18HA.

Internet payday loan.¹¹⁸ Nova Scotia is also unique in that payday lenders, whether providing services in person or online, must operate a permanent “brick and mortar” storefront in Nova Scotia to be licenced as a payday lender. The provision in the *CPA* providing for the scope of its application makes no mention of whether the borrower must be in the province, though unlicensed lenders are prevented from offering, arranging, or providing an Internet payday loan to borrowers in the province.¹¹⁹

vii. Ontario

Ontario’s *Payday Loans Act (PLA)* is responsible for much of the province’s approach to payday lending, along with the *General Regulation* enacted pursuant to it (*Regulation*). The *Regulation* outlines what payday lenders must display in their places of business.¹²⁰

Ontario has regulated online payday lenders since enacting the *Regulation*. This province is unique in that it uses the term “remote” to capture online payday lenders. According to the *Regulation*, a “remote payday loan agreement” is defined as a payday loan agreement entered into when:

- (a) the borrower is not present with the lender, if no loan broker assisted the borrower in obtaining the payday loan, or
- (b) the borrower is not present with the loan broker or the lender, if a loan broker assisted the borrower in obtaining the payday loan.¹²¹

The *Regulation* requires that applicants for a licence have at least one director or officer of the corporation who is ordinarily resident of Ontario.¹²² It also stipulates that licensees must maintain at least one office that is physically located in Ontario, and maintain an address for service in Ontario.¹²³

The *PLA* provides that “if a lender who is not licensed enters into a payday loan agreement with a borrower, the borrower is only required to repay the advance to the lender and is not liable to pay the cost of borrowing.”¹²⁴ The *PLA* applies to all payday loans so long as the borrower, lender, or loan broker is located in Ontario when the loan is made or to be made.¹²⁵

¹¹⁸ *Ibid*, s 18HB(a).

¹¹⁹ *Ibid*, s 18C.

¹²⁰ *Ontario Regulation*, *supra* note 54, s 14.

¹²¹ *Ibid*, s 1.

¹²² *Ibid*, s 3.

¹²³ *Ibid*, s 10.

¹²⁴ *Ontario PLA*, *supra* note 55, s 6(3).

¹²⁵ *Ibid*, s 2(1).

According to recent amendments to the *PLA*, that are now in force, the provincial Registrar (the Ministry of Government and Consumer Services) or its designate is empowered to conduct inspections when it has reasonable grounds to believe that an activity for which a licence is required is occurring.¹²⁶ Under these same amendments, the Lieutenant Governor in Council is empowered to make regulations prohibiting licensees from offering or providing prescribed goods or services other than payday loans to anyone.¹²⁷

viii. Prince Edward Island

The wording of Prince Edward Island's *Payday Loans Act (PLA)* is identical in many respects to that of Ontario, and accompanied by the *Payday Loans Act Regulations (Regulations)* enacted pursuant to it. The *Regulations* mandate what payday lenders must display in their places of business.¹²⁸

The *Regulations* also define "remote payday loan agreement" in the same way as Ontario.¹²⁹ The *Regulations* also state that a licensee maintain at least one office physically located in Prince Edward Island and an address for service in Prince Edward Island.¹³⁰ Similar to Ontario, the *PLA* applies to all payday loans so long as the borrower, lender, or loan broker is located in Prince Edward Island when the loan is made or to be made.¹³¹

ix. Saskatchewan

Saskatchewan's *Payday Loans Act (PLA)* and the *Payday Loans Regulations (Regulations)* enacted pursuant to it regulate payday lending in the province. The *Regulations* mandate what must be displayed in the lender's place of business.¹³²

Saskatchewan's payday loan legislation does not regulate online payday lending differently from in-person payday loans, save for a singular mention in the *Regulations* requiring that online payday lenders display certain information on their

¹²⁶ *Ibid*, s 47.1; Ministry of Government and Consumer Services, "A guide for payday lenders" (22 July 2020), online: *Government of Ontario* <www.ontario.ca/page/guide-payday-lenders> [perma.cc/ZSD2-UWNL].

¹²⁷ *Ontario PLA*, *supra* note 55, s 77.

¹²⁸ *PEI Regulation*, *supra* note 54, s 14.

¹²⁹ *Ibid*, s 1.

¹³⁰ *PEI Regulation*, *supra* note 54, s 10.

¹³¹ *PEI PLA*, *supra* note 54, s 2.

¹³² *Saskatchewan Regulation*, *supra* note 54, s 13.

websites.¹³³ The *PLA* also requires licensees to have an address for service in Saskatchewan.¹³⁴ Rather than specify the persons to which the *PLA* and *Regulations* apply, the legislation speaks specifically to the prescribed persons who do *not* fall within the purview of the legislation, and there is no mention and thus no exclusion of payday lenders or borrowers.¹³⁵ This is relevant to the question of if the province regulates online payday lending.

2. PROFESSIONAL REGULATION

The payday loan industry has also made some efforts to engage in self-regulation. The Canadian Consumer Finance Association (CCFA) “says its members operate a total of 961 stores and online payday businesses, and it lists 16 companies, including the five largest [payday lenders]” across the country.”¹³⁶

The CCFA was formerly known as the Canadian Payday Loan Association, during which time it had put out a *Code of Best Business Practices*, from which many measures have been adopted as part of provincial regulatory frameworks.¹³⁷ Some examples of these measures include the prohibition of rollover loans, and disclosure obligations.¹³⁸

It is important to note that the CCFA and its previous iterations have always been closely associated with the major corporate chains, as former employees have often served as executives.¹³⁹

3. DIFFERENCES AND GAPS IN REGULATION

The structure of each province’s regulatory framework is generally the same. A combination of consumer protection or specifically payday lending legislation and accompanying regulations establish caps on the rates charged for loans, outline the terms of repayment, disclosure of information, and prohibitions regarding lender conduct.¹⁴⁰

¹³³ *Ibid.*

¹³⁴ *Saskatchewan PLA*, *supra* note 55, s 6.

¹³⁵ *Saskatchewan Regulation*, *supra* note 54, s 3; *Saskatchewan PLA*, *supra* note 55, s 3.

¹³⁶ Chris Robinson, “A Business Analysis of the Payday Loan Industry” in Jerry Buckland, Chris Robinson, & Brenda Spotton Visano, eds, *Payday Lending in Canada in a Global Context* (Cham, Switzerland: Palgrave Macmillan, 2018) 83 at 85.

¹³⁷ Ben-Ishai & Schwartz, “Payday Lending in Canada,” *supra* note 7 at 958–59.

¹³⁸ *Ibid.*

¹³⁹ Robinson, *supra* note 31 at 85.

¹⁴⁰ Dilay & Williams, *supra* note 9 at 188.

Yet there are enough differences that, as Dilay and Williams point out, this “decentralized” framework means that “Canadian consumers do not all benefit from the same level of protection across the country.”¹⁴¹

For instance, there are some provinces, such as Alberta, Prince Edward Island, and Saskatchewan, where APR disclosure is not required. Knowing the APR on a payday loan is important for borrowers to assess the relative affordability of their options, and whether they are able to even repay the loan.¹⁴²

Similarly, the differences in how the maximum interest rate in the event of default is enumerated across the provinces (per annum or per month, and compounded or not specified) can create opportunities for confusion or greater complexity in assessing the costliness of taking on a payday loan in each province. Related to this, some provinces have more detailed disclosure requirements for store displays than others, which shows how consumers from those other provinces might be lacking context when deciding to get a payday loan. Some examples include British Columbia, which tries to provide context by detailing the parameters for a typical payday loan, and Manitoba, which emphasizes the “high-cost” nature and various components of the cost of such credit.

Notably, Saskatchewan is the only province that does not prohibit payday lenders from harassing borrowers, or limit contact with the borrower’s employer, relatives, neighbours, and so on.¹⁴³ This suggests a significant gap in consumer protection legislation in that province. All other provinces prohibit such harassment, as payday lenders or the collection agencies that debts are passed off to have been known to harass borrowers and those they are close to in an effort to get repaid.¹⁴⁴ It is also important to note that the protections regarding a borrower’s employer vary and are only found in three provinces.

In Manitoba and New Brunswick, the early collection of fees is not prohibited, which means borrowers are more vulnerable in these provinces to untimely financial pressures. There are also three provinces that do not set a loan limit related

¹⁴¹ *Ibid.*

¹⁴² Center for Responsible Lending, “APR Matters on Payday Loans” (June 2009) at 2, online (pdf): *Center for Responsible Lending* <www.responsiblelending.org/payday-lending/research-analysis/apr-matters.pdf> [perma.cc/N9FE-QRUZ].

¹⁴³ It is worth noting, however, that in Saskatchewan harassment by collections agencies is prohibited by *The Collection Agents Act*, RSS 1978 c C-15.

¹⁴⁴ “I can’t repay my payday loan. What should I do?” (8 September 2020), online: *Steps to Justice* <stepstojustice.ca/questions/debt-and-consumer-rights/i-can%E2%80%99t-repay-my-payday-loan-what-should-i-do/> [perma.cc/2DGX-NJ7T]; “Watchdog tells consumers to ‘be vigilant’ about illegal payday lenders” (26 November 2018), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/payday-loan-lenders-unlicensed-financial-consumer-services-commission-1.4921747> [perma.cc/UUF7-ENQ8].

to borrower net pay, an important factor that encourages more manageable debt to income ratios so far as these types of loans are concerned.

The greatest variation in regulation relates to the online payday lending market. While most provinces have started to try to address this segment of the market, Saskatchewan in particular does not appear to have clearly and meaningfully started to regulate online payday lenders. While provinces like Ontario have done so, trying to capture as broad a segment of the market as possible by defining “remote” payday lending activity, some provinces like Alberta and British Columbia do not even define the term. The latter provinces are examples of a trend of providing surface-level guidance for online payday lenders regarding the display of information on websites, but not trying to conceptualize a more substantive framework for the regulation of online payday loans.

Manitoba goes a bit further, with the most detailed regulatory scheme for online payday lending that includes a strict residency requirement for lenders to be licensed. Nova Scotia has a similarly stringent requirement that online payday lenders have a physical storefront in the province to be licensed. Lower-level requirements are present in New Brunswick and Ontario, and again, some provinces do not detail any expectations at all for residency, such as Alberta and British Columbia.

The requirements in Manitoba and Nova Scotia attempt to make it more difficult for online payday lenders to operate in these provinces. However, there is no clear evidence suggesting that a physical storefront is helpful towards regulating online lender behaviour. After all, there is potential for such requirements to counterintuitively encourage the unlicensed online payday lending market since it makes it harder to be a licensed online lender.

As previously mentioned, there is a higher chance of coming across an unlicensed and non-compliant payday lender on the internet, and being unlicensed can be indicative of a lack of compliance with the law. This presents a potential issue with the current state of online payday loan regulation.

The Consumers Council of Canada observed that the existing regulatory framework focuses on licensed lenders, and few attempts are made to try to deal with the issue of unlicensed lenders.¹⁴⁵ The extent of these efforts included sending information on the licensing process to unlicensed lenders as they are identified, either by the provincial government or self-reporting by other payday lenders.¹⁴⁶ This is more of a reactive than a proactive or innovative regulatory approach, and will have a hard time progressing at the same speed as the lenders.

The *PLA* in Ontario notably provides for conducting inspections when there are reasonable grounds to believe unlicensed activity is occurring. Besides that,

¹⁴⁵ Denise Barrett Consulting, *supra* note 52 at 18.

¹⁴⁶ *Ibid.*

provinces appear to be lacking robust application, investigation, and enforcement mechanisms in this regard. The provinces generally do not directly address consequences for the operation of unlicensed lenders either, except for Ontario and New Brunswick. In Ontario, a borrower is only required to repay the principal amount of the payday loan and not the cost of borrowing. In New Brunswick, borrowers can cancel a payday loan at any time if the lender is not properly licensed at the time of entering into the payday loan agreement.¹⁴⁷

Beyond the legislation, there is also not much evidence of strong enforcement efforts by provincial regulators. For instance, it is clear that despite the ban on licensed lending at rates above 35%, payday lending persists in Quebec. Bans on payday loans have been found to not be an effective form of regulation,¹⁴⁸ but another reason for this activity could also be the lengthy nature of the process for enforcing against violations.

There remains no simple method for consumers to inform themselves on the status of payday lenders. As mentioned previously, it was difficult even for the purposes of our research to locate licensing lists for payday lenders in each province—many provinces had to be directly contacted to obtain this information. In addition, we have not been able to find any case law or legislation on what happens to a debt owed to an unlicensed lender in bankruptcy, suggesting this may be an unresolved practical issue.

IV. RECOMMENDATIONS

A. A UNIFIED REGULATORY APPROACH

The provincial patchwork of payday lending regulation offers inconsistent protection and access to information for consumers across Canada. A basic recommendation responding to this concern is to aim for provincial cooperation towards establishing a unified regulatory approach to payday lending. This process could be facilitated by the Financial Consumer Agency of Canada (FCAC).

To this end, the FCAC could look to the Consumer Financial Protection Bureau (CFPB) in the United States for guidance. In the past, the CFPB has been considered a successful example of regulatory architecture not because of a dedication to “imposing extensive formal compliance,” but instead for “publishing complaints

¹⁴⁷ *NB CCDPLA*, *supra* note 54 at s 37.29(3).

¹⁴⁸ Neil Bhutta, Jacob Goldin & Tatiana Homonoff, “Consumer Borrowing after Payday Loan Bans” (2016) 59 *J L & Econ* 225. See also Luc Bissonnette et al, “Projecting the Impact of Population Aging on the Quebec Labour Market” (2016) 42:4 *Analyse de pol* 431.

and data about compliance, coordinating other agencies, and anticipating and discussing future trends, like the impact of financial technology.”¹⁴⁹

The FCAC is well-positioned to take on such a role and provide a broader perspective during the development and enforcement of regulation, collection of data, as well as identification of alternatives.

That said, looking at the state of payday lending regulation in the United States, the situation is similar. There are 12 states that have effectively banned payday loans, while 16 have set the cap on the interest rate at 36%, a rate too low for payday lenders to operate profitably. More generally, the CFPB noted that 32 states allow for the operation of “small dollar lending without major restrictions.”¹⁵⁰ There does not appear to be consistency in regulation across all of the states, and a unified regulatory approach would certainly be easier to try to implement across Canada’s 13 provinces and territories.

The CFPB’s ability to engage in consistent and meaningful regulation of the payday lending industry is limited by changes in administration. The CFPB, under the Trump administration, recently rescinded a 2017 rule that was meant to introduce nationwide underwriting requirements (meaning payday lenders would have to ensure consumers were able to pay back loans before providing them with any money).¹⁵¹ Without similar challenges in the Canadian context, the FCAC stands as a potential source for consistency in federal involvement in developing a unified regulatory approach.

Currently, provincial regulation occurs through general *CPAs* with accompanying payday loan regulations, though some provinces do have specific payday loan legislation. Payday-loan specific legislation provides for greater flexibility in terms of determining appropriate application and enforcement mechanisms, as opposed to the broad and often more lenient mechanisms found under general *CPAs*.¹⁵² A unified regulatory approach could therefore provide a more consistent and responsive legislative scheme across the provinces, for lenders and borrowers alike. Consistent expectations for lender conduct can possibly encourage greater compliance, while also more clearly informing and better protecting consumers.

¹⁴⁹ Cristie Ford, *Innovation and the State: Finance, Regulation, and Justice*, (New York: Cambridge University Press, 2017) at 53 [Ford].

¹⁵⁰ Megan Leonhardt, “New payday lending rules could leave 12 million Americans ‘exposed to unaffordable payments’” (7 July 2020), online: *CNBC* <www.cnbc.com/2020/07/07/new-payday-loan-rules-could-leave-millions-of-americans-exposed-to-debt-trap.html> [perma.cc/QG3K-MFEW].

¹⁵¹ *Ibid*; Komala Ramachandra, “US Consumer Protection Agency Scraps ‘Payday Loan’ Rules” (9 July 2020), online: *Human Rights Watch* <www.hrw.org/news/2020/07/09/us-consumer-protection-agency-scraps-payday-loan-rules> [perma.cc/FKAX-GA8Y].

¹⁵² Ben-Ishai & Schwartz, “Payday Lending in Canada,” *supra* note 7 at 963–64.

Another element of unified regulation to consider concerns rate- and cap-setting. In Nova Scotia, the rates and caps set for payday loans are not found in the legislation, but in the findings of the Board. This is a more flexible process than the process of having legislation amended, and therefore is more proactive. It is an approach that, similar to the rule-making function of the CFPB, could also be explored on a federal level through the FCAC in consultation with the provinces.

It is important to acknowledge, however, that the federal government in Canada has in the past been reluctant to be involved in the regulation of payday lending, hence the provincial regulatory model currently in place.¹⁵³ However, the current post-pandemic economic recovery period may provide the necessary circumstance to merit the involvement of the federal government.

B. SPECIFIC RECOMMENDATIONS FOR PROVINCIAL REGULATION

If not in the form of a unified regulatory approach from the top-down, there are at least some recommendations that can be made for less of a patchwork and more of a consistent system of regulation from the provinces, as follows:

- 1) Deciding on a common definition for online or remote payday lenders, as well as a robust framework of requirements for application and operation within a given province.
 - a) It will also be important to consider the boundaries on cross-border application and information exchange in light of the growth of the online payday lending market.
- 2) Detailing comprehensive and uniform disclosure obligations for both physical storefronts and online websites of payday lenders, including licensing status as well as APR and other costs related to the loan, and doing so in an accessible format.
- 3) Establishing a clear and proactive mechanism for monitoring and investigating potential unlicensed lender activity (especially online), as well as the enforcement of penalties.
 - a) Part of this will involve ensuring there are easily accessible public databases of the licensed payday lenders in a given province available for research and consumer uses.
- 4) Closing the gap in harassment and contact protections in Saskatchewan, and considering extending employer protections within limited contact prohibitions across the country.

¹⁵³ Kobzar, *supra* note 17 at 142.

C. POSTAL BANKING AS AN ALTERNATIVE

Considering that payday loans are alternatives Canadians seek when they do not have access to traditional financial institutions, another common recommendation is to develop an official or government alternative, such as a postal banking system.¹⁵⁴ In the American context, postal banking as an alternative was recently re-energized by the work of scholars such as Mehrsa Baradaran.¹⁵⁵

A postal banking system would involve, for instance, the federal government subsidizing the establishment of banking services through Canada Post, which has a much greater presence across urban, rural, and Indigenous communities in the country than banks do.¹⁵⁶ More Canadians will then have access to banking services, and thus also the potential to access traditional loans instead of having to turn to payday lenders.

Postal banking actually existed in Canada up until 1968, and the move to bring the system back has been percolating over the past decade, albeit slowly.¹⁵⁷ A 2016 review by the House of Commons Standing Committee on Government Operations and Estimates recommended that the Canada Post continue to focus on its existing duties rather than expand into postal banking.¹⁵⁸ Yet there has been a decrease in the number of bank branches in the country, and concerns over access to banking services due to closures and reduced hours in response to the COVID-19 pandemic may prompt a re-consideration.¹⁵⁹

Canada Post committed to funding a pilot project to provide postal banking in rural communities in May 2020, though the study has been delayed by the COVID-19 pandemic.¹⁶⁰ While the project's initial financial services offerings do not include loans, it would be an important first step in taking advantage of the postal service's existing infrastructure to determine the feasibility of the postal banking system as an alternative to payday lenders.

¹⁵⁴ Buckland & Visano, *supra* note 11 at 36; John Anderson, "Why we need postal banking" (1 November 2018), online: *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/publications/monitor/why-we-need-postal-banking> [perma.cc/XP7Q-E2B9] [Anderson]; Jerry Buckland, "Industry Canada, Affordable Credit Options for Vulnerable Consumer: Identifying Alternatives to High-cost Credit in Australia, Belgium, Canada, France, Germany, the UK, & the US" (Ottawa: The Office of Consumer Affairs, 2009).

¹⁵⁵ Stephanie Ben-Ishai, Book Review of *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy* by Mehrsa Baradaran (2017) 59:1 Can Bus LJ 119.

¹⁵⁶ Anderson, *supra* note 154.

¹⁵⁷ Buckland & Visano, *supra* note 11 at 168.

¹⁵⁸ Carl Meyer, "Canada Post tests the waters for postal banking with pilot projects, funding for study" (26 May 2020), online: *Canada's National Observer* <www.nationalobserver.com/2020/05/26/news/canada-post-tests-waters-postal-banking-pilot-projects-funding-study> [perma.cc/575V-LVZL].

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

D. INCREASING THE ACCESSIBILITY OF INSOLVENCY

It is also important to understand the context for the existence of payday loans. There is a demand for short-term loans that traditional financial institutions are not willing to meet. Inevitably, some of those who use payday loans will become insolvent and need the fresh start provided by personal insolvency.

Since payday loans are unsecured, they are easily dischargeable during an insolvency.¹⁶¹ Thus, when financial distress arises, insolvency could serve as a way to get access to a “fresh start.”¹⁶² However, as of yet the government and its legislation does not promote insolvency as a solution, instead referring payday loan borrowers to not-for-profit credit counselling agencies.¹⁶³

Even where insolvency is suggested as an option, it is not a meaningful option for many consumers. It is costly to file for insolvency, with the price charged by LITs being anywhere from \$1,500 to \$2,000, which for some means that “it may not be worth [it]... simply to discharge a relatively small payday loan.”¹⁶⁴ As well, though the OSB will still refer people who cannot afford the filing fee to LITs who can assist with the process, the fees charged for these services “result in a non-dischargeable debt that they will continue to owe following their discharge from bankruptcy, limiting access to a true ‘fresh start.’”¹⁶⁵

As a result, it is necessary to consider how products such as payday loans and processes such as insolvency can be reconfigured and regulated in a way that responds to these situations without exploiting or further harming consumers. As access to credit for consumers is expanded by less restrictive or non-existent regulation, corresponding changes need to be made to access to low- or no- cost insolvency options for no- or low-income consumers.

Where debtors with payday loans are able to access the insolvency process, there is the potential for LITs to render unlicensed or non-compliant payday loans void and seek to recover the fees charged for these loans from the lender. We have not

¹⁶¹ Hoyes Michalos, “Can I File Bankruptcy for Payday Loans in Canada?” (28 February 2019), online: *Hoyes, Michalos & Associates Inc* <www.hoyes.com/blog/can-i-file-bankruptcy-for-payday-loans-in-canada/> [perma.cc/NGJ8-PEFD].

¹⁶² Ben-Ishai & Schwartz, “Payday Lending in Canada,” *supra* note 7 at 998–99; Stephanie Ben-Ishai & Saul Schwartz, “A simple, low-cost option for Canada’s insolvency system” (18 May 2020), online: *Policy Options* <policyoptions.irpp.org/magazines/may-2020/a-simple-low-cost-bankruptcy-option-for-canadas-insolvency-system/> [perma.cc/V2MT-WE36].

¹⁶³ *Ibid.*

¹⁶⁴ Ben-Ishai & Schwartz, “Payday Lending in Canada,” *supra* note 7 at 998–99.

¹⁶⁵ *Ibid.*

found specific legislation or case law supporting such an approach, but it would fit within the discretion provided to LITs as court appointed officers.¹⁶⁶

E. MODERN RESPONSES USING FINANCIAL TECHNOLOGY (FINTECH)

Focusing in on payday loans themselves, the need they respond to can be more innovatively met by developing carefully regulated FinTech offerings.

One example of this is the rise of early wage access programs, which are marked by “facilitated transfers of earned-but-unpaid wages in advance of standard periodic pay days.”¹⁶⁷ Early wage access is therefore meant to alleviate the need that arises from waiting for a paycheck. These programs, often provided through apps or employer-partner programs (including being incorporated into employee wellness programs), operate through flat fees such as: subscriptions, per-period fees, per-transaction fees, employer-subsidized fees, or even per-transaction tips.¹⁶⁸ The APR can therefore vary widely, while also resembling those of payday loans.¹⁶⁹

In Canada, some examples of early wage access programs include ZayZoon and the KOHO Early Payroll program—the latter offers \$100 up to three days before a paycheck for no fee or interest.¹⁷⁰ Early wage access is an attractive alternative, especially since it can be less costly and encourage greater financial self-determination, though there is still cause for concern given cyclical use can obfuscate the fees and potential overdraft charges that can occur.¹⁷¹ Thus the borrower may not be clear on the fees involved.

Such concern leads back to the need for responsive regulation of financial institutions and products for consumers on the fringes who are unable to access traditional financial services and credit. Payday loans operate within a patchwork of provincial regulation, but FinTech (which intends to replace, if not coexist with,

¹⁶⁶ To the extent that the proof of claim correctly establishes the amount due with supporting documents, the creditor will be entitled to participate in the distribution of dividends. It is not the role of the LIT to determine if the interest rate is prohibitive or not. However, the LIT has the option, under section 34 of the BIA, to apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt. The appropriate remedy would derive more under the *Consumer Protection Act* rather than under the BIA since on its face the amount of the claim is duly established. The contract dispute and its conditions would fall under the *Consumer Protection Act*.

¹⁶⁷ Cuttino, *supra* note 14 at 1518–1522.

¹⁶⁸ *Ibid* at 1511; Jim Hawkins, “Earned Wage Access and the End of Payday Lending” (2020) 101:2 Bu L Rev 705.

¹⁶⁹ *Ibid*.

¹⁷⁰ “ZayZoon”, (2020) online: *ZayZoon Inc* <www.zayzoon.com/> [perma.cc/EW29-FWG5]; “Early Payroll”, (2020), online: *KOHO* <www.koho.ca/earlypayroll/> [perma.cc/UUX2-GQUU].

¹⁷¹ Cuttino, *supra* note 14 at 1526, 1554–1555.

payday loans) faces little regulation at all considering it currently exists within a gray area of legal regulation.

Returning to the idea of a unified regulatory approach, there is a need here not just for provincial unification, but an approach that carefully considers the need for financial access at the fringes. Comprehensive regulation should consider not just how to respond to the payday loan industry, but as Cuttino terms it, the “small-sum liquidity” industry itself.¹⁷² Financial regulation should therefore also encompass financial innovation to be effective.¹⁷³

V. CONCLUSION

As the COVID-19 pandemic carries on, it will be important to further explore its financial impacts. For example, it has yet to be seen empirically how government support such as the Canadian Emergency Response Benefit (CERB) has affected the need for payday loans, if it did at all.

The CCFA did note that “in the first six weeks of the pandemic, numbers across the industry were consistently down about 84 per cent from before the crisis,” and explained this as the result of decreased spending and an inability to pay back loans due to unemployment.¹⁷⁴ This trend could change, however, given how long the COVID-19 pandemic and related restrictions have continued.

Payday lenders have capitalized on the wait and confusion surrounding government support as a way to draw people in. One company in Ontario called Helium Loans advertises the provision of “CERB Payday loans,” while the more recognizable Pay2Day at one point advertised, “Waiting for EI or CERB? We Can Help!”¹⁷⁵

As a result, there is no time better than the present to review the current state of payday loan regulation in Canada and start to think of ways to utilize and even improve upon existing structures in ways that better serve and protect consumers. The current patchwork of provincial regulation gives payday lenders a great deal of choice to choose a province that best suits their operations, and lacks teeth so far as the regulation of unlicensed and/or online payday lenders is concerned. This environment creates many opportunities for consumers to take on payday loans without adequate

¹⁷² *Ibid* at 1568–1572.

¹⁷³ Ford, *supra* note 149 at 3.

¹⁷⁴ Bill Graveland, “Pawnshops, payday lenders shocked at the topsy-turvy way the COVID-19 pandemic is affecting them” (2 June 2020), online: *CBC News* <www.cbc.ca/news/canada/calgary/pawnshops-payday-lenders-pandemic-business-1.5594716> [perma.cc/8LQJ-QXVN].

¹⁷⁵ Helium Loans, “Get a CERB Loan in Payday” (2018), online: *Helium Investments Inc.* <heliumloans.com/loans/Payday-CERB-Ontario> [perma.cc/939F-T3N5]; “Pay2Day” (2020), online: *PAY2DAY Inc.* <pay2day.ca/> [perma.cc/TMT9-8VBV].

knowledge of the consequences, and can result in the “debt traps” or cycles the industry is known for perpetuating. This is likely why the majority of provinces have seen growth, and for many a substantial amount of growth, in the penetration of payday loan use among those filing for insolvency.

Yet banning payday loans is not much of a solution. There is a need that payday loans respond to for those who are disenfranchised from traditional financial products and services. An access issue here creates justice issues elsewhere.

While there are alternative solutions on the horizon, such as the rise of FinTech (for which provincial regulation should begin planning for now), existing structures, such as the insolvency process, should be more closely examined for its promise as a way of climbing out of debt traps such as payday loans and starting anew.

APPENDIX I: COMPARISON OF SELECT PAYDAY LOAN PROVISIONS IN EACH PROVINCE

Province	Total Cost of Borrowing	Max Interest on Default	Require APR Disclosure	Early Fee Collection	Online Lender Definition
AB	15%	2.5%/month	No	No	No
BC	15%	30% per annum	Yes	No	No
MB	17%	2.5%/month	Yes	Yes	Yes
NB	15%	2.5%/month	Yes	Yes	Yes
NL	21%	2.5%/month	Yes	No	No
NS	19%	60% per annum	Yes	No	Yes
ON	15%	60% per annum	Yes	No	Yes, as “remote” lenders

PEI	15%	Not specified	No	No	Yes, as “remote” lenders
SK	17%	30% per annum	No	No	No