

## **The Role of Governments in the Overindebtedness of the Economically Disadvantaged**

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with Jeremy Barretto\*\*\*

*In this article, Professors Stephanie Ben-Ishai and Saul Schwartz examine several ways in which the government becomes a creditor of economically disadvantaged Canadians and its role in limiting the options available for resolving the resulting overindebtedness. Specifically, the authors explore how government transfer programs, and the debts that result from benefit overpayment, affect those already marginalized by poverty. Ben-Ishai and Schwartz then argue that the two main remedies available to Canadians facing insolvency—credit counselling and bankruptcy—are simply too costly for low-income individuals, a term the authors use to describe those who are poor even before they incur the serious debts leading up to an insolvency. Low-income Canadians coping with government debt are shown to be in a unique and difficult position with respect to repayment. Using the overpayments that can occur within transfer programs such as Ontario Works (OW) and the Ontario Disability Support Program (OSDP) to illustrate the particular issues affecting low-income individuals, the authors demonstrate the lack of recourse this group has when dealing with insolvency. Ben-Ishai and Schwartz analyze this issue using the statutory framework, interviews with government program officials and data on social assistance overpayments to cast doubt on the assumption that those with low income have no need for bankruptcy and credit counselling. In so doing, the authors ultimately question whether existing insolvency remedies are serving the needs of all Canadians.*

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## **I. Introduction**

Jorge,<sup>1</sup> a Portuguese immigrant, wanted his daughter, who suffers from Down Syndrome, to join him in Canada from Portugal. Jorge was working at high wages in construction and felt able to sponsor her immigration to Canada. Upon her arrival, Jorge was advised by a social worker that his daughter would qualify for benefits under the Ontario Disability Support Program (ODSP). Unfortunately, the social worker failed to tell Jorge that he was only two years into a ten-year responsibility period for any social assistance received by his daughter and might be asked to pay back any aid given to her.

Subsequently, Jorge suffered an unfortunate series of events. First, he was injured and was forced onto ODSP himself. Then his wife passed away and he had to use all of his available resources to pay for the funeral costs.. Finally, the Ontario Ministry of Community and Social Services (MCSS) sent Jorge a letter claiming a \$57,112 sponsorship debt, based on the ODSP benefits received by his daughter after her arrival in Canada. Jorge laments that had he been properly advised of consequences, he would not have applied for ODSP for his daughter. Bankruptcy seems not to be an option for Jorge because he is unable to come up with the \$1600 in fees quoted by a bankruptcy trustee.

Jane<sup>2</sup> is unable to work due to a disability, but her ODSP application is pending. She is currently receiving \$572 per month from Ontario Works (OW), an amount that is less than her monthly rent. In order to meet her living expenses, she used her credit cards and now owes \$24,600 to four creditors. She is very nervous about her debts and bothered by frequent calls from collection agencies. In 1996, Jane had declared bankruptcy because of her student loan debts. Jane recently consulted two Toronto-area credit counselling organizations, Credit Canada and In-Charge Debt Solutions, but was told that her income was too low to qualify for their Debt Management Plans. Bankruptcy, however, could be an attractive option for Jane. Jane visited five bankruptcy trustees, including four from a list provided by the Office of the Superintendent in Bankruptcy Bankruptcy Assistance Program. Partly because of her previous bankruptcy, she was quoted fees between \$1600 and \$1800, approximately three times her current monthly income.

For middle-class people, unforeseen events such as marital disruption, job loss and illness can set in motion a process that leads to insolvency. If their debts can no longer be paid, the middle-class can resort to one of the two main remedies available to Canadian consumer debtors to address insolvency— credit counselling and bankruptcy. For low-income people who depend on government transfers, adverse economic events set in

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<sup>1</sup> Pseudonym. The authors ran a pilot debt advice clinic at Parkdale Community Legal Services in January, 2009. The purpose of the debt advice clinic was to provide neutral, informed advice and referrals to individual debtors. Clients visited this clinic with debts ranging from \$35 to \$57,112. Most of the clients were on either Ontario Works (OW) or Ontario Disability Support Program (ODSP) and had few, if any, assets. The following two stories from the Debt Advice Clinic are illustrative of the issues analyzed in this article.

<sup>2</sup> Pseudonym.

motion a process that can lead to changes in their benefit levels; sometimes these changes can cause benefit overpayments, which then become debts to the province. Faced with such debts, however, low-income people are left with few, if any, escape options because they do not have access to credit counselling, consumer bankruptcy or any form of neutral debt advice.<sup>3</sup>

In this article, we show that debts to the government are especially important in the lives of low-income people.<sup>4</sup> One sort of government debt is well-known: student loans are designed to help post-secondary students who come from families with relatively low income. Post-secondary education might well pay off for such students by giving them access to good jobs at high salaries. But post-secondary education is a risky undertaking and does not pay off for everyone. Those who borrow and do not find well-paying jobs after leaving school may find themselves with low incomes and significant debts to the government. Another sort of debt, and the one on which we focus in this article, arises when government transfer programs overpay benefit recipients. Such overpayments can arise through errors on the part of either the recipients or on the part of program administrators; in either case, the overpayment becomes an involuntary debt to the transfer program.

To illustrate the debt problems that low-income people may face, we focus on how overpayments can occur within Ontario Works (OW) and the Ontario Disability Support Program (ODSP) even though similar stories could be recounted in the context of other transfer programs. Similar to the overindebtedness of economically disadvantaged people more generally, the visibility of the debt problems faced by government transfer recipients is extremely low. Some believe that transfer recipients cannot incur large amounts of debt because lenders will be reluctant to extend credit to them. Moreover, many transfer recipients are “judgment-proof” — courts may render a judgment against them, but the judgment will have limited practical impact as they lack any means of repayment. As a result, some believe that low income people have few debts and little

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<sup>3</sup> Such overpayments are not a small issue, as demonstrated by work on the European consumer bankruptcy system. For a discussion of social problems caused by consumer overindebtedness, see Jason Kilborn, “Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark” 18 *Int'l Insolvency Rev.*, (forthcoming 2009). This article touches on the issues that arise when the law does not modify a creditor’s claim in light of a debtor’s inability to pay. Kilborn focuses on how these social problems acted an impetus for legal reform in Denmark, culminating in adoption of the Danish consumer debt adjustment act and other subsequent reforms. Kilborn also frames these reforms as a response to ineffectual collection efforts by the Danish state, highlighting the important role that governments play when acting as a creditor of low-income individuals. For a further discussion of the problems related to overindebtedness, see Jason Kilborn “Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice” in *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*, Johanna Niemi, Iain Ramsay & William Whitford eds., (Hart Publishing, 2009).

<sup>4</sup> For the purposes of this paper, the term “low-income” is used to describe those individuals who are poor even before they incur debts leading to an insolvency. However, it is important to clarify that not all insolvent people are low-income. Rather, insolvency is an issue that impacts Canadians of varying income levels. Yet, despite the wide range of consumer debtors in Canada, our insolvency system remains tailored to meet the needs of middle-income debtors. As such, this paper will explore unique situation faced by low-income debtors and the manner in which Canada’s current insolvency system further disadvantages them.

pressure to repay what they do owe and, as a result, have little need for bankruptcy or credit counselling.

This article uses the statutory framework, interviews with government program officials, and data on OW and ODSP overpayments to challenge the belief that low income people have no need for bankruptcy and credit counselling. That belief rests in part on the presumption that those with low income have always had low income and always will. In fact, however, there is substantial movement in and out of poverty, as well as in and out of government transfer programs.<sup>5</sup> As a result, those who are receiving transfers at any moment in time might well have accumulated large debts in their more prosperous past. And those who are now on government benefits and judgment-proof may be looking forward to a time when they need no longer rely on government transfers and will no longer be judgment-proof. Lacking a mechanism through which recipients can deal with their debts, the current system can operate as a disincentive to leaving social assistance since becoming independent may revive one's debts.

Using OW and ODSP as examples, our goal here is to demonstrate that transfer recipients are doubly disadvantaged in their efforts to resolve their debt problems. The first disadvantage is that the two most common remedies for debt problems — credit counselling and personal bankruptcy — are out of their reach. The second is that one of their most important creditors, the government, controls their income.

The two most common methods of debt resolution in Canada are credit counselling and personal bankruptcy. "Credit counselling" often provides little beyond debt management plans that require the full repayment of the debts.<sup>6</sup> Because transfer recipients often do not have any discretionary income with which to institute a debt management plan, credit counselling is not a viable option. The second option, consumer bankruptcy, offers the discharge of most debts but is costly — a private bankruptcy trustee typically charges about \$1,500 over the course of nine months.<sup>7</sup> The first disadvantage for transfer recipients is therefore that credit counselling is unavailable and personal bankruptcy is too expensive to be a viable option.<sup>8</sup>

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<sup>5</sup> See, for example, Ross Finnie and Arthur Sweetman, "Poverty Dynamics: Empirical Evidence for Canada" (2003) 36. Can. J. Econ. 291.

<sup>6</sup> Typically, a debt management plan requires that 100% of the existing debt, including interest, be repaid. However, the future accumulation of interest on most debts may be halted once the debt management plan is in effect. Credit counselling organizations will be further discussed below.

<sup>7</sup> Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2007) 45 Osgoode Hall L.J. 471 at 510, ["Bankruptcy for the Poor?"]. The fact that this rate puts consumer bankruptcy out of reach for many low-income individuals was reflected the authors experience running the debt advice clinic at Parkdale Community Legal Service. For specific examples, see *supra* note 2-3.

<sup>8</sup> >. The Office of the Superintendent of Bankruptcy operates a Bankruptcy Assistance Program (BAP); see Office of the Superintendent of Bankruptcy, "Bankruptcy Assistance Program" (5 July 2006), online: Service Canada <[http://www.servicecanada.gc.ca/eng/goc/bankruptcy\\_assistance.shtml](http://www.servicecanada.gc.ca/eng/goc/bankruptcy_assistance.shtml)>. Despite its name, however, the program is essentially a method of linking debtors to trustees. It does not offer lower cost bankruptcies, nor does it guarantee that a trustee will accept the debtor as a client. The program is poorly advertised, little used and offers few, if any, benefits to debtors. The advertising that does exist is misleading. See, for example, Service Canada's summary: "The Bankruptcy Assistance Program helps individuals seeking to file for bankruptcy hire a bankruptcy trustee if they do not have the means to do so on their own."

The second disadvantage is that the government, the main creditor of many low income debtors, has more debt collection options than do private sector creditors. For example, most transfer programs have agreements with the Canada Revenue Agency (CRA)<sup>9</sup> that authorize the CRA to intercept some tax refunds and tax credits and turn these over to the transfer programs as debt payments.<sup>10</sup> Moreover, the government is in the enviable position (for a creditor) of exerting substantial control over the economic lives of its debtors through income transfer programs.

The paper will proceed as follows. Part II describes how the government of Ontario, through its OW and ODSP programs comes to be a major creditor of some social assistance recipients. The primary reason for focusing on OW/ODSP is to illustrate the salience of the two disadvantages just discussed. Other government programs — such as Employment Insurance, the Canada Pension Plan and federal and provincial student loan programs — also become creditors of the poor but the OW/ODSP case best illustrates the situation. Part III explains and assess the range of collection options open to the government of Ontario as it tries to collect debts owed to OW/ODSP, options that include the reduction of benefit levels, referral to private collection agencies, court action and the set-off of tax refunds by the CRA. Part IV outlines the options for low-income debtors attempting to address their debt problems. This section makes clear that in recent years the government has made various efforts to improve and centralize their debt collection efforts, but there has been no corresponding change in the availability of remedies available to economically disadvantaged people to deal with their overindebtedness. On this basis, Part IV also makes preliminary recommendations for reforming the debt resolution procedures available to low-income people.

## **II. OW and ODSP**

### **a. How Social Assistance Recipients Incur Debts to OW and ODSP**

Social assistance in Ontario is divided into two separate programs. ODSP provides financial assistance and employment support to people with disabilities.<sup>11</sup> OW provides benefits, as well as employment assistance, to employable people in financial need.<sup>12</sup> ODSP is administered and delivered by the province, while OW is delivered by Ontario municipalities.<sup>13</sup>

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<sup>9</sup> *Canada Revenue Agency Act*, S.C. 1999, c. 17. The Canada Revenue Agency administers tax laws for the government and delivers various social and economic benefits through the tax system.

<sup>10</sup> See: Ontario Works, “Directive # 9.3: Recovery of Overpayments” (July 2008) at 10; Meeting with staff from the Canada Revenue Agency’s Refund Set-off Program (6 March 2009). The process of applying tax refunds to the repayment of Crown debts owed by the taxpayer is called the “set-off” process by the CRA.

<sup>11</sup> For a brief MCSS description of ODSP, see <<http://www.accesson.ca/mcss/english/pillars/social/odsp>>. For a lengthier version, see <[http://www.cfcs.gov.on.ca/NR/MCFCS/ODSP/ESDIR/en/0\\_0.pdf](http://www.cfcs.gov.on.ca/NR/MCFCS/ODSP/ESDIR/en/0_0.pdf)>.

<sup>12</sup> Ontario Works, “Directive # 1.1: Overview of Ontario Works” (July 2008) at 5.

<sup>13</sup> The local administration of Ontario Works is directed by “delivery agents.” A delivery agent is either a municipality or a First Nation. The 47 municipalities and 100 First Nations that comprise the set of delivery agents are listed at <[http://www.e-laws.gov.on.ca/html/regis/english/elaws\\_regs\\_980136\\_e.htm](http://www.e-laws.gov.on.ca/html/regis/english/elaws_regs_980136_e.htm)>. In this paper, we use the term “municipalities” to refer to the set of OW delivery agents.

OW and ODSP recipients come to owe money to the Ontario government when, for one reason or another, an overpayment is made to them by the government. Under section 19 of the *Ontario Works Act*, if a benefits recipient is paid in excess of what they are entitled to, the overpayment may be deemed as a debt due to the Crown.<sup>14</sup> Section 19(3) allows for recovery of overpayments originating from other government benefit programs including the *Ontario Disability Support Program Act* (the “*ODSP Act*”), as well as the legislation which preceded the *Ontario Works Act*.<sup>15</sup>

An important class of overpayments involves benefits paid to sponsored immigrants. A significant number of immigrants to Canada are sponsored by family members who are already living in Canada.<sup>16</sup> The *Immigration and Refugee Protection Act* (the “*IRPA*”) requires that the sponsor provide financial support to partners and to children 22 years of age or older for three years from the date when the sponsored person becomes a permanent resident.<sup>17</sup> Sponsored dependent children must be financially supported for ten years or until the child turns 25.<sup>18</sup> If the sponsored person receives financial assistance from OW or ODSP, despite the sponsorship agreement, that assistance is treated as an overpayment to the sponsored person and becomes a debt owed to the government by the sponsor.<sup>19</sup>

#### **b. How OW and ODSP Manage the Collection of Overpayments**

The collection of OW and ODSP overpayments is complicated by the administrative structure of the two programs. The province administers and delivers ODSP through the regional and local offices of the Ministry of Community and Social Services (MCSS), which takes responsibility for collecting overpayments.<sup>20</sup> For “active cases” — individuals who are currently receiving ODSP benefits — the Ministry reduces ODSP benefit payments by up to 10 percent until the overpayment has been repaid. For “inactive cases” — people who have an overpayment but who are no longer receiving

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<sup>14</sup> *Ontario Works Act*, 1997, S.O. 1997, c. 25, Sch. A, s. 19.

<sup>15</sup> *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sch. B.

<sup>16</sup> Citizenship and Immigration Canada, “Canada – Permanent residents by category, 2004-2008” (13 February 2009), online: <<http://www.cic.gc.ca/english/resources/statistics/facts2008/permanent/01.asp>>. Overview for 2008 listing: 65,000 Family Class (sponsored), 149,000 Economic Class and 22,000 Refugees. See also, David Carment & David Bercuson, eds., *The World in Canada* (McGill-Queen’s Press, 2008).

<sup>17</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, [IRPA].

<sup>18</sup> Prior to June 28, 2002, the *Immigration Act* required that sponsors provide financial support to partners and dependent children for 10 years from the date when the sponsored person became a permanent resident.

<sup>19</sup> IRPA, *supra* note 15 at s. 13.3. Because Section 13.3 of the IRPA states that “[a]n undertaking relating to sponsorship is binding on the person who gives it,” ODSP or OW payments made to a sponsoree while the sponsor is still obligated to provide financial support become a debt to ODSP or OW.

<sup>20</sup> Ontario Disability Support Program-Income Support, “Directive 11.1 Recovery of Overpayments” (November 2007) at 5.

ODSP benefits — a centralized unit known as the Overpayment Recovery Unit (ORU) takes charges of collection efforts.<sup>21</sup> The ORU will be discussed below.

The Ontario Works program is delivered on behalf of the MCSS by Ontario municipalities.<sup>22</sup> Eighty percent of OW benefits and employment assistance costs are paid by the province with the other twenty percent paid by the municipalities; the administrative costs of the program are split fifty-fifty between the province and the municipalities.<sup>23</sup> When overpayments occur, the responsibility for collection falls on the municipalities. As is the case for ODSP, overpayments among active cases are handled by reducing benefit levels by up to ten percent. For inactive cases, however, the financing of the program discourages the collection efforts of the municipalities; fifty percent of the cost of collection must be borne by the municipality but eighty percent of any monies collected must be returned to the province.<sup>24</sup>

Over time, the amount of uncollected social assistance overpayments grew to be quite large and drew the attention of the Ontario Auditor General (OAG) in studies done on OW in 2002 and ODSP in 2004. In its review of ODSP operations, the OAG wrote:

As of December 2003, information contained in the SDM system [the OW/ODSP computer system] indicated that outstanding overpayments for more than 61,500 active accounts (that is, amounts owed by people who were still receiving benefits) totaled \$179.9 million. Outstanding overpayments on approximately 71,000 inactive accounts (that is, amounts owed by people who were no longer receiving social assistance benefits) totaled \$303 million as of that date.<sup>25</sup>

As of December, 2008, a total of \$202 million in outstanding ODSP overpayments was owed by 54,866 active cases while \$473 million was owed by 95,217 inactive cases.<sup>26</sup> Expenditures by ODSP in 2007/2008 were about \$2.8 billion for financial assistance and

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<sup>21</sup> Interview of Darlene MacDonald Forsyth, Wendy Kaltainen, Maxine Daley and Elizabeth Roy, Ontario Works (6 February 2009). Ontario Disability Support Program-Income Support, “Directive 11.1 Recovery of Overpayments” (November 2007) at 5.

<sup>22</sup> See *supra* note 13 for a discussion of OW “delivery agents.”

<sup>23</sup> Interview of Darlene MacDonald Forsyth, Wendy Kaltainen, Maxine Daley and Elizabeth Roy, Ontario Works (6 February 2009), *supra* note 21. The same funding structure is in place for ODSP, with the province and the municipalities splitting the costs of benefits 80/20 and splitting administrative costs 50/50. That said, plans for changing the funding structure of OW were announced in the fall of 2008. See Ministry of Municipal Affairs and Housing, “Provincial Municipal Fiscal and Service Delivery Review”, online: <<http://www.mah.gov.on.ca/Page181.aspx>>. These changes would see the funding of OW return entirely to the province by 2018.

<sup>24</sup> Ontario Works, “Directive #9.3: Recovery of Overpayments” (July 2008).

<sup>25</sup> Office of the Auditor General, “2004 Annual Report of the Provincial Auditor of Ontario” (30 November 2004), online: <[http://www.auditor.on.ca/en/reports\\_2004\\_en.htm](http://www.auditor.on.ca/en/reports_2004_en.htm)> at 97.

<sup>26</sup> In the wake of a meeting of ODSP and OW staff on February 6, 2009, *supra* note 20, we requested further information about the nature and extent of overpayments and about the collection process. Much of the current information in this section arises from that request. We would like to thank Ministry staff for their complete and timely response. We will refer to this information as “MCSS information compiled at the request of the authors, May, 2009.”

\$53 million for employment assistance.<sup>27</sup> New overpayments of \$20 million were identified in 2008 and \$17 million of the stock of outstanding overpayments were recovered.<sup>28</sup>

In its 2002 report dealing with Ontario Works, the OAG noted that:

As of February 2002, Ministry records indicated that overpayments outstanding on over 49,000 active accounts totalled \$77.4 million. Overpayments outstanding for approximately 274,000 inactive accounts totalled \$336.9 million as of that date.<sup>29</sup>

As of December, 2008, a total of \$107.2 million in outstanding overpayments was owed by 54,055 active OW accounts, while \$487 million was owed by 319,133 inactive accounts. Expenditures for financial assistance by Ontario Works in 2007/2008 were approximately \$1.6 billion. New overpayments of \$24 million were identified in 2007/2008 and \$21.2 million of the outstanding Ontario Works overpayments was collected.<sup>30</sup>

In its 2004 report, the OAG criticized the ODSP program for being lax in its efforts to collect the overpayments, both among active and inactive cases. In particular, the program was criticized for not enforcing the directive which provides that benefits on active accounts can be reduced by up to 10 percent. The OAG noted that, at the offices visited, an average of about one-quarter of the active ODSP recipients with overpayments were not making repayments through automatic deductions. According to the OAG, this decision was prompted by recipient claims that reductions would cause hardship. Turning to Ontario Works, the 2002 OAG report noted that the efforts of municipalities to collect overpayment on inactive OW accounts were “minimal,” amounting to about 2 percent of the outstanding balances in 2001.<sup>31</sup>

The 2002 report led the Ontario Ministry of Community and Social Services to set up an overpayments task group in December 2003 to review how overpayments were created and managed in both the OW and ODSP programs.<sup>32</sup> Then, in October 2004, the ministry increased its capacity to recover overpayments from inactive social assistance cases and defaulting sponsors by consolidating collection activities into an Overpayment Recovery Unit (ORU). The ORU currently collects outstanding inactive delinquent overpayments from former ODSP recipients; outstanding inactive delinquent overpayments from Ontario Works participants who had been clients of Toronto Employment and Social Services (TESS); and Ontario Works and ODSP debts owed by defaulting sponsors.<sup>33</sup>

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<sup>27</sup> MCSS information compiled at the request of the authors, May, 2009, *ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> Office of the Auditor General, “2002 Annual Report of the Provincial Auditor of Ontario” (3 December 2002), <[http://www.auditor.on.ca/en/reports\\_2002\\_en.htm](http://www.auditor.on.ca/en/reports_2002_en.htm)> at 53. **Missing footnote.**

<sup>31</sup> Office of the Auditor General, “2004 Annual Report of the Provincial Auditor of Ontario” (2004) at 97.

<sup>32</sup> *Ibid*. at 361. Follow up on the recommendations from: Office of the Auditor General, “2002 Annual Report of the Provincial Auditor of Ontario” (2002) at VFM Section 3.01.

<sup>33</sup> The inclusion of TESS overpayments in the activities of the ORU is discussed below.

Operating as a 22-person unit within MCSS, the ORU attempts to contact inactive cases who owe the program money resulting from an overpayment and set up repayment plans where possible. When these efforts fail, cases are referred to the Refund Set-off (RSO) program operated by the Canada Revenue Agency (CRA).<sup>34</sup> CRA can then set-off tax refunds and tax credits being issued to those with overpayments and return the money to the province; the CRA Refund Set-off Program is discussed in greater detail below.

In 2008, 6,443 new cases were referred to the ORU, broken down as follows:<sup>35</sup>

Inactive ODSP cases: 4,638

Inactive TESS OW cases: 1,815

In 2008, the ORU was able to set up voluntary repayment plans for 1,134 of these cases and 3,458 cases were referred to CRA's RSO program.<sup>36</sup>

The special treatment of OW overpayments in Toronto deserves particular mention. As noted above, the funding structure of OW discourages municipal collection efforts because municipalities must pay 50 percent of the collection costs but receive only 20 percent of what is collected.<sup>37</sup> In the summer of 2005, Toronto Employment and Social Services, which handles one-third of all Ontario OW cases, indicated its interest in participating in a pilot of an enhanced provincial debt collection initiative. In December 2005, the City of Toronto outlined its plans for TESS to utilize the provincial Overpayment Recovery Unit for the collection of overpayments.<sup>38</sup> In May of 2006, TESS confirmed their participation in the pilot and agreed to turn over the collection of inactive, delinquent overpayment accounts to the ORU. The ORU pays all of the collection costs and returns 20 percent of the amount collected to the city.

The City of Toronto is the only municipality that has such an agreement with the ORU.<sup>39</sup> The ministry is planning to expand debt recovery in Ontario Works by identifying other municipalities who are willing to work with the ministry to refer inactive delinquent Ontario Works overpayments to the ORU.<sup>40</sup> Based on the results of the pilot, the ministry hopes to phase in the ORU's recovery of inactive delinquent Ontario Works overpayments across the province over 2009 and 2010.<sup>41</sup>

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<sup>34</sup> Ontario Disability Support Program, "Directive #11.1: Recovery of Overpayments" (March 2009) at 5.

<sup>35</sup> MCSS information compiled at the request of the authors, May, 2009, *supra* note 26.

<sup>36</sup> MCSS information compiled at the request of the authors, May, 2009, *supra* note 26. According to the ORU, the remaining cases — ones that the ORU has neither referred to the RSO program nor established voluntary repayment plans — required further administrative work because of the particular circumstances of the case.

<sup>37</sup> Ontario Works, "Directive # 9.3: Recovery of Overpayments" (July 2008). The funding structure of OW collection efforts was previously discussed in this paper at *supra*, note 23.

<sup>38</sup> City of Toronto, "Proposals for Implementing Toronto Social Services response to the Auditor General's Report on Recovery of Social Assistance Overpayments (June 2005)" (15 December 2005) at 5.

<sup>39</sup> MCSS information compiled at the request of the authors, May, 2009, *supra* note 26.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

### **III. Collection Options Available to the Government**

When efforts are made to recover ODSP and OW overpayments, three general collection methods are available:

- a. internal efforts by either the MCSS or by the municipalities who deliver OW;
- b. the hiring of private collection agencies to recover the overpayments; and
- c. referral of the cases to the Refund Set-off (RSO) program of the CRA.<sup>42</sup>

#### **a. Internal Efforts**

When it is discovered that people who are currently receiving OW or ODSP benefits have received an overpayment, internal actions by the Ministry in the case of ODSP or the municipalities in the case of OW are the most common collection method. As noted above, benefits can be reduced by up to 10% when an overpayment exists. As of February 2009, there were about 44,900 ODSP cases with ongoing overpayment reductions and about 51,500 Ontario Works cases with overpayment reductions.<sup>43</sup>

Using a reduction in benefits to recover an overpayment creates a conflict between the goal of providing financial assistance to needy people and government accountability. On the one hand, benefit levels are not generous at the best of times and any reduction can lead to real hardship for the recipient.<sup>44</sup> On the other hand, it is incumbent on the provincial government to make sure that people receive only the amount of financial assistance for which they are eligible, and that implies recovering overpayments.

The tension between providing adequate support to recipients and properly handling public funds shows itself in the determination of the percentage reduction that is imposed on active cases. Our interviews with program administrators suggest that default benefit reduction rate was 5 per cent, a rate that could be reduced if it seemed likely to cause hardship and that could be increased to 10 per cent if there was evidence of an ability or willingness to pay more.<sup>45</sup> However, the experience of staff at the non-governmental social service agencies has led them to believe that the “default” reduction rate is 10 per cent and can be lowered to 5 per cent only by negotiating with program staff.<sup>46</sup> Table 1, provided to us by MCSS, suggests that the reductions in benefits are less than 10% in most cases.<sup>47</sup>

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<sup>42</sup> *Supra* note 34.

<sup>43</sup> MCSS information compiled at the request of the authors, May, 2009, *supra* note 26.

<sup>44</sup> We are assuming here that the amount overpaid has been spent long before any benefit reduction takes place and is therefore not available to support current consumption.

<sup>45</sup> Interview of Darlene MacDonald Forsyth, Wendy Kaltiainen, Maxine Daley and Elizabeth Roy, Ontario Works (6 February 2009), *supra* note 21.

<sup>46</sup> Jacqueline Esler, Social Assistance Violence and Mental Health Staff Lawyer Parkdale Community Legal Services, personal communication (16 January 2009).

<sup>47</sup> MCSS information compiled at the request of the authors, May, 2009, *supra* note 26.

Table 1: Reduction of Benefits Because of Overpayments, by Program

Overpayment Reduction as a percentage of cheque	OW		ODSP	
	Percentage	Cumulative Percentage	Percentage	Cumulative Percentage
Between 0% and 5%	74%	74%	62%	62%
Between 5.1% and 10%	17%	91%	21%	83%
Between 10.1% and 15%	4%	95%	8%	90%
15.1% and over	5%	100%	10%	100%

**b. Collection Agencies**

Collection agencies appear to be rarely used to recover overpayments. We were told that the ORU did not use collection agencies to recover inactive ODSP overpayments. We were also told that collection agencies might be used by Ontario municipalities (other than Toronto).<sup>48</sup>

**c. Canada Revenue Agency**

The Refund Set-Off (RSO) program, established in 1992, is a program within the CRA. In order to be part of the RSO, various levels of government (federal, provincial, territorial) sign a Memorandum of Understanding (MOU) with CRA which enables them to refer otherwise unrecoverable Crown debts to the RSO program. Under the conditions specified in the MOU, the RSO program intercepts tax refunds and tax credits due to those who owe money to the various levels of governments and gives the refunds and credits to the level of government holding the debt.<sup>49</sup> CRA has, however, put in place a number of procedures, described below, to avoid creating hardship for debtors and to avoid compromising the privacy of information provided for tax purposes.

At the outset, it is important to distinguish between two types of collection activities that go on within CRA. The RSO program is a “passive” collection method since it simply sets-off refunds and credits rather than actively seeking out the debtor and attempting to collect the money owed. Another part of CRA — the Accounts Receivable Directorate — take charge of more active collection efforts, including unpaid taxes and defaulted student loans. Overpayments to ODSP and TESS can be handled by the RSO program under the MOU between the Ontario provincial government and the CRA but are not collected by the Accounts Receivable Directorate.

The RSO program developed out of 1992 agreements between CRA and the federal Employment Insurance and Canada Student Loans programs. In 1998, the Federal Department of Finance invited all provinces to become partners; Ontario was the fourth

<sup>48</sup> Interview of Darlene MacDonald Forsyth, Wendy Kaltiainen, Maxine Daley and Elizabeth Roy, Ontario Works (6 February 2009), *supra* note 21.

<sup>49</sup> The term “set-off” is used by the CRA to refer the activities related to using the proceeds of a tax refund toward a crown debt. Colloquially speaking, to “set-off” a refund means to send the refund to the government agency that is owed the crown debt rather than to the taxpayer. We will use the term “set-off” here to refer to that process.

province to join, in 1999. OW and ODSP started requesting set-offs 2-4 years ago. There are now more than 180 active partners.<sup>50</sup>

Using the RSO program confers a considerable advantage on the government-as-creditor for several reasons. First, CRA usually has the best contact information for debtors since most Canadians file taxes and, in doing so, provide a reasonably accurate address. Second, CRA allows the RSO program to be used only for unrecoverable Crown debts; no private creditor can use the program.

Prior to requesting a refund set-off, partners must establish that the debt is legally collectable and that they have established provisions to determine whether the interception of refunds and credits would cause hardship for the debtor. Then the partner must make its own unsuccessful efforts to collect on the debt, thus establishing the debt as “unrecoverable.”<sup>51</sup>

The relevant tax credits and refunds are generated by the review of individual tax returns. Before any of those refunds and tax credits can be set-off, however, any monies owing to CRA itself or to the Department of Justice for alimony and child support are first deducted. Any remaining amounts can be set-off to the RSO program partner.<sup>52</sup> When a refund has been set-off, CRA advises the taxpayer of that action and provides the taxpayer with information about how to contact the partner for information about why this has happened and about how to appeal the set-off or to claim hardship.

The CRA will set-off some tax refunds and credits for its partners but will not or cannot set-off others. For example, the CRA will not set-off credits arising from the National Child Tax Benefit or from the Universal Child Care Benefit because the legislation underlying these two programs prohibits their set-off.<sup>53</sup>

The major refunds and credits that can be set-off are as follows:<sup>54</sup>

- (1) income tax refunds;
- (2) the goods and services tax (GST) credit;
- (3) the Working Income Tax Benefit.

The various partners agree to ensure that the set-off will not cause hardship to the debtor. Nonetheless, the CRA has also established a number of policies with regard to the RSO program that are aimed at preventing hardship for taxpayers. If the family income of the

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<sup>50</sup> Interview of Nathalie Dumais and Doris Saucier, Canada Revenue Agency (6 March 2009), [CRA Interview]. Each province signs an MOU with the CRA; that MOU allows many government programs (such as ODSP) to become partners in the RSO program. See Canada Revenue Agency, “Refund Set-off Program for Individuals: Program Guide” (August 2008) at 4, [CRA Program Guide].

<sup>51</sup> CRA Program Guide, *ibid.* at 18.

<sup>52</sup> The set-off request remains in force until the debt is paid off. As long as the debt remains unpaid, eligible refunds and tax credits can be intercepted.

<sup>53</sup> *Income Tax Act*, 1985, c.1 (5<sup>th</sup> Supp.), s.122.61(4).

<sup>54</sup> Others include the British Columbia Low Income Climate Action Tax Credit, the Saskatchewan Sales Tax Credit, other provincial refundable tax credits and the refundable Medical Expense Supplement.

taxpayer is below various income thresholds — thresholds that vary according to the tax credit or refund involved — CRA will not set-off the refund. Income tax refunds, however, are set-off regardless of the taxpayer’s family income.

The CRA also concerns itself with maintaining the integrity of the tax system by not revealing confidential information about taxpayers. For example, if the RSO program has not set-off a tax refund or credit because the debtor has a family income below the relevant threshold, the CRA will not tell the partner why no refund is forthcoming since to do so would implicitly reveal the debtor’s income. Perhaps more importantly, the RSO program does not reveal the address of the debtor to the partners, even though having that address might make it easier for the partner to pursue its own collection efforts.

The creation and growth of the RSO program would seem to have ratcheted up the pressure on current and former OW/ODSP recipients. Essentially, the RSO program is a new and effective collector of Crown debts. That said, CRA staff have not noticed any particular *intent* to increase the pressure on those who owe debts to the Crown. They acknowledge, however, that enhanced computerization and the increase in the number of the partners has made it easier to identify debtors and collect money from them.<sup>55</sup>

## **V. Debt Resolution Options for Government Overpayments**

There is no specific debt resolution option designed for the majority of economically disadvantaged people to deal with government overpayments or any other debts that they might have incurred. Bankruptcy is financially inaccessible and is not the solution for all debtors; Canadian “credit counselling” is really a mechanism for rearranging the debts of the middle-class. Further, with a few notable exceptions, there is no agency or service to which a low-income debtor can turn for neutral debt advice.

### **a. Credit Counselling**

A diverse array of organizations provide “credit counselling” in Canada and in the United States. On one end of the spectrum are low-budget, local organizations that serve low-income individuals who need help dealing with the social assistance system, the tax system or ordinary financial matters. Such organizations charge no fees and are funded by charitable donations or local governments.<sup>56</sup> On the other end of the spectrum are “non-profit” organizations that seem to act as profit-maximizing entities, regardless of their status as registered charities, and essentially function as debt collectors; they provide little in the way of education or counselling, and simply create and administer debt management plans (DMPs), receiving “fair share” payments in return. Somewhere in the middle of the spectrum are a set of non-profit credit counselling agencies that have a relatively long history of operation in Canada, untainted by any hint of improper behaviour, which provide educational activities along with DMPs.<sup>57</sup> Another point on the

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<sup>55</sup> CRA Interview, *supra* note 50.

<sup>56</sup> We describe two such organizations (Entraide Budgetaire and FAPS) later in this section of the paper.

<sup>57</sup> The extent to which Canadian non-profit credit counselling organizations provide services beyond the creation and administration of debt management plans is unclear. Henrietta Ross, the executive director of

spectrum is occupied by for-profit credit counselling agencies that perform the same sort of debt consolidation function as the non-profits without the need to provide education or counselling.

DMPs, regardless of the organization creating and administering them, typically require that debtors repay 100 percent of their debts including any interest accumulated up to the point when the plan goes into effect. The credit counselling agency consolidates the debts of the client and negotiates a freeze on further interest accumulation with most creditors. The debtor sends the credit counselling agency a single monthly payment and the agency divides the payment among the creditors. The debtor pays a set-up fee (on the order of \$50) and a monthly service fee (\$30-\$50 per month). The credit counselling agency receives a “fair share” payment from the creditors (on the order of 20-25 percent of the funds collected), plus whatever fees are paid by the debtor. Credit counselling in this form is best viewed as a way of negotiating and rearranging debts.

There has been little systematic investigation of the credit counselling industry in Canada. In the US, a Senate investigation in 2004 uncovered a wide array of illegal and unethical practices, generally involving high fees, poor service and violations of the laws concerning the operation of non-profit organizations.<sup>58</sup>

It seems clear, however, that Canadian credit counselling organizations provide services primarily to debtors who can afford to make regular payments to their creditors within the parameters of a debt management plan. The monthly payments required by a DMP are beyond the financial reach of most low-income people and certainly beyond the reach of benefits recipients. When benefits recipients contact a credit counsellor, they are told that the agency cannot help them.<sup>59</sup> Since legal aid clinics do not generally offer debt

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the Ontario Association of Credit Counselling Services (OACCS) told us that 80 percent of the work of agencies accredited by the OACCS involves educational activities; only the remaining 20 percent is related to debt management plans. When we asked In-Charge Debt Solutions, a relatively new non-profit credit counselling agency that is not accredited by the OACCS for a summary of their educational activities, we were given a list of workshops that it had provided, free of cost, to various organizations.

<sup>58</sup> Such firms were the focus of an investigation by a US Senate Committee in 2005. See Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs United States Senate, *Profiteering in a non-profit industry: Abusive Practices in Credit Counseling* (Washington D.C.: U.S. Government Printing Office, 2005). In the wake of this investigation, as the US Government Accounting Office reported in 2007, the “IRS [undertook] a broad examination of credit counseling organizations for compliance with the Internal Revenue Code, including the propriety of the organizations’ tax-exempt status. Between January 2005 and March 2007, [the] IRS had revoked or terminated the federal tax-exempt status of 19 credit counseling agencies, and as of March 2007, [the] IRS had proposed revocations for an additional 28 agencies.” See Government Accounting Office, “Bankruptcy Reform: Value of Credit Counseling Requirement is Not Clear”(April 2007), online: <[www.gao.gov/new.items/d07203.pdf](http://www.gao.gov/new.items/d07203.pdf)> at 12-13.

<sup>59</sup> During a pilot Debt Advice Clinic at Parkdale Community Legal Services in January of 2009, an unemployed low-income client disclosed he was instructed to “come back when he had a job” by a credit counselling agency. The credit counselling agencies agree that successful debt management plans require a higher level of income than typically available to benefits recipients.

resolution services, there are few, if any, places where a low income person can obtain legal advice and counselling to address the debts caused by government overpayments.<sup>60</sup>

### **b. Bankruptcy**

Unlike credit counselling, bankruptcy in its current form could be quite useful to low income debtors. For example, the involuntary debts owed to the MCSS by active and inactive OW and ODSP recipients as a result of benefit overpayments are dischargeable in bankruptcy.<sup>61</sup> Directives from both programs contain information for program staff on how overpayments should be handled in cases where debtors file for bankruptcy. Therefore, one might expect that a non-trivial percentage of overpayment cases would end in bankruptcy.

According to the Ministry of Community and Social Services, for the 2008/2009 fiscal year the number of ORU bankruptcy cases can be broken down as follows. In the “sponsorship” category, there were 16 Ontario Works-related bankruptcies and 19 Ontario Disability Support Program-related bankruptcies. In the “social assistance” category, there were 60 OW-related bankruptcies and 254 OSDP-related bankruptcies.<sup>62</sup> Note that the bankrupts in such cases are not likely to be current benefits recipients: sponsors cannot be assumed to be receiving OW or ODSP and other ORU cases are inactive cases, implying that the individuals involved are no longer receiving benefits.

As far as we can tell, it seems that very few current benefits recipients utilize the Canadian bankruptcy system, likely because they do not have the financial means to access the system.<sup>63</sup> Two options seem to exist for those who cannot afford to pay the usual fees charged by trustees for administering their bankruptcy: (1) the Bankruptcy Assistance Program (BAP) of the Office of the Superintendent of Bankruptcy (OSB); and (2) *pro bono* efforts by bankruptcy trustees.

#### ***The Bankruptcy Assistance Program***

The OSB does not administer bankruptcies, leaving this task to private bankruptcy trustees. Under Directive 11, however, the OSB supervises a program called the “Bankruptcy Assistance Program” (BAP).<sup>64</sup> The target group for BAP, as outlined in Directive 11, are debtors who are having difficulty finding a bankruptcy trustee willing to take on their case; this group would seem include low-income Canadians in general and

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<sup>60</sup> Staff were consulted at Parkdale Community Legal Services, Rexdale Community Legal Clinic and St. Christopher’s House in Toronto, as well as Entraide Budgétaire in Ottawa.

<sup>61</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s.178(2), [BIA].

<sup>62</sup> E-mail correspondence with Ministry of Community and Social Services (6 August 2008).

<sup>63</sup> For example, one Debt Advice Clinic client received three quotes between \$1600 and \$1800 from bankruptcy trustees. His income is \$572 per month and his debts total \$24,600.

<sup>64</sup> Office of the Superintendent of Bankruptcy, “Directive #11: Bankruptcy Assistance Program” (10 January 1991), online: <<http://strategis.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01331.html>>, [“Directive #11”]. The Bankruptcy Assistance Program, and some of the problems related to it, are also discussed earlier in this paper at *supra* note 8.

benefits recipients in particular.<sup>65</sup> Since trustees are not required to take on any particular case, some debtors may not be able to use the bankruptcy system. In such situations, Directive 11 states that the OSB will facilitate the assignment of a participating trustee to the case of the debtor.<sup>66</sup> However, the directive does not specify that the trustee must charge a lower-than-normal fee; it says only that “the application for a bankrupt’s discharge is not to be delayed due to the lack of full payment of a trustee’s fee.”<sup>67</sup> The meaning of this section is obscure at best and falls well short of assuring debtors that the net cost of their bankruptcies will be low.

James Callon, the current Superintendent of Bankruptcy, interprets Directive 11 as outlining a program that “is not necessarily a zero cost program to a debtor, but at the same time a debtor is not to be turned away by a designated trustee due to the inability to pay the fees.”<sup>68</sup>

In our view, the BAP program is structured in a manner that seems to discourage, rather than encourage, its use. A debtor must be unable to “obtain the services of a trustee” after seeking out and consulting with two trustees.<sup>69</sup> He or she must then apply to the OSB, which eventually assigns the case to a participating trustee.<sup>70</sup> Even then, as we pointed out in a previous paper, the fee paid by a BAP participant is likely to be quite close to the average fee charged to any other bankrupt.<sup>71</sup> Neither bankruptcy trustees nor the OSB see BAP as guaranteeing a low-cost bankruptcy; part of the trustee’s responsibility is to realize money for the estate from tax refunds, from the sale of assets or from any other source allowed by the BIA. The BAP simply ensures that debtors who manage to navigate the program requirements will have a trustee assigned to their case; there is no guarantee that the eventual amount paid will be lower than what trustees normally charge.

Few bankruptcies are filed under BAP and the distribution of cases across Canada is quite uneven. For example, almost no cases are filed in the Toronto area.<sup>72</sup> The program is poorly advertised and the advertising that does exist is misleading. Service Canada’s summary of the program reads as follows: “The Bankruptcy Assistance Program helps individuals seeking to file for bankruptcy hire a bankruptcy trustee if they do not have the means to do so on their own.” We therefore do not see BAP, as it currently operates, as a mechanism that brings bankruptcy within the financial reach of the low-income debtors who might benefit from it.

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<sup>65</sup> *Ibid.* at 11.4.

<sup>66</sup> *Ibid.* at 11.7.

<sup>67</sup> *Ibid.* at 11.15.

<sup>68</sup> E-mail message from James Callon (7 July, 2009).

<sup>69</sup> Directive #11, *supra* note 63 at 11.8.

<sup>70</sup> *Ibid.* at 11.9.

<sup>71</sup> “Bankruptcy for the Poor?”, *supra* note 7 at 481. The fee paid “out of pocket” by the bankrupt may be lower than that asked of a non-BAP client but, after the trustee has filed the BAP debtor’s tax return and incorporated the tax refund into his or her estate, the overall fee can increase significantly.

<sup>72</sup> Because BAP has disproportionately few cases in Toronto, the experience of the clients who came to our pilot debt advice clinic may not be representative of the experience of low-income debtors across Canada. Nonetheless, the low number of cases administered under BAP does not suggest any widespread usage in other jurisdictions.

### *Pro Bono Work by Trustees*

The professional organization for the trustees, the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), does not have a formal program that offers low-cost bankruptcies administered by its members. In our previous paper, we documented the efforts by trustees in Edmonton and in Halifax to undertake bankruptcies for less than the normal fee in cases where the trustee felt that the debtor could not afford the normal fee. We had not heard of any other similar efforts in Canada, but it is clear that while pro-bono work by trustees undoubtedly exists, it is not systematically available.<sup>73</sup>

#### *c. Debt Advice and Access to Bankruptcy*

Debtors with government overpayment debts currently operate on an uneven playing field with the government. The government has shifted its collection efforts and policies to be more in line with those of private creditors.<sup>74</sup> However, because the existing remedies available to most Canadian debtors are not available to low-income debtors, the intensification and centralization of collection efforts has a harsh and unequal effect on low-income debtors.

In addition to access to bankruptcy, a missing element in the debt relief situation for low-income debtors in Canada is low-cost debt advice. Bankruptcy is not the solution for all debtors and, as we have noted, Canadian “credit counselling” is really about a rearrangement of debts available only to the middle-class. Two examples of agencies that provide free debt advice to the poor are the Financial Advocacy & Problem Solving (FAPS) Program co-ordinated by Miryam Zeballos at St. Christopher house in Toronto, and Entraide Budgétaire (EB) in Ottawa.

St. Christopher House in Toronto provides a wide range of services to low-income people in the west end of Toronto. The FAPS program, which started operations in 2003, provides general financial information to St. Christopher’s clients, in addition to help with income taxes, advice on how to apply for social assistance benefits and help obtaining bank accounts.<sup>75</sup> Depending on the situation of the client, FAPS can refer them to a bankruptcy trustee who is often able to administer their bankruptcies at a lower-than-normal cost or to a local credit counselling agency.

Entraide Budgétaire (“EB”), funded by the City of Ottawa and the United Way, is a non-profit agency that has served Ottawa’s Vanier neighbourhood for the past 25 years. Unlike the credit counselling agencies, EB has no financial interest in directing debtors to

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<sup>73</sup> “Bankruptcy for the Poor?”, *supra* note 7 at 511.

<sup>74</sup> See, for example, the discussion in the City of Toronto, “Proposals for Implementing Toronto Social Services response to the Auditor General’s Report on Recovery of Social Assistance Overpayments (June 2005)” (15 December 2005).

<sup>75</sup> FAPS prefers to be described as providing financial *information* rather than financial *advice*. In their words, FAPS helps its clients “make informed decisions by providing support, information, resources and training.”

any particular debt remedy.<sup>76</sup> The advice and counsel provided by EB is holistic in nature in that the personal situations of the clients — situations that can involve very low income, mental challenges and drug addictions — are considered before any financial recommendations are made. Importantly, EB continues to advise its clients as they go through whatever remedy they have chosen. Beyond advice on how to deal with indebtedness, EB also provides basic budget counselling, help with personal income taxes for the poor and the elderly, and financial literacy sessions. EB is quite small, with an annual budget of about \$350,000, and focusses its activities in one neighborhood.

For low-income debtors lucky enough to live in the areas served by FAPS or EB, the services they provide are extremely valuable. For example, staff at both St. Christopher House and EB have developed personal relationship with one or two bankruptcy trustees to whom they can refer debtors but those arrangements can break down at any point in time. For the vast majority of low-income Canadian debtors, at least in English Canada, no such services exist.<sup>77</sup>

#### **d. Low-income debtors and the BIA**

This situation described in the last three sections suggests that the Canadian bankruptcy system is not meeting the objectives set out in the *Bankruptcy and Insolvency Act*, case law, and subordinate legislation. The bankruptcy system in Canada essentially has three main objectives:

1. Liquidation and distribution of debtor's assets;
2. Rehabilitation of the individual debtor; and
3. Enhancing commercial morality and protecting the credit system.<sup>78</sup>

The first objective is not significant for the current discussion since low-income debtors rarely, if ever, have significant assets. The second objective is supposed to be met by providing access to the bankruptcy system and the “fresh start” offered by the subsequent discharge of pre-bankruptcy debts.

The third objective provides the justification for limiting access to bankruptcy to some debtors. For example, debtors who have committed fraud or other offenses should accordingly be limited in their access to the bankruptcy system so as to maintain commercial morality and preserve access to credit.<sup>79</sup> Debtors who have involuntarily

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<sup>76</sup> EB notes that the minimal amount of bankruptcy counselling that they undertake is an exception to this rule. Debtors filing for bankruptcy in Canada are required to attend two mandatory counselling sessions. Those leading the sessions receive \$85 per session from the estate of the bankrupt. EB derives a small amount of its budget (about 1%) from such counselling. E-mail correspondence from Helene Menard, the Executive Director of EB. (3 March, 2009)

<sup>77</sup> In Québec, ACEF (Association Coopérative Economie Familial) provides financial services in a number of locations as does Options Consommateur.

<sup>78</sup> See, for example, Rod Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 36.

<sup>79</sup> See BIA, *supra* note 61 at s. 198.

accrued a debt to the government through an overpayment, however, do not fall into the category of debtors who should be denied access to the bankruptcy system in order to preserve commercial morality. Accordingly, the hallmarks of the Canadian bankruptcy system do not justify limiting their ability to be rehabilitated through access to the fresh start that a bankruptcy offers. In addition, bankruptcy should be brought within the financial reach of low-income debtors, as this will level the playing field in negotiations with the government and also better allocate risk among debtors and creditors by providing both parties with equal opportunity to address an insolvency situation.

## **VI. Conclusion**

Low-income individuals are no different than higher income people in their need for remedies to insolvency-related issues. Without the same access to a fresh start, lower income people will be further marginalized, and their ability to contribute to Canadian society further hindered.

The main objective of this article is to challenge the view that low-income people do not need debt remedies because they have few debts and are judgment-proof. In contrast, such commonly-held assumptions are both factually incorrect and short-sighted. Many low-income people do have significant debts and, even if a debtor is currently judgment-proof, relief for the underlying debts might allow the debtor to escape poverty (and judgment-proof status). In fact, this is one of the goals of most government transfer programs.

The debts of low income people include many of the same debts incurred by higher income individuals. Because people are continually moving in and out of poverty, they can run up significant debts — including credit card balances and bank lines of credit — when they have a source of steady income. However, the debts of low-income people, and especially those of transfer recipients, are disproportionately likely to be debts to the various levels of government.

The central focus in this article has been on creating symmetry between the debt resolution options available to low-income people in Ontario with government debts, and the increasing centralization and intensification of the government's collection practices. The process by which some low-income people acquire these debts in the first place is also in need of further investigation. For example, OW program officials are confident that sponsors are adequately warned of their responsibility should the sponsored person receive social assistance.<sup>80</sup> However, there are some indications that such policies are not always followed. For example, a former Parkdale Community Legal Aid Services client's son was sponsored by a third party. When the son received social assistance, the provincial government attempted to collect from the mother rather than the third party. Another challenge is that legal clinics or social agencies occasionally advise sponsored persons to apply for social assistance without realizing the potential implications for his

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<sup>80</sup> Interview of Darlene MacDonald Forsyth, Wendy Kaltiainen, Maxine Daley and Elizabeth Roy, Ontario Works (6 February 2009).

or her sponsor.<sup>81</sup> In response, OW claims notification letters are sent to sponsors and outreach activities have targeted settlement workers.<sup>82</sup>

This study does not represent a comprehensive examination of the situation facing poor families who find themselves deep in debt. We were able to study only OW and ODSP, and, even though they represent the major transfer programs in the most populous Canadian province, other transfer programs in other provinces may handle matters differently. The specific cases referred to in the text are drawn from a small number of debtors who came to our pilot debt advice clinic in Toronto; the situation in other Canadian cities and perhaps even in other parts of Toronto may be different.

The next phase in our research requires a further investigation of the issues surrounding bankruptcy and low-income individuals. This involves developing a better understanding of the lived experiences of low-income individuals in Ontario, and their interactions with these government programs that often result in overpayments. This research will involve extensive interviews and consultations, in order to better comprehend the manner in which debts affect economically disadvantaged Ontarians. Ultimately, increasing our understanding of this issue will not only bring awareness to the unique position of low income people dealing with government debt, and insolvency generally; it will also allow us to explore the ways in which Canada can develop more inclusive insolvency framework.

As a counterbalance to the government's shift to act more like a private actor or business, the same remedies that are available to middle-class debtors should be made available to low-income debtors.

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<sup>81</sup> Geri Sadoway, Immigration Staff Lawyer Parkdale Community Legal Services, personal communication (15 January 2009).

<sup>82</sup> Interview of Darlene MacDonald Forsyth, Wendy Kaltiainen, Maxine Daley and Elizabeth Roy, Ontario Works (6 February 2009).