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Consumer Bankruptcy in the Wake of COVID-19: The Calm Before the Storm

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Abstract

The crisis created by the spread of COVID-19 seems likely to permanently change the structure of economic activity moving forward—more people are working from home, taking fewer business trips, and gravitating towards online spending. In the short-term, Canada has done well to provide temporary economic support to those temporarily or permanently affected by the virus. This unprecedented level of government support, together with the unparalleled level of voluntary creditor forbearance for late payments, has led to a remarkable drop in consumer bankruptcy filings in April and May 2020. However, a significant surge in the need for debt relief and bankruptcy filings is predicted for the near future. This article concerns the effect of COVID-19 on the household debt carried by Canadian families and on the debt relief measures that are available to them. How, if at all, will the socio-economic composition of those with serious debt problems change? Are the debt relief measures currently available through the Bankruptcy and Insolvency Act adequate to the task? What changes to the system of credit regulation might help those affected by the virus?

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This article concerns the effect of COVID-19 on the household debt carried by Canadian families and on the debt relief measures that are available to them. How, if at all, will the socio-economic composition of those with serious debt problems change? Are the debt relief measures currently available through the *Bankruptcy and Insolvency Act* adequate to the task? What changes to the system of credit regulation might help those affected by the virus?

* Distinguished Research Professor and Professor of Law, Osgoode Hall Law School. The research assistance provided by Mandy Bedford and Nolan Abboud is gratefully acknowledged. Funding supporting ongoing research that this article draws from is supported by the Law Foundation of Ontario and the Social Sciences and Humanities Research Council. However, the author is solely responsible for all content in this article which is current to July 2020.

THE CRISIS CREATED BY the spread of COVID-19 seems likely to permanently change the structure of economic activity moving forward—more people are working from home, taking fewer business trips, and gravitating towards online spending. In the short-term, Canada has done well to provide temporary economic support to those temporarily or permanently affected by the virus. This unprecedented level of government support, together with the unparalleled level of voluntary creditor forbearance for late payments, has led to a remarkable drop in consumer bankruptcy filings in April and May 2020.[1] However, a significant surge in the need for debt relief and bankruptcy filings is predicted for the near future.[2]

1. Office of the Superintendent of Bankruptcy Canada, "2020 Insolvency Statistics in Canada–April 2020" (April 2020) at 2, online (pdf): *Industry Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Insolvency-Statistics-April-2020-EN.pdf/$file/Insolvency-Statistics-April-2020-EN.pdf> [peram.cc/V56K-9RUN]. Similar trends were observed in the US where bankruptcy filings were down substantially over 50 per cent the first two weeks of April 2020 and bankruptcy filings declined by 46 per cent over the entire month and on a year-over-year basis. See Bob Lawless, "Total Bankruptcy Filings Remain Low, Chapter 11s Not So Much" (21 May 2020), online (blog): *Credit Slips* <www.creditslips.org/creditslips/2020/05/total-bankruptcy-filings-remain-low-chapter-11s-not-so-much.html> [perma.cc/4NYV-NMUZ].
2. American evidence suggests most people struggle financially for 2-5 years before filing for consumer bankruptcy. See Pamela Foohey et al, "Life in the Sweatbox" (2018) 94 Notre Dame L Rev 219. Given the current crisis, the period will likely be shorter.

This article concerns the effect of COVID-19 on the household debt carried by Canadian families and on the debt relief measures that are available to them. How, if at all, will the socio-economic composition of those with serious debt problems change? Are the debt relief measures currently available through the *Bankruptcy and Insolvency Act*[3] adequate to the task? What changes to the system of credit regulation might help those affected by the virus?

It is doubtful that anyone can definitively distinguish between the undeniable temporary effects of COVID-19 (the deaths of many, the illness of many others, mass unemployment, and the increased prevalence of working and studying from home) and the uncertain effects that will persist over time. This article begins by attempting the more modest task of asking what temporary steps have been taken to lessen the immediate economic consequences of unemployment and what steps have been taken to protect heavily indebted Canadians.

Next, this article speculates as to which occupations, industries, and demographic groups might be most affected beyond a merely transient basis. For example, older Canadians who had been increasingly likely to work beyond traditional retirement ages before COVID-19 struck might nowadays be more reluctant to return to work. In rough terms, since the characteristics of those receiving the main temporary income support program is known, it is possible to estimate which sorts of people are on track to exhaust their benefits first, giving insight as to who may then be unable to meet their debt service obligations.

Together with Saul Schwartz, I have long argued that Canada needs a low-cost bankruptcy option, perhaps modelled along the lines of New Zealand's No-Asset Procedure (NAP) or England and Wales' Debt Relief Orders (DRO).[4] These procedures are aimed at low-income, low-asset (LILA) debtors. With little income and few assets that can be sold to repay creditors or to pay the fees associated with bankruptcy, some LILA debtors cannot afford to file for bankruptcy, given that bankruptcy trustees typically charge $1,800 to $2,000 per case. The current article makes the case that the pandemic and predicted surge in need for debt relief, along with the measures that have been introduced to allow for remote filings, provide the conditions necessary to permanently open up access to consumer bankruptcy for LILA debtors.

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3. RSC 1985, c B-3 [*BIA*].
4. See *e.g.* Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2007) 45 Osgoode Hall LJ 471; Stephanie Ben-Ishai & Saul Schwartz, "A COVID-caused Lull in Bankruptcy Proceedings is an Opportunity to Establish a Better Procedure for Debtors who Can't Afford Conventional Bankruptcy," *Policy Options* (18 May 2020), online: <policyoptions.irpp.org/magazines/may-2020/a-simple-low-cost-bankruptcy-option-for-canadas-insolvency-system> [perma.cc/JHW8-YPPV] [Ben-Ishai & Schwartz, "COVID"].

This article is organized as follows: Part I describes the temporary income support programs that have been put in place by the federal and provincial governments as well as the temporary debt relief measures provided by the private sector, including the major banks. Part II contains an attempt to summarize which sectors of the Canadian labour force might be permanently harmed by COVID-19. Part III turns to the credit regulation system, including the currently available debt relief options. Part of that discussion involves the unintended fallout from the temporary measures. For example, those taking advantage of some of the private debt relief measures (such as mortgage interest deferral) might see their credit ratings fall, making it harder for them to borrow more in order to keep up their existing debt service obligations. This Part covers the actions taken by the Office of the Superintendent of Bankruptcy to defer payments required by consumer proposal plans. Finally, in Part IV, a proposal to create a low-cost option in the Canadian bankruptcy system is outlined.

I. GOVERNMENT AND PRIVATE SECTOR RELIEF FOR INDIVIDUALS

A. GOVERNMENT PROGRAMS

Each level of government has instituted a host of new programs, initiatives, and supports to assist individuals with the effects of lockdown measures that were implemented to slow the spread of COVID-19. The following is a brief and non-exhaustive summary of some of the most generous initiatives announced by governments across the country.

1. NEW FEDERAL INCOME SUPPORTS

Perhaps the first, and largest, program created to assist individuals adversely affected by the COVID-19 pandemic is the Canada Emergency Response Benefit (CERB). A primary motivation for the new benefit was to relieve pressure on the rapidly overwhelmed Employment Insurance (EI) system, which received 18.5 times more applications in the initial weeks of the pandemic compared with the previous year.[5] The CERB was a taxable benefit that provided $2,000 every four weeks for up to twenty four weeks to workers who lost their jobs or had to remain home to care for family members. Workers eligible for EI were be able

5. The Canadian Press, "Federal Government Flooded with 500,000 Applications for Employment Insurance," *CBC News* (20 March 2020), online: <www.cbc.ca/news/business/coronavirus-employment-insurance-1.5504676>.

to apply at the end of the CERB eligibility period if they were still unable to work.[6] As of 16 August 2020, 8.62 million applicants had received benefits at a cost of over $70.03 billion.[7] Once the CERB concludes at the end of September, an expanded EI system and a "transitional, parallel benefit" will provide continued income support.[8]

In response to concerns that students, who often rely on lower-wage positions in the now-moribund service sector, were ineligible for the CERB, the federal government introduced the Canada Emergency Student Benefit (CESB). This program offered post-secondary students and recent graduates $1,250 per month, or $2,000 if the student has a dependant under the age of twelve or a disability, from May through August.[9] Students were eligible for the program if they were unable to work due to COVID-19, they could not find work due to COVID-19, or they were currently working but made $1,000 or less in the previous four weeks.[10] The Parliamentary Budget Officer estimated that the program would distribute $5.9 billion in benefits to 1.1 million applicants.[11]

2. AUTOMATIC AND ADMINISTRATIVE MEASURES FROM THE FEDERAL GOVERNMENT

The federal government also automatically increased existing targeted payments. The Canada Child Benefit (CCB), a tax-free, income-targeted monthly payment to families with children under eighteen years of age, provided a one-time increase of $300 per child in May.[12] The benefit was also increased in July by $126 per year for each child under six, and $106 per year for each child aged six through

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6. *COVID-19 Emergency Response Act*, SC 2020, c 5, s 8 [*COVID-19 Act*]; Hannah Jackson, "Coronavirus: CERB to be Extended by 8 Weeks, Trudeau Says," *Global News* (16 June 2020), online: <globalnews.ca/news/7070423/coronavirus-cerb-extended> [*COVID-19 Act*].
7. Government of Canada "Canada Emergency Response Benefit Statistics" (last modified 21 August 2020), online: <www.canada.ca/en/services/benefits/ei/claims-report.html> [perma.cc/EYJ8-DRW8].
8. Beatrice Britneff, "Coronavirus: Trudeau Announces Plans for End of CERB, Transition to EI," *Global News* (31 July 2020), online: <globalnews.ca/news/7239834/cerb-recipient-move-ei>.
9. *Canada Emergency Student Benefit Regulations*, SOR/2020-105, ss 4, 6.
10. *Canada Emergency Student Benefit Act*, SC 2020, c 7, s 5.
11. Robert Behrend & Tessa Devakos, "Canada Emergency Student Benefit" (9 June 2020) at 2, online (pdf): *Parliamentary Budget Officer* <www.pbo-dpb.gc.ca/web/default/files/Documents/LEG/LEG-2021-027-S/LEG-2021-027-S_en.pdf> [perma.cc/9AAT-E8Q4].
12. *COVID-19 Act*, *supra* note 6, s 3; Prime Minister of Canada, News Release, "Families to Receive Increased Support Through the Canada Child Benefit" (3 May 2020), online: *PM.gc.ca* <pm.gc.ca/en/news/news-releases/2020/05/03/families-receive-increased-support-through-canada-child-benefit>.

seventeen. The maximum annual value of the benefit is now $6,765 for each child under six and $5,708 for each child between the ages of six and seventeen.[13] The GST/HST rebate, which is available to low-income Canadians, doubled for the 2019-2020 benefit year and was equalized by a one-time payment on 9 April 2020. The new maximum amount is $886 for single individuals and $1,160 for married or common-law couples.[14] For seniors, the government provided an additional tax-free payment of $300 for those receiving Old Age Security (OAS) and a further $200 for seniors eligible for the Guaranteed Income Supplement (GIS) top-up. A low-income senior receiving both the OAS and the GIS would have been able to receive both payments for a total of $500.[15]

All interest and repayments on the federal portion of Canada Student Loans were frozen from 30 March until 30 September 2020.[16] Interest and repayments on provincial portions of the loans issued to students by British Columbia, Ontario, New Brunswick, Newfoundland and Labrador, and Saskatchewan were also delayed for six months.[17] Students still in post-secondary or apprenticeship programs during the 2020-2021 school year also benefited from changes to the Student Loans system. The maximum amount available from the Canada Student Grants was doubled to $6,000 for full-time students and $3,600 for part-time students, and the maximum weekly loan limit rose from $210 to $350.[18] Spouses of students are also no longer required to make a spousal contribution, increasing both the number of students eligible for financial support and the amount of support available.[19]

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13. Prime Minister of Canada, News Release, "Prime Minister Announces Annual Increase to the Canada Child Benefit" (16 May 2020), online: *PM.gc.ca* <pm.gc.ca/en/news/news-releases/2020/05/16/prime-minister-announces-annual-increase-canada-child-benefit>.
14. *COVID-19 Act*, *supra* note 6, s 2; Government of Canada, "COVID-19 – Increase to the GST/HST Credit Amount" (1 April 2020), online: <www.canada.ca/en/revenue-agency/services/child-family-benefits/covid-19-gsthstc-increase.html> [perma.cc/KQL6-S48T].
15. Prime Minister of Canada, News Release, "Prime Minister Announces Additional Support for Canadian Seniors" (12 May 2020), online: *PM.gc.ca* <pm.gc.ca/en/news/news-releases/2020/05/12/prime-minister-announces-additional-support-canadian-seniors> [perma.cc/EC2C-92VM].
16. *COVID-19 Act*, *supra* note 6, ss 11.2, 9.3.
17. Ted Raymond, "Student Loan Payments, Interest Suspended Until Sept. 30 due to COVID-19, Federal Loan Agency Says," *CTV News* (30 March 2020), online: <ottawa.ctvnews.ca/student-loan-payments-interest-suspended-until-sept-30-due-to-covid-19-federal-loan-agency-says-1.4873812> [perma.cc/NFG5-S2SR].
18. Government of Canada "Canada Student Loans – COVID-19" (29 April 2020), online: <www.canada.ca/en/services/benefits/education/student-aid/notice-covid-19.html> [perma.cc/25UY-2TWR].
19. *Ibid*.

3. PROVINCIAL SUPPORTS

The provinces unveiled a bevy of measures designed to ease the burden on individuals. British Columbia and Nova Scotia added a "top-up" to the CERB of $1,000, although the supplement in Nova Scotia was only available to workers making less than $34,000 annually.[20] Low-income earners in British Columbia were eligible to receive an additional one-time payment of $174.50 per adult and $51 per child through its Climate Action Tax Credit.[21] Seniors in that province who have been receiving the Seniors' Supplement received an additional $300 per month for three months.[22] In Ontario, low-income seniors receiving benefits from the Guaranteed Annual Income System saw their payments double to a maximum of $166 per month for individuals and $332 per month for couples from April through October.[23] Low-income seniors in New Brunswick are eligible to receive a one-time benefit of $400 per person until the end of 2020.[24] Recipients of provincial disability payments in British Columbia, Ontario, Nova Scotia, and the Northwest Territories have also received increases in their payments.[25]

Most provinces have also suspended the evictions of residential properties. The duration of this ban varies based on the province. For instance, the ban was lifted in Nova Scotia in early July, whereas tenants in British Columbia

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20. Government of British Columbia, "B.C. Emergency Benefit for Workers" (last modified 17 August 2020), online: <www2.gov.bc.ca/gov/content/employment-business/covid-19-financial-supports/emergency-benefit-workers> [perma.cc/4DFB-87T6]; Government of Nova Scotia, "COVID-19: Worker Emergency Bridge Fund" (last visited 10 May 2020), online: <novascotia.ca/coronavirus/worker-emergency-bridge-fund> [perma.cc/5Z4Y-97EC].
21. Government of British Columbia, "Climate Action Tax Credit" (last updated 7 July 2020), online: <www2.gov.bc.ca/gov/content/taxes/income-taxes/personal/credits/climate-action#july-2020> [perma.cc/3QMD-GR2W].
22. Government of British Columbia, "COVID-19 Support for Income & Disability Assistance" (last visited 10 June 2020), online: <www2.gov.bc.ca/gov/content/family-social-supports/income-assistance/on-assistance/covid> [perma.cc/AP2B-X6U6].
23. Government of Ontario, "Ontario's Action Plan: Responding to COVID-19" (last modified 25 March 2020), online: <budget.ontario.ca/2020/marchupdate/action-plan.html> [perma.cc/J6N6-M6RS].
24. Government of New Brunswick, Finance and Treasury Board, News Release, "Applications for Low-Income Seniors' Benefit Available April 1" (29 March 2020), online: <www2.gnb.ca/content/gnb/en/news/news_release.2020.03.0163.html> [perma.cc/979Y-ENG5].
25. Marc Lee & Arman Hamidian, "Comparing Provincial Economic Responses to COVID-19" *Policy Note* (23 April 2020), online: <www.policynote.ca/provincial-responses-covid> [perma.cc/98ER-73XR].

were protected from eviction until the end of August.[26] Some provinces have gone further by putting programs in place to assist renters directly through the pandemic. For example, the Temporary Rental Supplement in British Columbia paid $300 per month for households without dependents and $500 per month for households with dependents, for four months.[27] Prince Edward Island's program provided $1,000 per household to help cover rent over a three-month period.[28] The Yukon's program paid the median market rent to the landlord in return for the tenant paying 25 per cent of their income to the government in lieu of their rent.[29]

Utilities were another area where many provinces provided direct support to affected individuals. Disconnections for non-payment were stopped in most provinces, and many utilities providers allowed deferrals, waived late fees, or set up payment plans for customers who have been unable to pay their bills. BC Hydro has reduced its rates by 1 per cent and provided a one-time credit equivalent to three months of electricity consumption for residential customers who lost income due to the pandemic.[30] This savings was estimated at $135 for apartments and $335 for a single-family home.[31] Ontario temporarily eliminated time-of-use pricing from April through to at least the end of October, allowing the lowest rate of electricity to be charged throughout the day, and introduced a

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26. Andrew Rankin, "Residential Eviction Ban Ends in N.S., Concerns Loom for Tenants, Landlords," *The Chronicle Herald* (30 June 2020), online: <www.thechronicleherald.ca/news/provincial/residential-eviction-ban-ends-in-ns-concerns-loom-for-tenants-landlords-468211> [perma.cc/4NPU-JEQP]; Richard Zussman, "B.C. Eviction Ban to End Sept. 1, Tenants Have Until July 2021 to Pay Unpaid Rent," *Global News* (16 July 2020), online: <globalnews.ca/news/7185583/bc-eviction-ban-lifted-sept-1-unpaid-rent-2021> [perma.cc/NPM9-7BRK].
27. BC Housing, "BC Temporary Rental Supplement (BC-TRS) Program" (last visited 10 June 2020), online: <www.bchousing.org/BCTRS> [perma.cc/9FXP-QDAN].
28. Government of Prince Edward Island, "Temporary Rental Assistance Benefit" (last visited 10 June 2020), online: <www.princeedwardisland.ca/en/service/temporary-rental-assistance-benefit> [perma.cc/KM73-94CE].
29. "Apply for Assistance to Pay Your Rent" (last visited 28 May 2020), online: <yukon.ca/en/housing-and-property/tenant-supports/apply-assistance-pay-your-rent-social-housing> [perma.cc/T2HD-7U6R].
30. *Direction to the British Columbia Utilities Commission Respecting COVID-19 Relief*, BC Reg 76/2020, s 3.
31. BC Hydro, News Release, "BC Hydro Providing Bill Credits, Waiving Charges for Customers Impacted by COVID-19" (1 April 2020), online: <www.bchydro.com/news/press_centre/news_releases/2020/covid-19-relief-fund.html> [perma.cc/RMC6-ZQKB].

fixed COVID-19 Recovery Rate."[32] It also expanded eligibility for its low-income energy assistance program.[33]

A variety of other relief measures and supports are available across the country. Many cities implemented grace periods of sixty days for payments and have waived any payment penalties until sometime in the summer.[34] Programs were also put in place to assist people whose move had been delayed by the pandemic,[35] are on a government-administered prescription drug plan,[36] have children that had to shift to learning virtually,[37] or have been laid off and need assistance with purchasing groceries.[38] While the net effect of all of these programs is unclear, it undoubtedly had the effect of stalling some of the bankruptcies and economic pain caused by the pandemic and its response.

B. PRIVATE SECTOR INITIATIVES

1. MORTGAGE AND CREDIT DEFERRAL

Relief on mortgage payments for up to six months was one of the first initiatives announced by the private sector in response to COVID-19. Controversially, any interest not paid during the deferral period, which could make up a substantial portion of the overall mortgage payment, is added to the principal of the loan. A six-month deferral of a $4,000,000 mortgage by someone who recently

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32. Ontario Ministry of Energy, Northern Development and Mines, News Release, "Ontario Provides Consumers with Greater Stability and Predictability with their Energy Bills" (30 May 2020), online: *Government of Ontario* <news.ontario.ca/mndmf/en/2020/05/ontario-provides-consumers-with-greater-stability-and-predictability-with-their-electricity-bills.html> [perma.cc/4VK7-Q4KR].
33. Letter from the Ontario Minister of Energy, Northern Development and Mines to the Vice-Chair of the Ontario Energy Board (1 June 2020), online (pdf): *Ontario Energy Board* <www.oeb.ca/sites/default/files/letter-from-the-minister-to-OEB-CEAP-20200601.pdf> [perma.cc/Y4ZM-ZQQL].
34. Rod Davidge & Jordan Adler, "COVID-19: Key Developments and Considerations for Real Estate Stakeholders" (last modified 19 May 2020), online: *Osler* <www.osler.com/en/resources/regulations/2020/covid-19-key-developments-and-considerations-for-real-estate-stakeholders> [perma.cc/2SKP-LQ5P].
35. Société d'habitation du Quebec, "Housing During the COVID-19 Pandemic" (last visited 28 May 2020), online: <www.habitation.gouv.qc.ca/english.html> [perma.cc/WM2J-RRM2].
36. Government of New Brunswick, News Release, "REVISED/Update on COVID-19" (21 March 2020), online: <www2.gnb.ca/content/gnb/en/news/news_release.2020.03.0147.html> [perma.cc/N22T-SRLM].
37. "Government of Ontario, "Get Support for Families" (27 May 2020), online: <www.ontario.ca/page/get-support-families> [perma.cc/K32A-Z5RS].
38. Government of Prince Edward Island "Employee Gift Card Program" (last visited 28 May 2020), online: <www.princeedwardisland.ca/en/service/employee-gift-card-program>.

purchased a house would result in an additional $2,443.30 in interest owed over the life of the mortgage.[39] By the end of June, more than 760,000 Canadians were permitted by their lenders to skip or defer their mortgage payments—roughly 16 per cent of all mortgages held by banks and other financial institutions.[40] The Canada Mortgage and Housing Corporation estimates that this figure could rise to 20 per cent of mortgage holders by September.[41] Given the size of the "mortgage deferral cliff" in September 2020, further action may yet be taken by major lenders and organizations like the Canada Mortgage and Housing Corporation.[42]

Financial institutions implemented measures similar to the mortgage deferral with their other credit products. Each financial institution took a slightly different approach to providing credit card relief, including deferrals of all payments for up to six months, interest deferral, payment plans on eligible purchases, and temporary reductions in interest rates to 10.99 per cent.[43] The standard interest rate for credit cards is between 19.99 and 20.99 per cent.[44] As with mortgage deferrals, outstanding balances continue to accrue interest until they are paid. Consumers with variable rates of interest on their credit products also received

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39. Rob Carrick, "Pandemic Personal Finance Update No. 4: How the Cost of Making Your Mortgage Go Away for Six Months Could Top $2,000," *The Globe and Mail* (13 April 2020), online: <www.theglobeandmail.com/investing/personal-finance/article-pandemic-personal-finance-update-no-4-how-the-cost-of-making-your> [perma.cc/55G9-9NMR].
40. Canadian Bankers Association, "Focus: Fast Facts on Bank Measures in Response to the COVID-19 Pandemic" (23 July 2020), online: <cba.ca/fast-facts-on-bank-measures-in-response-to-the-covid-19-pandemic> [perma.cc/HX5W-ZEMX].
41. Geoff Zochodne, "Big Banks to Report Results as Mortgage 'Deferral Cliff' Starts to Loom, Loan Loss Expectations Rise," *Financial Post* (25 May 2020), online: <business.financialpost.com/news/fp-street/big-six-banks-report-earnings-mortgage-deferral-cliff-loan-losses> [perma.cc/X5CZ-JLR2].
42. Geoff Zochodne, "CMHC Eyeing 'New Tools' as Mortgage Deferral Cliff Looms for Borrowers," *Financial Post* (28 July 2020), online: <financialpost.com/real-estate/mortgages/cmhc-eyeing-new-tools-as-mortgage-deferral-cliff-looms-for-borrowers> [perma.cc/PA84-XYX6].
43. Renee Sylvestre-Williams, "How do Credit Card Payment Deferrals Work During COVID-19?" *MoneySense* (17 April 2020), online: <www.moneysense.ca/spend/how-do-credit-card-payment-deferrals-work-during-covid-19> [perma.cc/D6XW-MB3S].
44. Reuters, "Coronavirus: Canadian Banks Offer Reduced Credit Card Interest Rates," *Global News* (3 April 2020), online: <globalnews.ca/news/6777308/coronavirus-credit-card-interest-rates> [perma.cc/3F3S-UJ3L].

some relief indirectly through the Bank of Canada's decision to reduce rates by 1.5 per cent in the first three months of 2020.[45]

2. DATA LIMITS AND PHONE PLANS

With many Canadians prevented from going into their workplaces by stay-at-home orders, millions of people have shifted to working from home, and, consequently, are using substantially more internet. In response, major internet providers, including Bell, Rogers, and Videotron, waived any caps on residential internet usage, effectively converting all existing plans to unlimited ones. Customers in rural areas who use different infrastructure received extra usage amounts and financial credit.[46] These measures were initially supposed to be in place until the end of April, but were extended until the end of June.[47] Some planned rate increases, including to TV and home phone packages, have been suspended as a result of the pandemic, while other increases have proceeded as previously planned.[48]

Wireless carriers have offered similar benefits to internet providers. Common initiatives have included a cancellation of long-distance fees for calls within Canada, eliminating roaming charges, and making new plans more affordable. Most major carriers provided flexible payment options, and both Rogers and CityFone pledged to not suspend or disconnect service for ninety days in response to unpaid bills.[49]

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45. Bank of Canada, "Canadian Interest Rates and Monetary Policy Variables: 10-year Lookup" (last visited 26 May 2020), online: <www.bankofcanada.ca/rates/interest-rates/canadian-interest-rates/?lookupPage=lookup_canadian_interest.php&startRange=2010-05-27&rangeType=dates&dFrom=2020-01-01&dTo=2020-05-27&rangeValue=1&rangeWeeklyValue=1&rangeMonthlyValue=1&ByDate_frequency=daily&submit_button=Submit> [perma.cc /WK2V-2TSM].
46. Nicole Bogart, "Bell, Rogers, Other Telecoms Remove Internet Data Caps Amid COVID-19," *CTV News* (14 March 2020), online: <www.ctvnews.ca/health/coronavirus/bell-rogers-other-telecoms-remove-internet-data-caps-amid-covid-19-1.4853389> [perma.cc/SLV2-AVZN].
47. See *e.g.* Bell Canada, "Keeping You Connected – Extending Assistance to Customers" (15 April 2020), online: <www.bell.ca/Covid-19-update> [perma.cc/NNY2-VCLT].
48. Sophia Harris, "Bell, TekSavvy Customers Shocked by Price Hikes during COVID-19 Pandemic," *CBC News* (22 April 2020), online: <www.cbc.ca/news/business/bell-price-increase-teksavvy-internet-covid-19-pandemic-1.5540034> [perma.cc/MW2A-WUFL].
49. Stephen Clark, "What Canadian Mobile Providers are Doing for Customers During the COVID-19 Pandemic" (7 May 2020), online: *Whistle Out* <www.whistleout.ca/CellPhones/Guides/covid-19-mobile-carrier-response> [perma.cc/A8WP-8FC5].

3. AUTO INSURANCE PREMIUMS

Enabled by various provincial governments, a variety of insurers across the country provided premium reductions to customers who drove significantly less or experienced financial hardship as a result of the pandemic.[50] For instance, Intact Insurance has offered a premium reduction of 15 per cent for driving less, or 75 per cent to individuals who have parked and stored their vehicle.[51] For customers experiencing financial challenges, insurance companies committed to providing flexible payment options and waiving any insufficient fund fees incurred from automatic withdrawals of premiums. These changes were in effect from April through June of 2020. The Insurance Bureau of Canada estimated that the relief measures resulted in $600 million in savings to consumers.[52]

II. LABOUR FORCE IMPLICATIONS FOR DEBT ACCUMULATION

The CERB has been a lifeline for many Canadians whose hours have been cut or eliminated entirely as a result of the pandemic. However, the CERB is scheduled to conclude at the end of September as the economy hopefully returns to normal (or a variation thereof).[53] This date coincides with the conclusion of many other pandemic-relief programs and relief measures. At this point, it appears that the economic damage from the virus and efforts to contain it will continue to be severe, even if a second wave does not materialize. This part reviews both the Labour Force Statistics from the beginning of the re-opening efforts and commentaries to identify groups who may be more likely to find themselves with a need for debt relief. These groups will likely see their short-term liquidity crisis turn into a long-term issue as the CERB and other government and private

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50. Insurance Bureau of Canada, "Insurers Reducing Insurance Costs for Canadians: IBC Member Companies Offer Substantial Consumer Relief Measures" (8 April 2020), online: <www.ibc.ca/on/resources/media-centre/media-releases/insurers-reducing-insurance-costs-for-canadians-ibc-member-companies-offer-substantial-consumer-relief-measures> [perma.cc/2US4-Y2VX] [*IBC*].
51. Intact Insurance, "COVID-19: We Are Here for You" (last visited 27 May 2020), online: <www.intact.ca/qc/en/covid19.html> [perma.cc/4NM8-GSS2].
52. *IBC*, *supra* note 50.
53. Rachel Gilmore, "Feds Will 'Be There for Canadians' as CERB End Date Looms for Thousands: Duclos," *CTV News* (6 May 2020), online: <www.ctvnews.ca/politics/feds-will-be-there-for-canadians-as-cerb-end-date-looms-for-thousands-duclos-1.4927639> [perma.cc/L75V-7BP9].

sector support programs come to an end, leaving them with a lack of income and limited access to further credit.

The leading labour economists in Canada have made a number of general conclusions based on the Labour Force Statistics about the initial impacts of the pandemic on the labour market.[54] In particular, Thomas Lemieux et al have concluded that the majority of job losses have been low-income jobs in the bottom quartile of weekly earnings, in public-facing jobs in industries such as food, accommodation, and retail, which were hit the hardest by the shutdowns.[55] They have also found that the employees who have lost the most work tend to be paid hourly, are younger, and are not unionized.[56]

At the time of writing various points of data were beginning to emerge to support the reports that BIPOC ("black, Indigenous and people of colour") were disproportionately impacted by the virus. Both the Ontario and federal governments were faced with questions about why data about the race of patients infected with the virus was not being released.[57] Ontario eventually mandated that its public health units collect race-based data, although such collection was not taking place at a federal level until the end of June 2020.[58] Both the United States and United Kingdom have released this data, and found that there is a higher incidence of infection and severity among the Black community than the general population.[59]

A. LOWER-INCOME WOMEN AND MOTHERS OF SMALL CHILDREN

One of the dominant themes of the pandemic has been its disproportionate impact on women's employment. This effect has been colloquially dubbed

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54. Thomas Lemieux et al, "Initial Impacts of the COVID-19 Pandemic on the Canadian Labour Market" (2020) Canadian Labour Economics Forum Working Paper Series No 26, online (pdf): <clef.uwaterloo.ca/wp-content/uploads/2020/06/CLEF-26_2020-Spring-Summer-Lemieux-et-al.pdf> [perma.cc/26D2-4V3H].
55. *Ibid* at 4.
56. *Ibid.*
57. Ryan Flanagan, "Does COVID-19 Discriminate? This is How Some Canadians are Harder-Hit," *Global News* (15 April 2020), online: <www.ctvnews.ca/health/coronavirus/does-covid-19-discriminate-this-is-how-some-canadians-are-harder-hit-1.4897298>.
58. The Canadian Press, "Ontario Proposing All Health Units Collect Race-Based Data on COVID-19," *National Post* (15 June 2020), online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/ontario-proposing-all-health-units-collect-race-based-data-on-covid-19>.
59. *Ibid*; Vanmala Subramaniam, "New Race-Based Data Shows Visible Minorities in Canada Disproportionately Impacted by COVID Recession," *The Financial Post* (7 August 2020), online: <financialpost.com/news/economy/new-race-based-data-shows-visible-minorities-in-canada-disproportionately-impacted-by-covid-recession>.

the "she-cession." In March, when the social distancing restrictions were first implemented, the monthly decline in employment for women was twice that of men. For women working an hourly job, 19.2 per cent saw a decline of all or substantially all of their hours, compared with 13.9 per cent of men.[60] Workers in temporary or precarious positions were also most at risk of losing their positions or most of their hours.[61] In March and April, when restrictions were still in place across most of the country, employees who earned $16 per hour or less experienced a 38.1 per cent drop in employment, compared with 12.7 per cent for all other paid employees.[62]

The recovery appears to be slower for the workers who have been hardest hit by job losses. Nearly a quarter of low-income workers are still working less than half of their usual hours, compared with 9.6 per cent for other hourly employees. Gains in employment have been largely due to men returning to work. In May, men recovered 20 per cent of their low-wage employment losses, compared with just 5.2 per cent for women. This trend was also seen in the labour market as a whole, with total employment increasing twice as fast for men as it had for women over the same period.[63]

Parents, especially of young children, have also been experiencing an uneven return to the job market. Both men and women with children were about as likely to lose their jobs from February through April. During the initial recovery in May, men saw an increase of 5.2 per cent in employment, regardless of the age of their children. Women, by contrast, saw a 4.2 per cent increase in employment if their youngest child was between six and seventeen, and only a 2 per cent increase if their youngest child was under six.[64] These numbers imply that women, particularly with young children, are unable to return to work due to the pressures associated with caring for young children at home.

Given the fluid nature of the return to daycare and school, childcare will remain an urgent issue that may drive some women out of the labour force.[65]

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60. Statistics Canada, "Labour Force Survey, March 2020" (9 April 2020), online: <www150.statcan.gc.ca/n1/daily-quotidien/200409/dq200409a-eng.htm> [perma.cc/C5AN-V4HQ].
61. *Ibid*.
62. Statistics Canada "Labour Force Survey, May 2020" (5 June 2020), online: <www150.statcan.gc.ca/n1/daily-quotidien/200605/dq200605a-eng.htm?HPA=1>.
63. *Ibid*.
64. *Ibid*.
65. Nicole Bogart & Vanessa Lee, "Child Care Restrictions Preventing Some from Going Back to Work as Economy Reopens," *CTV News* (18 May 2020), online: <www.ctvnews.ca/health/coronavirus/child-care-restrictions-preventing-some-from-going-back-to-work-as-economy-reopens-1.4944380> [perma.cc/957M-M3TY].

Anecdotally, there is an increasing number of women who are choosing to quit their jobs in order to adequately care for their children.[66] This choice may make sense for heterosexual couples where the husband earns more than the wife and both are overwhelmed with childcare obligations, but it will further strain already tight family finances. As the country recovers, these "temporary" decisions may become more permanent if the wife is unable to find another job, or if much-needed childcare centres are slow to re-open. Half of women who became unemployed between February and May were not actively seeking work, where men are more likely to be seeking new employment.[67] Already, the effects of the pandemic have pushed female labour force participation to its lowest level in thirty years.[68]

There is currently limited research in Canada about the effect of the pandemic on single parents. Initial data indicates that single mothers of toddlers or school-aged children were more likely to lose their jobs (12 per cent) than single fathers (7 per cent).[69] Single parents are also more likely to feel the effects of "stay home" messaging, as it limits the support systems available to assist with childcare and other household tasks. The median income for sole-parent families with two children in 2018 was $38,520, compared with $116,410 for dual-earner couple families with two children in 2018, indicating that a typical solo parent is more likely to experience financial stress than a typical two-parent family.[70]

B. GROUPS WHO ARE UNPREPARED TO MEET TAX REPAYMENT OBLIGATIONS

One largely overlooked aspect of the CERB is that the funds are taxable. Unlike income, the full amount of the CERB will be taxed back when the individual files their taxes in early 2021 for the 2020 tax year. The amount of taxes that someone would owe on their CERB payments would depend on how many periods they received the CERB, what province they live in, and what their income was both

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66. Jennifer Goldberg, "Moms are Leaving the Workforce to Care for Their Kids and It's Not OK," *Today's Parent* (13 May 2020), online: <www.todaysparent.com/blogs/opinion/should-i-leave-my-job-during-the-pandemic-moms> [perma.cc/4XFU-E338].
67. RBC Economics, "Pandemic Threatens Decades of Women's Labour Force Gains" (16 July 2020), online: *Royal Bank of Canada* <thoughtleadership.rbc.com/pandemic-threatens-decades-of-womens-labour-force-gains> [perma.cc/NG9R-SUX3].
68. *Ibid*.
69. *Ibid*.
70. Statistics Canada "Single-earner and dual-earner census families by number of children" Table No 11-10-0028-01 (6 January 2021), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110002801>.

before and after they received the benefit. For example, someone in Ontario who earned $20,000, including the full CERB entitlement of $8,000, would need to repay $1,600 from their CERB payments.[71] Even in circumstances where the individual made a fairly limited income in 2020, they may still attract a tax liability they are unable to easily pay.

Another source of CERB related debt may come from people who improperly received the CERB. If someone received the CERB who was ineligible for it, they would be required to pay the full amount as part of their tax bill for 2020.[72] The scope and characteristics of those who are improperly receiving the CERB are difficult to assess at this juncture. Initial reports indicate that seniors, who are not eligible for the CERB, were targeted by scammers encouraging them to participate in the program.[73] It is estimated that between 200,000 and 1.2 million fraudulent or improper applications were filed.[74]

Regardless of the reasons for a debt obligation to CRA because of the CERB, it is unclear how many Canadians would have the funds to meet this obligation. At the end of 2019, Canadian households had a debt to disposable income ratio of 176 per cent. Economists have estimated that this figure could temporarily increase to 230 per cent as a result of shrinking incomes from the pandemic.[75] At the beginning of 2020, 29 per cent of Canadians were unable to meet all of their monthly obligations, with a further 31 per cent reporting that they were $200 or less away from being insolvent at the end of the month.[76] While similar

71. Jamie Golombek, "Here's How to Calculate How Much Tax You'll Owe on Your CERB Payments," *Financial Post* (20 April 2020), online: <financialpost.com/personal-finance/taxes/heres-how-to-calculate-how-much-tax-youll-owe-on-your-cerb-payments> [perma.cc/T6N6-96CE].
72. Catherine Cullen & Kristen Everson, "Pandemic Benefit Cheats Could Get Caught by New CRA Measures – but Not Soon," *CBC News* (14 May 2020), online: <www.cbc.ca/news/politics/cerb-cra-measures-1.5568835> [perma.cc/2GZR-ZTEB].
73. Nick Wells, "Loophole in CERB Could Leave Seniors Vulnerable to Scammers, MP Warns," *Global News* (21 May 2020), online: <globalnews.ca/news/6971576/cerb-scammers-loophole-seniors-coronavirus> [perma.cc/Z6DY-6ZK8].
74. Cullen & Everson, *supra* note 72; Tom Blackwell, "Number of CERB Claimants Topped Number of Jobless by a Million Last Month, Statistics Show," *National Post* (19 May 2020), online: <nationalpost.com/news/number-of-cerb-claimants-topped-number-of-jobless-by-a-million-last-month-statistics-show> [perma.cc/SB3F-MWTG].
75. David Akin, "A Looming Coronavirus Debt Crisis Could Swamp Canadian Households," *Global News* (7 June 2020), online: <globalnews.ca/news/7027309/coronavirus-debt-crisis-canada> [perma.cc/K2XZ-BNDP].
76. Ipsos, "Three in 10 (29%) Canadians Already Insolvent; Cannot Pay All Their Monthly Bills" (20 January 2020), online: <www.ipsos.com/en-ca/news-polls/MNP_Debt_Index-2020-01-20> [perma.cc/U2XQ-97Z4].

figures from the post-pandemic world are not yet available, these figures imply that Canadian households were not well-placed to handle either a job loss or an unexpected expense. Now that they will have likely experienced both to some degree, it appears inevitable that many households will be pushed over the edge when additional financial obligations arise.

C. OTHER HIGH-RISK GROUPS

Women, parents of small children, and single mothers are not going to be the only groups facing increased financial difficulties as a result of the pandemic. Small businesses that have been unable to survive the downturn may have knock-on effects in tipping their owners into the need for debt relief. Older or immunocompromised workers may be unable to return to work until a vaccine has been developed and widely administered. A soft job market for new graduates may have longer-lasting effects on employment prospects and their ability to repay student loans. Unfortunately, there is no concrete data at this time to support a circumstantial case that these groups will have a greater need for debt relief measures. Both the scale and pace of the recovery, as well as additional data, will better illuminate the financial effects the pandemic has had on these groups.

III. SHORT-TERM CHALLENGES FOR CREDIT REGULATION

The analysis to this point has highlighted the groups that are most likely to incur high levels of debt as a result of the pandemic and also experience long term drops or loss of income. These consumers will be most in need of access to credit to stabilize their income interruptions and, where credit is no longer available, debt relief to allow them to be economically productive in the future. This part considers the scope of credit regulation impacting this group. The next part considers the proposal for increasing access to debt relief for these groups.

A. IMPACT OF DELAYED PAYMENTS ON CREDIT SCORES

A key question that should be asked by many consumers who might be looking to take advantage of payment deferral options is what effect it would have on their credit score. This issue is not an idle one, since a credit score is a vital metric that lenders consider when deciding whether to extend credit for a variety of credit products and on what terms. Credit scores are calculated based on a variety of factors, including used versus available credit (weighted at roughly 30 per cent), credit history (15 per cent), and payment history (35 per cent).[77] As the most significant single factor in determining a credit score, missing payments can almost certainly result in a lower credit score. For individuals looking to obtain a car loan, purchase a house, or consolidate credit, a low credit score can make those dreams more expensive or out of reach entirely.[78]

The effect of COVID-19-related deferrals on credit scores appears mixed. According to representatives of the banking industry, banks have taken "steps to ensure that credit scores are unaffected by deferrals and skipped payments."[79] All of the Big Six Banks (BMO, CIBC, National Bank of Canada, RBC, Scotiabank, and TD Bank) indicate that they are not reporting the deferral to credit bureaus as missed payments, however, CIBC and Scotiabank have warned that the increase in the balance owing on the principal of loans could have other negative effects on credit scores.[80] Canada's major consumer credit reporting agencies, Equifax and TransUnion, have also indicated their willingness to ensure that deferred payments are not reported as late. However, the reporting systems in financial institutions are set up to automatically report late payments, which could lead to some deferrals being erroneously tracked on a consumer's credit score. As of early April, the financial industry and credit reporting agencies were reportedly working on an alternative system for these extraordinary deferrals. Consumer advocates have encouraged individuals to ensure that they have the deferral commitment in writing from their lender and to check their score regularly for any mistakes.[81]

It remains to be seen how effective this new process will be at providing relief to consumers without affecting their credit scores. Banks and other lenders

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77. Equifax, "How Are Credit Scores Calculated?" (last visited 29 May 2020), online: <www.consumer.equifax.ca/personal/education/credit-score/how-are-credit-scores-calculated> [perma.cc/5XXG-J2AE].
78. Financial Consumer Agency of Canada, "4.5.2 Why Your Credit Score is Important" (10 February 2020), online: *Government of Canada* <www.canada.ca/en/financial-consumer-agency/services/financial-toolkit/credit/credit-5/3.html> [perma.cc/H4GA-SYHT].
79. Neil Parmenter"Bank Sector Relief Measures During the COVID-19 Pandemic" (9 April 2020) at 2, online (pdf): *Canadian Bankers Association* <cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/remarks-20200409-bank-sector-relief-measures-en.pdf> [https://perma.cc/P84W-QRW4].
80. See *e.g.* CIBC, "COVID-19 Financial Relief FAQ" (last visited 29 May 2020), online: <www.cibc.com/en/personal-banking/advice-centre/covid-19/financial-relief-faq.html> [perma.cc/8TTY-G8MD]; Scotiabank, "FAQs About Financial Relief Measures" (last visited 29 May 2020), online: <www.scotiabank.com/ca/en/personal/scotia-support/coronavirus-covid-19-updates.html> [perma.cc/EW5Y-8VJV].
81. Erica Alini, "REALITY CHECK: Will Deferring Debt Payments Amid COVID-19 Hurt Your Credit Score?" *Global News* (2 April 2020), online: <globalnews.ca/news/6769404/payment-deferrals-credit-score-canada-equifax> [perma.cc/SF69-2WZR].

have faced unprecedented volumes of calls from customers at a time when their branches were closed. Particularly in the early days of the pandemic, staff have been re-allocated to assist with the deferral requests.[82] In this context, with a new system being implemented for lenders, some issues are to be expected. The onus is also on consumers to monitor their credit score for issues and request additional extensions beyond an initial deferral period.[83] If a consumer does not ask for a further deferral after their initial month or two, a missed payment after that period would negatively affect their credit score. During a time of already unprecedented stress and upheaval, it is unclear how well equipped consumers are to navigate this new system and advocate for the correction of any issues that may arise.

B. PANDEMIC-RELATED SUPPORT FROM THE CRA

The Canada Revenue Agency (CRA) implemented a variety of measures to relieve pressure on individuals experiencing financial hardship that would otherwise impact credit scores and collections. One such measure involves extending the deadline to file taxes for the 2019 calendar year to June 1 and setting a new deadline to pay without incurring penalties or interest of September 30.[84] All collections activities have been suspended "until further notice," with the CRA encouraging taxpayers to take advantage of flexible payment arrangements.[85] Taxpayers who cannot make payments due to the pandemic could request that any penalties or interest be cancelled. Any auditing work being conducted by the CRA has been focused on work that is either beneficial to the taxpayer, close to completion, or of strategic importance to the government.[86] It has also committed to not push individuals with substantial tax debts into bankruptcy

82. Aaron Saltzman, "Consumers Could Face Hit to Credit Scores, Jump in Payments from Mortgage Deferrals," *CBC News* (22 March 2020), online: <www.cbc.ca/news/business/mortgage-deferral-rbc-banks-covid19-coronavirus-credit-card-1.5505704> [perma.cc/D6AU-HD86].
83. Elaine Smith, "People Deferring Their Mortgage Payments are Making an Unpleasant Discovery: It Can Wreck Your Credit Rating," *The Toronto Star* (30 March 2020), online: <www.thestar.com/business/personal_finance/2020/03/30/prevent-your-credit-score-from-diving-during-covid-19.html> [perma.cc/8YKS-4HN5].
84. Canada Revenue Agency, "Income Tax Filing and Payment Deadlines: CRA and COVID-19" (27 July 2020), online: *Government of Canada* <www.canada.ca/en/revenue-agency/campaigns/covid-19-update/covid-19-filing-payment-dates.html> [perma.cc/9CR8-53P4].
85. Canada Revenue Agency, "Collections, Audit, Objections and Appeals: CRA and COVID-19" (29 May 2020), online: *Government of Canada* <www.canada.ca/en/revenue-agency/campaigns/covid-19-update/covid-19-collections-audits-appeals.html> [perma.cc/9GK4-E683].
86. *Ibid*.

until 1 September 2020.[87] Where an individual was already working through a proposal, the CRA presumptively has accepted amendments to the plan that waived payments until September 1.[88]

The federal government proposed suspending various legislative time limits prescribed in statutes including the *Bankruptcy and Insolvency Act89* and *Income Tax Act*.[90] Under the draft statute, the Governor in Council would be empowered to suspend any deadline in the listed statutes by up to six months, retroactive to 13 March 2020.[91]

C. MORE ENFORCEMENT POWERS FOR THE FINANCIAL CONSUMER REGULATOR

Financial institutions and lenders are bound by various statutory obligations, voluntary codes of conduct, and public commitments regarding their treatment of consumers, and how they address and investigate complaints. The enforcement of these codes of conduct for lenders offering deferrals and credit scoring agencies is managed by the Financial Consumer Agency of Canada (FCAC).[92] The FCAC is also responsible for promoting financial literacy, providing objective information to consumers about financial products and services, and monitoring trends that may affect consumers of financial products and services.[93]

Since its inception in 2001, the FCAC has been reformed several times in an attempt to broaden its mandate and improve its regulatory efficacy.[94] The latest amendments, which involved implementing an expanded consumer protection framework, were partially brought into force on 30 April 2020.[95] The most notable feature in the new provisions pertain to the FCAC's enforcement

87. Canada Revenue Agency, "Pending Default of a Proposal under the BIA Where the Canada Revenue Agency is a Creditor" (23 April 2020), online: *Government of Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04251.html> [perma.cc/E2GE-D6C5].
88. *Ibid*.
89. *BIA*, *supra* note 3.
90. RSC 1985, c 1 (5th Supp).
91. Bill C-17, *An Act Respecting Additional COVID-19 Measures*, 1st Sess, 43rd Parl, 2020, cl 6(1) (first reading 10 June 2020).
92. Financial Consumer Agency of Canada, "About FCAC" (31 October 2020), online: *Government of Canada* <www.canada.ca/en/financial-consumer-agency/corporate/about.html> [perma.cc/8AQE-9MM7].
93. *Ibid*.
94. Stephanie Ben-Ishai, "Consumer Protection and 'Non-Banks': A Comparative Analysis" (2019) 54 Tex Intl LJ 327 at 343–344, 346.
95. *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27(, PC 2020-0274). (entered into force 30 April 2020).

abilities. The Commissioner of the FCAC is now able to direct a bank audit if he or she believes it is required to administer consumer provisions. This audit will be conducted by an external accounting firm, and all expenses will be paid for by the bank.[96] If a bank, or one of its directors, employees, or agents, does not comply with the consumer provisions, the Commissioner or other complainants may apply to a court for a compliance order and any other relief that the court sees fit.[97]

Additionally, the maximum fine has increased substantially. Individuals who commit a violation are now subject to a maximum fine of $1 million, up from $50,000. Regulated corporations have also seen their maximum fine double from $500,000 to $10 million.[98] When assessing the amount of the penalty, the FCAC must now consider both the duration of the violation and the violator's ability to pay, in addition to pre-existing factors.[99] Details about the enforcement action, including the party, the violation, and the penalty, must now be made public, subject to any regulations.[100] Since no regulations to that effect are currently in force, this means that the default is that the details of all violations will be publicized until further notice.

These changes are only the first of many that will be brought into force respecting the FCAC's processes and mandate. Other amendments that have yet to be brought into force include requirements that complaints procedures are satisfactory to the Commissioner, that reports of all complaints must be made on a quarterly basis to the Commissioner, and that the institution's Board of Directors must establish a new committee focused on implementing and complying with consumer provisions.[101] Overall, these changes will serve to make Canada's financial consumer oversight body more robust.

These enforcement powers bring the FCAC's authority more in line with those of its American counterpart, the Consumer Financial Protection Bureau (CFPB). The FCAC's new investigative and audit powers have a direct corollary with the CFPB's, which allows it to examine financial institutions.[102] Rather than using an external auditing and accounting firm, the CFPB examination is

96. *Bank Act*, SC 1991, c 46, s 659.
97. *Ibid*, s 989(3).
98. *Financial Consumer Agency of Canada Act*, SC 2001, c 9, s 19(2).
99. *Ibid*, s 19(3).
100. *Ibid*, s 19(1).
101. *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and Other Measures*, SC 2018, c 27, ss 316–317, 627.43(1), 627.46.
102. 12 USC § 5515(b)(1) (Supp V 2011).

conducted by in-house investigators.[103] The costs associated with the examination are borne by the CFPB directly as employee and operating expenses, rather than by the institution being examined itself.[104] The most effective way that the CFPB ensures compliance is by bringing suits against companies that violate "federal consumer financial law."[105] These may proceed either through commencing proceedings in a federal district court or before an administrative law judge which is subsequently enforced in federal court.[106] Civil monetary penalties are limited to $5,000 per day, with increases available for up to $25,000 per day for reckless violations, and $1 million per day for knowing violations.[107] Pursuing enforcement through the legal system means that a variety of equitable and contractual remedies are also available to the CFPB and affected consumers. These include rescission of contracts, refunds or returns, restitution, compensation for unjust enrichment, damages, and injunctive relief.[108] How the FCAC's record of court-enforced actions against financial institutions compares with the CFPB's is worthy of continued study in the future.

As of the date of writing, the FCAC has not publicized details of any enforcement actions it may have made related to COVID-19. In an interview from the beginning of the pandemic, the Commission said that it would be watching deferrals closely and regulating accordingly.[109] A statement from early April indicated that it has been encouraging financial institutions to comply with their obligations while simultaneously adjusting its regulatory expectations in light of the new demands from the pandemic.[110] Other statements available on their website provide warnings about potential fraud, links to resources about

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103. Consumer Financial Protection Bureau, "Supervision and Examination" (last visited 29 May 2020), online: <www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations> [perma.cc/6RFG-AKLC].
104. *Ibid*.
105. 12 USC § 5516.
106. *Ibid* §§ 5564(a), 5563.
107. *Ibid* § 5565(c).
108. *Ibid* § 5565(a)(2).
109. Geoff Zochodne, "Consumer Watchdog Keeping Close Eye on Banks' Offer of Coronavirus Mortgage Relief," *Financial Post* (23 March 2020), online: <business.financialpost.com/news/fp-street/consumer-watchdog-keeping-close-eye-on-banks-offer-of-coronavirus-mortgage-relief> [perma.cc/4UAS-AAD5].
110. Financial Consumer Agency of Canada, "Updated COVID-19: How FCAC is Responding" (9 April 2020), online: *Government of Canada* <www.canada.ca/en/financial-consumer-agency/services/industry/covid-19-how-fcac-responding.html> [perma.cc/5E6P-KZKE].

managing financial health, and an encouragement to sign up for direct deposit of government benefits.[111]

The CFPB also has a dedicated page related to managing finances during the pandemic. Unlike the FCAC page, it appears to be set up as a resource page for consumers, rather than a collection of statements for industry actors. The CFPB coronavirus page collects resources to help consumers make financial decisions in a variety of areas, including mortgage and housing assistance, student loans, resources for small business owners, and provides guidance for where complaints can be submitted.[112] Data collection efforts have been paused, while complaints collection and processing have continued throughout the pandemic.[113] The CFPB has also issued policy statements and guidance on credit reporting and its enforcement action while much of the country remained on lockdown.[114] Research and reports continue to be conducted and published, including studies on the effect of the pandemic on credit applications.[115]

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111. Financial Consumer Agency of Canada, "COVID-19: Updates from the Financial Consumer Agency of Canada" (last modified 12 May 2020), online: *Government of Canada* <www.canada.ca/en/financial-consumer-agency/corporate/covid-19.html> [perma.cc/V6TR-T529].
112. Consumer Financial Protection Bureau, "Protecting Your Finances During the Coronavirus Pandemic" (last visited 29 May 2020), online: <www.consumerfinance.gov/coronavirus> [perma.cc/LNX8-57YW].
113. Consumer Financial Protection Bureau, News Release, "CFPB Provides Flexibility During COVID-19 Pandemic" (26 March 2020), online: <www.consumerfinance.gov/about-us/newsroom/cfpb-provides-flexibility-during-covid-19-pandemic> [perma.cc/CFB5-FMNF]; James Langton, "U.S. Financial Consumer Complaints Spike: CFPB," *Investment Executive* (22 May 2020), online: <www.investmentexecutive.com/news/from-the-regulators/u-s-financial-consumer-complaints-spike-cfpb> [perma.cc/452T-A8CR].
114. Consumer Financial Protection Bureau, "Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act" (1 April 2020), online (pdf): <files.consumerfinance.gov/f/documents/cfpb_credit-reporting-policy-statement_cares-act_2020-04.pdf> [perma.cc/VG3V-ASV7]; Consumer Financial Protection Bureau et al, "Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus" (22 March 2020), online (pdf): <files.consumerfinance.gov/f/documents/cfpb_interagency-statement_payment-obligations-covid19.pdf> [perma.cc/ZLD9-QR3V].
115. See generally Consumer Financial Protection Bureau, "The Early Effects of the COVID-19 Pandemic on Credit Applications" (April 2020), online (pdf): <files.consumerfinance.gov/f/documents/cfpb_issue-brief_early-effects-covid-19-credit-applications_2020-04.pdf> [perma.cc/4M9J-EZ28].

IV. LOW-COST BANKRUPTCY

In response to the pandemic, Canada's insolvency regulator, the Office of the Superintendent of Bankruptcy (OSB), has issued a variety of temporary directions to facilitate physical distancing. Prior to the pandemic, a Licensed Insolvency Trustee ("trustee") would need to apply for an exemption to holding debtor assessments in person. As a result of the pandemic, these can take place without the need for a separate approval from the OSB.[116] Counselling and creditor meetings, which were held in person before the pandemic, can now be held by telephone or by other digital methods of communication. Any reporting requirements arising from those meetings can be submitted online through a newly expanded portal. Finally, trustees have been encouraged to accept signatures through email or other electronic means, and can also witness the swearing of oaths online.[117] These changes will be in effect until at least 31 March 2021, although the OSB is considering which changes to this temporary system may remain beyond the pandemic.[118] Similar initiatives have been put in place by other peer jurisdictions.[119]

If the OSB permits the remote delivery of trustee services to continue past 2021, it could lead to tangible positive effects on the costs associated with consumer bankruptcy. For instance, eliminating the need to rent an office to conduct business may allow trustees to work from home. This could have a tangible positive effect on the cost of administering a bankruptcy by reducing overhead costs. Similarly, a trustee must register in the bankruptcy district that they intend to practice in. Changing or adding a practice district is possible, but it acts as a geographical barrier that limits where trustees may practice. Absent a requirement for physical offices, or meeting the debtor in person, these

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116. Office of the Superintendent in Bankruptcy, "Temporary Guidance for LITs During the COVID-19 Pandemic" (13 March 2020), online: *Government of Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04223.html> [perma.cc/3JZ8-DLZG].

117. *Ibid*.

118. Office of the Superintendent in Bankruptcy, "Superintendent's Message of March 13, 2020 to LITs – Update" (8 June 2020), online: *Government of Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04312.html> [perma.cc/2GHR-A76K].

119. See *e.g. Coronavirus (Scotland) (No.2) Act 2020*, (Scot), ASP 10, ss 12–13 [*Coronavirus No.2*]; Cara O'Neill, "Bankruptcy Procedures Changes Dur to Coronavirus Outbreak" (last updated: 19 May 2020), online: *NOLO* <www.nolo.com/legal-updates/bankruptcy-procedures-change-due-to-coronavirus-outbreak.html> [perma.cc/LJU8-U79U]; Ann Henry et al, "Coronavirus: How Have Courts Across Europe Responded?" (17 April 2020), online: *Pinsent Masons* <www.pinsentmasons.com/out-law/guides/coronavirus-courts-response-europe> [perma.cc/U69S-L9RP].

restrictions may make less sense. Both proposals would require a change in policy from the OSB, but become more feasible if the pandemic's temporary measures become permanent.

Measures introduced by other peer jurisdictions also merit consideration in the Canadian context. Australia has extended its temporary debt protection period from twenty-one days to six months, which gives the debtor breathing room to negotiate a plan with its creditors by staying all enforcement actions from unsecured creditors.[120] The minimum sum required for a creditor to apply to push an individual into bankruptcy has also increased from AU$5,000 to $20,000.[121] Scotland expanded the pool of people who will be able to access its low-cost bankruptcy option by increasing the maximum debt load from 17,000 Pounds sterling (GBP) to 25,000 GBP.[122] Additionally, it has reduced the fees associated with its low-cost bankruptcy program from 90 GBP to 50 GBP, and its regular bankruptcy program from 200 GBP to 150 GBP.[123] Debtors who have been receiving various social supports, including the Jobseekers Allowance or welfare payments within three months of applying for bankruptcy, have had their fees waived entirely.[124] Temporary reductions or elimination of fees along with measures that would give debtors more financial "breathing room" to order their affairs, would be helpful in assisting Canadians to order their financial affairs.

However, even before the pandemic, there were indications that Canada's bankruptcy system was not serving everyone who needed it. The typical cost of declaring bankruptcy in Canada is between $1,500 and $2,000.[125] For low-income and low-asset debtors, this fee is simply too high unless they can find a trustee willing to reduce their fees. As a result, many poorer Canadians are denied a financial "fresh start" that would allow them to move forward from often unforeseen unfortunate circumstances. The precise scale of this figure is difficult to ascertain; however, estimates range from ten to fifteen thousand annual filings.[126] Once the financial assistance from governments winds down,

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120. *Coronavirus Economic Response Package Omnibus Act* 2020, (Austl), 2020/22, Sch 12, s 16.
121. *Ibid*.
122. *Coronavirus No.2*, *supra* note 119, s 9.
123. *Ibid,* s 14(3).
124. *Ibid,* s 14(2).
125. Ben-Ishai & Schwartz, "COVID," *supra* note 4.
126. These estimates are based on comparing Canadian bankruptcy figures with peer jurisdictions with low-cost bankruptcy procedures, summary administration bankruptcies with receipts of less than $500, LILA debtors approaching credit counseling agencies, and social assistance recipients in Ontario whose benefits were newly reduced. For more, see Saul Schwartz & Stephanie Ben-Ishai, "Establishing the Need for a Low-Cost Canadian Debt Relief Procedure" (2020) 29 Intl Insolvency Rev S25.

the pool of Canadians who could benefit from a low-cost bankruptcy option will only grow.

Other common law countries have instituted programs for their low-income debtors which should serve as a model for Canada moving forward. New Zealand's NAP is geared towards debtors with no realizable assets aside from basic household items, a car valued at no more than 5,000 NZD, and the tools of their trade. Total debts cannot exceed 47,000 NZD (excluding student loans), and it must be unlikely that the debtor would be able to repay their debts given their low income. A debtor wishing to access this program may only do so once and cannot have previously been in bankruptcy. A similar program, DROs, is in place in both England and Wales. To access the program, debtors must have total debts of less than 20,000 GBP and assets of less than 1,000 GBP. Debtors must have a surplus income of less than 50 GBP after a calculation of vital expenses. The application fee is 90 GBP. Unlike in New Zealand, debtors can access the program again if at least six years have passed since their last filing. In both programs, debtors are overseen by approved professional intermediaries who have the discretion to turn down applicants if they are not eligible. While a debtor is under the NAP or a DRO, all creditor action is stayed, and a discharge is available after twelve months. As with the "regular" bankruptcy process, DRO and NAP participants are made public, and participation can negatively affect credit ratings.[127]

Both programs have been in place for at least a decade and have proven beneficial to LILA debtors. A review of the NAP program in New Zealand found that it has been effective at expanding access to the fresh start of bankruptcy while safeguarding the system from abuses and excess costs. British evaluations of DROs have reached similar conclusions and recommended increasing the maximum threshold to access the program to increase its availability.[128] The success of the low-cost bankruptcy option in both jurisdictions provides a strong initial signal that a similar program might be able to assist LILA debtors in Canada.

Canada should learn from the DRO and NAP programs and implement similar procedures. A Canadian version should retain the essential elements of both programs—low- or no-cost access to bankruptcy for LILA debtors that is administered by approved intermediaries. The lack of a central agency for these intermediaries provides an impediment to adopting identical programs to those that are currently in place in New Zealand and the United Kingdom. Challenges with regulatory fragmentation in the financial services industry could also cause

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127. *Ibid* at S35-S36.
128. *Ibid*.

difficulty with such an endeavour. One option would be to add oversight of the low-cost bankruptcy regime to the responsibilities of insolvency trustees. This group is already subject to accreditation programs and oversight, which could be expanded to include responsibility for this new bankruptcy process. Given this overlap, ultimate responsibility could fit neatly within the mandate of the OSB, although it may be appropriate to run it through the FCAC.[129]

An administration fee of approximately $200 would be necessary to ensure that the new system could be adequately funded, while also not acting as a barrier to access for those who the system was set up to help. The contactless modalities approved during the pandemic could also assist with the effective administration of the program, including through reduced overhead costs.[130]

Canada should also consider measures implemented in New Zealand and the United Kingdom to address concerns about abuse. Key measures should include public records on those who access the system, similar to what already exists when individuals access the status quo bankruptcy regime. Limits on the frequency of accessing the low-cost debt option should be included, either through minimum required periods between filings, as in the international examples, or additional time spent in the bankruptcy process, which exists in the current Canadian regime. Crafted appropriately, the low-cost bankruptcy regime could expand its access to a segment of Canadians who arguably could benefit from it most, while safeguarding the system's integrity.

V. CONCLUSION

In order to prevent the economy from plummeting into freefall—and taking Canadians with it—all levels of government have implemented an unprecedented amount of financial support, which has been complemented by various voluntary measures taken by the private sector to provide relief to its customers. However, the sheer cost of these programs means that they cannot continue in perpetuity. Bill deferrals from the private sector will come due, interest rates will rise again, and credit scores will be affected.

Canadians who were already indebted and financially stressed before the pandemic will undoubtedly find themselves considering bankruptcy in greater numbers once the relief programs end. Data from the initial re-opening efforts show that those at the greatest risk of being left behind are those who were already struggling—low-income Canadians, and single parents. These individuals are

129. *Ibid* at S37.
130. *Ibid*.

potentially most at risk of not being able to access the fresh start of bankruptcy, further prolonging the financial pain felt by millions.

The OSB's physical distancing directions present an opportunity to permanently lower the cost of accessing bankruptcy and should be extended beyond the pandemic. Before the wave of coronavirus-related bankruptcies begins to crest, Parliament should consider implementing a no- or low-income bankruptcy option. The need may never be greater than it will be soon.