The Pathology of Credit Breakdown

Michael Trebilcock* assisted by Arthur Shulman**

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I. INTRODUCTION: PERSPECTIVES ON THE ECONOMIC AND SOCIAL ROLE OF CONSUMER CREDIT

Social attitudes to the virtues of credit have changed markedly over recent years. There was a time when a consumer who borrowed to buy goods was widely regarded with disdain as one whose interests society should not be too solicitous to protect. Either he was a pauper, and thus a social failure, or he was attempting to live beyond his means, in which case the lack of discipline would prove destructive of his character. To believers in the Protestant Ethic, solid citizens worked hard, saved up, and then, as an invariable principle, paid cash. This cynicism towards the wisdom of using credit is well-reflected in the oft-quoted observation of an English County Court Judge that a great part of his time on the Bench had been concerned with "people who are persuaded by persons they do not know to enter into contracts they do not understand to purchase goods they do not want with money they have not got".[1]

However, reflecting the dramatic change in social attitudes, consumer credit outstanding in Canada has risen from $1 billion in 1949 ($77 *per capita*) to $19 billion in 1975 ($825 *per capita*).[2] Today

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* Professor, University of Toronto Faculty of Law.

** Advocate, Bar of the Province of Quebec.

[1] Lord Greene, quoted by Lord Evershed, *The Practical and Academic Characteristics of English Law* (1956), 40.

[2] See *e.g.*, *Canadian Consumer Credit Fact Book* (1974), Tables 1 and 41 and Statistics Canada (1975).

a majority of families sooner or later have occasion to use consumer credit.[3] Why do these families borrow?

1. Benefits[4]

In some cases, measurable economic benefits can be obtained through the use of consumer credit in the same way that businesses can, in particular cases, maximize profits by borrowing. For example, to buy a television set on credit and reduce outside entertainment expenditures may produce a net saving for a family. Similarly, a washing machine bought on credit may eliminate outside laundromat charges.

There are administrative conveniences to the use of credit. This applies particularly to credit card types of credit which may obviate the necessity of carrying around large amounts of cash, avoid the possibility of being "caught short" without ready access to a bank, and provide documentary records of transactions.

Using credit may also provide a family with a form of budgetary constraint which will ensure that the family regularly devotes a proportion of its budget to acquiring reasonably enduring assets. If consumers were required to save up and pay cash for all items purchased, many would find the austerity required too much for them. Thus, in the case of these consumers, the use of consumer credit operates as a form of compulsory saving.

The most important advantage of the use of consumer credit is the least measurable in objective terms: consumer credit enables a consumer to maximize the satisfactions that he can obtain from his available resources.

In the case of business credit, this issue poses few problems. Satisfaction is measured in terms of monetary profit, and if the use of credit better maximizes this, clearly its use can be regarded as justified. Thus, there is an objective criterion against which to measure marginal satisfaction derived from the use of business credit. On the other hand, in the case of consumer credit, satisfactions are often physical and aesthetic and thus almost entirely subjective and unmeasurable. Will a man derive more satisfaction from buying a car or appliance for his family now on credit, thus committing future income, or saving up, doing without for five years and then buying it for cash?

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[3] In 1970, 51 percent of all non-farm family units used some form of consumer credit: *Consumer Credit Fact Book, ibid.*, Table 40.

[4] *Cf.* E. P. Neufeld in J. J. Ziegel and R. E. Olley (eds), *Consumer Credit in Canada* (1966), 13.

Studies indicate that the greatest use of credit is made by young families in the middle income brackets (with rising income expectations, for the most part).[4a] This is what one would expect. By using consumer credit prudently, consumers are able to level out peaks in their needs and resources, which otherwise might not coincide. A young married couple with a family will obviously have the greatest needs now for accommodation, home appliances, transportation and educational "investments". The peak earning capacity of the family is likely to occur at some later time when the couple has moved to higher income brackets. Consumer credit thus enables them, perfectly rationally, to meet present needs out of future income, and thus to maximize the benefits which flow from that income:

> [I]t would be rational to argue that a consumer should use consumer credit up to the point where his marginal satisfaction from the goods and services so acquired is equal to the marginal cost of credit needed to acquire them within the constraints imposed on him by his income and net worth. Certainly on an *a priori* basis it is as easy to visualize a consumer using too little consumer credit as too much.[5]

While the question of what is a prudent use of consumer credit is a difficult one, due to the many subjective factors, it is a central one to framing regulatory laws in the area. Until one arrives at some concept of what is a prudent use of credit, it is difficult to frame legislation along lines that prevent consumer abuses and encourage greater consumer rationality.

2. Costs

The most notable social cost of the use of consumer credit is overcommitment. Consumer credit is especially dangerous in this respect. Because one buys now and pays later, the pleasures of possession are immediate while the pains of payment are remote, and a proper balancing of both considerations is often not undertaken. With the rapidly rising burden of debt, it is argued that the social damage caused by people taking on commitments they cannot meet is being gravely compounded. If a consumer defaults in payment of his debts he is liable to have his wages garnished (and perhaps as a result lose his job), or his possessions seized in execution, or be forced into bankruptcy. In any of these circumstances his welfare and that of his family may be severely impaired. Even if he manages to meet his commitments and avoid a formal default, it may be at

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[4a] *Consumer Credit Fact Book* (1970), 24-25; Report of the U.S. National Commission on Consumer Finance, *Consumer Credit in the United States* (1972), 12, 16.

[5] *Supra*, note 4, 10.

the expense of better food, housing or education, and may cause family division or disintegration:

> One wonders, inevitably, about the tensions associated with debt collection on such a massive scale. The legacy of wants, which are themselves inspired, are the bills which descend like the winter snow on those who are buying on the instalment plan. By millions of hearths throughout the land, it is known that when these harbingers arrive, the repossession man cannot be far behind. Can the bill collector be the central figure in the good society?[6]

While it is impossible to quantify overcommitment the figures reported in annual reports by the Federal Superintendent of Insurance regularly disclose that 25% of the accounts of Canada's consumer loan companies are running at least a month or more behind their repayment schedules. These figures, of course, include mutually agreed advance reschedulings, but nevertheless they indicate a degree of marginality amongst a high proportion of borrowers from this category of consumer credit grantor. However, in the Montreal study discussed later in this article,[6a] a nation-wide department store informed us that 18-20% of their credit accounts were 30 days or more in arrears, and an oil company credit card department told us that 33% of their accounts were 30 days past due.

Opposing arguments stress, however, the trifling incidence of total defaults. Bad debt write-offs in the consumer credit industry generally average less than 2% of total credit extensions.

The use of consumer credit has strengthened the net worth position of consumers enormously. "The average net worth [the difference between total assets and total indebtedness] of all families and unattached individuals in the spring of 1969 amounted to $14,369 compared to $8,430 in 1964 — a rise of 70 percent."[7] Using inflation-proof figures, in 1964, 25% of all families and unattached individuals had debts as great as, or greater than, their total assets. By 1969, this percentage had fallen to 16%. In 1956, 27% of all families and unattached individuals held no assets as compared to 4% in 1969.[7a]

Neither has consumer credit discouraged prudence in maintaining a steady level of savings. Indeed, personal savings as a ratio of personal disposable income rose from 4.7% in the early sixties to 7.4% in 1973.[8]

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[6] J. K. Galbraith, *The Affluent Society* 2nd ed. (1969), 172.

[6a] *Infra*, p. 420.

[7] *Canadian Consumer Credit Fact Book, supra*, note 3, 36-37.

[7a] *Ibid.*

[8] *Ibid.*, exhibit 33, 34.

The percentage of non-farm families and unattached individuals using some consumer credit has remained relatively static, increasing slightly from 48.6% in 1956 to 50.8% in 1970,[9] perhaps suggesting, as Neufeld hypothesizes, that some consumers are in fact under-utilizing consumer credit (although the figures may also suggest that an increasing number of *existing* users are over-utilizing credit).

In addition many defaults are explained by quite unforeseeable contingencies such as lengthy sickness or unemployment of the consumer which in no way reflect laxness on the part of the credit grantor in extending the credit. For credit grantors to eliminate all possibility of defaults would involve depriving a number of potentially good credit risks of credit. As the use of credit becomes more widespread consumers will educate themselves as to its possibilities and limitations, just as commercial borrowers have done. In other words, they too will become "professional" borrowers.

A wider criticism of the phenomenon of consumer credit sees private enterprise promoting the consumption ethic and subverting the sovereignty of the consumer over his own wants which in classic free market economics is essential to the proper operation of a competitive market-place. Galbraith in *The Affluent Society*[10] and *The New Industrial State*[11] argues that most consumer wants today are artificially contrived by the process of production itself, either by emulation and suggestion or by advertising and salesmanship. The conventional theory that holds that production must be maximized so as to cater to existing consumer wants is alleged to be fallacious once it is shown that the process of production creates its own wants.

Defenders of the existing consumer market-place argue that Galbraith attributes far too much influence to advertising. It has not been demonstrated, so it is argued, that advertising raises the general level of consumption. Instead, it may simply reflect pre-existent social tates and values and only divert consumer expenditures from one product to another. Moreover, even if present consumer wants are contrived, there is no way of altering this through State intervention without imposing another ethic.[12]

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[9] *Ibid.*, table 40, 76.

[10] *Supra*, note 6.

[11] J.K. Galbraith, *The New Industrial State* (1967).

[12] *Cf.* M.J. Trebilcock, *Consumer Protection in the Affluent Society* (1970) 16 McGill L.J. 263.

Given the diversity of opinion, a fundamental policy issue must be resolved before regulatory laws in the area of consumer credit can be drafted: What is the legitimate social function of consumer credit? A similar question, formulated in terms of an individual consumer, was posed earlier: *When is an individual making a prudent use of credit?* The answer to one is dependent upon the other. Of course, any evaluation of existing and prospective forms of regulation of consumer credit implies an examination of the very basic social issues to which they are a response.[13]

In the next section we examine empirically the phenomenon of credit break-down against the background of the considerations raised above. Finally, we will present some policy suggestions for regulating the adverse consequences of wide-scale consumer credit granting.

II. THE CASUALTIES OF THE CREDIT SYSTEM: THE 1972 MONTREAL STUDY

1. The methodology

In the summer of 1972, the authors, assisted by several summer research students, embarked upon an empirical study of a number of aspects of the credit granting and debt collection process in the city of Montreal. The focal point of the study involved personal interviews, lasting on average between two and three hours, with one hundred and ten debtors, chosen at random from court records, who had had their personal effects seized or wages garnished within the preceding six months. The purpose was to obtain some picture of the demography of debtors who default: the reasons for their default, the kind of transactions in respect of which default most frequently occurs, the kinds of creditors who most frequently resort to the courts, the course and features of the collection process, formal and informal, to which these debtors were subjected, and knowledge of legal rights and obligations on their part at different stages of the process. This study (hereinafter referred to as the Debtor Survey) was supplemented by a statistically broader-

[13] We have not attempted in this introduction to examine the aggregate economic impact of consumer credit on economic growth, economic instability, and inflation: see P.W. McCracken, J.C.T. Mao and C. Fricke, *Consumer Credit and Public Policy,* University of Michigan (1965), and the Report of the Board of Governors of the U.S. Federal Reserve System, *Consumer Instalment Credit* (1957).

based analysis of five hundred closed court files, selected at random, from files held by the Montreal Provincial Court, in which proceedings had been commenced at least two years before our analysis (hereinafter referred to as the Court File Survey). In both surveys, debt claims involving business debtors (*i.e.*, corporations, partnerships, or sole traders) were eliminated, so that the creditor-debtor relationship examined was confined to one where the creditor was either a business or a private plaintiff and the debtor was a non-business debtor. In addition, major categories of creditors (*e.g.*, small loan and sales finance companies, banks, small, medium and large retailers, utilities and even loan sharks) were the subject of extensive selected interviews and inhouse observation, sometimes lasting several days, enabling us to analyze their credit granting and collection policies.

Finally, intermediaries in the collection process, in particular collection agents and bailiffs, were the subject of extensive empirical analysis. In the case of the former, members of the research team spent a number of days as observers in several collection agencies. In addition, seven collection agencies were selected at random from the telephone directory and mock accounts were sent by one member of the team under a registered business name to an agency to be collected against another member of the team, and details of the correspondence and phone calls from each agency were collected. In the case of bailiffs, we collaborated in two studies being simultaneously conducted by the Pointe St Charles Community Legal Services Clinic[14] and by students from the Sir George Williams Sociology Department.[15] As part of these studies, one of our students spent several weeks working for a bailiff. Finally, independently, but during approximately the same period, the Research Group in Jurimetrics from the University of Montreal Faculty of Law conducted a detailed, empirical analysis of 370 files of debtors under the Lacombe Law and 201 files ofdebtors in the small debtors' bankruptcy programme in Montreal.[16] We make comparative reference to this impressive study throughout this article (hereinafter referred to as the University of Montreal study). We also from time to time make comparative references to an unpublished 1973 research study

[14] Community Legal Services Inc., *Service, Seizure and Sale (1972)* (unpublished).

[15] Sir George Williams University (now Concordia University), Sociology Department, *A Study of Accounts Buying and Bailiff Practices in Low-Income Neighbourhoods of Montreal* (1972).

[16] C. Masse, E. Mackaay, J. Hérard, *Vivre ou Exister?*, Université de Montréal (1974).

by the Alberta Debtors Assistance Board in which 636 current files of debtors under Part X of the *Bankruptcy Act*[16a] were analyzed (hereinafter referred to as the Alberta study). In order to make as broad a set of comparisons geographically within Canada as possible, we also refer briefly to some 1974 demographic data on debtors with files with the Small Claims Court Referee in Toronto compiled by the Referee and 1970-71 data in British Columbia of debtors under Part X of the *Bankruptcy Act*.[17]

2. Which creditors sue?

In our Debtor Survey and Court File Survey respectively, the categories of creditors invoking formal coercive legal process and their relative distribution are shown in Table 1.

TABLE 1

Creditors Suing

	Debtor Survey (%)	*Court File Survey (%)*
Banks	7.3	6.9
Finance Companies	10.9	9.1
Government Creditors	0.9	1.2
Credit Card Companies	4.5	2.6
Retail Credit Sales	14.5	17.7
Utilities	11.8	12.5
Professionals (doctors, dentists, lawyers, hospitals)	14.5	14.9
Account Buyers	1.8	4.0
Private Plaintiffs	12.7	9.7
Others	21.1	21.4
	100.0	100.0

The Alberta study revealed a different distribution of debts owing under Orderly Payment of Debt orders by category of creditors, shown in Table 2.

[16a] R.S.C. 1970, c.B-3.

[17] G. Gallins, *The Operation of Part X of the Bankruptcy Act in British Columbia* (1971) 6 U.B.C. L.Rev. 419. The authors are acutely aware of the methodological limitations of their own study, particularly the Debtor Survey with its small sample and elements of self-selection in the interviewing process. However, debates over the extent of the phenomenon of overcommitment in Canada, and prescriptions for its cure, have until now been characterized more by dogma than any information at all.

TABLE 2

Amounts owing to:

	%
Banks	15.89
Chargex	.86
Credit Unions	5.73
Finance Companies	38.79
Department Stores	11.79
Oil Companies	4.27
Collection Agencies	1.67
Medical	1.36
Income Tax	.88
Personal	4.42
Auto	1.20
Other	13.14
	100.00

The U.B.C. study showed that 94% of debtors owed money to at least one finance company, 90% to at least one store, 45% to at least one bank, 25% to at least one credit union, 20% to at least one professional, and 12% to at least one utility.[18]

Who grants consumer credit and who holds seriously delinquent debts? In 1973 banks held 50.2% of the consumer credit market in Canada, finance companies, credit unions and caisses populaires 30.7%, retailers and department stores 11.2% and others 7.9%.[19] Several interesting patterns emerge from our tables in this respect. First, purveyors of retail credit (vendor credit) make much more frequent use of formal legal processes to collect their debts (about 16% of our cases relative to an 11% share of the credit market) than purveyors of lender credit (essentially finance companies and banks; about 20% of our cases relative to an 80% share of the credit market). Among more specific classes of creditors, professionals, especially doctors, hospitals and dentists (presumably before medicare took hold), appear the toughest collectors. Utilities also appear to be frequent collectors through the courts.

To try to obtain a closer reading on what "non-loan" credit transactions lead to default and formal collection activity, in our Court File Survey we attempted to identify the subject matter of the transactions in question. The results are shown in Table 3.

[18] *Ibid.*, 426.

[19] *Supra*, note 2, exhibit 40.

TABLE 3

	%
Credit Cards	8.9
Rent	12.3
Car Purchases	10.5
Household Appliances	3.5
T.V., Stereo, Tape Recorders	0.8
Furniture	5.0
Leisure terms (*e.g.*, boats, snowmobiles, cottages)	1.1
Utilities	22.4
Clothing	10.0
Professional Services	25.5
	100.0

The subject matter of loan transactions which were the subject of court action could not generally be identified from court files but Table 4 below gives statistics for the "reasons for loans" from a

TABLE 4*

A. *A Major Canadian Consumer Loan Company: Reasons for Loans, 1973*

Reason	*Percent of Total Number*
Consolidation of Debt	41.9%
Refinancing Miscellaneous Debt	4.2%
Clothing	2.2%
Fuel	.1%
Rent	.3%
Medical Expense	.3%
Automobile	8.2%
Tax Service Loan	1.0%
Cash Voucher	.4%
Travel and Vacation	7.9%
Education	.3%
Investment	.9%
Repair	4.7%
Furniture	3.3%
Taxes	.7%
Assisting Relatives	.9%
Insurance Premiums	.6%
Moving Expense	.6%
Mortgage and Interest	.2%
Adjust Contracts	.9%
Miscellaneous	15.6%
Unknown	4.8%
	100.0

*These figures are not broken down into delinquent and non-delinquent loans.

B. *A Major Canadian Bank: Reasons for Personal Loans, 1974*

Reason	*Percent of Total Number*
Vans, Trucks, School Buses, Mobile Homes	6.69%
Debt Consolidation	7.25%
Loan Liquidation	4.05%
Taxes, Real Estate Mortgages, *etc.*	2.42%
Travel and Education	7.32%
Home Improvement, Furnishings	16.45%
Motor Cars	30.24%
Purchase of Real Estate	4.80%
Boats, Airplanes, Snowmobiles	3.78%
Sundry, Including Refinancing	17.00%
	100.00

nation-wide analysis of the files of the customers of a major Canadian consumer loan company and a major Canadian bank.

By this data, two common stereotypes about debt delinquency are challenged: that finance companies lend money easiest and collect it hardest (a common view of consumerists) and that most debtors are dead-beats who get themselves into trouble by impulse purchases of luxury goods (a common view of business).

3. Who are collected against?

A number of questions in the Debtor Survey were designed to enable us to compile a profile of debtors in trouble. The Court File Survey provided useful complementary data. Data from the independent studies are cited for comparative purposes.

In the Debtor Survey, 54% of the respondents gave French as their principal language, 28% English, 16% gave both and only 2% gave some langnage other than French or English. Somewhat different, and statistically broader-based, linguistic figures emerge from the University of Montreal study: 89.7% of the debtors in the two programmes filled in the court forms in French and only 10.3% in English. The linguistic breakdown for Montreal from the 1971 census figures shows that just over 30% of the population are English speaking and 70% French speaking, thus indicating a substantial over-representation of the French speaking population among debtors in default.[20] Eighty-nine percent of the debtors in the Debtor Survey had spent the first twenty years of their lives in North America; 11% came from Europe or elsewhere.

[20] *Supra,* note 16, 55.

The Debtor Survey showed that 19.5% of the respondents fell into the 18-29 years age range, 54.8% in the 30-45 age range, 24.3% in the 46-64 age range, 1.2% in the over 65 age range. Hence, fully 80% of the sample were 30 years or older. Both the University of Montreal and Alberta studies of wage earner and small debtor bankruptcy programmes show a higher percentage of debtors in the lower age ranges. In the University of Montreal study, 37.3% of debtors in both programmes were younger than 29, 32.1% were in the 30-39 age range, 18.2% 40-49, 9.4% 50-59 and 3% older than 60.[21] The Alberta study of Orderly Payment of Debt orders shows 51.87% of debtors in the 0-30 year range, 30.17% in the 31-40 range, 13.51% 41-50, 2.8% 51-60, .62% over 60, and .62% unknown.[22] A major Canadian consumer loan company provided us with the following figures for age of borrower for its Canada-wide personal loan operations for 1973: 0-29 years 40.3%, 30-39 25.6%, 40-49 19.3%, 50-59 11.7%, 60 and over 3.1%. A major Canadian bank provided us with their figures for age of borrower (for 1974) in its personal loan operations across Canada: 0-29 48.85%, 30-39 24.32%, 40-49 16.11%, 50 and over 10.72%.

The Debtor Survey showed that 84.5% of the sample were male, 15.5% female. The Court File Survey showed that 88.4% of defendants were male, 11.6% female. The University of Montreal showed 83.5% male[23] and the Alberta study, 90.88% male.[24]

In terms of the number of people being wholly supported by the debtor, the Debtor Survey showed that 21.6% had no dependents, 9.4% had one dependent, 11.3% two dependents, 49% between three and five dependents, 8.4% more than five dependents. Thus, 57% of the sample had three or more dependents. The University of Montreal study showed 25.5% of the debtors with no dependent, 51.9% between one and three dependents, 20.1% four to six dependents and 2.3% more than six dependents.[25] The Alberta study showed 10.39% of debtors with no dependents, 13.67% with one, 19.37% with two, 23.14% with three, 14.81% with four, 9.60% with five and 9.43% with more than five.[26]

In the Debtor Survey, 14.1% of the debtors were single, 67.9% were married, 16% were separated or divorced and 1.8% were living

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[21] *Ibid.*, 47.
[22] A study by the Alberta Debtors Assistance Board (1973), 30 (unpublished).
[23] *Supra*, note 16, 43.
[24] *Supra*, note 22, 3.
[25] *Supra*, note 16, 58.
[26] *Supra*, note 22, 32.

common law. Thus a majority of the debtors were married and a significant percentage (16%) had experienced marriage break-down. The University of Montreal study found that 25.5% of debtors under Lacombe Law[27] or in the small debtors bankruptcy programme were either divorced or separated.[28] While Statistics Canada only publishes statistics on the number of people divorced as a percentage of the population and not those separated, the figures for Montreal in 1972 show divorcees as 1.6% of the population contrasted with 8.5% in the University of Montreal study.[29] The Alberta study showed that 10.52% of the debtors were either separated or divorced,[30] and the U.B.C. study found that 20% of the debtors were separated or divorced (compared to a claimed figure of 10% in B.C. generally).[31]

In answer to the question "Are you presently employed?", 74.7% of debtors in the Debtor Survey said they were, 25.2% reported that they were not. The University of Montreal study found that 34.7% of debtors under the Lacombe Law or in the small debtors bankruptcy programme had no job at the time their files were opened[32] and 67.6% had experienced some period of unemployment during the three years that preceded the survey.[33] Of those debtors who were unemployed at the time their files were opened, 67.7% had been unemployed for periods greater than three months.[34] The average rate of unemployment in Montreal in 1972 was about 7%.[35] The Alberta study found that 41.67% of the debtors had experienced some unemployment during the twelve months prior to the Orderly Payment of Debts order, 38.79% for periods of greater than one month.[36] The U.B.C. study found that only 45% of the debtors granted Orderly Payment of Debts orders were continuously employed during the twelve months prior to filing. Fifty per cent of those who were unemployed at the date of filing were unemployed for a period of more than six months prior to this time.[37]

In terms of usual occupation, 21.4% of respondents in the Debtor Survey described themselves as business or professional people,

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[27] Arts. 652-59 C.C.P.

[28] *Supra*, note 16, 52.

[29] *Ibid.*, 53, quoting Statistiques Canada, *Recensement 1971*, Bulletin préliminaire, Catalogue (AB-1), tableau 4.

[30] *Supra*, note 22, 31.

[31] *Supra*, note 17, 424.

[32] *Supra*, note 16, 62.

[33] *Ibid.*, 61.

[34] *Ibid.*, 64.

[35] *Ibid.*, 62.

[36] *Supra*, note 22, 31.

[37] *Supra*, note 17, 425.

16.6% as skilled tradesmen, and 61.9% as unskilled labourers. In the Court File Survey, in the 110 cases where an occupation for the defendant appeared in the court documents 17.2% were business or professional people, 18.1% were skilled tradespeople, and 64.5% were unskilled labourers. Table 5 of the Alberta study shows the occupational break-down among Orderly Payment of Debts debtors.

In terms of occupational distribution among people who use consumer credit generally, a major Canadian consumer loan company and a major Canadian bank supplied us with the figures in Table 6.

In terms of residential and job mobility, 29.8% of the respondents in the Debtor Survey had not changed addresses in the previous five years, 31.9% had changed addresses once, 28.8% had changed addresses two or three times, 9.2% had changed addresses four or more times. Thus, 69.9% of the respondents had moved homes at least once during the previous five years. Forty-six point five percent of the respondents had not changed jobs in the previous five years, 17.4% had changed jobs once, 25.5% two or three times, and 10.4 four or more times. Thus over 53% of the respondents had changed jobs at least once during the previous five years.

The distribution of the level of educational achievement in the Debtor Survey showed that 28.5% had elementary school education only, 31.8% some high school education, 17.5% were high school graduates, 5.4% were trade school graduates, and 16.4% were university graduates. Thus, over 60% of the sample had less than a full high school education. The University of Montreal study found that 37.2% of debtors in the two programmes had elementary education only, 45.6% some high school education, and 17.2% some post-secondary education.[38]

Figures on the annual family income of debtors in the Debtor Survey show that 12% earned less than $3,000, 28% $3,000-$5,999, 25% $6,000-$7,499, 21% $7,500-$11,999, 14% $12,000 or more. Thus, 40% of the *families* earned less than the average income for *individuals* in Canada in 1972 ($5,828) and about 80% of the *families* less than the average *family* income ($11,300).[39] The University of Montreal study found that 32.7% of debtors in the two programmes had no income, 4.8% less than $3,000 gross income a year, 20.3% $3,000-$4,999, 24.4% $5,000-$6,999, 12.6% $7,000-$8,999, 4.8% more

[38] *Supra*, note 16, 56.

[39] Statistics Canada, *Income Distribution by Size in Canada: 1972*, Catalogue 13-207, at pp.21, 53.

TABLE 5

	Males	*Female Clients*
Skilled Labour	18.51%	6.81%
Unskilled Labour	46.01%	10.41%
Clerical	5.19%	62.06%
Professional	3.80%	3.44%
Student	1.38%	—
Unemployed	5.70%	10.44%
Medical	2.59%	3.44%
Managerial	4.13%	—
Sales	6.05%	3.44%
Armed Forces	2.76%	—
Other	3.58%	—

TABLE 6
Consumer Loan Company (1973)

Occupation	*% of Total*
Skilled, Semi-Skilled	73.2
Unskilled	9.2
Service Workers	1.5
Sales Persons	1.8
Clerks, Kindred Workers	4.3
School Teachers	.5
Fed., St, County, City Emp.	3.2
Armed Forces	.7
Managers, Officials, Exec.	2.2
Proprietors	1.4
Farmers	.4
Pensioned, Independent	.8
Miscellaneous	.3
Professionals	.5
	100.0

Bank (Personal Loans 1974)

	% of Total
Manual	46.21
Office Workers	19.20
Managers, Foremen	15.29
School Teachers & Professional People	8.78
Salesmen, *etc.*	10.52
	100.00

than $9,000.[40] The Alberta Orderly Payment of Debts study found that 2.10% of debtors had total net family income a year of less than 2,400, 10.51% $2,412-$3,600, 26.37% $3,612-$4,800, 26.69% $4,812-$6,000, 16.34% $6,012-$7,200, 10.82% $7,212-$8,400, 4.04% $8,412-$9,600, 3.07% over $9,600. It may be useful to compare these figures on debtors in default with figures (Table 7) supplied to us by a major Canadian consumer loan company and bank respectively on incomes of personal loan customers generally.

The University of Montreal study related the income of debtors inscribed under the Lacombe Law between June 1972 and December

TABLE 7

Canadian Consumer Loan Company (1973)

Annual Income	*% of Total*
$ 2,000 - 3,000	1.6
3,000 - 4,000	6.4
4,000 - 5,000	12.8
5,000 - 6,000	24.8
6,000 - 7,000	10.6
7,000 - 7,500	8.7
7,500 - 8,000	4.8
8,000 - 8,500	5.2
8,500 - 9,000	3.7
9,000 - 9,500	2.4
9,500 - 10,000	4.8
10,000 - 11,000	4.8
11,000 - 12,000	2.5
12,000 - 13,000	3.1
13,000 - 14,000	1.2
14,000 - 15,000	1.0
15,000 and Over	1.6
	100.0

Canadian Bank (Personal Loans 1974)

Annual Income	*% of Total*
Under $5,000	5.90
$5,000/$5,999	6.79
$6,000/$6,999	8.88
$7,000/$7,999	10.46
$8,000/$8,999	10.96
$9,000 and Over	57.01
	100.00

[40] *Supra*, note 16, 67.

1973 to the definition of poverty by the Special Senate Committee in *Poverty in Canada.*[41] Projections to 1972 and 1973 of the Senate Committee poverty lines by family size, as calculated in the University of Montreal study,[42] are shown in Table 8.

TABLE 8

Number of Members of the Family Unit	*Poverty Level for 1972*	*Poverty Level for 1973*
1	$ 2,580	$ 2,740
2	4,270	4,520
3	5,160	5,470
4	5,990	6,340
5	6,850	7,250
6	8,120	8,720
7	8,540	9,140
8	9,400	10,010
9	10,260	10,880
10	11,120	11,750

The relationship between the income of debtors in the programme and these poverty lines is indicated in Table 9 below, taken from the University of Montreal study.[43]

TABLE 9

Number of Members of the Family Unit	*Number of Participants*	*Average Situation Relative to Poverty Level*
1	51 (21.7%)	+35%
2	42 (17.8%)	—17.5%
3	39 (16.6%)	—32.5%
4	53 (22.5%)	—30%
5	24 (10.2%)	—50%
6	16 (6.8%)	—52%
7	4 (1.7%)	—67%
8	6 (2.5%)	—32.5%
TOTAL	235 (100%)	—17.5%

[41] Information Canada (1971), 7.
[42] Table 48, *supra,* note 16, 105.
[43] *Ibid.,* 106.

The asset position of debtors was also explored in the Debtor Survey. Only 35% of the debtors owned their own homes; the other 65% rented homes or apartments. The Alberta Orderly Payment of Debt study found that 87.42% of the debtors did not own their own homes.[44] The U.B.C. study found that 76% of debtors did not own their own homes.[45] The Debtor Survey found that 53.6% of the debtors possessed cars, 62% black and white televisions, 26% colour televisions and 11% had no television, 56% possessed washers and/or dryers, 66% refrigerators and/or stoves, 49% stereo sets and/or tape-recorders, 60% major furniture items such as living-room or dining room suites, 17% leisure goods such as a vacation cottage, boat or snowmobile. Thirty-six percent reported that they had some savings (including insurance); the remaining 64% said they had no savings at all.

In terms of outstanding credit commitments, 16.6% of the debtors in the Debtor Survey reported total debts in the range 0-$499, 8.9% in the range $500-$999, 21.7% in the range $1,000-$1,999, 15.3% in the range $2,000-$3,499, and 37.1% reported debts in excess of $3,500. Thus, over half the respondents had debts in excess of $2,000. The level of overcommitment becomes progressively more serious in the case of debtors under Lacombe Law or in the small debtors bankruptcy programme. Table 10 shows the levels of indebtedness found by the University of Montreal study.[46]

TABLE 10

Debt/Programme	*Lacombe Law*	*Bankruptcy*	*Total*
Less than	140	32	172
$3,000	(40.4%)	(16.0%)	(31.5%)
$3,000	171	139	310
to	(49.4%)	(69.5%)	(56.7%)
$9,000	35	29	64
More than	(10.1%)	(14.5%)	(11.7%)
$9,000	346	200	546
TOTAL	(63.3%)	(36.7%)	(100.0%)

The average debt of Lacombe Law debtors was $4,658, and of small debtor bankruptcy debtors, $6,265.[47]

[44] *Supra*, note 22, 4.
[45] *Supra*, note 17, 425.
[46] *Supra*, note 16, 70.
[47] *Ibid.*, 70.

The levels of debt, at the time of making Orderly Payment of Debts orders, found by the Alberta Study are shown in Table 11.[48]

TABLE 11

Less than $1,000	.31%
$1,001 — $1,500	2.99%
$1,501 — $2,000	5.35%
$2,001 — $2,500	7.87%
$2,501 — $3,000	7.55%
$3,001 — $3,500	11.33%
$3,501 — $4,000	11.81%
$4,001 — $4,500	8.02%
$4,501 — $5,000	6.92%
$5,001 — $5,500	7.08%

At the order date, three out of every four debtors in the Alberta study were therefore more than $3,000 in debt, with more debtors being represented in the $3,000-$4,000 category than any other.

The Small Claims Court Referee in Toronto reports that for the year 1974 the average debt commitment per debtor interviewed was $5,840.[49] This figure is closely in line with that reported by the Credit Counselling Service of Metropolitan Toronto for 1974. The U.B.C. study found that approximately two-thirds of the debtors under Part X in 1970-71 had debts in excess of $3,000.[50]

Figures from the Debtor Survey on the size of the particular debt on which garnishment or seizure proceedings had been taken show that 28.8% of the debts fell in the range $0-$99, 24% $100-$249, 27.8% $250-$749, 11.5% $750-$1,499, and 7.6% of the debts were in excess of $1,500. The Court File analysis of the same question showed that 32% of the debts fell into the $0-$99 range, 26.8% $100-$249, 25.8% $250-$749, 9% $750-$1,499, 6.2% were in excess of $1,500.

As to the efficiency of shopping decisions made by the respondents, where the debt being enforced was for merchandise, 27.5% of the debtors in the Debtor Survey said that they did not intend to buy the item in question before going into the store and did not know the price of the item at other stores. A further 20% intended to buy the item before going into the store but did not know the price at other stores. 52.5% claimed that they intended to buy the item before going into the store and knew the price at other stores. Thus, almost half the sample displayed perhaps some element of im-

[48] *Supra,* note 22, 39.
[49] *Annual Report,* Ministry of the Attorney-General, Ontario (1974).
[50] *Supra,* note 17, 425-426.

pulsiveness and certainly a lack of concern about comparative shopping.

As to the creation of the debt for the item in question, 78.8% said that the seller did not initiate the idea of buying the goods on credit. Nine percent said that the seller did and suggested that they obtain credit from him or her. Twelve point one percent said that the seller suggested the use of credit but recommended that they obtain it from a third-party source.

Respondents were also asked what part of the credit terms were they most interested in at the time they incurred the debt. Seventy-four point one percent said "just getting the loan, goods or services". Twenty-two point four percent said the amount of the monthly instalments. Only 3.4% said that they were interested in the amount or rate of interest. Half the respondents said that *at the time of the interview* they knew what rate of interest they were paying. The other half could give no indication. As might be expected, this state of knowledge directly correlates with level of education. Only 40% of the respondents with less than a full high-school education claimed to know the rate of interest they were paying. In the case of respondents who had graduated from high-school, trade school or university, 70% claimed to know the rate. However, in terms of comparative shopping, we found a remarkedly high level of awareness among debtors whom we interviewed of which finance companies were the "easiest" lenders. Many debtors had a hierarchy of finance companies in their minds and if turned down at one would know which company next to try. This information seemed accurate because the same "easy" lenders were named in many interviews. Once a debtor's "regular" finance company found out about a new loan with another company, it would often reverse its earlier decision and pay out the loan in order to keep the debtor's business.

These figures suggest both a serious lack of concern about the importance of shopping around for the most favourable credit terms, and perhaps even more seriously, a disregard for the impact of the credit commitment on the family's monthly budget.

As to the debtor's reasons for default, 61.2% named financial difficulties resulting from simple inability to pay. Six percent connected their default directly to a failure by the seller or lender to live up to the agreement, *e.g.*, by supplying defective merchandise. Seventeen and a half percent said that they had defaulted either because they were unable to locate the creditor or more usually because they did not think that they owed any money. Some percentage of those cases presumably involved a degree of fault on the part

of the creditor through billing misunderstandings, *etc.* Fifteen and a half percent appeared to be wilful defaulters, who simply said they were unwilling, although able, to pay. An example of the latter category we encountered in our Debtor Survey was a single man aged 26, heavily in debt, who said that whenever he became despondent he would take a sick leave from work, perhaps obtain a loan and buy a car and take off on a vacation, running up, in one case, $900 in gas bills. He had no dependents, no assets, and no intention of paying any of his debts. Another example was a young man aged 22, writing advertising copy for a radio station, who had run up large bills for telephone, gas and hydro services, with no intention of paying for them. He changed addresses regularly in order to keep ahead of his creditors. The only explanation he could give for his actions was that he wanted "to — up the system".

As to when default first occurred in payment of the debt, 29.4% said they first fell behind within one month of incurring the debt, 16.6% between one and three months, 24.3% between four and eight months, 16.6% between nine and eighteen months and 12.8% after nineteen months or more.

If it were possible to piece together a single stereotype of the debtor financially distressed enough to be involved in court processes of some kind, it would be a male debtor, probably between 25 and 45, married, with three dependents, with an annual income (in 1972 figures) of between $5,000-$6,000, with debts between $2,000 and $3,000, having a level of education of high-school or less, an unskilled labourer vulnerable to abnormally high employment insecurity and, to a lesser extent, marital break-down.

4. The course of the collection process

a) *Informal collection*

Interviews with respondents in the Debtor Survey revealed that in 26% of cases the debtor claimed to have contacted the creditor about payment problems before default occurred. In 42.4% of cases the first contact with the creditor about payment problems came after default. In 12% of cases, there was contact with the creditor before and after the default. In the remaining 19.5% of cases, debtors claimed that legal action was the creditor's first response to the default. In cases where contact occurred, a rescheduling or variation of the term of repayment occurred in 32.8% of the cases. The time elapsing between the first contact by the creditor and commencement of legal action was estimated by the respondents to be between 0-2 weeks in 14.2% of cases, 2 weeks — 2 months in

14.2% of cases, 2 — 6 months in 25.7% cases, 6 months — 1 year in 20% of cases, and over 1 year in 25.7% of cases. An independent survey carried out by Arthur Shulman in his law firm showed that the payment response rate to lawyers' letters threatening suit (*mise-en-demeure*) was of the order of 33% (although rates varied by class of account). We found consumer loan companies surprisingly lenient in their treatment of defaults. Often a default would lead to another loan, which would be consolidated with the first and loans would be constantly stacked one on top of the other. Even where all payments had ceased, we encountered cases where months had elapsed without any action by the finance company. Whether this permissiveness is ultimately in the debtor's interests may be arguable.

Ninety-five percent of the debtors said that the first contact from the creditor was a polite reminder. In the remaining 5% of cases the debtor was requested to visit the creditor's office. Eighty-four and a half percent of the debtors said that the last contact from the creditor was a polite reminder, 11.6% said that they were requested to come to the creditor's office, and only 3.9% reported insulting letters or telephone calls. No debtors reported that creditors had threatened to contact, or actually contacted, friends, relatives or the employer of the debtor. Twenty-eight point three percent of debtors reported no or only one contact by the creditor before legal action was commenced. A further 59.4%, who were contacted more than once, said they were never contacted more frequently than monthly. Five point four percent said that during the intervals of most frequent contact, they were contacted about every two weeks, 5.4% said weekly and 1.3% said more frequently than weekly.

One or two additional observations might usefully be made here from our analysis of selected creditors' credit granting and collection procedures. Use of credit rating bureaux for information on a consumer before the granting of credit seems to be general among banks and finance companies, large department stores offering vendor credit and credit card companies. Utilities, fuel oil companies and smaller retailers use it much less frequently. However, complaints we heard from a number of creditors related to the refusal of many banks to supply personal loan or credit card status information on a customer either to them directly or even indirectly through credit rating bureaux.

Security over goods apparently assumes considerable significance not only in itself, but through the threat of repossession, in substantially reducing delinquency levels. For example, sales acceptance companies financing automobiles on conditional sales contracts

reported remarkably low levels of delinquency relative to every other class of creditor. A surprising discovery we made, given the widely divergent credit granting and collection policies that emerged from our study, was how few creditors could supply us with any useful quantitative measure of the effectiveness of each of the various collection steps pursued. This suggests that hit-or-miss approaches to collection that may have served in the past have not yet, in many cases, been adapted to cope with the phenomenon of wide-scale use of consumer credit. Resulting inefficiencies are presumably ultimately a cost to consumers. In fairness, we did note that a number of the large credit grantors had recently both centralized and computerized their collection operations to provide almost constant monitoring of the aging of accounts, internal reclassification of customers' credit ratings for collection purposes, credit ceiling violations *etc.* Undoubtedly small credit grantors will increasingly be at a comparative disadvantage as modern management techniques, justified largely by scale, are adopted by larger credit grantors in their collection departments.

A collection agency had subsequently taken over the debt in 24.6% of the cases in the Debtor Survey.[51] Of these, 21.4% said that the terms of repayment were varied as a result. All debtors contacted by a collection agency said that the first contact was a polite reminder. Sixty-four point seven percent said that the last contact from the agency was a polite reminder, 17.6% said that they were requested to visit the agency's office, 11.7% said they received insulting letters or phone calls, 5.8% reported that the agency threatened to contact, or actually contacted, the debtor's employer. Thirty-six point eight percent said they were contacted only once by the agency, a further 42% said that the most frequent intervals of contact were monthly or longer, 15.7% said that they were contacted about every two weeks, 5.2% said they were contacted more often than weekly.

While debtors in our survey who were contacted by collection agencies are a very small sample, the figures do not suggest pervasively abusive conduct by collection agencies, at least as perceived by the debtors themselves, or contact so frequent as to amount to a form of harassment. This impression was generally confirmed

[51] There appear to be about 60 to 80 collection agencies in Quebec. The standard terms of doing business are to charge a percentage of money recovered, often 33⅓%, although rates vary by class of account. Agencies reported to us recovery rates of between 30% and 60% depending on the class of account handled.

by our independent investigations of collection agencies. Isolated cases were uncovered of the use of simulated court forms, the use of form letters from "outside" legal firms, which had obviously been signed and sold by lawyers in blank (and in bulk), agents masquerading as representatives of government agencies such as the Unemployment Insurance Commission in order to obtain access to, or information from, a debtor. In one case a one-man collection agency for a doctor phoned at two-hour intervals throughout the day and night although it later transpired that the $20 bill was that of another patient as the consumer had insisted throughout. Another fairly prevalent practice we encountered, which seems susceptible of abuse because of conflict of interest, is the arranging of loans by collection agents from finance companies for defaulting debtors. Although collection agencies were not involved, several related practices are worth mention. Some debtors had been contacted, following a garnishment or execution, by small finance companies and money-lenders offering consolidation loans at high interest rates. *Pro rate* firms offering to take instalments from the debtor and arrange a *pro rate* agreement with his creditors for a substantial fee often disappeared with the debtor's initial payment and did nothing. However, larger collection agencies today appear to see their task as involving psychological strategies, abuses of which are harder to isolate. We reproduce (without comment) some passages from a Montreal collection agency's instruction handbook to its staff:

> a) Nationalité:
>
> Chaque nationalité à 75% possède les mêmes penchants. Il ne faudrait quand même pas appliquer cette règle dans tous les cas, car il y a toujours exception. Prenons pour commencer les canadiens-français et anglais. Pour ce qui est du canadien-français, en général il est plus agressif que l'anglais. Quand nous disons agressif, ne pensons pas qu'il est meilleur ou réussit mieux dans les affaires que l'anglais. Il est tout simplement plus explosif dû à l'étouffement de sa race depuis quelques années. Aujourd'hui il se réveille et donne bouchées doubles pour rattraper le temps si précieux déjà perdu. Donc, lors de nos entretiens téléphoniques il faut toujours chercher à ne pas augmenter la tension déjà existante. Il faut, au contraire, le traiter en égal, monter et descendre avec lui, ne lui donnant jamais l'impression que vous voulez l'écraser.
>
> ... L'Anglais est une personne déjà très froide à la base. Ne cherchez pas à le réchauffer, vous allez finir geler avec lui. Laissez-le vous apprécier et il se réchauffera par lui-même. Il souffre généralement d'un complexe de supériorité mais ils ne sont pas les seuls. La meilleure façon de transiger avec eux est de vous montrer toujours à la hauteur de la situation car ils se pensent de très grands hommes d'affaires. Ne vous laissez jamais intimider par leur langage car ils vont se servir de la bonne vieille tactique et à votre insu se hisser au plus haut sommet.

> ... L'israélite (juif). Comme tout le monde le sait, cette race a subi les pires injustices, injures, dégradations physiques et morales que les hommes ont pu connaître à travers des âges.
>
> ... Quand vous transigez avec eux, ils sont durs, mesquins et vont user de toutes les stratégies possibles pour sauver quelques sous. Mais, par contre, ce sont des hommes d'affaires. Il faudra user vous aussi de toute votre arsenal en même temps.
>
> ...
>
> b) Crainte:
>
> Ceci est le plus gros point psychologique du groupe. Nous savons que généralement l'être humain est craintif. Non pas par anormalité mais parce que la crainte fait partie de notre système.
>
> ... Pour obtenir un certain respect vis-à-vis votre débiteur, il faut toujours créer et maintenir un climat de crainte. Généralement, les gens ne peuvent pas vivre normalement sous un climat d'insécurité. La meilleure façon de créer ce climat, est de ne jamais dévoiler complètement ce qu'il adviendra si telle ou telle chose n'est pas respectée.
>
> ... Le climat de crainte est un facteur que le collecteur doit maintenir et soutenir continuellement car il est la base de son succès.

b) *Formal collection procedures*

i) General

Fifty per cent of the debtors in the Debtor Survey reported that they were the subject of a seizure against their moveables, 42.5% were the subject of a wage garnishment and 7.5% were, or had been, the subject of both in respect of the debt in question. These figures on the incidence of seizure of moveables and wage garnishment surprised us. We expected a much higher ratio of wage garnishment, consistent with patterns in other jurisdictions. Despite rather contradictory figures that emerged from our Court File Survey, figures supplied to us by Court officials for the Provincial Court for the Judicial District of Montreal (jurisdiction in claims up to $3,000) appear to confirm the pattern that emerged from the Debtor Survey. In 1974, there were 6,705 writs of execution taken against moveable property (58%), 54 against immoveable property (.5%), and 4,751 post-judgment garnishments (41.5%). This heavy reliance on executions against moveables in Montreal would seem partly explicable on the basis of the relatively high garnishment exemption and relatively low exemption from seizure of moveables.[52] In addition, rules in the Quebec Code of Civil Procedure severely circumscribe the rights of a secured creditor when goods are executed against by an un-

[52] Arts.552 and 553 C.C.P.

secured creditor of the debtor.[53] The rules relating to the terms of a sale under execution in Quebec are very permissive.[54] The Court File Survey indicated that enforcement proceedings of some kind on the judgment followed judgment in 95.4% of cases. In 30% of wage garnishments and seizures, the creditor filed a *main-levée* lifting the execution, presumably because he had been paid or come to an accommodation with the debtor, or because the execution had been invalidly taken in the first instance.

Of the debtors in the Debtor Survey, 78% said that they received a summons, 21% said they did not, and one person did not know. These figures are open to several interpretations. Given that service is almost invariably personal service by a bailiff, the figures may suggest a significant number of cases of "sewer" service by bailiffs. Another interpretation is that a number of debtors did not recognize the summons for what it was. Of those debtors who acknowledged receiving a summons, 11% said they did not bother reading it, 12% said that they read it but did not understand it, and 77% said that they both read and understood it.

Of the debtors receiving a summons, 31% responded by doing nothing, 43% by contacting the creditor or his agent, 15.5% by taking the matter to their lawyer, 7.8% by filing an appearance, and 2.6% by contesting the action. We attempted to verify some of these patterns from our Court File Survey. In 91% of cases, the debtor did not file an appearance (*i.e.*, preserve the right to file a defense), in 3% he filed a personal appearance, and in 6% of cases he filed an appearance through his lawyer. In 98% of cases, the debtor did not plead (*i.e.*, file a defense), in 0.8% of cases he pleaded personally, and in 1.2% of cases he pleaded through his lawyer. Thus, in only about 2% of all cases (about 9 out of 470) did the debtor actively involve himself in the legal proceedings as to merits. It will be recalled that only about 6% of the debtors interviewed in the Debtor Survey gave as a reason for default any direct breach of performance by the seller or creditor although a further 17.5% said they could not locate the creditor or they did not think that they owed any money. It may be inferred that there are not a large number of meritorious defenses left unlitigated, although, of course, it is unknown how many debtors may have had a defense to the debt claim if properly advised. For example, about 10% of cases in the Debtor Survey involved bait and switch sales of carpets, door-to-door sales of magazine subscriptions and encyclopedias, or health spa contracts.

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[53] Arts.604 and 612 C.C.P.
[54] Art.610 C.C.P.

ii) Seizure of goods

Of the debtors in the Debtor Survey who had had goods seized under execution, 50% said that the bailiff effecting the service had demanded payment at the time of seizure and 50% said he had not.

At the time of seizure, 61.6% of the debtors seized had no knowledge of their rights, 10.2% knew they had the right to withdraw $1,000 of goods or necessities, 2.5% knew they had the right to choose the exempt goods, 2.5% knew they had a right to appoint a solvent guardian to guarantee production of the goods on the date of sale, and 23% were aware of more than one of these rights. In 93% of all seizure cases, the bailiff provided the debtor with no information as to his rights. In 56.5% of cases, debtors claimed that the bailiff seized goods belonging to someone else. One reason why this figure is so high (apart from secured creditors' claims) is that 45.5% of the married debtors in the Debtor Survey claimed to have marriage contracts. In 95% of cases the bailiff chose the $1,000 worth of goods to be exempt from seizure. In 93% of cases the debtor made no attempt to appoint a solvent guardian and in 7% of the cases an attempt was made but one could not be found. In 44% of the cases, the seized goods were removed from the home, in 51% the goods were left in the home, and in 5% some seized goods were removed and some left. In 22% of cases, seizure papers were left and were signed by the debtor. In 44% of cases seizure papers were left but the debtor refused to sign them and in 34% of cases debtors claimed that the bailiff left no seizure papers (although he is required to do so).

From our impression of bailiffs' sales notices and the observations of the member of the research team who worked with a bailiff for part of the summer, most sales of non-business debtors are held at their place of residence. This avoids both moving the goods and, by virtue of the potential humiliation, increases the pressure on the debtor to settle. In the seizures that had reached a determination at the time of interview, 79% resulted in the debtor settling the claim to avoid sale. Only in the remaining 21% of cases did seizure proceed to sale. We believe even these figures probably over-state the percentage of seizures that generally proceed to sale. A member of the research team telephoned bailiffs' offices on the morning of 36 separate advertised sales and not one sale was proceeding. There appear to be several explanations for this. Seizure is used as a form of pressure on the debtor and appears to prove highly effective in this respect. Oppositions to seizure, either by the debtor or by a third party, prevent many sales, perhaps as many as 50%, according to the Court File Survey. Thirdly, the uncertain timing and dispersed

locations of most of the sales hopelessly undermine the efficiency of the procedure as a form of liquidating unpaid debt claims. This latter inference was supported by our observations of a number of bailiffs' sales. There were rarely more than six people present and often only two or three. Often the bailiff would "knock down" goods to members of his own staff. The other buyers were almost invariably second-hand dealers. Because the effectiveness of a seizure lies primarily in the threat it represents, in a sense the more "value destruction" it causes the more effective it is as a collection weapon.[55] We reproduce below the minutes of sale from an actual sale:

Debt: $1,438.54
Creditor: national credit card company
Debtor: Doctor
Number of Buyers at Sale: 1

(1)	1 complete rosewood wall hanging unit, consiting of liquor bar, custom cabinet for stereo and records, six drawer cabinet and serving tray, further cabinet with drop-down desk, 8 rosewood scatter shelves, size of unit 15' long, floor to ceiling, (new, still in crates) Estimated value $3,000	Sold: $100.00
(2)	4 seater leather chesterfield and matching leather arm-chair (new) Estimated value $4,000	Sold: $275.00
(3)	2 rosewood end tables with glass tops (new) Estimated value $600	Sold: $ 10.00
(4)	2 leather pouffes Estimated value $200	Sold: $ 2.00
(5)	1 1974 Smith Corona portable typewriter and carrying case	Sold: $ 15.00
(6)	1 decorator lamp for wall unit (chrome, glass and rose-wood) Estimated value $285	Sold: $ 10.00
(7)	1 20" Black and White Admiral portable T.V. (year old) (1974)	Sold: $ 26.00

Of the debtors seized, 64.5% had never been seized before, 11% had been seized once before, 9% had been seized twice before, and 15.5% had been seized three or more times previously. The Court File Survey shows that 9% of debtors were seized twice successively for the same debt. Thus for a significant portion of the debtors seized (35%), seizure had become almost a way of life.

The Court File Survey, Table 12, reveals the categories of creditors which seize most often.

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[55] *Cf.* A.A. Leff, *Injury, Ignorance and Spite — The Dynamics of Coercive Collection* (1970) 80 Yale L.J. 1, 13.

TABLE 12

Seizing Creditors

Banks	2.8%
Finance Companies	4.2%
Government	2.8%
Credit Card Companies	1.4%
Retail Creditors	18.1%
Utilities	5.6%
Professionals	18.1%
Account Buyers	2.8%
Private Creditors	13.9%
Others	30.3%
	100.0%

TABLE 13

Seizing Creditors

Government:	*Numbers*	*%*
Ministry of Revenue (Prov.)	88	8.0
Minimum Wage Commission	19	1.7
Accident Insurance Commission	19	1.7
Federal Government	17	1.5
Municipalities	54	4.9
Other Government	1	.09
	(Sub-total: 198)	(18)
Financial Institutions:		
Banks	65	5.9
Caisses Populaires	29	2.6
Finance Companies	21	1.9
Collection Agencies	34	3.1
Real Estate Companies	10	0.9
Investment Trusts	8	0.7
Credit Unions	8	0.7
	(Sub-total: 175)	(16)
Wholesalers	113	10.3
Construction Companies	31	2.8
Retail Goods & Services:		
Doctors	102	9.3
Fuel Companies	67	6.1
Utilities	20	1.8
Auto Dealers	39	3.5
Gas & Repair (Auto)	46	4.2
Car Rentals	13	1.1
Department Stores	70	6.4
Food Stores	35	3.2
Other Retail Goods & Services:	179	16.4
	(Sub-total: 571)	(52.4)

Interesting comparative figures are afforded by the Sir George Williams study of bailiff sales. In this study, every second Saturday's statutory advertisements of bailiffs' sales each month from July 1970 to June 1971 were analyzed. Of the 2,320 seizure and sale notices analyzed, the precise nature of the plaintiff and the general nature of the credit relationship could be identified in 1,088 cases. Of the cases relating to seizures of business, most of the plaintiffs were either government or wholesalers. Government departments or agencies most frequently seizing businesses were the Accident Insurance Commission, the Minimum Wage Commission and the Ministry of Revenue (126 out of 198). The balance of government seizures were mostly municipal seizures for unpaid property taxes. Wholesalers' seizures related exclusively to business debtors. A minority of the 31 seizures carried out by the construction industry were against businesses and an even smaller proportion of bank seizures related to business debts. Identifiable creditors seizing moveables, from the Sir George Williams study, are shown in Table 13.

Table 14 shows categories of debtors seized by occupation from the Debtor Survey and the Court File Survey.

TABLE 14

Debtors Seized by Occupation

Occupation:	*Debtor Survey*	*Court File Survey*
Business or Professional	29%	25 %
Skilled Tradespeople	21%	16.7%
Unskilled Labour	50%	58.3%
	100	100.0

And Table 15 shows categories of debtors seized by income from the Debtor Survey:

TABLE 15

Debtors Seized by Income

Under $3,000	36.3%
$3,000 - $5,999	18.2
$6,000 - $7,499	18.2
$7,500 -$11,999	15.2
$12,000 or more	12.1
	100.0

It must be noted that while bailiffs are court officers in the sense that they effect service of court documents and execute orders of the court, in fact, in Montreal they operate in firms as independent entrepreneurs who charge creditors on a piecework basis, in accordance with court tariffs. They are normally required to be members of the Bailiffs Corporation of Montreal, which has self-regulating powers over admission and discipline. In 1972, there were about 75 member-bailiffs in the corporation. The corporation does not exercise rigorous disciplinary action. The Pointe St Charles study reports that as of 1972, a bailiff was last suspended for misconduct in 1952.[56] Fines do not seem to enjoy much greater popularity. The Pointe St Charles study reports that in one case where a bailiff attempted to conduct a seizure, he was refused entry by the wife of the debtor who told him he could only make the seizure over her dead body. He replied that "this can easily be arranged". For this, the corporation fined him $300.[57]

Other abuses clearly abound: failure to advise debtors of their statutory rights, contrived mileage charges on service, "sewer" service, conflict of interest on sales and routine overseizure. An extreme example of the latter involved a seizure, against an elderly unemployed janitor on welfare, of an $880 stereo set for non-payment of the $17 balance of a $32 doctor's bill. In order to retrieve the set, the $17 plus $92 in various legal costs had to be paid, together with an additional $24 for retransportation charges.

iii) **Wage garnishment**

Debtors in the Debtor Survey whose wages had been garnished said they were previously notified by the creditor of his intention to issue a garnishment in 57.5% of cases. In 63% of cases debtors became aware that their wages had been garnished upon service of a garnishment notice on them. In the remaining 37% they first heard through their employer. In 74% of cases, debtors claimed that their employer did not express any opinions as to the garnishment. In 17% of cases, the employer urged the debtor to settle the debt. In 3% of cases, the employer threatened to fire the debtor and in 6% of cases the debtor was actually fired. These latter two figures are surprisingly low compared to figures reported in other studies[58] and may, in part, be a reflection of the effect of article 650 of the Quebec Code of Civil Procedure, a unique provision which renders

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[56] *Supra*, note 14, 4.

[57] *Ibid.*, 5.

[58] *E.g.*, a 19% job loss on account of garnishment, D. Caplovitz, *Consumers in Trouble* (1974), 238.

an employer civilly liable, apparently to both debtor and creditor, for damage suffered as a result of job dismissal on account of garnishment. However, in response to the question whether they were still working for the same employer, 76% replied affirmatively, 24% negatively. Of those who were not, 85% either left or were fired within 4 weeks after the garnishment, which may suggest that the garnishment did have an effect on either employer or employee in cases other than those of debtors who were explicitly fired on that account.

In 35% of all garnishment cases in the Debtor Survey, the debtor immediately settled the claim and the garnishment was lifted. Thus, like seizure, garnishment operates as an effective form of pressure on many debtors, without the necessity of execution although, unlike seizure, the majority of garnishments do proceed to execution. Of the debtors who had been garnished, 70% had never been garnished before, 14% had been garnished once before, 9% had been garnished 2 or 3 times previously, and 7% had been garnished 4 or more times. The Court File Survey showed that 9% of debtors who were garnished were garnished more than once in respect of the same debt.

As to which categories of creditors garnish most, the Court File Survey revealed the distribution shown in Table 16.

TABLE 16

Garnishing Creditors

Banks	6.8%
Finance Companies	11.6%
Credit Card Companies	4.4%
Retail Creditors	16.3%
Utilities	17.9%
Professionals	13.9%
Account Buyers	3.2%
Private Creditors	8.4%
Others	17.5%
	100.0

As to which categories of debtors are most frequently garnished, Table 17 shows distribution by occupation both from the Debtor Survey and the Court File Survey.

TABLE 17

Debtors Garnished by Occupation

Occupation:	*Debtor Survey*	*Court File Survey*
Business or Professional	16%	12%
Skilled Tradespeople	9%	19.4%
Non-skilled Labour	75%	68.6%

Debtors garnished by income are shown in Table 18 from the Debtor Survey.

TABLE 18

Debtors Garnished by Income

Income:	
Under $3,000	0 %
$3,000 - $5,999	27.3%
$6,000 - $7,499	33.3%
$7,500 -$11,999	30.3%
$12,000 and over	9.1%

The different impact of seizure of goods and garnishment on different categories of debtor by income should be noted from Tables 15 and 18.

5. General

The impact of direct transaction costs on either party in the collection process interested us.[59] The Court File Survey revealed that in 34.3% of cases, costs on the judgment fell in 0-$49 range, 39% in the $50-$99 range, 24% in the $100-$199 range, 2.5% in the $200-$299 range, and 0.2% in excess of $300. In cases where costs were incurred subsequent to judgment 72% fell in the 0-$50 range, 15.9% in the $51-$76 range, 4.7% in $77-$100 range, 4.7% in the $101-$150 range, and 2.8% over $151. To get an impression of the size of direct transaction costs in the collection process relative to the size of the claim out of which these were generated, we correlated size of the debt with the costs on judgment in Table 19.

TABLE 19

Relationship Between Size of Debt and Costs on Judgment

Size of Debt	*Costs on Judgment*				
	0-$49	$50 - 99	$100 - 199	$200 - 299	$300 & over
0-$24	89 %	11 %			
$25 - $99	93.8%	6.2%			
$100 - $249	8.8%	83 %	7 %	1 %	
$250 - $749	3.4%	55 %	39 %	2.5%	
$750 - $1,499	2.4%	4.9%	87.8%	4.9%	
$1,500 and over	4.1%	4.1%	66.6%	20.8%	4.1%

[59] See Leff, *supra*, note 55.

As to how both costs on judgment and costs subsequent to judgment may build up, we reproduce below the details of an actual file:

Debt: $395 personal loan

(1)	Writ of summons	$ 3.00
	Service of writ of summons	$ 9.50
	Inscription for judgment	$ 5.00
	Judgment costs (disbursements as above plus lawyer's fee)	($100.00)
(2)	Filing of first garnishment	$ 6.00
	Service of garnishment	$ 22.00
	Judgment costs on garnishment (disbursements as above plus lawyer's fee)	($ 38.00)
(3)	Second garnishment (on job change)	($ 42.20)
(4)	Third garnishment (on job change)	($ 41.40)
	Total costs:	$221.60
	Total received:	$303.76
	Balance outstanding:	$312.84

To conclude our Debtor Survey, we asked some subjective questions. Thirty-five and a half percent of the interviewees considered they had been fairly treated by the creditor in the collection process, 64.5% felt they had not. Thirty-six point three percent felt they had been fairly dealt with by the creditor's agents, 63.7% felt they had not. Forty-six percent felt they had been fairly treated by the Court and other officials, 54% felt they had not.

Thirty-two point six percent claimed they had heard of the Lacombe Law, but did not know what their rights were under it. Twelve point two percent had not heard of it at all. Fifty-five point two percent claimed that they knew of it and knew that they were not liable to seizure or garnishment while making payments under it. Respondents were also asked if they had ever considered going into personal bankruptcy. Nine point nine percent said that they could not afford to hire a trustee, 55.5% said that they had never considered it at all, 5% said they did not want to lose their goods in the bankruptcy, 14.8% said that they were unwilling to go bankrupt because of the stigma attached, and 14.8% said that they were planning to. Thus, about half the sample had not even considered the two major statutory programmes open to them in their state of financial distress, the Lacombe Law and personal bankruptcy.

III. POSSIBLE POLICY DIRECTIONS

1. Irrelevant prescriptions

It is perhaps useful at the outset to dispose of certain ill-conceived policy solutions sometimes proposed for treating problems of over-commitment.

a) *Censoring credit advertising*

The Quebec Minister of Financial Institutions, in a speech to an Interprovincial Conference on Consumer Affairs in Banff, May 15, 1974, announced that he was considering legislation which would prevent cash credit grantors (*e.g.*, banks and finance companies) from advertising the purposes for which they were prepared to extend credit. The object of this exercise would apparently be to stop banks and finance companies from "over-selling" credit through the medium of glossy travel or automobile advertisements. Vendor credit grantors would also be prevented from emphasizing the availability of credit in advertisements for their merchandise.

It will be obvious from our studies that very few debtors become involved in serious problems of overcommitment because they are seduced by credit advertising into buying red Cadillac convertibles or spending expensive weekends in the Bahamas. Secondly, even if this were so, it is difficult to see how this would justify a discriminatory attack on credit grantors' advertising. If the premise underlying these proposals is correct, presumably all advertising encourages over-buying. Placing the issue against this broader setting, the Galbraithian view of advertising is not so well settled as to justify legislation.

The one proposal in this area that may be deserving of serious consideration would require all lender and vendor credit grantors in all advertisements which refer to the availability of credit to include the average effective annual interest rate charged to their customers. In this way, the pleasures and pains of utilizing credit would be more obvious than at present.

b) *Interest rate ceilings*

The practice of prescribing maximum interest rates chargeable on loans is of respectable antiquity and is reflected in Canada principally in the federal *Small Loans Act*[59a] which regulates the level of interest charges on loans up to $1,500.

[59a] R.S.C. 1970, c.S-11.

As one of the authors, with Professor David Cayne, has elsewhere pointed out,[60] depending on market conditions, at best rate ceilings set above or at the market rate will be irrelevant. At worst, vendor credit ceilings set below market rates will be unenforceable; excess credit charges can be buried in the cash price. Similarly lender credit ceilings will exclude certain risks from the market who, depending on the elasticity of their demand for credit, may be forced into the illegal money market. Interest rate ceilings improve credit terms for virtually no one and many borrowers are actually prejudiced. The impotence of legislation like the *Small Loans Act*[60a] is underscored by the fact that the police estimate that the volume of loan-sharking is now of the order of $700,000,000 a year in Montreal alone.[61] Eighty percent is estimated to involve low-income debtors. Since the enactment of the Act in 1939, there have been no more than about three dozen prosecutions under it for illegal interest charges throughout Canada.

A loan-shark whom we interviewed shortly after his return from prison following (a rare) conviction under the *Small Loans Act*, gave us some insights into the nature of this credit-granting operation. He was a retired factory worker and operated out of a rooming house in the low-income suburb of Pointe St Charles. At the date of conviction, he had 500 live files, with loans running from about $30 to $500, but typically being initially in the $50-$100 range. Annual interest rates on loans under $100 tended to run at close to 500% a year, over $100 about 250% a year (no doubt reflecting fixed costs that were the same on smaller loans as larger loans). Over ten years, he had built up his capital investment from $3,000 to $50,000 in loans that he regarded as collectable. His activities provided him with full-time employment and he made his services available day and night, mainly to low-income or unemployed residents of the area. He took from his returns a very modest subsistence allowance of about $150 a month. Of his 500 active clients, fewer than 20 were paying off capital as well as interest.

Provided interest payments were met, he had no concern with capital repayments. His collection methods were relatively genteel. He would take I.O.U.'s from debtors for a sum substantially in excess of the amount advanced, and in the event of default in payment of interest would have a lawyer enforce payment through the

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[60] D. Cayne and M. Trebilcock, *Market Considerations in the Formulation of Consumer Protection Policy* (1973) 23 U.of T.L.J. 396, 411.

[60a] *Supra*, note 59*a*.

[61] *Toronto Star*, Sept. 25, 1974, A-3.

courts (witting and unwitting participants respectively in the loan-shark's criminal conduct).

The loan-shark told us the police knew of his existence but had not bothered him until the charges in question, because they accepted that he was providing a necessary service to this low-income community (as he himself vehemently asserted he was doing). While the judge in sentencing him had described him as "a social plague", it is not clear that the facts support this view. First, the police told us that it was almost impossible to get customers to give evidence as they regarded the loan-shark's services as very satisfactory. Secondly, even a rudimentary examination of the man's finances and life style suggested that the net returns from his business were quite modest. Thirdly, the annual interest rates in question may well have been justified both in terms of the high fixed costs involved in writing and collecting very small loans, and in terms of the high-risk clientele being served. After all, ten dollars lent for a week at a charge of one dollar (not even enough to cover writing and collecting the loan) involves an annual interest rate of 500%.

Loan-sharking exists to meet a real demand and, like Prohibition, will defy legal regulation. By making certain levels of interest rates illegal, the costs of credit are actually forced up reflecting reduced numbers of suppliers and higher risks of doing business. Intelligent public policy towards loan-sharking should involve taking the market away — both by an appropriate incomes policy, and by abolition of fixed rate ceilings to encourage institutional lenders to enter the small loan, high-risk market at more competitive rates.

The furthest that legislation can reasonably go is to proscribe "unconscionable" credit transactions, where interest charges bear no relation to the risk involved, as has been done in article 1040(c) of the Quebec Civil Code and provincial Unconscionable Transaction Relief Acts.[62] Perhaps this legislation could incorporate rebuttable statutory presumptions, as exemplified in the U.K. *Money Lenders Act*,[63] providing that rates in excess of stipulated rates on loans of certain sizes are presumed to be unconscionable unless the contrary is proved. Legislation attempting to stipulate firm ceilings will always be too crude and arbitrary to reflect the myriad of risks dealt with in the credit market.

c) *Minimum deposit requirements*

The proponents of minimum deposit requirements argue that

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[62] *E.g.*, R.S.O. 1970, c.472.

[63] *Money Lenders Act, 1900*, 63-64 Vict., c.51 (U.K.).

the provision of the required deposit is some evidence of credit-worthiness, and provides an inducement to the consumer to protect his equity in the goods by completing the agreement.

We see some force in the second argument but little in the first. Whether a person is credit-worthy depends, obviously enough, on his present and future income, his present and future commitments and various contingencies such as overtime and sickness. The provision of a deposit says nothing about these factors and the requirement of a deposit may well preclude consideration of them.

Minimum deposit requirements have the disadvantage of being virtually unenforceable. By "jacking-up" trade-in allowances, dealers can readily make it appear that the required deposit has been provided and, except in extreme cases, this practice is difficult to police and prosecute.[64]

d) *A full-scale curtailment of creditors' remedies*

Extreme critics of current credit practices have advocated everything from abolition of wage garnishment to abolition of all formal creditors' collection remedies.[65]

We believe that this approach, while no doubt well-intentioned, is seriously misconceived and naive in its disregard of the economic imperatives operating in the market-place.

One of the authors (with Professor Cayne) has pointed out these imperatives elsewhere and nothing in the 1972 study has shaken these views:

> Clearly, the exercise by a creditor of his remedies against a debtor for default are some of the most visible and distressing symptoms of over-commitment and it is natural enough, as a first instinct, to respond to these symptoms by advocating their removal. But, as in many other contexts, the symptoms of a problem are not its cause and to remove the symptoms does not eliminate the cause but more often than not merely gives rise to new symptoms. Once again, policy makers must accept the immutable economic imperative that lenders will only extend credit if they can do so on a profitable basis; and it is equally axiomatic that restrictions on remedies will give rise to correspondingly higher interest rates to the extent that they increase bad debt write-offs. As a result, a certain number of borrowers, unable to absorb the interest rate exacted, will be excluded from the market. More significantly, degenerative conse-

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[64] *Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law relating to Consumer Credit and Moneylending,* University of Adelaide Law School (1969), 23-24.

[65] See Cayne and Trebilcock, *supra,* note 60, 418, 419, 429, 430; see also T. G. Ipson, *Small Claims* (1972) 35 M.L.R. 18; and D. St L. Kelly, *Debt Recovery in Australia,* Report to Australian Poverty Commission (1976).

> quences will result where interest ceilings prevent the lender from charging rates consistent with restrictions legislatively imposed. In these circumstances, high-risk consumers whom these lenders would otherwise have served must withdraw from the market-place (which, admittedly, some proponents explicitly adopt as their objective), or, alternatively, enter the illegal money market where informal day and night harassment, or even the baseball bat, replace the writ of seizure.
>
> Clearly, the extent to which such legislation initiates exclusionary or degenerative processes will depend upon both the severity of the restrictions imposed and the elasticity or inelasticity of the demand for credit.... Pursuing our assumption of workable competition, market imperfections will always temper the exclusionary consequences of such rules. For example, creditors might respond to the elimination or restriction of deficiency claims and garnishments by relying more heavily on remedies not contemplated by the legislation. Thus, in Pennsylvania, the attachment of a debtor's home became commonplace after that jurisdiction prohibited garnishments. Other potential responses might include greater reliance upon threats of execution against a debtor's personal property as a form of harassment, third-party guarantees, and credit black-listing.[66]

2. Proposals for consideration

a) *The income problem*

Unquestionably, for a very large percentage of debtors surveyed in our study, a deficiency of income is the major reason for overcommitment, and only policy responses that address this issue are likely to have any effect. Rational use of consumer credit is generally predicated on fairly rapidly rising income expectations where present needs can be financed out of future income. But for debtors without those expectations, the use of credit becomes a form of income supplement which must ultimately erode buying power and create financial distress.

To discourage the use of credit as a subsistence income supplement requires policies that promote stable economic growth and employment conditions, that provide adequate educational and employment opportunities for all social and economic classes and, ultimately, a guaranteed annual income. Regulation of the debtor-creditor relationship will not touch the heart of the problem of overcommitment: insufficient income.[67]

The remaining suggestions are no more than ancillary to this central proposition.

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[66] *Supra*, note 60, 418-419; for an opposing viewpoint, see G.J. Wallace, *The Logic of Consumer Credit Reform* (1973) 82 Yale L.J. 461.

[67] *Supra*, note 60, 430.

b) *Improving the exchange of information between debtor and creditor*

Professor Arthur Allen Leff in an important and impressive economic analysis of the formal debt collection process traces the transaction costs incurred by both creditor and debtor. He argues that if each party could be made aware of the costs involved in continuing the formal collection process, invariably, the parties would settle the claim as early as possible to avoid mounting costs. Merchant to merchant debt relations proceed on this basis but rarely merchant-consumer relations. Leff recommends the presence of an impartial referee to assist negotiations between the disputants by supplying trustworthy "information that makes the [generally co-operative] merchant-merchant collection system feasible".[68] The referee would inform the debtor of the prospective transaction costs he faces if he allows the collection process to proceed further; he would also inform the creditor of the debtor's true circumstances to avoid needless transaction costs on the part of the creditor in collecting against a debtor with limited or no present ability to pay the full claim.

The intent of this proposal is to induce more cooperative accords on debt claims and avoid the waste built into the present formal collection system. Leff's proposal has much merit and essentially reflects the thinking underlying the creation of the Debtors' Assistance Board in Alberta, the Credit Referee's Office in British Columbia, and the Small Claims Court Referee's Office in Toronto. These offices, in addition to offering budget counselling services, will attempt to make *pro rate* arrangements with a debtor's creditors, recommend consolidation and instalment orders to the Court where a debtor faces several judgments, recommend variations of garnishment exemptions to the court, process Part X Orderly Payment of Debt applications (in Alberta and British Columbia) and if necessary, counsel personal bankruptcy.

It is clear, for a start, from our Montreal study that these schemes need to be vigorously advertised if the appalling ignorance on the part of debtors in distress is to be overcome. This may require sending out a statutory brochure detailing the agency's services with every enforcement process. In order to interdict the process, it should be possible for a debtor simply to fill in a part of the process documents invoking the agency's assistance and suspending execution pending recommendations to the court by the agency.

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[68] *Supra*, note 55, 44; for an extended discussion of Leff's proposals, see *Symposium* (1972) 33 Univ.of Pitts.L.Rev. 667.

This would give the neutral referee more leverage than envisaged in Leff's proposal, which ignores the individual creditor's point of view. It will rarely, if ever, be worth his while to engage in voluntary collective decision-making with other creditors when the possibility is still open of his obtaining a larger payment at the expense of existing creditors or by inducing the debtor to borrow from a new creditor to liquidate the first creditor's debt. Each of the creditors individually will try to avoid a collective arrangment (a type of "hold-out" problem, in economic terms).

However, despite the considerable merits of proposals like Leff's that would interdict the formal collection process at a relatively early stage and force negotiations between the parties through a neutral intermediary, we believe that this, in terms of policy priorities, is looking at the wrong end of the stick.

Leff states earlier in his article that "[i]f information about a person's reputation were perfect, there would be no such thing as a collection problem. The sole 'collection' practice would be [the] precise pricing of the initial transaction. The end-point of every individual credit transaction being identical with the price, no longer would any cheerfully quick repayer subsidize the slow, slovenly or evasive borrower".[69] He then, in a few lines in a long article, dismisses this as "impossible even in theory" and probably objectionable on non-economic grounds such as loss of privacy.[70]

While we accept that complete information is an unattainable ideal, we argue that the present structures could be changed to create stronger incentives for creditors to obtain reliable information and to discourage consumers from supplying misinformation. It is important to clarify the respective positions of creditor and debtor at the time when the credit is granted, not after the credit relationship has broken down and the options are much less inviting.

Reliable information alone will not solve the collection problem. Often collection problems arise because contingencies unforeseen, and sometimes unforeseeable, materialize after credit has been granted. To the extent that these possibilities have not been accurately reflected in the cost of the transaction, the creditor still faces a collection problem if he is to avoid forcing other clients to subsidize credit defaulters.

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[69] *Supra,* note 55, 28.
[70] *Ibid.*

Present priority rules, as reflected in provincial Creditors Relief Acts,[70a] the Lacombe Law and federal Bankruptcy legislation, which permit all unsecured creditors, irrespective of the time at which they granted credit, to share *pro rate* on a distribution, in our view, seriously subvert the objective of improving the exchange of information at the time credit is granted. These rules enable later creditors to unilaterally and retrospectively falsify the information on which an earlier creditor granted credit by subsequently creating competing debt claims. The incentive to search out the best available information on the credit risk to whom a creditor is considering extending credit is reduced, as is the incentive of a later creditor to make a similar search. Neither creditor will have priority.

In recognition of this problem, several commentators have proposed the creation of a public credit register where all major, unsecured debt claims must be registered if creditors are to preserve their priorities. Priorities would be determined by order of registration and unregistered debt claims would be subordinated, obviously, to all registered claims.[71]

In the light of the Ontario Government's continuing efforts at implementing *The Personal Property Security Act, 1967*,[71a] by setting up a central registry system for secured debt claims, one may question whether a public registry is the key to the proposed priority system. If on a distribution on an execution under the *Creditors Relief Act*[71b] or a distribution under a Part X type scheme or a consumer bankruptcy, all unsecured creditors were simply ranked in order of the date of granting credit, the substantial objective of this proposal would be achieved. No one would risk granting any significant amount of credit without making a serious effort to ascertain a debtor's existing commitments. The need for this information would itself provoke an appropriate response in the private sector, through the further expansion of credit rating bureaux. Privacy and considerations of accuracy of information would seem to be adequately protected through credit reporting legislation of the type already in force in most provinces.[72]

Some problems of detail would remain to be resolved, such as the back-dating of contracts by creditors to improve their priority

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[70a] *E.g.*, R.S.O. 1970, c.97.

[71] See K.E. Wenk and J.E. Moye, *Debtor-Creditor Remedies: A New Proposal* (1969) 54 Corn.L.Rev. 249; J. Ziegel, *The Globe and Mail*, October 2, 1970, B-6.

[71a] S.O. 1967, c.73.

[71b] *Supra*, note 70a.

[72] *Cf.* W. A. Sturges, *A Proposed State Collection Act* (1934) 43 Yale L.J. 1055.

position, and the ranking of different credit grantors who grant credit on the same day, especially "line" creditors, such as credit card companies and revolving credit store account operations.

While it is already a criminal offence for a person to obtain credit by fraud, the precedent of section 57 of the South Australia *Consumer Credit Act 1972*,[72a] which makes it a specific offence for a consumer knowingly to provide false information in a credit application, would seem a useful complementary reform, so that consumers can have impressed upon them explicitly in credit applications the importance of providing accurate information. It is as much in their interests as a creditor's that credit not be imprudently granted. And, in any event, deliberate misrepresentation is indefensible from whichever side of the market-place it comes.

The Montreal study showed a significant incidence (about 10%) of credit breakdowns arising from transactions involving bait and switch selling of carpet in the home, health studio "packages", and door-to-door sales of magazine subscriptions and encyclopedias. The abuses that abound in these areas can be reduced through "cooling-off" periods in door-to-door sales and more vigorous policing of misleading advertising laws. Apart from incidences of outright deception and merchant defaults, a good deal of credit delinquency could be avoided by a vigorous information programme conducted by various government agencies which presently receive and mediate consumer complaints. The complaints records of firms, including name, product and service sector, could be collated and disseminated widely to the public. In effect, existing complaints agencies would operate as business rating bureaux for consumers paralleling the function that credit rating bureaux perform for merchants. While problems of privacy and accuracy of information would need to be resolved, these are not substantially different from problems faced by consumers with credit rating bureaux and now the subject of special legislation.

3. **The externalities problem**

a) *Exemption from execution*

The exemptions from execution in force in the various provinces of Canada, especially the exemptions from wage garnishment, for the most part, are extremely modest. For example, Alberta permitted a married debtor to retain $200 per month plus $40 for each child,

[72a] *Consumer Credit Act. 1972* South Australian Statutes 1972. Part II. no. 134.

and $100 a month in the case of single debtors.[73] While some other provinces are relatively more generous, including Quebec,[74] the fact remains that time and again in our interviews with debtors who had been subjected to garnishment, we were told that following garnishment, they quit their jobs and went on welfare or unemployment insurance. The difference between the level of public welfare benefits and the allowable exemption from garnishment was so small that it was not worth working for the difference. For example, in our Debtor Survey we interviewed a woman aged 26 with two small children left by her recently deceased common law husband. She had been working as a telephone operator but when her wages were garnished she quit and went on welfare. She told us bluntly that the only realistic employment alternative for her was prostitution (where garnishment would be impractical) but had decided against it (rather pragmatically) for fear of contracting venereal disease. Table 20 from the University of Montreal study of Lacombe Law debtors dramatically underscores this point.

TABLE 20

Situation Poverty Line	*Situation before making the Deposit*	*Situation after making the Deposit*
Above the Poverty Line	61.7% (145)	26.8% (63)
Below the Poverty Line	38.3% (90)	73.2% (172)
TOTAL	235	235

The exemption levels in other, less generous, provinces would necessarily reinforce the reaction of debtors similarly circumstanced to those we interviewed. This represents a perfectly rational economic calculation on the debtor's part. The results are that the costs of credit breakdown are passed on to the public at large, and the purpose of the garnishment procedure is, perhaps counter-intuitively, subverted by the very illiberality of the exemptions. Clearly, wage garnishment exemptions cannot be set below, at, or even marginally above, the relevant welfare entitlements claimable by a garnished debtor if the purpose of the law is to encourage him to continue working and to pay off his creditor over time. The exemptions must be set *significantly* above the relevant welfare entitlements so

[73] *Alberta Rules of Court*, Alta Reg. 390/68, Rule 483; a recent amendment, July 15, 1976, has increased these amounts to $400, $80, and $300 respectively.
[74] Art.553 C.C.P.

that a *significant* incentive to work remains. The details are no doubt difficult to ascertain, but the guiding principle is surely clear. Any exemption formula should also provide for regular adjustments to take account of changes in the cost of living and for variations in the exemption in particular cases to take account of any special circumstances of the debtor.

The same observations apply, in principle, to exemptions from execution against personal property. For example, in terms of household effects, New Brunswick exempts only bedding, clothing, and food for 3 months not exceeding $100 in value.[75] Newfoundland and Nova Scotia and Prince Edward Island exempt bedding, clothing and necessary cooking utensils.[76] As many debtors subject to seizure in our survey told us, and as is borne out by the extraordinarily high percentage of claim settlements after seizure and before sale, the only way of avoiding being divested of assets necessary for even subsistence living is to borrow the amount of the creditor's claim from someone else — perhaps a finance company from whom the facts are concealed, a friend, or the neighbourhood loan-shark. The debt problem is not solved; it is simply swept under another carpet.

b) *Costs of wage garnishments to employers*

The costs entailed for employers in administering wage garnishments are clearly a major reason why some employers fire employees who are subject to garnishment. One American study found that 53.1% of employers who discharged employees on account of garnishment gave costs as the reason.[77] Other American studies show that an employer's costs in administering a single garnishment deduction run between $15 and $35.[78]

In Quebec employers are not permitted to make any deductions for payments on a garnishment to defray expenses of administration. This again involves a case of the creditor and debtor following credit break-down being permitted by the law to transfer part of the costs to an innocent, involuntary third party, who, of course, reacts predictably. It is not fair to the employer; ultimately, it is not in the interests of the debtor, who stands to suffer from an adverse reaction

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[75] *Memorials and Executions Act*, R.S.N.B. 1973, C.M-9, s.33.

[76] *Judicature Act*, R.S.N. 1970, c.187, s.123; *Judicature Act*, S.N.S. 1972, c.2, s.41; *Judgment and Execution Act*, R.S.P.E.I. 1974, c.J-2, s.25.

[77] C.K. Grosse and C.W. Lean, *Wage Garnishment in Washington — An Empirical Study* (1968) 43 Wash.L.R. 743, footnote 78 on page 756.

[78] *Ibid.*, footnote 74, 756; Western Center on Law and Poverty, *Wage Garnishment — Impact and Extent in Los Angeles County* (1968).

by the employer; and it is not in the interests of the creditor who also suffers in the event of the debtor being fired. The employer should be permitted to deduct a realistic sum from garnishment payments to cover costs and these should be absorbed by the collection process like other costs.

4. Transaction costs

There are several issues involved in the transaction costs generated for creditors and debtors by the collection process.

Firstly, can these costs be reduced? Does all service of process need to be personal? Why should service not be required by registered post in the first instance, and personal service only permitted where service by post proves impossible? All sales following seizure by unsecured creditors and perhaps some sales following repossession by secured creditors (in the absence of recourse agreements with the dealer) should be held at a well-advertised, accessible place and time each month to maximize the number of buyers attending sales and reduce the needless "value destruction" that invariably occurs. In those common law provinces which still require separate wage garnishments to be filed against a debtor each pay day or each pay period, a single garnishment against a given employer having continuing effect until the debt is liquidated should be permitted.

More difficult issues are raised by the question of state subsidization of transaction costs. Many provinces permit creditors to sue in provincial Small Claims Courts where process costs are nominal. The rationale for subsidization of ligitation costs in Small Claims Courts is a desire to provide roughly equal access to the courts for both business and non-business litigants by attempting to compensate non-business litigants for the scale economies available to business litigants. Why the subsidy should be extended to the latter is not clear and even though higher costs engendered in other courts will often be passed on to the debtor, it may be that in the present context this position provides a more desirable regime of incentives and disincentives to the formal coercive collection processes.

If the true costs of coercive collection are concealed through state subsidies of the collection process, both creditors and debtors have less incentive to exchange the information which might prevent unnecessary court costs. Public subsidies for the costs of credit breakdown would be better directed to the income security problem so that improper use of credit is discouraged at the outset. In addition, our earlier proposal allowing a debtor to invoke the intervention of a

Credit Referee or Debtors Assistance Board before coercive enforcement of a judgment proceeds would operate to mitigate normal litigation costs, although involving some public subsidy.

5. Due process

The constitutional debates that are currently raging in the United States over a debtor's constitutional right to due process before his property can be adversely affected, have clear policy implications for Canada. A compelling policy argument grounded simply in considerations of equity (quite apart from constitutional considerations) can be made out for a requirement of due process in certain cases:[79] prejudgment garnishments, utility cut-offs by statutory monopolies such as gas, hydro, and telephone utilities where there is no alternative source of supply,[80] self-help repossession by secured creditors.

An actual hearing, rather than a reasonable opportunity for a hearing, is not necessary in every case. Due process requirements would seem sufficiently met if the debtor were able to fill out a portion of the process form in each case where he desires a hearing; the process should be suspended pending the hearing. In the case of self-help repossession where in many common law provinces no formal process is required, prior notice of repossession should be required and this notice could then be framed so as to permit a request for a hearing. The procedure here suggested is closely modelled on the provisions of the Saskatchewan *Limitation of Civil Rights Act*[81] which also empower the judge on the hearing, irrespective of the validity of the creditor's claim, to make a number of discretionary orders, including suspension of repossession and rescheduled instalment payments. This seems a useful ancillary power and may avoid needless destruction of the value of the debtor's property.

6. Defects in statutory rehabilitative schemes

The Part X wage earner scheme under the federal *Bankruptcy Act*,[81a] the Quebec Lacombe Law variant thereof, and proposals contained in the new federal *Bankruptcy Bill*[81b] for amending Part X,

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[79] See U.S. National Commission on Consumer Finance, *supra*, note 4a, 27-31.

[80] In Montreal, our research indicates that utility cut-offs run at between about 3,000 and 6,000 per major utility each year.

[81] R.S.S. 1965, c.103, s.19-22A.

[81a] R.S.C. 1970, c.B-3.

[81b] *An Act Respecting Bankruptcy and Insolvency*, Bill C-60, 1st reading, May 5, 1975.

all suffer from certain common defects given the ostensible rehabilitative objectives of the legislation.

The first problem pertains to secured creditors. One of the attractions for a debtor to enter into a Part X scheme rather than to go bankrupt is that he is able to keep his property in return for an undertaking to pay off his debts in full over a period of time (3 years under Part X). Secured creditors are, however, exempted from Part X with the result that many debtors whose major assets are subject to security will find it more rational to go bankrupt where the assets are still lost but three years of payments can be avoided. To make the discipline involved in making three years' payments an attractive alternative to personal bankruptcy, which is prejudicial both to the debtor and his creditors generally, secured creditors should be subject to Part X, thus freezing their security during the duration of a scheme, payments to them being subject to the same rate of determent as that applied to other creditors. On the termination of the scheme (if it is a composition as proposed in the Bankruptcy Bill), the unpaid residue of their claims should revive, payable at the contract rate, with their security then realizable in the event of further default. Without such restrictions on the rights of secured creditors, they will be in a position to subvert many Part X type schemes by destroying any incentive for the debtor to enter into such a scheme and prevent creditors generally from obtaining the benefit of the debtor's payments, a benefit which disappears, of course, once bankruptcy occurs.

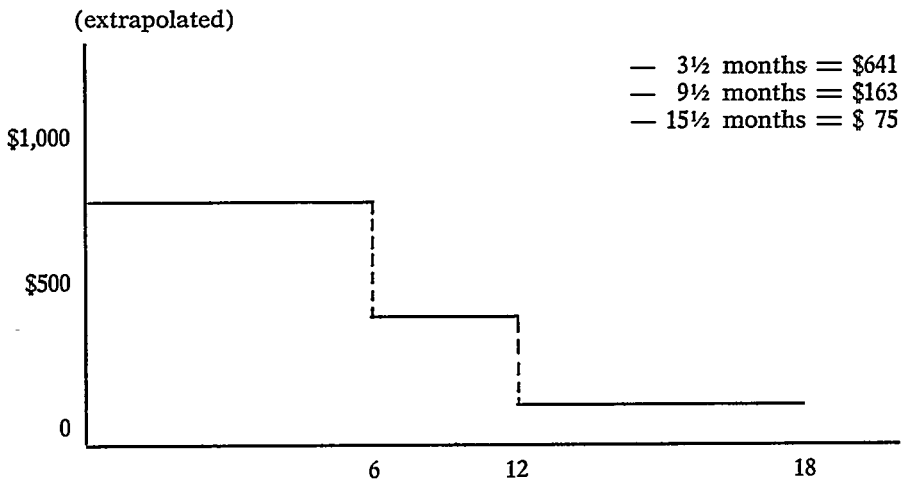
It is, no doubt, true that these proposals will have some impact on secured creditors' lending and pricing policies. These costs may be outweighed by the rehabilitative virtues of Part X where a debtor is forced to adjust to an imposed form of budgetary discipline, the value destruction inherent in bankruptcy is avoided, and unsecured creditors who almost always lose in a bankruptcy, are satisfied.

The second problem is that of after-acquired creditors. Under a Part X scheme, the debtor is entitled to retain a reasonable living allowance out of his wages (under the Lacombe Law, the non-garnishable portion of his wages). Because this exemption is fixed, a debtor under the scheme has little or no incentive not to run up further debts, as he suffers no immediate consequences. If further creditors are simply brought under the scheme, the short-run, terminal rehabilitative purpose of the scheme instead becomes a permanent way of life encouraging greater financial irresponsibility. As we have already pointed out, improved exchange of information at the time that credit is granted should ensure that future creditors

are more frequently aware of the debtor's circumstances before they extend credit. Secondly, it might perhaps be made a criminal offence for a debtor to obtain further credit while under the scheme. Thirdly, if credit is in fact so obtained, this should be treated as terminating the scheme in the sense that creditors then become free again to invoke their normal collection remedies while the debtor may consider personal bankruptcy.[82]

The third problem with Part X and similar schemes is the principle of voluntarism in regard to payments adopted in the legislation. In general, the initiative rests with the debtor to make the appropriate payments into court each pay day. The consequences are predictable. They are indicated in Table 21 from the University of Montreal study of Lacombe Law debtors.[83]

TABLE 21



Time elapsed since inscription (in months)

Table 22 from the University of Montreal study, projects the periods of payments that would be required for debtors to liquidate their debts considering both the deposits already made and the debts to be liquidated:[84]

[82] For a more extended discussion of some of these issues, see Canadian Consumer Council, *Report on Personal Bankruptcy*, June 7, 1972.

[83] *Supra*, note 17, table 43, 97.

[84] *Ibid.*, 104.

TABLE 22

Inscription: Periods of Payments Necessary	6 to 12 months 1972	1 to 5 months 1973	6 to 12 months 1973	TOTAL
No Possibility	19 (16.3%)	28 (25.6%)	35 (27.3%)	82 (23.2%)
More than 20 years	21 (18.1%)	17 (15.6%)	12 (9.3%)	50 (14.1%)
From 15-20 years	10 (8.6%)	5 (4.5%)	0 (0.0%)	15 (4.2%)
From 10-15 years	20 (17.2%)	6 (5.5%)	7 (5.4%)	33 (9.3%)
From 5-10 years	12 (10.3%)	13 (12.0%)	15 (11.7%)	40 (11.3%)
From 0- 5 years	24 (20.6%)	30 (27.5%)	41 (32.0%)	95 (27.0%)
No Claims	10 (8.6%)	10 (9.1%)	18 (14.0%)	38 (10.7%)
TOTAL	116 (32.8%)	109 (30.8%)	128 (36.2%)	353 (100.0%)

This pattern is reinforced by the Alberta study of Part X debtors, where over 50% were in arrears in their monthly payments, 41.67% being 90 days or more in arrears.[85]

The reasons for this seem obvious. Firstly, debtors suffering from a chronic income deficiency, caused by unstable employment, sickness or high day-to-day family financial outgoings, simply cannot pay anything. They have no discretionary income from which to make payments. Wage earner plans can be of no use to them. Secondly, to the extent that the exempted portion of a debtor's wage is lower than welfare entitlements, he will simply stop working, as in the case of garnishments. Thirdly, the reason why many debtors are financially distressed is that they lack budgetary self-discipline. To expect them to develop it overnight and maintain it over a period of several years is simply naive. We argue that, *provided the exemptions are realistic*, a debtor's payments under Part X or the Lacombe Law or indeed any instalment or consolidation order made by a court, should be deducted at source as in the case of a garnishment.

[85] *Supra*, note 22, 6.

Moreover, if creditors are expected to forego their normal collection rights for an extended period, as Part X entails, it seems reasonable that there be some assurance of continuity of benefits to them under the scheme. Deduction at source is an accepted principle for all kinds of other imposts, and again provided the exemptions are realistic and provision is made for variation in the event of unforeseeable changes of circumstances, it is hard to see what objection can be made against it.

The final issue raised by the Part X type wage earner scheme is its relationship to personal bankruptcy. It is now widely argued that the bankruptcy process should serve a rehabilitative function as well as providing a collection tool for creditors.[86]

On the one hand one might argue that for a debtor who is hopelessly overcommitted, any prospect of being able to lift himself out of his financial mire and start afresh dictates bankruptcy where, in return for surrendering his non-exempt assets to his creditors, he is permitted to unload his debts and obtain a discharge within a very short period. However, on the other hand, a readily available bankruptcy regime, which is not restricted in its availability to debtors of the kind above described, encourages not rehabilitation but financial irresponsibility. Curiously, neither the existing *Bankruptcy Act*, the Study Committee's proposals for a new Bankruptcy law[87] nor the new Bankruptcy Bill itself attach any significant conditions to a debtor's right of access to bankruptcy. For example, one might have thought that one precondition on which the Bankruptcy Court should be required to be satisfied before accepting a debtor's assignment is that a wage earner plan under Part X is not feasible because of the scale of overcommitment relative to the debtor's projected income stream. If it is feasible for a debtor over, say three years to pay off all or a substantial portion of his debts, is there any case for making bankruptcy available to him? Again, to return to Leff's point, if cooperative (collective) accords between a debtor and his creditors generally produce the most mutually advantageous settlements of claims, and creditors are to be discouraged from unilateral use of coercive collection remedies, should debtors have total freedom to repudiate unilaterally, through bankruptcy, their obligations to their creditors?

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[86] See *e.g., Report of the Study Committee on Bankruptcy and Insolvency Legislation*, Ministry of Consumer and Corporate Affairs, Information Canada (1970), 86.

[87] *Ibid.*

7. Discriminatory regulation

Collection agencies are state licensed and regulated in every province in Canada and certain collection practices prohibited. It is difficult to justify singling out collection agents for regulation. If a collection practice is offensive and unacceptable, then it is offensive and unacceptable whether it is engaged in by collection agents, bailiffs, lawyers acting for creditors or collection agents, or by the creditor himself. Only British Columbia in its *Debt Collection Act*[88] and Manitoba in its *Consumer Protection Act*[89] have accepted the logic of this. It is important in legislation proscribing certain collection practices that civil consequences be attached to the use of these practices (*e.g.*, unenforceability of the debt claim) so that enforcement resources, public and private, are optimized, and all enforcement initiatives do not rest with a typically under-resourced state agency.[90]

In the case of bailiffs in Quebec, their position both as official court officers and as entrepreneurs working directly for creditors on a piecework basis involves a hopeless conflict of interest. One of two solutions seems open. The first is to make them full-time salaried employees of the court, like other court officials, as is the case in many other jurisdictions. If this is thought likely to be less efficient than an entrepreneurial bailiff system, then at least bailiffs should be recognized for what they presently are: collection agents for creditors. If this is to be the case their self-regulating status should be completely withdrawn. They should be licensed and regulated by an independent state authority, as in the case of other collection agents.

8. The process of reform

Over the past fifteen years, the area of consumer credit has attracted more legislation than any other area of consumer protection. Western jurisdictions have accumulated a great deal of experience in judging the efficacy of different legislative approaches. It is surely time to review and consolidate that experience, abandon-

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[88] S.B.C. 1973, c.26, s.14.

[89] R.S.M. 1970, c.C-200 as am. by S.M. 1970, c.63, s.100.

[90] *E.g.*, S.M. 1970, c.63, s.102, where a debtor is given a right to recover from the creditor three times the amount of the debt if the creditor charges the debtor with an amount not rightfully collectible under s.100.

ing the intuitive method that has characterized public policy-making up to now.

The goal in Canada might well be a uniform provincial Consumer Credit Code. As a first, and urgent, step towards this goal, the task of improving our data collections on critical questions must be embarked upon. The various debtors' assistance courts and agencies dealing with debt problems should be encouraged, across all jurisdictions, to develop common indicators for collecting and reporting relevant data. We make no claims to have performed this task in our very modest study; this is just a beginning. Without hard, empirically unassailable facts, policy-making in the regulation of the consumer credit market will remain what it has always been — at best an exercise in accidental wisdom.