



“BUY NOW, PAY LATER”: ASSESSMENT OF RISKS AND REMEDIES

RESEARCH REPORT

2023

Option consommateurs has received financing under Innovation, Science and Economic Development Canada's Contribution Program for Non-profit Consumer and Voluntary Organizations. The views expressed in this report are not necessarily those of Innovation, Science and Economic Development Canada or the Government of Canada.

Reproduction of this report, in whole or in part, is authorized, provided the source is acknowledged. Its reproduction or any allusion to its content for advertising or profit-making purposes is however strictly prohibited.

Author: Clarisse N'kaa

Option consommateurs
50 Sainte-Catherine Street West, Suite 440
Montreal, Québec)
H2X 3V4
Telephone: 514 598-7288
Fax: 514 598-8511

E-mail: info@option-consommateurs.org
Website: www.option-consommateurs.org

Contents

Option consommateurs	iv
Acknowledgments	v
Summary	vi
CHAPTER 1. INTRODUCTION: THE ISSUES	7
1.1. CONTEXT	7
1.1.1. PRODUCT CLASSIFICATION.....	8
1.1.2. COMPANY CLASSIFICATION.....	9
1.1.3. THE INDEBTEDNESS ISSUE	9
1.1.4. THE RECOURSE ISSUE	10
1.1.5 THE LITERACY ISSUE.....	11
CHAPTER 2. ANALYTICAL FRAMEWORK AND METHODOLOGY	12
2.1. CREDIT/INDEBTEDNESS DIMENSION: INDICATORS	12
2.1.1. THE CREDIT AGREEMENT	13
2.1.2. FORMAL REQUIREMENTS FOR CONTRACT FORMATION	15
2.1.3. CLASSIFICATION OF THE ENTERPRISE.....	16
2.1.4. PREVENTIVE MEASURES AGAINST INDEBTEDNESS.....	17
2.2. APPEAL/DISPUTE SETTLEMENT DIMENSION	19
2.2.1. REMEDIES UNDER THE BANK ACT AND PROVINCIAL LAWS	20
2.2.2. EQUITY MEASURES IN DISPUTE RESOLUTION.....	21
2.3. THE LITERACY DIMENSION	22
2.4. METHODOLOGY	23
CHAPTER 3. DATA PRESENTATION	25
3.1. CONTRACT AND POLICY DATA	25
3.1.1. Credit/indebtedness dimension data	25
3.1.2. Data related to dispute recourse/resolution Dimension	29
KLARNA.....	29
3.1.3. Literacy data dimension	31
3.2. FOCUS GROUP DATA.....	32
3.2.1. Credit/indebtedness dimension data	32
3.2.2. Recourse/dispute resolution dimension data	34
3.2.3. Literacy dimension data	34
CHAPTER 4. DATA ANALYSIS	36
4.1 What are the risks associated with the emergence of BNPL financing, their companies and indebtedness?.....	37
4.1.1. Risks related to the credit/indebtedness dimension	37
4.2 What are the risks associated with BNPL dispute resolution?	43
4.2.1 Risks related to dispute resolution	43
4.3. What are the risks related to consumer literacy about BNPL?.....	46
4.4. Does the legislation in force in Canada sufficiently protect consumers against these emerging products?.....	48
CHAPTER 5. CONCLUSION AND ANSWER TO THE GENERAL RESEARCH QUESTION	50
5.1. Our recommendations.....	52
Appendix 1 – Discussion guide	53

Option consommateurs

About Option consommateurs

Option consommateurs is a non-profit association whose mission is to help consumers and defend their rights.

Option consommateurs informs consumers who have a disagreement with a merchant, through consultation on budgeting and information sessions on debt, consumer law and privacy protection. Each year, we produce research reports on important consumer issues. We also intervene with policy-makers and the media to denounce unacceptable situations.

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class actions suits and applying pressure on government authorities and businesses. You can help us do more by supporting Option consommateurs.

For more information: www.option-consommateurs.org.

Acknowledgments

This research was conducted and written by Clarisse N'Kaa, lawyer and analyst at Option consommateurs.

The author would like to thank the employees, interns and volunteers at Option consommateurs who, directly or indirectly, collaborated in this research. Among her colleagues, the author especially wishes to thank Mtre Sarah-Ève Levac and Mtre Sylvie De Bellefeuille for their help and support during the research.

The author is grateful for the interview granted by Maya Cachecho, a professor in the Faculty of Law at Université de Montréal, as well as her student, Vahidah Gholami, whose doctoral studies focus on fintechs. She would also like to thank Mr. Jacques St Amant, an expert on banking and payment law, for his help during the research. Thanks also to Geneviève Saumier, law professor at McGill University, for the interview she granted.

Finally, the author thanks everyone who contributed to the review of this report. She would like to thank Bruno Marien, sociologist and lecturer at the Faculty of Political Science and Law at Université du Québec à Montréal, for his methodological support. Thanks to Jean-Pierre Beaud, professor at the same faculty, who carried out the evaluation of the report. Finally, she would like to thank Roy Cartlidge for his English translation.

Summary¹

A new financing formula, known as “Buy now, pay later” (or “BNPL”) is steadily making its presence felt on the Canadian consumer landscape. Unlike the model offered by traditional financing companies, BNPL permits consumers to obtain financing for small purchases. The emergence of this new formula, offered by “fintechs” such as Sezzle, Affirm, Afterpay and Klarna, raises numerous questions, particularly as they relate to consumer protection. In our study, we examined the risks associated with credit and indebtedness, recourse in cases of dispute, and consumer literacy regarding the phenomenon.

Accordingly, our study led us to consult the relevant regulations in force, the contracts/agreements of these companies and the information posted on their websites. We supplemented our data by holding two focus groups, one in Québec and one in Ontario. This procedure revealed important discrepancies between, on the one hand, the relevant legislation in force and the content of the contracts/agreements, and, on the other, between consumers’ perceptions and the actual content of the agreements and regulations.

For example, when it came to credit and indebtedness, our research revealed difficulties of interpreting “Buy now, pay later” agreements as credit contracts, due to general vagueness and the diversity of practices, particularly with regard to fees and whether these companies have a lender’s license. One consequence was that credit provisions to protect the consumer from excessive indebtedness were not always included in the agreements. Other practices, such as NSF charges, loan stacking or entries in the consumer’s credit file also gave cause for concern.

As regards recourse and dispute resolution, our research brought to light the need for an effective service to assist consumers in resolving their problems, the existence of certain clauses that might limit consumers’ access to justice, and the need to clarify the applicability of chargebacks to this phenomenon.

Ultimately, our research revealed the need to improve consumer literacy about these new financing products.

¹ We should point out that between the time of the collection of data (agreements, contract and information) from these companies’ websites and the time of the final drafting of this report, the websites have undergone modifications, and it is possible that certain information about these companies contained in this report has since changed. However, this does not alter the recommendations arising from our analysis in the report.

CHAPTER 1. INTRODUCTION: THE ISSUES

1.1. CONTEXT

Formerly reserved for high-value purchases, Buy Now, Pay Later (BNPL) financing has undergone a makeover. Is it really the same phenomenon? While the old BNPL financing formula made it clear that the product was either a loan or a credit offered by a bank or a financing company, the situation still stands in need of clarification when it comes to the new version. BNPL financing allows the consumers to finance small purchases (make-up products, clothes) over a short period (2, 3 or 4 instalments); it is sometimes presented as a simple method of payment without fees or interest, sometimes as a credit product that will show up as a loan in your credit report.² The *modus operandi* seems similar to the old model, whereby a merchant offered financing in partnership with a major Canadian financial institution (bank, *caisse*) and financing companies such as ATB Financial or credit unions.³ This time, however, the ones offering the financing are fintech companies⁴ such as Affirm, Afterpay, Klarna or Sezzle. Unlike traditional forms of financing, the product offered by these companies requires reimbursement by debit, directly from the customer’s credit or debit card.

The model adopted by this emerging phenomenon raises questions about both the risk of indebtedness and protection of consumers. In Canada, the first data published on BNPL financing products points to their growing popularity, and to the possible risks in terms of indebtedness, vagueness in the regulations and in resolving disputes related to them.⁵ The literature presents BNPL products as unregulated fintech products.⁶ There are reports that in other jurisdictions,⁷ these new forms of financing fall outside the scope of existing consumer protection laws. The issues raised by the phenomenon reside in the classification of the product (financing) and the companies that offer it, indebtedness and dispute resolution.

2 <https://www.cNBC.com/2021/12/31/equifax-is-adding-buy-now-pay-later-payments-to-credit-reports.html>.

3 Option consommateurs, “The Highs and Lows of Long-Term Financing” (June 2014), p. 11, available online: <https://option-consommateurs.org/wp-content/uploads/2017/06/oc-2013-2014-finance-long-term-rapport.pdf>.

4 Di Johnson, John Rodwell, Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing, 2021, online at: <https://bit.ly/3NUODGF>.

5 Financial Consumer Agency of Canada, Pilot Study: “Buy Now, Pay Later” Services Available in Canada (2021), online at: <https://bit.ly/38omveO>.

6 Benedict Guttman Kenney, Chris Firth, John Gathergood, *Buy Now, Pay Later... On Your Credit Card* March 2022, online at: <https://arxiv.org/pdf/2201.01758v4.pdf>.

7 Di Johnson, John Rodwell, Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing, 2021, online at: <https://bit.ly/3NUODGF>.

1.1.1. PRODUCT CLASSIFICATION

According to one British report,⁸ despite its similarities to other credit products, it is difficult to clearly define, from a regulatory point of view, what a BNPL product is. In a similar vein, another foreign (Australian) report⁹ on the subject emphasizes that the product that fintechs offer to consumers cannot be considered as credit. Classification is important because, unlike regulated lenders, companies offering these products are not required to provide certain information at the pre-contract stage and are exempt from advertising rules on credit or assessment of consumers' ability to pay, or on the settlement of disputes.¹⁰ In the United States, despite the fact that under federal law a product is not considered a loan when there is no interest or when repayment involves less than four instalments, the state of California nevertheless concluded that BNPL constitutes a loan.¹¹ Even though, under the *Truth in Lending Act*, they are not considered to be offering credit, these companies are obliged to hold a valid state-issued license to engage in such practices. In one case dealt with in California, the company Sezzle claimed that it did not grant loans to consumers but purchased contracts from merchants who were not subject to Californian loan laws. The Department of Business Oversight (DBO) rejected this argument and concluded that Sezzle had gone beyond simply buying credit sales contracts and was making loans to consumers:

Sezzle's purported purchasing of credit sale contracts between merchants and California consumers constitutes the making of loans under California law and, thus, requires a CFL license. "All of the negotiations, circumstances and conduct of the parties surrounding and connected with" the transactions show that Sezzle did not buy merchants' credit sale contracts; Sezzle provided consumers temporary use of money.¹²

The DBO concluded that, given the nature of the BNPL transaction, it should be considered a loan, regardless of its form. But what is the situation in Canada? This is what this research will attempt to elucidate. From the outset, however, it is important to point out that consumer credit is regulated in Canada, and that in Québec, for example, when talking about a loan, two conditions must be met: a term and charges.¹³

8 Benedict Guttman Kenney, Chris Firth, John Gathergood, *Buy Now, Pay Later... On Your Credit Card* March 2022, online at: <https://arxiv.org/pdf/2201.01758v4.pdf>.

9 Di Johnson, John Rodwell, Thomas Hendry, *Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing*, 2021, online at: <https://bit.ly/3NUODGF>.

10 Benedict Guttman Kenney, Chris Firth, John Gathergood, *Buy Now, Pay Later... On Your Credit Card* March 2022, online at: <https://arxiv.org/pdf/2201.01758v4.pdf>.

11 Di Johnson, John Rodwell, Thomas Hendry, *Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing*, 2021, online at: <https://bit.ly/3NUODGF>.

12 <https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/12/Sezzle-Statement-of-Issues.pdf>.

13 *Consumer Protection Act* (CPA), CQLR, c.s.1. f.

1.1.2. COMPANY CLASSIFICATION

BNPL companies call themselves fintechs. A fintech is a company that innovates by using technology to rethink financial services.¹⁴ They are found in various sectors, including insurance, payment, and now loans. In some cases, fintechs originate from within recognized financial institutions, in others, they operate independently of financial institutions. As the phenomenon of BNPLs arises in other jurisdictions, such as Australia or the United Kingdom, certain reports emphasize the absence of specific legislation for fintechs and the importance of determining the appropriate regulatory approach to ensure better protection of consumers. For example, these reports emphasize that if the regulatory approach is based on the classification of the company rather than on its practices, a consumer could buy products on credit, pay them off or go into debt, incur fees and risk damaging their credit rating without any consumer protection laws to protect them.¹⁵ According to some authors,¹⁶ current Canadian regulations—particularly in banking law and consumer protection—create a number of issues and challenges related to integrating fintechs within the banking services market. The criticisms generally levelled at fintechs relate to the fact that they avoid the regulations of the Canadian banking industry and financial institutions, which should theoretically provide them with more flexibility in their operations.

Does this mean that the rules laid down for lending or credit do not apply to BNPL products? This is what we shall see shortly.

1.1.3. THE INDEBTEDNESS ISSUE

BNPL products are presented to consumers as an alternative to credit, with no fees or interest attached, that will help them achieve better management of their finances. However, the literature is increasingly showing that there is a link between these products and consumer indebtedness, due in particular to the model used and the resulting ease of access. For example, it allows consumers to accumulate several financing plans at once, which can easily incur a risk of indebtedness. Someone who has commitments to several companies at the same time could lose track of their payments: “If a consumer has multiple purchases on multiple schedules with multiple companies, it may be hard to keep track of when payments are scheduled.”¹⁷ Moreover, in a decision rendered in the USA¹⁸ involving one such company, the judge came to

14 Sylvie Bourdeau, Nicolas Faucher, Charles Alexandre Brosseau, “Les Fintechs: quels sont les enjeux juridiques ?” in *Développements récents en droit bancaire*, 2017, consulted online:

[https://unik.cajj.qc.ca/recherche#q=%20FinTechs%20%2Cissues%20juridiques&t=unik&sort=relevancy&f:cajj-unik-checkboxes=\[Jurisprudence,Doctrine,L%C3%A9gislation\]&m=detailed&bp=results&nq=true](https://unik.cajj.qc.ca/recherche#q=%20FinTechs%20%2Cissues%20juridiques&t=unik&sort=relevancy&f:cajj-unik-checkboxes=[Jurisprudence,Doctrine,L%C3%A9gislation]&m=detailed&bp=results&nq=true).

15 Di Johnson, John Rodwell, Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing, 2021, online at: <https://bit.ly/3NUODGF>.

16 Sylvie Bourdeau, Nicolas Faucher, Charles Alexandre Brosseau, “Les FinTechs : Quels sont les enjeux juridiques ?” in *Développements récents en droit bancaire*, 2017, consulted online:

[https://unik.cajj.qc.ca/recherche#q=%20FinTechs%20%2Cissues%20juridiques&t=unik&sort=relevancy&f:cajj-unik-checkboxes=\[Jurisprudence,Doctrine,L%C3%A9gislation\]&m=detailed&bp=results&nq=true](https://unik.cajj.qc.ca/recherche#q=%20FinTechs%20%2Cissues%20juridiques&t=unik&sort=relevancy&f:cajj-unik-checkboxes=[Jurisprudence,Doctrine,L%C3%A9gislation]&m=detailed&bp=results&nq=true).

17 <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/>.

18 See paragraph 42 of the decision: <https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/12/Sezzle-Statement-of-Issues.pdf>

the conclusion that some charges billed to consumers may be higher than those required under certain traditional credit agreements. Finally, since these products are often linked directly to debit or credit cards, in the event of a lack of funds, the consumer could be obliged to pay administration fees to both the issuer of his card and to the BNPL financing company. In Australia, it has been shown that users of BNPL products who linked their credit cards to their BNPL accounts experience interest charges consistently higher than credit card users who have no such accounts linked to their cards.¹⁹ Furthermore, in the United States, some financial institutions such as Capital One have prohibited their users from linking their BNPL accounts to credit cards because they believe that BNPL transactions are too risky, not only for customers but also for themselves.²⁰ Twenty percent of consumers in Australia²¹ said they cut back on, or went without essentials such as meals to make their payments on time, and 15% took out an additional loan. Further, among consumers who missed payments, some also skipped paying other household bills (44%), credit card payments (32%) and mortgage payments (22%).

In Canada, most rules governing credit are designed to protect consumers from their vulnerability to the pitfalls of credit.²² When it comes to BNPL, there seems to be confusion among consumers about whether or not BNPL constitutes credit and therefore about the consequences.²³ Our analysis of the application of protective measures to BNPL financing is therefore more than relevant.

1.1.4. THE RECOURSE ISSUE

Another dimension to consider with regard to BNPL is the consumer’s recourse in the event of a problem. It has been reported²⁴ that consumers in the United States have filed complaints with the Consumer Financial Protection Bureau over difficulties obtaining reimbursement or for charges billed to their accounts.

In matters of consumerism, the legislator intervenes upstream to balance the power between the consumer and the merchant, in particular by setting up certain mechanisms to facilitate reimbursement for purchases concluded online or by prohibiting certain clauses in a consumer contract.²⁵ Our analysis of BNPL dispute resolution mechanisms should allow us to determine whether consumers are well protected.

19 Di Johnson, John Rodwell, Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing, 2021, online at: <https://bit.ly/3NUODGF>.

20 Di Johnson, John Rodwell, Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing, 2021, online at: <https://bit.ly/3NUODGF>.

21 Di Johnson, John Rodwell, Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing, 2021, online at: <https://bit.ly/3NUODGF>.

22 Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, p. 310, Éditions Yvon Blais, 2015.

23 <https://www.protocol.com/fintech/buy-now-pay-later-holidays>.

24 <https://www.protocol.com/fintech/buy-now-pay-later-holidays>.

25 *Consumer Protection Act (CPA)*, CQLR.

1.1.5 THE LITERACY ISSUE

Last among the issues reported is the confusion experienced by consumers, who do not always understand the fees charged to them, and even less the possible risks associated with these products.²⁶ In fact, they do not understand whether or not these products actually constitute credit. Such a lack of knowledge is likely to have consequences for them. For example, if bad debts are reported on a consumer’s credit file when they are not aware that these are related to a credit product, they could see their credit rating affected without knowing why, which could have various impacts on their financial situation.

The issues presented in this introduction to the problem converge towards one single research question: What are the risks, protections and remedies associated with the use of “Buy now, pay later” financing in the Canadian context? The analytical framework presented in the following chapter will outline our approach to this question.

²⁶ <https://www.protocol.com/fintech/buy-now-pay-later-holidays>.

CHAPTER 2. ANALYTICAL FRAMEWORK AND METHODOLOGY

The aim of our research is to analyze the risks and remedies associated with BNPL financing in the Canadian context, more specifically, in the jurisdictions of Québec and Ontario. Since the problem outlined above concentrates on issues related to credit regulations, our analytical framework should logically focus mainly on related regulations (the legal framework). Since the issue of literacy applies to every other regulation-related issue, one of the dimensions of our analytical framework will be devoted to this dimension.

Credit legislation in Canada is designed to protect consumers from excessive debt and also to facilitate their access to justice. This protection translates into the incorporation of various measures within the laws aimed at countering indebtedness and facilitating certain types of recourse for consumers. Consequently, the risks for consumers, in the context of these new credit products, would be in the discrepancy between the protection measures provided for in the legislation and what is provided for by the emerging companies, namely the BNPLs. On the other hand, this risk will be assessed in the light of the actual situation of the consumers that the legislation aims to protect with these measures. This risk will therefore be the existence of a discrepancy between the perceptions and knowledge of consumers (reinforced in particular by what is conveyed) and what is actually provided for in the BNPL agreements and the legislation.

Such a framework will permit us, at a later point, to study the contracts and conditions of use of BNPL accounts in the light of the legislation in force. In particular, it will allow us to determine whether the financing products offered qualify as credit products within the meaning of the law, and therefore whether the protections provided to counter indebtedness and to facilitate the resolution of consumer disputes are respected, and whether these companies are subject to the applicable laws. In addition, this framework will allow us to analyze the perceptions of consumers as well as certain factors tending to reinforce these perceptions such as messages displayed on the websites and certain contradictions in the messages, compared to what is actually intended in the agreements and in the law. This discrepancy has the potential to point us in the direction of where consumer literacy efforts need to be focused, should the need arise.

There are therefore three major dimensions of our analytical framework: credit/indebtedness, recourse/dispute resolution and literacy.

2.1. CREDIT/INDEBTEDNESS DIMENSION: INDICATORS

The indicators of this dimension are important because they will make it possible to determine the criteria for what actually constitutes a credit contract and the legal requirements of companies or institutions to comply with the law with respect to credit. Accordingly, the relevant indicators are *the credit contract, business classification, formalism and preventive measures against indebtedness*. These indicators were chosen because of their high degree of relevance to the subject. This section will therefore be made up of various pertinent legal provisions. To enrich our corpus, we will refer to certain authors who have written on the subject, namely professors Pierre-Claude Lafond, Nicole L'Heureux and Marc Lacoursière as well as the author Michel Deschamps, in regard to the credit contract and the formal requirements.

For issues relating to business classification and fintechs, we refer respectively to Professor Marc Lacoursière and authors Sylvie Bourdeau et al.

In view of the issues raised, and considering that banks that make loans are also subject to the *Consumer Protection Act* for loans made to consumers (except when the standards in the *Bank Act* are applicable to such contracts),²⁷ we will refer to federal legislation only where relevant.

2.1.1. THE CREDIT AGREEMENT²⁸

A loan of money is called a credit agreement when it is concluded between a merchant and a consumer. Québec's *Consumer Protection Act* applies to any credit agreement between a consumer and a merchant.²⁹ However, the challenge consists in defining what is actually meant by a credit agreement. In Québec, Section 1.f) of the *Consumer Protection Act* (CPA) defines credit as “the right granted by a merchant to a consumer to perform an obligation within a term in consideration of certain charges.” For the term *credit* to apply, two elements are therefore necessary: a *term* and *charges*. According to Professor Lafond, credit is the possibility accorded by a merchant to pay later, for a fee, that is to say by paying a little more. Thus, an account opened with a merchant in which the consumer pays at the end of each month, without additional charges, does not constitute a credit instrument. In fact, if there are no charges, the section of the Act relating to credit cannot apply. It would also not apply in the case of a loan of money for which no interest or other cost of credit is payable.³⁰ This clarification is important in the context of this research because one of the peculiarities of the BNPL product is that it is characterized by the majority of providers as a loan without any charges.³¹

That said, it is important to clarify what is meant by charges. The *Consumer Protection Act* (CPA) distinguishes between three types of charges: credit charges, credit rate and interest rate. Credit charges are the sum of money, expressed in dollars and cents, that the consumer must pay in addition to the capital obtained.³² It may include interest, cost of insurance, administration fees, brokerage fees, account opening fees, etc. For the more specific case of the “Buy now, pay later” phenomenon, in its traditional form, the Court of Appeal has already

27 Nicole L'Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais

28 Taking into account the comments of the evaluator, certain passages of this section may appear unclear to the reader. It should be noted that the analytical framework presents the regulations; however, later in this report, the analysis of this corpus in the light of the data, will permit a clearer understanding.

29 Michel Deschamps, “L’application de la loi sur la protection du consommateur aux contrats de crédit,” in *Revue du Barreau*, vol. 77, 2018, consulted online:

[https://unik.cajj.qc.ca/recherche#q=Application%20de%20la%20loi%20sur%20la%20protection%20du%20consommateur%20Michel%20Deschamps&t=unik&sort=relevancy&f:cajj-unik-checkboxes=\[Jurisprudence,sDoctrine,L%C3%A9gislation\]&m=detailed&i=1&bp=results.](https://unik.cajj.qc.ca/recherche#q=Application%20de%20la%20loi%20sur%20la%20protection%20du%20consommateur%20Michel%20Deschamps&t=unik&sort=relevancy&f:cajj-unik-checkboxes=[Jurisprudence,sDoctrine,L%C3%A9gislation]&m=detailed&i=1&bp=results)

30 Michel Deschamps, “L’application de la loi sur la protection du consommateur aux contrats de crédit,” in *Revue du Barreau*, vol. 77, 2018, consulted online:

[https://unik.cajj.qc.ca/recherche#q=Application%20de%20la%20loi%20sur%20la%20protection%20du%20consommateur%20Michel%20Deschamps&t=unik&sort=relevancy&f:cajj-unik-checkboxes=\[Jurisprudence,sDoctrine,L%C3%A9gislation\]&m=detailed&i=1&bp=results..](https://unik.cajj.qc.ca/recherche#q=Application%20de%20la%20loi%20sur%20la%20protection%20du%20consommateur%20Michel%20Deschamps&t=unik&sort=relevancy&f:cajj-unik-checkboxes=[Jurisprudence,sDoctrine,L%C3%A9gislation]&m=detailed&i=1&bp=results..)

31 For example: <https://www.klarna.com/ca/>.

32 *Consumer Protection Act* (CPA), CQLR, c.s. 69-71.

determined that late fees can constitute credit charges.³³ Moreover, Sections 92 and 119 of the CPA state that late fees or charges imposed in the event of non-payment by the due date also constitute credit charges. Author Michel Deschamps³⁴ points out that when a credit agreement requires the cardholder to pay their monthly balance in full by the date specified in their statement, no interest is then payable. At first glance, one might think that such agreements are not really credit agreements within the meaning of the CPA. However, in cases when the agreement stipulates that interest will be payable by the holder if they do not pay their balance on the stipulated date, it then becomes a credit agreement.

In other cases, membership fees could be considered credit charges. Author Michel Deschamps has a clarification to make about Section 70 of the CPA. In his view, this section presumes that the discount granted to a consumer who pays cash constitutes credit charges for a buyer who does not pay cash. For this presumption to apply, the merchant must offer two prices: one for the buyer who pays cash and another for the buyer who takes advantage of the term offered.³⁵

The credit rate, on the other hand, is “the amount of credit charges expressed as an annual percentage.”³⁶ It is what allows the consumer to compare rates and take advantage of competition in the credit market.³⁷ The *interest rate* is the cost of money, often determined in accordance with the Bank of Canada’s key rate. The difference between the credit rate and the interest rate makes it possible to justify the intervention of the provincial legislator in the domain of money interest, which falls under federal jurisdiction.³⁸

With respect to period (term), it is important to note that Section 67b) of the Québec CPA defines a period as a space of time of no more than thirty-five days, while Section 84 states that the contract must require only one deferred payment per period³⁹ with the exception of the loan of money under which the consumer’s total obligation is repayable in full on a single fixed date.⁴⁰

Ontario’s *Consumer Protection Act, 2002* provides for the concept of a *supplier credit agreement*⁴¹ which is defined as a “consumer agreement (...) under which a supplier or an associate of the supplier, extends fixed credit to a consumer to assist the consumer in obtaining goods or services, other than credit or a loan of money, from the supplier.” In our understanding, this definition is the closest to the type of product offered by BNPLS. It includes the *fixed credit* criterion. As for the requirement of the charges and the period, one realizes, on reading the chapter on credit in this law, that it includes the concept of the *cost of borrowing*, which is defined as the total of the sums that a borrower is required to pay under a credit

33 Nicole L'Heureux, Marc Lacoursière, *Droit de la consommation*, 6th edition, Éditions Yvon Blais, p. 213.

34 Michel Deschamps, “L’application de la loi sur la protection du consommateur aux contrats de crédit,” in the *Revue du Barreau*, vol. 77, 2018, consulted online: <https://edoctrine.caij.qc.ca/revue-du-bar/77/1108547120/>.

35 Michel Deschamps, “L’application de la loi sur la protection du consommateur aux contrats de crédit,” in the *Revue du Barreau*, vol. 77, 2018, consulted online: <https://edoctrine.caij.qc.ca/revue-du-bar/77/1108547120/>.

36 *Consumer Protection Act (CPA)*, CQLR, c s. 72.

37 Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Éditions Yvon Blais, 2015.

38 Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Éditions Yvon Blais, 2015, p. 303.

39 *Consumer Protection Act (CPA)*, CQLR, c s. 84.

40 *Consumer Protection Act (CPA)*, CQLR, c s. 89.

41 *Consumer Protection Act 2002*, s. 66.

agreement or as a condition for entering into one, and the prescribed sums, excluding the payment or repayment of principal and prescribed charges (cost of borrowing)⁴². For example, the same section discusses the credit rate as well as the default charges imposed on a borrower who does not make a payment when it is due under a credit agreement or who does not fulfill an obligation under the same, excluding interest on overdue payment. We therefore understand that there is a period (term) and that there may be charges.

At the federal level, Canadian law imposes on the banker (the credit provider), an obligation of diligence towards his client. This obligation is framed by a disclosure requirement under the *Bank Act* and the *Cost of Borrowing Regulations*.⁴³ Thus, when a consumer applies for credit, the banker’s only statutory obligation is to act with prudence and diligence and to respect the internal policies of his institution.⁴⁴

2.1.2. FORMAL REQUIREMENTS FOR CONTRACT FORMATION⁴⁵

In Québec, the law states that a credit contract, with the exception of a contract for the loan of money payable on demand, “must be evidenced in writing.”⁴⁶ Added to this is the merchant’s obligation to disclose certain information to the consumer. Accordingly, the merchant is obliged to disclose to the latter both the nature of the transaction as well as the specifics and its modes of execution.⁴⁷ The merchant has an obligation to clearly and precisely disclose the costs that the consumer must assume; for example, credit charges must be disclosed in the contract.⁴⁸ In the absence of such stipulation, the consumer may demand the nullity of the contract or the cancellation of the credit charge.⁴⁹ In addition, the merchant may be open to criminal⁵⁰ or administrative⁵¹ sanctions. Finally, since BNPL financing is offered online, the rules for distance agreements may apply, particularly the rules relating to the disclosure of certain information set forth in Section 54.4 of the law.

In Ontario, the agreement must be in writing;⁵² however this section does not apply in the case of Internet agreements, which are classified as future performance agreements.⁵³ A list of the information to be communicated to the consumer is set forth in Section 24 of the *Regulations* under the Act. There is also an obligation to disclose certain declarations and statements provided for in the Act, and their non-disclosure is severely sanctioned, under Section 70 of the

42 *Consumer Protection Act 2002*, s. 66.

43 Nicole L’Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 267.

44 Nicole L’Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 267.

45 Only items relevant to this research are covered in this report.

46 *Consumer Protection Act (CPA)*, CQLR, c s. 80.

47 Nicole L’Heureux, Marc Lacoursière, *Droit de la consommation*, 6th edition, Éditions Yvon Blais, 2011, p. 205.

48 *Consumer Protection Act (CPA)*, CQLR, c s. 71 and 72.

49 *Consumer Protection Act (CPA)*, CQLR, c s. 271.

50 *Consumer Protection Act (CPA)*, CQLR, c s. 277.

51 *Consumer Protection Act (CPA)*, CQLR, c s.314, 315, 316, 317.

52 *Consumer Protection Act 2002*, s. 22.

53 *Consumer Protection Act 2002 Regulations*, s. 18.

Act. The consumer will not be liable for the cost of borrowing, "nor in respect of the cost of borrowing, the excess over the amounts specified in the declarations and statements relating to the agreement which this part requires to be returned to the borrower."

It should be noted that at the federal level, Canadian law imposes on the banker (the credit provider), an obligation of diligence towards its client. This obligation is framed by a disclosure requirement, under the *Bank Act* and the *Cost of Borrowing Regulations*.⁵⁴ Thus, when a consumer applies for credit, the banker has no other statutory obligation than to act with prudence and diligence and to respect the internal policies of their institution.⁵⁵

2.1.3. CLASSIFICATION OF THE ENTERPRISE

The other issue raised by the emergence of BNPLs is whether the laws in force in Canada apply to these companies, considering that they are presented in the literature as fintechs. These are defined⁵⁶ as companies that innovate using technology to rethink financial services. Their appearance caused a disruption in a market traditionally reserved for established financial institutions by offering Canadian consumers a new form of accessibility to financing services.

Professor Marc Lacoursière has already commented on this topic in a report on payment systems,⁵⁷ in which he refers to the inequity, in terms of regulations, that exists between traditional financial institutions and companies that offer new means of payment, when all of these entities operate within the same market. In the first case, banks and credit unions are subject to very strict rules, including the constitution of the financial institution, governance, permitted and prohibited activities and the protection of bank deposits through credit insurance. Since the new payment issuers are not traditional financial institutions, but commercial enterprises, they are generally not subject to such regulatory constraints, depending on which operating structure they have adopted.

Generally speaking, fintechs may either be integrated within the services of a bank or be separate entities. Banks are subject to the *Bank Act* and its Regulations, as well as the guidelines of the Office of the Superintendent of Financial Institutions (OSFI). They must therefore take into consideration this entire regulatory framework when implementing these technologies.⁵⁸ When a bank or other federal financial institution outsources some of its functions to a third party, it must ensure that this third party complies with its regulatory requirements. Fintechs

54 Nicole L'Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 267.

55 Nicole L'Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 267.

56 Sylvie Bourdeau et al, "Les Fintechs: quels sont les enjeux juridiques?" in *Développements récents en droit bancaire*, 2017, consulted online.

57 Marc Lacoursière, , *Rapport de groupe de travail sur l'examen du système de paiement*, 2013, consulted online: <https://heinonlineorg.proxy.caij.qc.ca/HOL/Page?handle=hein.journals/canadbus53&size=2&id=210&collection=journals>

58 Nicole L'Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 320.

carrying out operations on behalf of banks may therefore be indirectly subject to the regulations applicable to those institutions.⁵⁹

When it comes to companies independent of banks that provide loans or credit, one should know that at the provincial level, any company that grants loans to consumers must hold a permit to this effect. In Québec, this obligation is set forth in Section 321(b) of the *Consumer Protection Act*. The permit is issued by the president of the Office de la protection du consommateur, who also has the power to refuse to grant, suspend it or cancel it. These options are exercised particularly in cases of doubt over the honesty of commercial activities or to ensure the public interest.⁶⁰ According to Professor Lacoursière,⁶¹ this measure is intended to eliminate lenders who do not take their role seriously or those who have reprehensible practices. Banks and financial service cooperatives whose activities are subject to regulation are exempt from this requirement, as are merchants who are party to a contract for an insurance premium finance agreement.⁶² Accordingly, a consumer contracting with a merchant who does not hold the permit required under the CPA may request that the contract be nullified.⁶³ In the case of a loan of money, the consumer may request, if they so choose, the cancellation of the credit charges or the restitution of the part of the credit charges already paid.⁶⁴

Ontario’s *Consumer Protection Act, 2002* contains no requirement to hold a license in order to make loans to consumers. However, a lender’s license is required to make loans under Section 6 of the *Payday Loans Act 2008*.⁶⁵ Furthermore, Section 2(2) dealing with the scope of this law, specifies that this law applies, with the necessary modifications, to loans other than payday loans. It can therefore be concluded that a license is necessary to grant loans to consumers.

2.1.4. PREVENTIVE MEASURES AGAINST INDEBTEDNESS

The main problem associated with loans and credit is indebtedness. Professor Lafond emphasizes the fact that the primary objective of the legislator in matters of credit is to combat excessive consumer indebtedness and to protect them against the pitfalls of credit. To do this, the legislator uses various means of control which are embodied in measures provided for by law.⁶⁶ The measures most relevant to this research are the following:

1. *At the pre-contractual stage*

Consent

59 Marc Lacoursière, *Rapport de groupe de travail sur l’examen du système de paiement*, 2013, consulted online: <https://heinonline.org.proxy.caij.qc.ca/HOL/Page?handle=hein.journals/canadbus53&size=2&id=210&collection=journals>

60 *Consumer Protection Act* (CPA), CQLR, c s. 325b).

61 Nicole L’Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 320.

62 *Regulation respecting the application of the Consumer Protection Act*, s. 18.

63 *Consumer Protection Act* (CPA), CQLR, c s. 322.

64 *Consumer Protection Act* (CPA), CQLR, c s. 322.

65 <https://www.ontario.ca/en/laws/law/08p09#BK6>

66 Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Éditions Yvon Blais, 2015

This measure targets credit advertising in particular. The aim of Section 244 of the *Consumer Protection Act* is to prevent an advertisement for goods or services from becoming an advertisement for the ease of obtaining goods or services by means of credit,⁶⁷ with the exception of information authorized by the applicable regulations of this law.⁶⁸ The law also prohibits encouraging consumers to obtain a good or service,⁶⁹ and Section 247 of the same law prohibits advertising payment methods. This is particularly relevant in the context of this research, because the aspect that "Buy now, pay later" formulas often emphasize are the terms of payment (e.g., pay for makeup products in four \$10 instalments) and, in some cases, the possibility of improving one's credit rating by using these payment methods.⁷⁰ The requirements of the law prior to signing the contract therefore relate to obtaining free and informed consent.

Evaluation

During the latest revision of the *Consumer Protection Act*, a new section (103.2) was added aimed at evaluating the consumer's ability to pay when concluding a credit agreement. Accordingly, in order to meet the requirements of this section, the merchant must take into account, in their assessment, the information determined by the regulation.⁷¹ This information includes the amount of the consumer's gross income, the total recurring monthly payments directly related to the dwelling or their monthly cost, the total monthly payments required under a credit agreement as well as the information contained in a credit report and, if applicable, the consumer's credit history with that merchant. Failure to comply with this requirement will result in the merchant losing the right to claim credit charges.⁷² According to this same section, banks and credit unions are deemed to meet this requirement.

At the federal level, the assessment of consumers' ability to pay is currently regulated only in the case of mortgage credit. As regards personal credit, there are no rules other than what is required by the internal policies of the banks.⁷³

Right of termination

Another measure provided for in Section 73 of the *Consumer Protection Act* allows the consumer to terminate (cancel) a contract for the loan of money or a contract involving credit without cost or penalty, at the discretion of the consumer, within two days following that on which each of the parties is in possession of a duplicate of the contract (this is the right of termination). Professor Lafond rightly points out that the consumer must remember this: If they have purchased goods with a loan of money, the law gives them the possibility of resolving the loan, but not the sale.⁷⁴

67 *Léon Furniture Ltd v. Option consommateurs*, 2020 QCCA 44, paras. 96, 98 and 100. Application for leave to appeal to the Supreme Court of Canada dismissed on October 22, 2020

68 *Regulation respecting the application of the Consumer Protection Act* (RaCPA), s. 80

69 *Consumer Protection Act* (CPA), CQLR, c s. 245

70 Case of Sezzle: Build credit: <https://sezzle.com/>

71 *Regulation respecting the application of the Consumer Protection Act* (RaCPA), s. 61.0.1c

72 *Consumer Protection Act* (CPA), CQLR, c s. 103.3.

73 Nicole L'Heureux, Marc Lacoursière, *Droit bancaire*, 5th edition, Éditions Yvon Blais p. 267.

74 Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Éditions Yvon Blais, 2015.

2. *At the time of conclusion of the contract and after*

Control of credit and interest rate

This indicator is important to our research because BNPL products are presented as an alternative to credit. At the federal level, according to the *Interest Act*, which applies to all contracts and agreements,⁷⁵ whenever interest is payable by agreement and no rate is fixed thereunder, the applicable interest rate is 5% per annum.⁷⁶ At the provincial level, the merchant can only specify one credit rate within the contract.⁷⁷

Right to pay before due date

Advance payment, according to the *Consumer Protection Act*, is always possible and without penalty.⁷⁸ Professor Nicole L'Heureux explains the rule as follows:

"[...] In consumer law, in order to prevent the consumer whose credit has become useless or unfavorable from falling into indebtedness, the legislator sets forth a rule of public order that allows the consumer to repay their non-mortgage obligation at any time, in whole or in part (s. 93). If the payment is partial, the merchant must take this into account so that the credit charges are lower and the period of the contract is brought forward. If the payment is in full, the contract is deemed to have been executed before maturity." [TRANSLATION]

In Ontario, Section 76(1) of the *Consumer Protection Act, 2002* also allows a borrower to pay all amounts outstanding under a credit agreement at any time, without charge or prepayment allowance. Ontario has two other interesting debt protection measures. Section 75 of the law regulates the default costs that a merchant can demand. Consequently, the consumer can be billed only the following: reasonable legal costs incurred by the merchant in collecting or attempting to collect a payment that the borrower is required to make under the agreement, reasonable legal costs incurred by the merchant in enforcing a security interest or protecting the subject of a security interest as a result of a default under the agreement, and reasonable costs that reflect the costs incurred by the merchant as a result of the refusal of a cheque or other payment item that the borrower has tendered under the agreement.

2.2. APPEAL/DISPUTE SETTLEMENT DIMENSION

The indicators of this dimension are important because they will help identify specific uses of credit in Canadian credit regulation that are relevant for our research. On the other hand, they will provide the criterion for determining fairness in the resolution of disputes.⁷⁹ Professor

⁷⁵ *Interest Act*, s. 2.

⁷⁶ *Interest Act*, s. 3.

⁷⁷ *Consumer Protection Act (CPA)*, CQLR, s. 81.

⁷⁸ *Consumer Protection Act (CPA)*, CQLR, s. 93.

⁷⁹ See on this subject the Option consommateurs research report *Les mécanismes de règlement des différends proposés par les plateformes de l'économie du partage. Des outils efficaces pour l'accès à la justice ?* online at:

Michelle Cumyn⁸⁰ makes the point that that the legislator intervenes upstream, in order to modify the balance of power between the merchant and the consumer and to try to achieve a certain equality. These indicators are the remedies set forth in the *Bank Act* and in provincial legislation as well as in the measures aiming at fairness in the resolution of disputes.

2.2.1. REMEDIES UNDER THE BANK ACT AND PROVINCIAL LAWS

Under the Bank Act

The regulatory structure of banks⁸¹ obliges them to have an internal complaint resolution process to which consumers must have recourse. In the absence of an internal dispute process between a consumer and a bank, it is possible to address the dispute to an external complaint body such as OBSI or ADRBO.

Under provincial laws

Chargeback

Contracts concluded within the framework of BNPL transactions can be considered contracts concluded remotely, if one relies on the definition of remote contract contained in the Québec CPA, i.e. a contract not concluded in the physical presence of the consumer and the merchant. Hence, due to the nature of the services they offer, fintechs and financial institutions using technologies may be subject to these provisions.⁸² This will entail resorting to a dispute resolution method specific to this type of contract, namely chargeback. This method, which is employed in both Québec⁸³ and Ontario,⁸⁴ permits the consumer to ask the issuer of the credit card they used to make their payment to cancel their payment and obtain a refund. This indicator is relevant because it allows one to assess whether a chargeback might be possible in the context of a BNPL purchase, or whether it would be wiser to recommend to consumers who use BNPL financing to link their purchase to a credit card rather than a debit card, considering that both are permitted, which poses a risk of indebtedness if the two credit products are combined.

The interdependence of the contract and its financing or means of defense

<https://option-consommateurs.org/wp-content/uploads/2020/04/oc-811405-economie-du-partage-reglement-des-differends-rapport.pdf>.

⁸⁰ Michelle Cumyn, “L’équité: définition et concepts,” in Pierre-Claude Lafond and Benoît Moore (eds.), *L’équité au service du consommateur*, Montreal, Éditions Yvon Blais, 2010.

⁸¹ s. 157(1).c of the *Bank Act* (SC 1991, c. 46).

⁸² Sylvie Bourdeau et al, ““Les Fintechs: quels sont les enjeux juridiques ?” in *Développements récents en droit bancaire*, 2017, consulted online:

[https://unik.caij.gc.ca/recherche#q=The%20Fintechs%2Cwhat%20are%20the%20issues%20juridique&t=unik&sort=relevancy&f:caij-unik-checkboxes=\[Jurisprudence,Doctrine,L%C3%A9gislation\]&m=detailed&bp=results&nq=true](https://unik.caij.gc.ca/recherche#q=The%20Fintechs%2Cwhat%20are%20the%20issues%20juridique&t=unik&sort=relevancy&f:caij-unik-checkboxes=[Jurisprudence,Doctrine,L%C3%A9gislation]&m=detailed&bp=results&nq=true).

⁸³ *Consumer Protection Act 2002*, s. 99(1).

⁸⁴ *Consumer Protection Act (CPA)*, CQLR, s. 54.14.

In certain very specific cases, the legislator wanted to allow the consumer to invoke against a money lender the means of defense that are normally available only to the co-contracting merchant, in the event of non-execution or improper execution of the contract.⁸⁵ Thus, Section 103.1 of the *Consumer Protection Act* states that a consumer who has used all or part of the net capital of a money lending contract to pay all or part of the rental of a goods or the provision of a service may set up against the lender or his assignee the means of defense that he may assert against the merchant who is the seller, lessor, contractor or service provider when the merchant and the lender have collaborated with a view to granting this credit to this consumer.

Suspension of reimbursement

Section 117 of the *Consumer Protection Act* provides that the court may order the suspension of the repayment of a loan, when there is a legal dispute between a merchant and a consumer. For example, if a consumer sues a merchant for latent defects, they may request the suspension of the repayment of the loan they took out with the bank or credit union to pay for their purchase. But for the borrower to be able to invoke this section, the money lender and the merchant must collaborate regularly with a view to granting loans to consumers in accordance with Section. 103.1 of the CPA.⁸⁶

2.2.2. EQUITY MEASURES IN DISPUTE RESOLUTION

The legislator intervenes in a number of ways, notably by standardizing the “obligational content” of the contract by prohibiting certain clauses⁸⁷ in order to balance the power relationship between consumer and merchant. The principles set out in case law serve as a guide in applying the principle. Generally speaking, in consumer law, most of these measures are aimed at enabling access to justice, reducing the costs and constraints associated with going to court or any other forum for settling disputes or any abuse that may be deemed unenforceable against consumers. For example, certain clauses, although justified in other contexts, may be unenforceable against the consumer in a consumer contract. This is particularly true of mandatory arbitration clauses and class action waiver clauses.

Hence, we can read in Section 11.1 of the *Consumer Protection Act*, regarding mandatory arbitration and class action waiver clauses: “Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer’s right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.”

In Ontario, Section 7(2) of the *Consumer Protection Act, 2002* renders invalid “any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out to the agreement be submitted to arbitration.” Like

85 François Nantel, “Le prêt d’argent dans la Loi sur la protection du consommateur,” in *Collection de droit 2022-2023, vol.6, Obligations et contrats*.

86 “Le prêt d’argent dans la Loi sur la protection du consommateur,” in *Collection de droit 2022-2023, vol.6, Obligations et contrats*.

87 Michelle Cumyn, “L’équité: définition et concepts,” in Pierre-Claude Lafond and Benoît Moore (eds.), *L’équité au service du consommateur*, Montréal, Éditions Yvon Blais, 2010.

Section 11.1 of the Québec *Consumer Protection Act*, this provision creates an exception aimed at guaranteeing fairness and balance in the consumer contract.

Furthermore, external, illegible, incomprehensible or abusive clauses may also be unenforceable against the consumer in a consumer contract or in a membership contract.

Our Risk Hypothesis-1: Discrepancy between legislation and BNPL agreements

2.3. THE LITERACY DIMENSION

This indicator applies to all the others because it will enable verification of the consumers' knowledge of the two other dimensions (Credit/indebtedness and Recourse/dispute resolution) and later, will improve knowledge of the terms of BNPL contracts among users, which in particular will make it possible to assess the validity of their consent. In financial matters, literacy denotes the combination of knowledge, knowledge, skills, attitudes and behaviours needed to make decisions that will result in financial well-being.⁸⁸ A Québec research report⁸⁹ reveals that financial literacy results from concrete experience.

As a result, the level of financial literacy is lower among consumers who own few products, due to lower incomes and reduced financial activity. A pilot project carried out by the Financial Consumer Agency of Canada⁹⁰ reveals that in regard to the services offered by BNPLs, 44% of users found it difficult to understand the effect that using such a service could have on their credit rating, 36% found it was difficult to understand how to resolve a potential dispute, and 21% said it was difficult to understand the size of penalties or interest charges for any missed or partial payments.

Analyzing the gap between, on the one hand, the knowledge and perceptions of consumers and, on the other, the actual terms in the contract and the provisions of the law, will permit us to determine whether this gap truly exists. It is likely to reveal the risks run by users, particularly as a result of low literacy in this domain. Furthermore, a published study⁹¹ on BNPL tells us that high financial literacy reduces the favorable perception of BNPL services and that low financial literacy is associated with a more favourable, less risky perception. We will be able to test this hypothesis in the focus groups conducted later in this study.

88 OECD 2022 *The Recommendation on the G20/OECD High-Level Principles on Financial Consumer Protection*.

89 Maya Cachecho, Pierre NOREAU and Pierre-Alain-COTNOIR, *Rapport de recherche sur un nouvel indice de littératie financière*, November 16, 2022, online: https://lautorite.qc.ca/fileadmin/lautorite/grand_public/publications/organisation/etudes-sondages/rapport_recherche_litteratie-financiere2022_fr.pdf.

90 <https://www.canada.ca/en/financial-consumer-agency/programs/research/pilot-study-buy-now-pay-later-services-in-canada.html>.

91 Paul Gernans, Dirk G Baurb et al, Shane Lavagna-Slater, *Fintech and responsibility: Buy-now-pay-later arrangements*, 2021, online: <https://journals.sagepub.com/doi/abs/10.1177/03128962211032448>.

Our Risk Hypothesis-2: Discrepancy between consumers’ knowledge or perceptions and actual content of agreements and legislation.

RESEARCH SUB-QUESTIONS

Our research sub-questions will allow us to answer the overall research question: What are the risks, protections, and remedies associated with using Buy Now, Pay Later financing?

These sub-questions are:

- 1) What are the risks associated with the emergence of BNPL financing, the companies that offer it, and indebtedness?
- 2) What are the risks associated with dispute resolution?
- 3) What are the risks associated with consumer literacy about these products?
- 4) Does the legislation in force in Canada sufficiently protect consumers against these emerging products?

2.4. METHODOLOGY

The aim of our research is to analyze the debt-related and recourse-related risks associated with the use of Buy Now, Pay Later products. To achieve this goal, we attempted to identify the discrepancies that exist between the regulations in force and what is currently being done and planned by BNPL companies. We also attempted to identify the discrepancy between the knowledge or perceptions of consumers and what is presented to them as information as well as what is actually stated in the legislation.

To answer the research question and its sub-questions, we used both a conceptual and field-based methodology. We began with a documentary analysis of articles, books, legislation and case law. This allowed us to build an analytical framework to facilitate classification of BNPL products and BNPL companies in the light of Canadian legislation, and to highlight the provisions in these laws aimed at protecting consumers with regard to indebtedness and recourse.

Subsequently, we collected the relevant data contained in the agreements and contracts concluded in the context of these transactions and on the websites of these companies. We chose four (4) of the best-known companies in Canada, namely Klarna, Sezzle, Afterpay and Affirm. Our aim was to obtain a sample that would enable us to identify differences and trends, whenever relevant. To complete our data on these companies and with a view to classifying

them, we consulted the websites of the Office de la protection du consommateur du Québec and the website of Consumer Protection Ontario. We also conducted two focus groups, in English and French, with participants from Ontario and Québec on March 7 and 8, 2023. The groups were composed of 6 participants from Québec and 8 participants from Ontario, all of whom had used BNPL financing products. The groups were held online, by videoconference. Participant recruitment and group moderation were carried out by polling firm BIP.

This was followed by a qualitative analysis of the field data collected, in the light of the legislation. This analysis allowed us to identify discrepancies and, in doing so, to identify the potential and real risks associated with the use of BNPL financing as well as needs in terms of literacy.

Considering the novelty of the phenomenon in Canada, we conducted interviews with a number of specialists, namely Université de Montréal law professor, Maya Cachecho, and her doctoral student, Vahideh Gholami, who is interested in fintechs as they relate to payment issues as part of her doctoral studies. We also spoke with Geneviève Saumier, a law professor at McGill University. We also consulted Jacques St-Amant, who has written extensively on payment issues, banking and consumer law. We contacted the Office de la protection du consommateur in Québec and Consumer Protection Ontario with specific questions relating to complaints and the practices of these companies as well as the interpretation of certain provisions of the law (Ontario).

Finally, we utilized the services of a methodologist during our study.

CHAPTER 3. DATA PRESENTATION

In this research, we studied the risks related to indebtedness and recourse associated with the new Buy Now, Pay Later (BNPL) financing products. This necessitated an analysis of credit-related legislation that confers certain protections with regard to indebtedness and consumer recourse. There were three major dimensions to our theoretical framework, namely the credit/indebtedness dimension, the recourse/dispute resolution dimension and the literacy dimension. The data we present reflects the same structure and is qualitative in nature. This data is composed, on the one hand, of the agreements, terms of use and website information of four companies that offer such financing: namely Afterpay, Affirm (PayBright⁹²), Sezzle and Klarna, and, on the other, of data from the focus groups conducted in Québec and Ontario.

3.1. CONTRACT AND POLICY DATA⁹³

The finance companies we studied have established various policies governing their dealings with users. The names of these policies and their content, which can be accessed on the websites of these companies, may vary from one company to the next. For the purposes of this study, we consulted the documents serving as agreements between the consumer and each of these companies, namely Klarna’s Pay Later in 4 Agreement,⁹⁴ Afterpay’s Instalment Payment Agreement⁹⁵ and Terms of Service,⁹⁶ Affirm’s Terms of Service⁹⁷ and Sezzle’s User Agreement.⁹⁸ We also consulted the privacy policies (or equivalent) of each of these companies specifically on the issue of information related to the credit file as well as their respective websites. In the case of Klarna, we also consulted its buyer protection policy,⁹⁹ since it is the only company to have such a policy.

3.1.1. Credit/indebtedness dimension data

A. CREDIT

Regarding product classification

92 Note that Paybright and Affirm have merged to form a single company: Affirm.

93 The contracts, terms of use and confidentiality agreements were downloaded from the companies’ websites, for analysis, as of January 27, 2023. It is possible that, at the time of reading or publication of this report, certain documents may no longer be found online or certain titles or content may have changed.

94 This is a document published on September 26, 2022, which was online at the time of data collection on January 27, 2023: https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_ca/paylaterin4.

95 <https://www.afterpay.com/en-CA/instalment-agreement>.

96 <https://www.afterpay.com/en-CA/terms-of-service>.

97 <https://www.affirm.com/en-ca/terms>.

98 <https://legal.sezzle.com/user/en-ca>.

99 <https://www.klarna.com/ca/buyer-protection-policy/>.

From the outset, it should be emphasized that Affirm and Sezzle are the only companies that call their product a loan. Affirm simply calls it a loan, while Sezzle defines it as an interest-free instalment loan.¹⁰⁰

All contracts have a *term*. This may vary from company to company. Thus for Klarna, the duration of the agreement is 6 weeks and the total number of payments is 4, while Afterpay simply mentions 4 instalments. For Affirm and Sezzle, we understand from our reading that the term depends on the amount of the purchase.

As far as *charges* are concerned, they all advertise on the homepage of their websites that there are none, which is not entirely accurate. For Klarna, for example, while the agreement does not refer to late fees imposed by the company, in the website’s Questions and Answers section, in reply to the question *Why did I receive a late payment fee?* it explains that a late payment fee is added to the payment if it cannot be collected by the due date or if no payment has been received for a purchase.¹⁰¹ Also, it clearly states that late fees may be reported to the credit bureau.¹⁰²

Afterpay states that there are no charges, not even late fees. However, in the case of cross-border transactions, the exchange rate for the conversion is at the discretion of Afterpay, and the company may generate a margin in the event of a currency conversion, which may be considered to be charges. As for Affirm, even though it states on the company’s website that “*there are no fees (late fees, annual fees, etc.,*” in the section entitled *Why you will love Affirm:* we quickly realize, looking at the bottom of the webpage, that the interest rate can vary between 0 and 30%.¹⁰³ It explains that “Buy with Affirm” loans are simple interest loans, which means that interest accrues daily on the outstanding principal balance up to the credit charges/cost of borrowing, until the buyer has repaid the loan in full. The interest rate is established on the basis of individual creditworthiness. Sezzle imposes various types of fees of differing amounts: account reactivation fee (\$15), payment deferral fee (\$7.50), debit or credit card payment fee (\$5). Sezzle is the only company to charge such fees. The company also requires third-party payment fees when there are suppliers on site in stores, pharmacies and other establishments. The contracts these companies use seem to be standard documents, but it can be assumed that, considering the variation in the interest rate in the case of Affirm, each client receives a personalized version.

Regarding business classification

In the documents consulted on these companies’ websites, we generally found it difficult to determine out how they classify themselves. However, in the Sezzle Merchant Agreement,¹⁰⁴ the company describes itself as a technology that allows users to pay for their purchases via an interest-free payment plan, or any other plan that Sezzle may offer them. We extended our

100 <https://legal.sezzle.com/user/en-ca>.

101 <https://www.klarna.com/en-ca/customer-service/why-did-i-receive-late-payment-fees/>.

102 <https://www.klarna.com/en-ca/customer-service/why-did-i-receive-late-payment-fees/>.

103 Payment options through Affirm Canada Holdings Ltd. (“Affirm”). Your rate will be 0–30% APR (where available and subject to provincial regulatory limitations). APR offered is based on creditworthiness and subject to an eligibility check. Not all customers will be eligible for 0% APR.

104 <https://legal.sezzle.com/merchant/en-ca>.

business classification research by consulting the business registry¹⁰⁵ and also the website of the Office de la protection du consommateur du Québec,¹⁰⁶ in order to verify whether these companies had a lender’s license.¹⁰⁷ It turned out that Affirm was the only company with a lender’s license¹⁰⁸ and was registered as a consumer loan service with the Registraire des entreprises du Québec. Afterpay was listed as a provider of retail technology and promotion/marketing services, while Klarna was listed as a local subsidiary of Klarna Bank AB, a licensed bank and global provider of innovative online payments and shopping solutions for consumers and merchants. We also performed a search on the website of the Office of the Superintendent of Financial Institutions,¹⁰⁹ which did not locate Klarna on the list of active banks in Canada. Finally, Sezzle was not registered in the business registry, nor did it hold a lender’s license from the Office de la protection du consommateur

B. INDEBTEDNESS AND CREDIT FILE

KLARNA

With regard to debt-related measures, we learned that Klarna has adopted a privacy policy.¹¹⁰ This states that certain information is collected for credit verification purposes at the time of the financing application. This data includes the person’s contact information, their national identification number (probably their S.I.N.) income, credit history, information related to credit cards, debit cards or their bank account. There is other information contained in the agreement. It states that prepayment is permitted at no cost to the consumer, at any time for all or part of the balance. In the event of late payment, the consumer has two days to regularize their situation, after which the company reserves the right to resort to any method of payment on file to obtain reimbursement. Klarna indicates that default situations include missing a payment, facing insolvency or bankruptcy proceedings or what they interpret as a lack of sufficient funds in the customer’s bank account. In these situations, and with the exception of cases of bankruptcy, the company may send the file to a collection agency, since a clause in the contract allows Klarna to assign or sell the contract or any rights relating thereto. The consumer consents to Klarna appointing a collection agency to collect the sums due. Finally, in the event of non-payment, the consumer may have to pay an NSF charge to both Klarna and their bank, and the delay may be flagged in their credit file.¹¹¹

105 <https://www.registreentreprises.gouv.qc.ca/en/default.aspx>.

106 <https://www.opc.gouv.qc.ca/>.

107 The searches on the websites of these companies were carried out on March 14, 2023.

108 https://www.opc.gouv.qc.ca/se-renseignement/liste-des-resultats-de-recherche/details/commercant/695583/?token=03AL8dmw-EWf7l-3hUh8EGWRLZfDrDuhIJE72hsWAS2K2_d4mmt_Rm7KIK0l8LtNurpkv4SOTIdaGOqebXKOQaPBCCBCVARx1On5wEgf866yaDMvcG3BCCHXIQBs3EQfG1hcFxlXgiTnWreRI4zEFUjowASxBLGP5FBCX1cv0jN6TS p8iaHjjDNBWo81g72CtGDMHXv4DrxzGnuw-l4DPuhye5JhXxEeUM_CEOmRGXSC-S1r_frvw3OhjUhf3LD4zkHzDn0-g2ZgpRLTcuBJjsYs-IdCVKGVaqUhtTuDQgZKn86fgqso3Nm7jRLXgT-JrQ_fZomNaV7wBvLIcrgL2lDs7FUDNttGPxGd5FevBr0kygn_PZ-5rip58jXlw-izHmZnNwexKbQoKjencCKGjaicixVJjhvRqpgS9SRBSjCcN6QmiYpdj-or55CagJiDlJCCrjrY2uJmSwxTZL-kBxV9piUdvQmnAH5Lqs53G1UAM79Az09u0VJRRmYk_9z_TQ8xSseEnnW8cDhneurwNzj1uJAhrDu9NLB5w_hhinyQKJtg la9A&tx_wlprofilws_pi1%5Bmotcle%5D=Affirm&terms=true.

109 <https://www.osfi-bsif.gc.ca/Eng/Pages/default.aspx>.

110 https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_ca/privacy/.

111 <https://www.klarna.com/en-ca/customer-service/why-did-i-receive-late-payment-fees/>.

AFTERPAY

Afterpay clearly states that it requires new applicants to undergo an assessment of their ability to pay.¹¹² Part of this process is pre-authorization, which may include freezing funds corresponding to the amount of the first payment in the account associated with the chosen payment method, every time the consumer makes an online purchase. In most cases, the funds are frozen for only a few hours, but they could be frozen for as long as fourteen (14) days. In its privacy policy, Afterpay states that it does verify credit ratings, but only in the USA. Like Klarna, Afterpay permits prepayment. Moreover, even though the company specifies that there are no fees for using the service, it warns that the issuer of the payment method may charge interest or other fees. Finally, in the event of non-payment, the account may be sent to a collection agency. In addition, there is a waiver clause (which does not apply in Québec), against receiving a formal notice, or any notice of non-payment or protest.¹¹³

AFFIRM

In its Terms of Service, Affirm states that it may conduct a credit check at various stages, such as at the time of application, periodically during the term of the loan, and periodically as part of other services offered by Affirm. It specifies in capital letters that failure to pay can affect one's credit rating. Affirm includes a clause prohibiting the use of its services for the purpose of paying another loan or making cash advances or transfers, which suggests that the consumer may have access to a credit limit exceeding the amount granted to finance the product in question. It states, in the *No Loan Limit section of the Help Center*, that there is no limit to how many loans one can have at one time.¹¹⁴ Also, not all loans require a down payment.¹¹⁵ Prepayment of a loan is possible, although it could have an impact on interest.¹¹⁶ After reading the Terms of Service,¹¹⁷ it will become clear that Affirm will share the consumer's personal information with credit checking bureaus and agencies and wireless service providers.

SEZZLE¹¹⁸

Sezzle carries out a credit check¹¹⁹ at the time of the credit application, but at the same time stresses that it does not perform firm credit score checks. Consent to access the credit file is continuous throughout the contract.¹²⁰ What sets Sezzle apart from other companies is that it

112 See Point 5 of the Agreement: <https://www.afterpay.com/en-CA/instalment-agreement>.

113 To the extent permitted by applicable law, unless you are a resident of Québec, you hereby waive any right to receive any demand letter, notice of non-payment, protest and all other notices or demands of any nature whatsoever and hereby agree that, without either party being given notice or being released from liability, the obligations evidenced by this Agreement may from time to time, in whole or in part, be renewed, extended, modified, advanced, settled, canceled or released by us or be the subject of a transaction.

114 <https://heCPAenter.affirm.ca/s/article/no-loan-limit-ca?language=en>.

115 <https://heCPAenter.affirm.ca/s/article/make-a-down-payment-ca?language=en>.

116 <https://heCPAenter.affirm.ca/s/article/payment-options-paybright?language=en>.

117 <https://www.affirm.com/en-ca/privacy>.

118 We realized that Sezzle had changed its User Agreement at the time of this writing. The data presented was collected well before this modification and the references correspond to the old version of the User Agreement.

119 See clause 4.1 of the User Agreement.

120 See clause 13.1 of the User Agreement.

claims to offer additional benefits, such as a limit, and an extended limit in certain cases, as well as the possibility of purchasing from stores exclusive to Sezzle Up users,¹²¹ in exchange for consent to enter information in the credit file.¹²² This means that consumers who wish to have their information reported will see both positive and negative results in their credit reports, and Sezzle may transmit this information up to 90 days after termination of the contract. However, this information cannot be deleted following account closure. In addition to the credit check, Sezzle claims that it performs an exclusive analysis using proprietary analysis tools to assess the consumer’s ability to complete the instalment payments.

Sezzle gives users who are experiencing difficulty making payments three days’ notice to change their payment method or payment date.¹²³ Furthermore, Sezzle reserves the right to withdraw funds from any registered bank account at any time,¹²⁴ including savings accounts and secondary checking accounts.

3.1.2. Data related to dispute recourse/resolution Dimension

KLARNA

Klarna has adopted a policy¹²⁵ designed to protect the buyer in the event of a problem resulting from a purchase made using its payment method. The policy also sets out a dispute resolution process. It states that the consumer must first contact the merchant, and retain proof of this communication in order to contact Klarna if the problem has not been resolved with the merchant. The consumer will then have to report the problem by logging on to the application. Please note that not all situations are covered. For example, when the goods purchased are gift cards, a trip or an event, when there is a lack of proof, when it has not been confirmed that the purchased article could be delivered, the problem cannot be resolved via this policy. Klarna invites consumers who have been unable to resolve their problem to contact its Consumer Protection Office.¹²⁶

AFTERPAY

The company provides for an arbitration agreement that does not apply in Québec. Arbitration must be preceded by a 30-day negotiation period. The arbitration location (Vancouver) is pre-established, it is but it is possible to attend the session remotely. Consumers can opt out of this clause within 30 days of signing the agreement. Rules and fees¹²⁷ are governed by the rules of international arbitration, but it is not specified whether Afterpay will assume the costs of

121 See clause 3.9 of the User Agreement.

122 See clauses 3.9 and 4.3 of the User Agreement.

123 See clause 2.7 of the User Agreement.

124 See clause 3.7 of the User Agreement.

125 <https://www.klarna.com/ca/buyer-protection-policy/>.

126 See Q&A: <https://www.klarna.com/en-ca/klarna-purchaser-protection-policy/>.

127 https://www.icdr.org/sites/default/files/document_repository/International-Arbitration-Fee-Schedule.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=Fees-intl-fee-schedule.

arbitration or whether these will be shared with the consumer. Afterpay also includes a limited liability clause that is not applicable in Québec. This clause states Afterpay is not liable for any loss of profits or indirect loss or for any special, exemplary or punitive damages even if the possibility of such damages has been raised. In the event of damages, it limits its liability to \$750.

In its Terms of Service, Afterpay specifies that arbitration will take place in English. It also includes a jury trial waiver clause as well as a forum selection clause in cases in which a dispute cannot be submitted to arbitration, except for claims brought before a small claims court. In such cases, the courts of British Columbia have exclusive jurisdiction.¹²⁸ The applicable law is the law of British Columbia; however, this clause does not apply to residents of Québec.

Like Klarna, Afterpay accepts no liability¹²⁹ for any dispute between the consumer and the merchant. Rather, it directs consumers to the refund policy, where applicable, and declares itself not responsible for any additional charges or measures imposed by the merchant.

AFFIRM

Affirm includes a prescription in its Terms of Service. Specifically, one year after the problematic events, it will no longer be possible to exercise any recourse whatsoever in connection with the services offered. This requirement does not apply to consumers in Québec. To resolve a dispute, Affirm recommends that you first contact the Affirm Help Center. A final and binding arbitration clause, not applicable in Québec, is provided for. Furthermore, unlike Afterpay, the arbitration will take place in the province or territory where the consumer resided at the time the contract was concluded. In the event of cancellation of an order, a refund is offered within 21 days, and in certain cases up to 90 days.¹³⁰

There are also waiver of rights clauses. One clause for example, provides for the waiver of all defenses based on the electronic version of the Terms of Service and the absence of a signature by the parties for the execution of these conditions. Another clause provides for the indemnification of Affirm and its representatives in the event of liability related to the Terms of Service, as well as the assumption of reasonable legal costs, in connection with its use or any violation of these Terms of Service. Finally, Affirm disclaims all liability for any damages in connection with the services provided.¹³¹

128 See clause 12.8 of the Terms of Service: <https://www.afterpay.com/en-CA/terms-of-service>.

129 See point 7 of the Instalment Agreement entitled Reimbursement: <https://www.afterpay.com/en-CA/instalment-agreement>.

130 <https://heCPAenter.affirm.ca/s/article/cancel-an-order-ca?language=en>.

131 The content of the Terms of Service has changed between the time of data collection and the time of final report writing. The new version excludes Québec but we refer to the following clause: AFFIRM AND ITS AFFILIATES ARE NOT LIABLE FOR ANY COMPENSATORY, DIRECT, INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING DAMAGES FOR LOSS OF BUSINESS, LOSS OF PROFITS, LITIGATION, OR THE LIKE), WHETHER BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, TORT, PRODUCT LIABILITY OR OTHERWISE; NOR ARE AFFIRM AND ITS AFFILIATES LIABLE FOR ANY THIRD PARTY CLAIMS OF ANY NATURE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR CLAIMS.

SEZZLE

With regard to dispute resolution, Sezzle first invites users to report the problem to its Help Desk by email or phone. In the event of errors made by Sezzle, the consumer has 60 days following receipt of the statement to inform Sezzle. For Canadian residents, it is possible to dispute a pre-authorized debit in accordance with Payments Canada rules, in cases where the debit does not comply with the agreement or in the event that authorization is revoked. To be reimbursed, the consumer must complete an event declaration and submit it to the financial institution within 10 business days of the date of the pre-authorized debit. After 10 days, the consumer should only contact Sezzle. For *recourse* and *reimbursement*, consumers are referred to the financial institution or to Payments Canada.

Thereafter, an arbitration clause is provided for disputes under \$10,000, which does not apply in Québec, as well as a class action waiver clause, which does not apply to Canadians.¹³² It is possible for the consumer to opt out of the arbitration clause, but if they do so, Sezzle reserves the right to terminate the contract. At the request of the user, Sezzle may pay fees, which may include such filing, administration and arbitration fees that the arbitrator(s) deem(s) necessary. If the arbitrator(s) determine(s) that the claim against Sezzle is frivolous, the User agrees to reimburse Sezzle for all costs associated with the arbitration paid by Sezzle. The company will pay reasonable attorneys' fees if and only if the User is successful in arbitration. Another clause provides that the consumer agrees to defend and indemnify Sezzle, to protect it from any claim made by a third party arising from the breach of the agreement with Sezzle, including assuming its attorney's fees.

Finally, Sezzle limits its liability in settling disputes and considers that it is not a party to any litigation related to the purchase. The company emphasizes that its role in disputes is limited to creating a communication and dispute management portal for User and Merchant accounts. It obviously limits its liability in the event of damage or loss of any kind.¹³³

3.1.3. Literacy data dimension

For most of these companies, even though they present information on their websites, we have found that the information displayed on their home page may contradict that contained in certain sections of their website. Sometimes information on the website contradicts information contained in contracts or Terms of Service. By way of illustration, we will repeat the information already presented above: for Klarna, the agreement makes no reference to late fees imposed by the company, yet in the Q&A section of the site, we see that, with regard to the question, *Why did I receive late payment fees? fees* are indeed added in instances of late payment.¹³⁴ Also, it clearly states that late fees can be reported to the credit bureau.¹³⁵

Afterpay, for its part, points out that there are no fees, not even late fees. However, there are charges for cross-border transactions. As for Affirm, although in the section of the company's

¹³² See clause 14.2.1 of the old version of the User Agreement.

¹³³ See clause 3.6 of the old version of its User Agreement: Sezzle is not party to any purchase dispute. Our role in disputes is limited to creating a communication and dispute management portal for User and Merchant accounts.

¹³⁴ <https://www.klarna.com/en-ca/customer-service/why-did-i-receive-late-payment-fees/>.

¹³⁵ <https://www.klarna.com/en-ca/customer-service/why-did-i-receive-late-payment-fees/>.

website called *Why You'll Love Affirm*, it states that there are no fees (late, annual or surprise), we quickly realize, by looking at the bottom of the webpage, that the interest rate can vary between 0 and 30%.¹³⁶ As for Sezzle, it does include various fees in its terms and conditions, but these are not highlighted on the company's website.

3.2. FOCUS GROUP DATA

This section presents data collected online from two focus groups. One is made up of six French-speaking residents of Québec, and the other of eight English-speaking residents of Ontario. It should be noted that, in terms of product experience, the participants in Québec used Afterpay and Sezzle financing only, while those in Ontario used the products of the four companies, Afterpay, Affirm, Sezzle and Klarna. Almost all of the participants who used the financing made their purchases online, with the exception of one Ontario participant who said he used it at a Home Depot point of sale. The participants had to answer questions related to the three dimensions of our analytical framework. We summarize here the answers given by participants during the focus groups held on March 7 and 8, 2023. Overall, participants rated their experience with BNPL financing positively, giving it an average score of 7.3 in both Québec and Ontario.

The participants found out about the product via an online shopping site (4), through friends (2), at a point of sale (2) or even from their credit card statement (1). The cost of the financed products varied between \$500 (Québec) and \$3,500 (Ontario). The financed products ranged from clothing to business equipment to small household appliances. None of the participants used the financing to purchase food.

3.2.1. Credit/indebtedness dimension data

A. CREDIT

All the participants claimed to have consented to the Terms of Service online, but they all declared that no copy of the contract had been sent to them. As regards the technique for using the BNPL payment option, some downloaded the company's app onto their phone to use the loan:

"When I paid for it, I was on the Sephora app. I went through the checkout process and then, I selected Afterpay. It redirected me to the app store to get the Afterpay app. I downloaded the app, made my account. The apps synchronized and then, I was able to continue with my payment on my Sephora app."

Others did not have to download:

"I was just checking out for the payment and it said: "Do you want equal payments?" No app downloading, no signature and you click how you want to pay, and you are done."

¹³⁶ Payment options through Affirm Canada Holdings Ltd. ("Affirm"). Your rate will be 0–30% APR (where available and subject to provincial regulatory limitations). APR offered is based on creditworthiness and subject to an eligibility check. Not all customers will be eligible for 0% APR.

None of the participants had a credit limit exceeding the price of the product purchased.

Regarding product classification

All focus group participants were assigned a term. In Québec, this period ranged from 6 weeks to 6 months, while in Ontario, one participant had a loan with a term of up to 12 months. As for fees, participants in both provinces considered that there were none, but no one had checked previously to see whether there was an interest rate. None of the participants received information on credit charges. One participant even considered the financing to be a loyalty program used by companies.

Regarding company classification

For some participants, these companies are credit companies; for others, they are banks or private lenders; for still others, they are companies using artificial intelligence or payment tools used by merchants.

B. INDEBTEDNESS

For both focus groups, the main attraction of these products is the opportunity to benefit from an interest-free period of several months. Some also saw it as a way of being able to afford the product they wanted, even if they lacked liquidity at the desired moment, others saw it as a way of accessing credit without having to check their credit file. The vast majority of participants interviewed used financing more than once, some as many as six times. As for loan stacking, over half of Ontario participants had already used more than one financing at a time, unlike in Québec, where no participant had used more than one form of financing at the same time.

In Québec, all the participants linked their BNPL financing to their credit card. In Ontario, half linked it to their credit card and the other half to their debit card. The reasons given for using their credit card were fraud protection and insurance. As for those who used the debit card, the main reason was debt control; some also saw it as protection against fraud, thanks to the limit on the number of bank withdrawals per day.

When asked if they would have made the purchase without the financing, all the participants in Ontario said no, while in Québec almost all (5 out of 6) of the participants would still have made the purchase. Furthermore, every participant in both groups believed that BNPL financing contributes to overconsumption. No participant failed to pay their other bills or went without to pay for their financing, but one participant noted that she had experienced anxiety about making a BNPL payment.

Assessing ability to pay

All participants considered the assessment process easy and fast. In both Ontario and Québec, credit card information is the primary information requested by businesses. However, in Québec, two (2) participants said they had been asked for information related to work and income.

Payment before due date

There is a difference here between Ontario and Québec. In Québec, none of the participants were aware of this possibility, while in Ontario all the participants said they knew they had the option of paying the full amount before it was due.

3.2.2. Recourse/dispute resolution dimension data

The interdependence of the contract and its financing or defenses

None of the Ontario participants canceled their financing plan. However, one participant canceled his purchase within 24 hours with PayBright. Another attempted to cancel his payments with Afterpay, but was unable to do so; he had to cancel his order and place another to be able to charge it to his credit card; however, he did not specify whether he continued to repay the financing.

Most of the participants interviewed had no problem in the course of their contracts, nor had to return or exchange an item. Only two participants (Ontario) had to return merchandise, but the explanations about payment adjustment were unclear. However, they all assumed that, in the event of a problem, the merchant would not take the item back.

In the event of a difficulty regarding financing, all participants said they would contact the merchant. Only one participant, who used the PayPal network, confided that he would contact PayPal. Finally, none of the participants requested a refund from their credit card issuer.

Some participants made a few comments about customer service, which they would like to see made more accessible:

"They should have a chat. Returns should be made easier. Getting in touch with customer service should be a lot easier. Staying on the phone for hours is just annoying."

3.2.3. Literacy dimension data

The experience of the focus groups prompted participants to reflect on their knowledge of these new products. Consequently, some participants in both Québec and Ontario changed their perception of these products before the end of the discussion sessions. Certain participants from Québec admitted that before these meetings, they would have agreed to repeat the BNPL experience, but, after listening to possible negative points raised by other participants, they would now be more hesitant:

"It opened my eyes. Whether you want it or not, do you really need it? Even with no interest, nobody gives you something for nothing." [TRANSLATION]

"Everybody who uses BNPL pays a fee somewhere. I'm going to use it sparingly, because I don't think it's a super good idea. I'll keep this as an option for unforeseen situations." [TRANSLATION]

In Ontario too, a few participants admitted to changing their perception before the end of the discussions:

"For me, it has changed negatively. I would continue using it for large purchases however for smaller purchases, I would not. I would rather do my purchases in person."

"These products are not designed for the fiscally sound. They are designed for the screw ups of the world. That is where these companies make money charging very high interest rates or penalties."

Some participants commented on the need to provide participants with clear information:

"There should be clear indication or information as what consequences there are if we miss a payment."

Others discussed payment terms:

"I would like the option to select in how many months I would like to pay. Never had that option. When you go make a payment, should see that option that you can pay early."

Finally, the participants ended the discussion by suggesting that information about the terms of the contract, the product and the consequences of missing a payment be presented in more accessible, user-friendly terms:

"Summarize the contract in a few points." [TRANSLATION] "Prepare capsules to better educate consumers." [TRANSLATION] " There should be clear indication or information as what consequences there are if we miss a payment..."

CHAPTER 4. DATA ANALYSIS

Un problème de recherche se conçoit comme un écart conscient que l'on veut combler entre ce que nous savons, jugé insatisfait, et ce que nous désirons savoir, jugé désirable.

- Jacques Chevrier, 1993 ¹³⁷

At the time of writing, we are unaware of any Canadian court decisions or specific legislative interpretation of the BNPL issue in Canada. Our analysis is therefore intended to highlight possible areas of risk, based on the facts gathered, subject to any future interpretation of the phenomenon. Our analysis will be based primarily on Québec legislative provisions, with reference to Ontario and federal legislation where applicable. We would also like to point out that between the time of data collection (agreements, contracts and information) from the websites of the companies concerned and the final drafting of this report, the websites have evolved and it is possible that some of the information contained in this report has been modified.

Our analysis is therefore based on the information collected from these sites before such changes, if any. Our observation of the phenomenon led us to this research question: What are the risks, protections and remedies associated with the use of “Buy Now, Pay Later” (BNPL) financing? We have chosen to answer these questions, on the one hand, by analyzing the discrepancies between the regulations in force and the content of the BNPL agreements, and on the other, by noting the difference between consumer perceptions and the actual content of the agreements. and regulations. As a result, the answers to the research sub-questions already

¹³⁷ “A research problem is conceived as a conscious gap that we want to bridge between what we know, deemed as unsatisfactory, and what we want to know, deemed as desirable” – Translator.

identified will gradually reveal the risks or absence of risk related to BNPL debt and remedies, and by extension, will suggest possible protections for consumers.

These research sub-questions are listed below:

1. What are the risks associated with the emergence of BNPL financing, their companies and indebtedness?
2. What are the risks associated with dispute resolution?
3. What are the risks associated with consumer literacy about these products?
4. Does the legislation in force in Canada sufficiently protect consumers against these emerging products?

4.1 What are the risks associated with the emergence of BNPL financing, their companies and indebtedness?

4.1.1. Risks related to the credit/indebtedness dimension

First, let us review how the new “Buy now, pay later” (BNPL) financing formula works. It is very similar to traditional financing of the same name. The consumer buys a product from a retailer. To pay for it, the retailer offers doing business with a bank or an independent financing company with which it acts in partnership. In the context of this report, the companies concerned are the fintechs Sezzle, Afterpay, Klarna and Affirm which regularly collaborate with retailers to grant loans, mainly online. Consumers therefore find themselves entering into two separate contracts: a sales contract with the retailer and a loan contract with the financing company.

4.1.1.1 Classification of the BNPL credit agreement: vagueness and contextual analysis

The primary issue in this part of the report is with the classification of the second contract entered into by the consumer, i.e. whether or not the contract with the financing company is a credit (loan) agreement. As a reminder, a contract is not a credit agreement if no fees are charged in return for the consumer’s right to perform their obligation over time. This would be the case for a loan of money for which no interest or other cost of credit is payable as a result of the loan.¹³⁸ The main problem with the fees charged by BNPLs is that the practices related to the application of these fees and the nature of the fees charged are so diverse. This situation creates a vagueness of interpretation and requires each loan to be analyzed in context in order to determine whether it is a credit agreement or not. Consequently, it may be difficult to determine whether companies have discharged themselves from the obligations required by

138 Michel Deschamps, “L’application de la loi sur la protection du consommateur aux contrats de crédit,” *la Revue du Barreau*, vol. 77, 2018, consulted online: <https://edoctrine.caij.qc.ca/revue-du-barreau/77/1108547120/>.

law in the presence of a credit agreement, which obligations, it should be remembered, are designed to protect the consumer against over-indebtedness. If we nevertheless attempt the exercise by referring to the Québec CPA, Section 70 lists the different types of charges that can be considered as credit charges and, unsurprisingly, interest is included there.¹³⁹ Therefore, in the case of Affirm, which specifies an interest rate that can vary from 0 to 30% depending on level of solvency,¹⁴⁰ it is quite clear that it is a credit agreement. Moreover, Affirm was the only one of the four companies to hold a lender’s license from the Consumer Protection Office at the time of writing. But even so, the question remains: what about Affirm’s 0% loan? Can it be considered a loan, and will Affirm's obligation to comply with credit rules vary with each loan it makes? In Sezzle’s case, the charges are an account reactivation fee (\$15), a payment deferral fee (\$7.50), and a debit/credit card payment fee (\$5). In our opinion, these fees can easily be associated with any of the fees listed under Section 70, i.e. administration fees,¹⁴¹ renewal or membership fees.¹⁴² As for Klarna’s late fees, Section 92 of the CPA treats them as credit charges. As for Afterpay’s cross-border transaction fees, and the margin they can generate, the company points out that these can be considered as fees. In *Bank of Montreal v. Marcotte*,¹⁴³ the Supreme Court of Canada instructs that fees must be examined in two stages. The first is to determine whether the credit fees or charges in question fall into one of the categories of credit charges listed in Section 70 of the CPA. If so, these are credit charges. If not, the second step is to determine whether the fees or charges represent the amount for which the credit is actually granted (s. 68). If this is the case, we are talking about net capital, if not, we are talking about credit charges belonging to an unlisted category (Section 69). Credit charges are therefore fees for access to, or use of, credit.¹⁴⁴

The situation In Ontario is no clearer. In fact, a BNPL contract could be classified as a supplier credit agreement understood as a consumer agreement, whereby the supplier or a person associated with it grants a fixed credit to the consumer to help them obtain goods or services from the supplier, to the exclusion of a credit or loan.¹⁴⁵ However, for the rules governing the section on credit agreements to apply, the situation must not fall within the category of exclusions set out in Section 67 of the Ontario Act. Thus, when the agreement does not specifically provide for charges or interest,¹⁴⁶ these rules do not apply.

It therefore seems to us that the notion of charges is decisive in the application of provisions relating to credit, in both Québec and Ontario.

The contracts and agreements consulted could, depending on the context, be qualified as credit agreements. However, leaving the characterization of the contracts concluded by the consumer with these new companies to the vagaries of the context when we are dealing with contracts of adhesion could run counter to the objective of credit regulations, which is to protect the

139 *Consumer Protection Act* (CPA), CQLR, c s. 70a).

140 See the Affirm website: Payment Options through Affirm Canada Holdings Ltd. (“Affirm”). Your rate will be 0-30% APR (where available and subject to provincial regulatory limits). The APR offered is based on creditworthiness and subject to eligibility verification. Not all customers are eligible for the 0% APR.: <https://www.affirm.com/en-ca/>.

141 *Consumer Protection Act* (CPA), CQLR, c s. 70d).

142 *Consumer Protection Act* (CPA), CQLR, c s. 70th).

143 *Bank of Montreal v. Marcotte*, EYB 2014-242090,2014 SCC 55, para. 56.

144 *Bank of Montreal v. Marcotte*, EYB 2014-242090,2014 SCC 55.

145 2002 Act, s. 66.

146 2002 Act, ss. 67b) and c).

consumer against excessive indebtedness. It would mean that the rules intended to protect the consumer, particularly as regards the disclosure of charges or advertising, could not be correctly applied. One would then only need claim that financing is an alternative to credit or that it is free of charge to evade regulation, when in reality the said product could entail the same dangers as another regulated credit product. This is illustrated by this excerpt from a California decision handed down in the context of a permit application made by Sezzle in 2019:

Unlike some of the reported cases in California, there are no countervailing policy considerations justifying the exemption of Sezzle's product from the state's loan laws.¹⁴⁷ Sezzle's financing product may be worse for consumers than comparable, regulated options. For example, at least one Sezzle merchant allows consumers to use Sezzle to finance purchase amounts as low as \$35. If a consumer used Sezzle to finance a \$35 purchase and was charged all fees provided under the User Agreement, the consumer would have paid an equivalent annual percentage rate (APR) of about 600% on their purchase¹⁴⁷.

The analytical framework we have constructed should allow us to establish the discrepancies that exist between the legislation in force and the companies' agreements and contracts. We believe that the vagueness in the interpretation of the credit agreement could create such a discrepancy. Indeed, some of these companies may stipulate charges in their contracts or Terms of Service, while presenting their products as having no charges or interest,¹⁴⁸ which contributes to the vagueness when it comes to classifying the contract as a credit agreement. The risk is therefore the resulting difficulty in interpreting the credit agreement, which can engender problems in terms of compliance and also in terms of the authorities' control over emerging formulas in terms of the requirement to hold a lender's license.

4.1.1.2 *Classification of the BNPL company: between diversity and ambiguity*

In Québec, unless exempt by virtue of being a bank or a financial services cooperative, companies must obtain a permit to enter into a money-lending contract.¹⁴⁹ The decision whether or not to grant a permit to a company rests with the Office de la protection du consommateur. Thus, the Office may refuse to grant a lender's license,¹⁵⁰ in particular if certain formalities related to the loan agreement are not respected¹⁵¹ or if the contract contains an abusive credit rate.¹⁵² The four companies in our analysis all present themselves as having

147 <https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/12/Sezzle-Statement-of-Issues.pdf>

148 For example, on the **Affirm** site, the product is presented as follows: *No charge.*

You will never pay late fees. No annual fees. No surprise fees. While in the small print below, it is mentioned that there may be interest: <https://www.affirm.com/en-ca/>.

Afterpay: *pay in six interest-free instalments:* <https://www.afterpay.com/en-CA/how-it-works> *Shop now. Pay over 6 weeks. Never pay interest.:* <https://www.klarna.com/ca/pay-in-4/>; **Sezzle:** *Pay your purchases in 4 instalments with 0% but increase your credit:* <https://sezzle.com/en-ca>.

149 *Regulation respecting the application of the Consumer Protection Act* of Québec, s. 18.

150 *Ultra Comptant v. Office de la protection du consommateur*, 2001 CanLII 32656 (TAQ).

151 For example the requirements associated with the content set forth in s. 115 of the *Consumer Protection Act* (CPA).

152 *Ultra Comptant v. Office de la protection du consommateur*, 2001 CanLII 32656 (T.A.Q.).

different classifications, and of these, only Affirm held a lender’s license issued by the Office de la protection du consommateur at the time of our research. Klarna was registered in the Registraire des entreprises as a company whose majority shareholder was Klarna Bank AB, a chartered bank, which may suggest that it is a bank and therefore that it is exempt from licensing requirements when granting loans to consumers. However, Klarna did not appear anywhere on the list of institutions supervised by the Office of the Superintendent of Financial Institutions (OSFI)¹⁵³ if we are to rely on the results of our search of the organization’s website. Indeed, according to Section 2 of the *Bank Act*, a bank is an entity whose name appears in Schedules I or II of the Law, which is not the case with Klarna. However, an authorized foreign bank may operate in Canada if it has the benefit of a Ministerial Order under Section 524(1) of the Act. In addition, a foreign regulated entity is one incorporated in a foreign country that has ratified a treaty listed in Schedule IV¹⁵⁴ of the Act. According to the interpretation of an expert¹⁵⁵ consulted in the context of this research, and taking into account Section 14 of the *Bank Act*, an entity can also be a subsidiary of a foreign bank subject to the Act, but its name must then appear in Schedule II of the Act. Klarna does not appear to be listed in either Schedule I, II or III of the *Bank Act*. However, Schedule IV refers to an agreement with the European Union, of which Sweden is a member (Klarna is Swedish in origin). It has been difficult to find any trace of a ruling that might apply to Klarna. It therefore appears difficult to conclude that Klarna is a bank within the meaning of Canada’s *Bank Act* and that it is exempt from holding a license to grant loans to consumers. It should be noted that creating the impression that the lender is a regulated institution could constitute a violation of Section 983 of the *Bank Act*.¹⁵⁶ As for Afterpay and Sezzle, neither held a lender’s license at the time of the research. Sezzle does not even appear to be registered with the Registraire des entreprises du Québec

Ontario’s *Consumer Protection Act, 2002* does not appear to require companies to hold a license to grant loans to consumers. However, a lender’s license is required to make loans under Section 6 of the *Payday Loans Act 2008*.¹⁵⁷ Furthermore, Section 2(2), the Application of the Act, specifies that it applies, with the necessary modifications, to loans other than payday loans.

Here again, there is a risk of lack of compliance with a requirement of a law of public order,¹⁵⁸ which although it is designed to protect consumers, may exempt emerging credit companies from having their practices regulated by the relevant authorities. This risk stems in particular from the vagueness of classifying the financing as a credit agreement.

4.1.1.3 *Debt: diversity of practices, NSF fees and registration in the credit file*

As noted earlier in this report, credit legislation is designed to protect the consumer against excessive indebtedness. Among the obligations imposed by the CPA and retained for the

153 <https://www.osfi-bsif.gc.ca/eng/wt-ow/Pages/wwr-er.aspx?sAll=1>.

154 <https://laws-lois.justice.gc.ca/eng/acts/b-1.01/page-4.html>.

155 Jacques St Amant, specialist in banking law, former lecturer at UQAM and former employee of Option consommateurs.

156 <https://laws-lois.justice.gc.ca/eng/acts/b-1.01/section-983-20180621.html>.

157 <https://www.ontario.ca/laws/statute/08p09>.

158 It cannot be derogated from by a specific agreement: See s. 261 Québec CPA and s. 7(1) of the 2002 Ontario Act.

purposes of this research, in the process of granting credit, the obligation respected by all companies is the consumer’s right to pay before the due date. The right of withdrawal is not included in any of the agreements. With regard to consent, it is important to point out, on reading the agreements, that most companies provide for charges, while they emphasize the absence of fees on their websites, which could contravene Section 247.2 of the Québec CPA which states that no one can lead another to believe that no credit charges will be payable during a certain period following a transaction, unless the credit rate applicable at the end of the transaction if the net capital is not repaid in full is clearly specified. It may also contravene Section 219 of the CPA regarding false or misleading representations. If we take the example of Affirm, which holds a lender’s license from the Office de la protection du consommateur, the first statement on its website, reads as follows: “**No fees: you’ll never pay late fees. No annual fees. No hidden fees – ever.**”¹⁵⁹ There are, however, interest charges associated with the loan, depending on the Terms of Use and information to be found elsewhere on the company’s website. This could vitiate the consumer’s consent to use this product rather than another, in the belief that there are no fees.

Furthermore, in their business model, BNPL companies ask consumers for permission to access their banking data as part of what they present as a credit check or an ability-to-pay assessment, which, incidentally, varies from company to company. Sezzle talks about a credit check that is not firm but continues throughout the contract and points out that it only accesses the credit ratings of residents of the United States. This is also true of Affirm and Afterpay, except that Afterpay mentions a freezing of funds corresponding to the first month of payment during the evaluation process and each time there is a new purchase. Klarna also collects data for credit check purposes. As part of the approval process, consumers consent to reimbursement by direct debit from their debit card or credit card. Following are some of the considerations we propose in connection with how this financing works:

1. Direct and unlimited access to bank accounts for the recovery of funds

Certain practices referred to in Sezzle’s User Agreement may be questionable and have a considerable impact on the financial situation of consumers, especially the most vulnerable. In the event of non-payment, Sezzle reserves the right to withdraw funds at any time from any registered bank account, including savings accounts and secondary checking accounts that are listed at the time of verification but not registered for Sezzle account reimbursement.¹⁶⁰ We question the validity of such consent granted by a consumer. It is true that a bank account may be seized by a creditor:¹⁶¹ “since the money deposited by the customer in his bank account constitutes a loan granted to the bank, the seizure of these funds held in this account by the

¹⁵⁹ <https://www.affirm.com/en-ca/>.

¹⁶⁰ Excerpt from clause 3.7 Bank Accounts.

When you log into your bank account to connect your bank account(s) to your Sezzle Account, Sezzle will store information related to all accounts connected to this bank connection. Sezzle reserves the right to initiate payments and withdraw funds from any bank account(s) on file at any time in order to collect all payments, including delinquent payments. Accounts include saving accounts and non-primary checking accounts.

¹⁶¹ Nicole L’Heureux, Marc Lacoursière, *Droit de la consommation*, 5th edition, Montreal, Éditions Yvon Blais, 2017, p. 181.

seizing creditor of the customer (his debtor) obliges the bank (third party seisor in this case) to remit these funds to the creditor of its customer.” [TRANSLATION] However, there is a procedure that must be followed, which in Québec is specified in Articles 711 and following of the *Code of Civil Procedure of Québec* that govern such a seizure. Although seizure would be possible in the context of legal proceedings, the same cannot be said of a simple consent given by the consumer.

2. Credit on Credit and NSF Fees: Misrepresentation?

Beyond what has been said about fees in the preceding lines, there is another issue related to interest and fees in the event of insufficient funds. Since the financing is combined with a credit card or another bank account (e.g. a checking account), there is a risk that the consumer will have to pay financing-related fees, even when the financing is at 0%. If the consumer uses a credit card, they will be charged interest if the account is not paid on time. In the case of a debit card, there is the possibility of the bank imposing NSF charges. Furthermore, Klarna also charges NSF fees on top of those charged by the bank, which could constitute a heavy burden for the consumer, especially if they are financially vulnerable. In fact, a class action suit has been filed in California (USA) against Klarna¹⁶² accusing it of misrepresenting NSF fees. Finally, it should be noted that occasional overdrafts in a chequing account maintained by a consumer with a financial institution may be considered as loans granted to the customer by the financial institution if they are repayable only on demand by the institution.¹⁶³

3. No limit to the number of loans a customer can hold at any one time (loan stacking)

Affirm is the only company of the four to stress the fact that there is no limit to the number of loans a consumer may have at one time.¹⁶⁴ In the focus groups conducted in the context of this research, half of the Ontario participants claimed to have had more than one loan at a time. This raises questions about the value of the ability-to-pay assessment performed at the time of loan application, which all the companies claim to perform. It should be remembered that the purpose of the assessment of the consumer’s ability to pay is to protect them against uncontrolled indebtedness, and that the assessment of their ability to pay involves taking into account, in particular, information about all recurring monthly disbursements in addition to the total monthly disbursements required under a credit agreement.¹⁶⁵

4. Credit file recording

BNPL financing clearly has an impact on users’ credit files, since all the companies report the information to the credit bureaus. Sezzle seems to leave it up to consumers to decide whether or not a loan is recorded in the credit file, but they still need to be aware of this when they take

162 <https://www.classaction.org/media/hale-v-klarna-inc.pdf>.

163 Michel Deschamps, “L’application de la loi sur la protection du consommateur aux contrats de crédit,” in *Revue du Barreau*, vol. 77, 2018, consulted online: <https://edoctrine.caij.qc.ca/revue-du-barreau/77/1108547120/>.

164 See the No Limits section of the Help Center: <https://heCPAenter.affirm.ca/s/article/no-loan-limit-ca?language=en>.

165 Regulations for the application of the *Consumer Protection Act*, art. 61.0.1 b) and c).

out the loan. Afterpay simply points out that the account will be sent to a collection agency, which may have the effect of tainting the credit file.

5. Possible access to a credit limit exceeding the amount of the purchase?

Sezzle mentions the possibility of benefitting from an increased limit. On the other hand, the clause in Affirm’s Terms of Service that prohibits users from using these services to pay another loan or make cash advances suggests to us that there may be the possibility of having access to a credit limit exceeding the amount of the purchase. But we cannot confirm this because our focus groups did not allow us to validate this information.

Finally, it is difficult for us to say whether the debt protection measures provided for by law are respected by BNPL companies, based on a reading of their agreements and contracts. One measure provided for in all the agreements is the possibility of making payment in advance. The assessment of ability to pay is also provided for, but we wonder about its validity, as the only element emphasized is a credit report check, which, in the case of Sezzle, is qualified as a non-firm check but refers to an exclusive proprietary analysis tool, whose compliance with the information required by the *Regulation respecting the application of the Consumer Protection Act*¹⁶⁶ is difficult for us to verify. The right of withdrawal (or the right to cancel a loan contract within 2 days of each party having received it) is not provided for in any agreement or contract. Furthermore, since the contract can be considered a contract concluded at a distance,¹⁶⁷ certain legal requirements, notably with regard to the disclosure of certain information (e.g. fees), which must be made in a way that is obvious, intelligible and expressly brought to the consumer’s attention, are not fully respected. Information about NSF fees is not prominently displayed, but rather hidden in the multitude of pages that muddy user agreements. This is also one of the elements alleged in the class action brought against Klarna¹⁶⁸ in California: “*Klarna prominently markets itself as a service that allows users to pay for purchases at a later date, with no interest, no fees and no hassle. These representations are false. In fact, there are huge, undisclosed fees and interest associated with using the service.*”

4.2 What are the risks associated with BNPL dispute resolution?

4.2.1 Risks related to dispute resolution

4.2.1.1 Frontline mechanisms

Despite the high degree of appreciation of BNPL, some participants in the focus groups conducted as part of this research pointed to difficulties encountered when returning purchased

¹⁶⁶ Regulations for the application of the *Consumer Protection Act*, s. 61.0.1.

¹⁶⁷ *Consumer Protection Act* (CPA), CQLR, c s. 54.4.

¹⁶⁸ <https://www.classaction.org/media/hale-v-klarna-inc.pdf>.

goods and in contacting customer service. Yet all of these companies provide frontline assistance (Help Center (Affirm), Shopper Support (Sezzle), Help Center (AfterPay)). Klarna recommends contacting the merchant first. The effectiveness of these measures is questionable, however. While it is true that the *Code of Civil Procedure of Québec* encourages parties to attempt to settle disputes before going to court and that Ontario’s *Consumer Protection Act, 2002* authorizes settling a dispute other than by going to court,¹⁶⁹ the mechanisms that are put in place must facilitate access to justice. This is defined as the action of making accessible a form of justice that is perceived as such by the person for whom it is intended and which meets their motivations and expectations of justice.¹⁷⁰ It is difficult for us to confirm that this goal has been achieved. On the more specific question of reimbursement, Affirm provides for reimbursement within 21 days, or 90 days in certain cases. Also, questions may arise concerning the application of certain specific credit measures to facilitate consumer recourse.

4.2.1.2 Chargebacks?

One of the issues raised by the emergence of BNPL is the application of chargebacks to purchases made using BNPL financing. Chargeback is a mechanism provided for in both Québec’s *Consumer Protection Act*¹⁷¹ and in Ontario’s *Consumer Protection Act, 2002*.¹⁷² It allows a consumer who has used their credit card for a purchase to contact his credit card issuer for reimbursement in the event of the merchant’s failure to reimburse. In a context involving a BNPL, could the consumer contact their credit card issuer? First of all, during the period of our research, we found no court decisions involving the four companies in Canada.

However, a search carried out on the website of the Office de la protection du consommateur du Québec brought turned up a formal notice against Afterpay. According to the information obtained about the content of the formal notice, the case involved returning items purchased through the Afterpay account linked to the consumer’s credit card. The consumer demanded a refund. The merchant claimed to have credited the Afterpay account. The facts do not tell us whether the consumer had made a chargeback request to his credit card issuer, but this would be very difficult to determine. Let us first recall the mechanism by which a consumer enters into two contracts:¹⁷³ one with the seller and another with the financing company. This is an assignment of a claim under Article 1637 of the *Civil Code of Québec (CCQ)*.¹⁷⁴ In an assignment of claim, the creditor assigns his claim or his right to claim to a third party. This is what happens, in our view, when the retailer offers the consumer the possibility of having their purchase financed by a financing company. Except that in this case, the consumer decides to repay their financing with the credit card. One can therefore wonder whether the consumer loses the right

169 *Consumer Protection Act 2002*, s. 7(4)

¹⁷⁰Jean-François Roberge, *La justice participative, changer le milieu juridique par une culture intégrative de règlement des différends*, 2011, Montréal, éd. Yvon Blais, p. 23

171 s. 54.14 CPA.

172 s. 99(1) Act 2002.

173 <https://www.canada.ca/en/financial-consumer-agency/services/loans/buy-now-pay-late.html> and Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, 2nd edition, Éditions Yvon Blais, pp. 361-362, 2021.

174 1637 CCQ states: “A creditor may assign to a third person all or part of a claim or a right of action which he has against his debtor. He may not, however, make an assignment that is injurious to the rights of the debtor or that renders his obligation more onerous.”

to chargeback conferred by the CPA to facilitate their recourse. The question is not clear-cut, but several suggestions can be put forward.

First of all, under Section 54.3 CPA, in a contract concluded at a distance, a merchant may not collect payment before performing his obligation, except by a payment mode for which the consumer can request a chargeback, i.e. a credit card. In the event that the consumer does use their credit card to repay the BNPL, we consider that it would nevertheless be difficult to assert that they will be able to benefit from the chargeback, despite paragraph 2 of Article 1637 CCQ, which states that the assignment of debt cannot affect the debtor’s rights. The reason is that the consumer did not use their credit card to purchase their good, but rather to repay the financing. If the consumer uses their debit card to repay their BNPL, the situation is not so different, since the merchant is not supposed to accept payment before performing the obligation if payment is not made by credit card.

On the other hand, if we consider that BNPL is a credit, the question of the application of Section 6.3 of the *Regulation respecting the Consumer Protection Act* arises, because this section of the Regulation excludes credit contracts from chargeback. The question is therefore not easy to decide. Perhaps the authorities should contemplate allowing chargebacks in situations in which a credit card is not used, but the contract is concluded at a distance, as in the case of BNPL. In the meantime, consumers who use their debit card will still be able to contact their financial institution under Section 23, paras. a) and b) of Rule H1 of the Canadian Payments Association, which allows the consumer to contact their financial institution to request a refund within 90 days, in very specific situations.¹⁷⁵

Finally, in the case of pre-authorized payments, Section 124 of the Québec CPA allows consumers to stop withdrawals at any time by notifying the merchant. In this case, however, if the contract continues, the consumer will have to agree on another means of payment to meet their obligations.

4.2.1.3 The interdependence of the contract and its financing

Both the Ontario 2002 Act and the Québec CPA contain provisions that make the assignee and the merchant jointly and severally liable. In the case of the Québec CPA, it is Section 103, and in the case of Ontario, it is Section 83(1) of the 2002 Act, that states that the assignee does not have greater rights than the merchant with respect to the credit or loan, and is bound by the same obligations, responsibilities and duties as the merchant, including compliance with the law. In Québec, the legislator specifies in Section 103.1 that a consumer who has used a contract for the loan of money to pay for goods may set up against the lender the same means of defense that they can assert against the merchant. But when we read the various BNPL agreements, we realize very quickly that these companies disclaim all liability in the event of a

¹⁷⁵ This section states as follows: “the processing member accepts a claim request for reimbursement from a Payor whose account a PAD has been debited with a PAD under the following declared conditions:

- i. the PAD was not drawn in accordance with the Payor's PAD Agreement; or
- ii. the Payor's PAD Agreement was revoked; or
- iii. Confirmation, Prenotification or notice was not given in accordance with sections 16, 17, 28 or 29, as may be applicable;” <https://payments.ca/sites/default/files/h1eng.pdf>.

dispute. Sezzle limits its role to that of a communication and dispute management portal for user and merchant accounts. As for Klarna and Afterpay, they disclaim all liability for any dispute between the consumer and the merchant. Since the *Consumer Protection Act* is of public order, it is our opinion that these clauses are not enforceable against consumers.

4.2.1.4 *Clauses likely to affect fairness in dispute resolution*

Afterpay and Sezzle have arbitration clauses that exclude Québec. Sezzle also has a class action waiver clause. It is assumed that these companies know that these clauses are not binding on Québec consumers.¹⁷⁶ Ontario consumers, however, are not excluded from such clauses. Nevertheless, Section 7(2) of Ontario’s *Consumer Protection Act, 2002* renders invalid “any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration.” Also, Section 8(2) of the same Act states that a consumer may institute proceedings on behalf of members of a class or become a member of a class in such proceedings in respect of a dispute arising out of a consumer agreement notwithstanding any condition or acknowledgment in the consumer agreement or related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding. It can therefore be concluded that these clauses do not apply to Ontario consumers either, despite the absence of an exclusion for the province. Affirm also provides for a one-year limitation period for filing a claim, which excludes Québec. In Ontario, subject to certain exceptions, the statute of limitations is two years under the *Limitations Act, 2002*.¹⁷⁷ These agreements also include all manner of clauses that may be deemed unfair toward the consumer;¹⁷⁸ a more in-depth analysis of these clauses is therefore necessary. For the time being, it is difficult for us to state that these clauses comply with the legislation in force.

Based on the foregoing, it is also difficult for us to conclude that the agreements comply with the regulations in force with respect to dispute resolution, both in Ontario and in Québec.

4.3. **What are the risks related to consumer literacy about BNPL?**

The major finding from the focus groups was that the participants’ perception of BNPL products changed over the course of the discussions. This evolution went from unreserved appreciation of such products at the start of the sessions, to questioning the need to repeat the experience and inducing a measure of reflection on the subject, by the end.

The literacy needs in this area could not be more telling. Knowledge of the product is all the more essential as it can affect consumer consent. When it comes to credit, we believe that the importance of consent is reflected in the various rules governing the disclosure of relevant

¹⁷⁶ *Consumer Protection Act* (CPA), CQLR, c s. 54.4.

¹⁷⁷ <https://www.ontario.ca/en/laws/law/02l24#BK4>.

¹⁷⁸ Art. 1437 of the *Civil Code of Québec*.

information to consumers. For example, the merchant has the obligation to disclose to the consumer the nature of the transaction, its particularities and the terms and conditions of its execution,¹⁷⁹ for example, whether there are any charges involved.¹⁸⁰ This is also true in Ontario, where the supplier must provide the consumer with the information in a clear, comprehensible, and prominent manner.¹⁸¹

4.3.1. Risks related to literacy: discrepancy between consumer-friendly information and the agreements

As we have pointed out more than once, the emphasis on BNPL websites is on the absence of fees and the fact that it is an alternative to credit. However, on reading the agreements, one quickly realizes the existence of charges, as presented in point 4.1.1.1. of this chapter of the report. We will recall that the NSF fees imposed by Klarna were the grounds for a class action in California. The impact of this information gap on consumers is quite evident. Indeed, our focus group participants all told us that there were no fees associated with these products (prior to verification), and no one claimed to have received any information about fees.

It was precisely the absence of fees and interest that attracted participants to these products. Let us recall the lesson of the Supreme Court in *Richard v. Time*¹⁸² regarding representations made to consumers: that it is the general impression conveyed that is important.¹⁸³ Whether or not a representation caused harm to a consumer is irrelevant in deciding whether a merchant engaged in a prohibited practice. The CPA prohibits misleading representations, not just deceptive ones. A representation is misleading when it has the ability to mislead.¹⁸⁴ To demonstrate its misleading nature, it is not necessary to provide proof that a consumer has actually been deceived by it.¹⁸⁵ Misleading representations may take the form of allegations, omissions, or behaviour.¹⁸⁶ According to the Supreme Court, to assess the veracity of a representation, it is necessary to proceed in two stages:¹⁸⁷ 1) describe the general impression that the representation is likely to give to the credulous and inexperienced consumer; then 2) determine whether this impression is consistent with reality. If the answer is no, the merchant is guilty of a prohibited practice.

In the case that concerns us, the discrepancy between the information presented in order to attract the consumer and the information presented in the agreements allows us to reply to these two considerations in the negative. This analysis throws doubt on the consent given by any consumer who subscribes to these products.

179 Nicole L’Heureux, Marc Lacoursière, *Droit de la consommation*, 6th edition, Montreal, Éditions Yvon Blais, 2011.

180 *Consumer Protection Act*, s. 72.

181 *Consumer Protection Act 2002*, s. 5(1).

182 *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 SCR

183 *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 SCR, paras. 49-50.

184 Nicole L’Heureux, Marc Lacoursière, *Droit de la consommation*, 6th edition, Montreal, Éditions Yvon Blais, p. 495, 2011.

185 RSQ, c P-40.1, s. 217.

186 RSQ, c P-40.1, s. 216.

187 *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 SCR, para. 78.

4.3.2. *Risks related to literacy: discrepancies between consumers’ perceptions of the law and agreements*

The degree of confusion over the products was such that one participant considered BNPL financing to be a loyalty program offered by the company. This is understandable in light of the analysis we conducted in our research in the attempt to classify the products and the companies that offer them. In terms of the formalities required by the law, whether or not these involve collection, all the participants stated that they had not received a written contract, yet quickly agreed to the terms of use. The participants also granted a measure of trust to these companies, as they likened them to banks. Some participants were unaware that certain companies could carry out a credit check under the terms of the agreements, especially since one of their motivations for using these products was to access credit without a credit check. As regards measures to prevent indebtedness, the ability-to-pay assessment seemed to be limited to credit card information for some participants. As for paying before due date, none of the participants seemed to be aware that this was a possibility. Also, they knew very little about what remedies the companies provided. Finally, the majority were even unaware of the existence of traditional measures such as contacting their credit card issuer.

In short, the greatest risk in terms of literacy resides in the discrepancy between the consumers’ impression of the product and the remedies, and the reality. Although we did not pose any specific questions to this effect, all the participants commented on the need to make information on the subject more accessible and easier to understand.

4.4. Does the legislation in force in Canada sufficiently protect consumers against these emerging products?

Historically, the main issue with regard to credit has been overindebtedness. According to Professor Pierre-Claude Lafond,¹⁸⁸ the government adopts two attitudes to protect consumers against their own weaknesses. The first is a bottom-up approach aimed at protecting consumers against abusive or inconsiderate use of credit, in particular by adopting measures to reduce indebtedness (e.g. by offering consumer the possibility of canceling the contract two days after signing or by invoking lesion, etc.). The second is a top-down approach, i.e. control over credit providers, notably by prohibiting advertising, requiring the disclosure of certain information and by requiring a license. All these measures have been analyzed in this report. It is true that there is as yet no specific legislation respecting BNPLs, but in the meantime, we can work to apply the protections offered by the regulations in force. While one of the issues related to the classification of the BNPL product is the existence of credit charges, we now know that certain charges, such as late fees, can be considered as credit charges, in particular when those they affect are financially vulnerable. It is reported that in the UK,¹⁸⁹ consumers using BNPL products were charged £39 million over a one-year period, which represents a considerable amount in terms of fees. Furthermore, Section 66 of the Québec CPA, which lists the various contracts

188 Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Éditions Yvon Blais, 2015.

189 <https://www.endava.com/en/blog/Business/2022/Buy-Now-Pay-Later-Will-Regulation-Burst-the-Bubble>.

covered by the section on the credit agreement, seems to be less than exhaustive, if we are to rely only on the vocabulary used: “*This division contemplates all contracts of credit, particularly ...*” A broad interpretation of this section would make it possible to integrate other types of contract, including BNPLs, and qualify them as credit contracts. This would involve having to perform a contextual analysis every time to determine whether it is credit or not and would create an automatic obligation on the part of new companies that offer credit, regardless of how they decide to present their product (alternative to credit, interest-free loan, etc.). Just as when you use a traditional credit card and pay the balance in full at the end of the required period; interest does not apply, but you are no less in the presence of a credit product.

It should be remembered that the requirement to hold a license is designed to eliminate unscrupulous lenders and those who employ reprehensible practices¹⁹⁰ to provide loans to consumers. In our view, fuelling this confusion by referring to the limits of current legislation goes against the spirit of the law, which is to protect consumers against excessive indebtedness, and makes them even more vulnerable when faced with new models. Ultimately, this attitude contributes to the creation of two systems: one for regulated companies and another for all the new formulas that are able to operate on the fringes of the current regulations. However, the current laws in Canada, at both the provincial and federal level, do provide protection against prohibited practices such as misleading advertising.

Finally, whether credit is involved or not, a contract between a BNPL company and a consumer is, in our opinion, a consumer contract, and several other provisions of the law apply, in particular those relating to distance contracts, to recourse or even those that prohibit certain clauses that could limit consumer recourse.

4.4.1. *To legislate or not to legislate: what is the best approach?*

The BNPL phenomenon is being discussed around the world. In some jurisdictions, such as Australia, initiating debate on BNPL regulation has had a positive effect on the practices of those companies. Indeed, this government was among the first to begin work on BNPL regulation¹⁹¹. In response to this work, the BNPL industry has introduced the *Buy Now Pay Later Code of Practice*,¹⁹² which sets out more effective rules than those currently in force in Australia.

In the UK¹⁹³ a BNPL bill has been under consideration since February 2023. The wording of the Bill makes clear that the British legislator intends to classify these companies as “lenders” and the product as “credit.” Consequently, these companies will need to be authorized by the Financial Conduct Authority (FCA)¹⁹⁴ before they can grant loans to consumers. They will of course be subject to the rules already in force on advertising. If the provisions under

190 Nicole L’Heureux and Marc Lacoursière, *Droit bancaire*, Éditions Yvon Blais, 5th edition, 2017, p. 320.

191 <https://www.forbes.com/sites/dylansloan/2022/07/12/why-regulation-will-help-the-buy-now-pay-later-giants/?sh=78739e367f95>.

192 https://afia.asn.au/files/galleries/AFIA_Code_of_Practice_for_Buy_Now_Pay_Later_Providers.pdf.

193 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1136257/B_NPL_consultation_on_draft_legislation.pdf.

194 “As a result, third-party lenders offering these agreements will need to be authorized and regulated by the FCA and will need to comply with the regulatory controls that will apply under the government’s tailored regime.”

consideration are adopted, BNPL companies that have not obtained authorization from the FCA will still need to have their advertising approved.

Some consider that regulating BNPLs will primarily benefit these new ventures,¹⁹⁵ because it will create a sense of trust among consumers, who will see these fintechs as safe, regulated companies. Furthermore, regulation could favour large BNPL companies and banks to the detriment of smaller companies. The BNPL market is being taken over by new competitors, including traditional credit card companies.

What will Canada's approach be? Whatever attitude the government adopts, it is important to reflect on the conjunction of three dimensions we have analyzed, namely credit/indebtedness, recourse/dispute resolution and literacy. The adoption of credit measures alone is likely to have little effect without the introduction of effective mechanisms for resolving disputes and ensuring adequate consumer literacy on the issue.

The emergence of these new formulas raises new questions that have ramifications in various areas, including the protection of consumers' personal information. A study carried out in California has concluded that BNPL companies collect more personal information than they need for the purposes of their services.¹⁹⁶ Although we did not study this issue, we have noted that with the model used by BNPL companies, consumers authorize these companies to access their bank accounts and their data. We cannot comment on the potential risks raised by all such authorizations, but this is an issue that future research in Canada could address. It is worth noting, however, that Canada is currently studying how best to enable the safe adoption of an open banking system,¹⁹⁷ which is defined as a secure means of sharing financial data with financial technology companies (fintechs or financial applications).

CHAPTER 5. CONCLUSION AND ANSWER TO THE GENERAL RESEARCH QUESTION

In this research, we sought to identify the risks associated with the emergence of the new “Buy now, pay later” financing formula. The context suggested issues relating to credit/indebtedness, recourse/dispute resolution and consumer literacy. Since the general research question related to the risks associated with the phenomenon entailed regulation, we constructed an analytical framework based on the relevant legislation, while noting discrepancies between, on the one hand, the legislation and the content of the agreements/contracts and, on the other, between consumers' perceptions and the actual content of agreements and regulations. There are three dimensions to this analytical framework that emerged from the context: the

195 <https://www.forbes.com/sites/dylansloan/2022/07/12/why-regulation-will-help-the-buy-now-pay-later-giants/?sh=78739e367f95>.

196 <https://advocacy.consumerreports.org/wp-content/uploads/2023/05/Buy-Now-Pay-Later-A-Case-Study-for-a-Digital-Standard-1-2.pdf>

197 <https://www.canada.ca/en/financial-consumer-agency/services/banking-activities/open-banking-system.html>.

credit/indebtedness dimension, the recourse/dispute resolution dimension, and the literacy dimension.

We proceeded to study the doctrine, legislation and case law related to credit. We reviewed the agreements and contracts used in “Buy Now, Pay Later” transactions, and we searched the websites of four companies involved in financing these products: Klarna, Sezzle, Afterpay and Affirm. Finally, we supplemented our data with qualitative field research by conducting two focus groups, one in Ontario and the other in Québec. This allowed us to analyze the data collected in the light of the regulations in force and to identify discrepancies while answering the research sub-questions which revealed the answer to the general research question: What are the risks, protections and remedies associated with the use of “Buy Now, Pay Later” (BNPL) financing in the Canadian context?

Our analysis revealed that, in general, there were discrepancies between credit/indebtedness regulations and agreements provisions, which had an impact on recourse/dispute resolution and consumer literacy. The discrepancies between the regulations relating to the first two dimensions and the agreements/contracts were mainly the result of vagueness in the application of the law to the new phenomenon. On the other hand, the discrepancy between consumer perceptions with regard to legislation and agreements was mainly the result of the way these products were represented and lack of consumer knowledge.

More specifically, for the credit/indebtedness dimension, the risks identified were first of all: vagueness in the interpretation of the “Buy now, pay later” contract as a credit contract, due to the diversity of practices regarding fees and the requirement to hold a lender’s licence. As a result, the credit provisions designed to protect the consumer from excessive indebtedness were not respected. There were also various practices likely to affect vulnerable consumers, such as direct and unlimited access to bank accounts for collection purposes, the imposition of NSF fees by certain companies in addition to those charged by banks, loan stacking and entries in credit files, for certain companies.

On the subject of recourse/dispute resolution, it should first be noted that the main problem referred to by users of these products was the difficulty of obtaining a refund in the event of the return of goods, for example, and the quality of customer service. Even though purchases are made remotely, it is difficult to say that chargeback could apply to these situations. It would therefore be appropriate to reflect on a mechanism that would be effective for consumers. We also noted the presence of certain limitation-of-liability clauses, which have the effect of setting aside the protections provided by consumer protection laws with regard to provisions concerning the joint and several liability of merchants and assignees, as well as the associated defenses. In Ontario, we noted the presence of mandatory arbitration and class action waiver clauses.

Finally, in terms of literacy, we found some confusion among consumers about whether or not BNPL financing actually constituted credit, as well as confusion as to existence of fees or a credit check prior to obtaining financing. We also noted a lack of knowledge concerning the possibility of repaying the loan before the due date, as well as exercising recourse. The most important finding with regard to literacy was the change in the participants’ perception of BNPL between

the beginning and the end of the discussion groups, which indicates the need for education about the phenomenon.

To sum up and answer the research question, the greatest risk is in the vagueness of the regulations, which necessitates a contextual analysis in order to determine whether or not a credit contract is involved; this has an impact on the remedies and contributes to consumer confusion. Last February, the United Kingdom launched a consultation process to legislate on the phenomenon. Some proposals concern classifying the product as “credit” and submitting it to the advertising rules already in force. Regardless of the direction that Canada decides to take, a reflection on the phenomenon is necessary. In the meantime, certain provisions already in force could perhaps be applied.

Finally, certain avenues could be explored in the future. For example, our study revealed a number of issues related to personal information. Further research could identify other areas in which intervention is needed.

5.1. Our recommendations

Option consommateurs recommends

That the Federal and Provincial Governments:

- **Intervene to clarify the notion of credit agreement in light of the emergence of new models**
- **Intervene to clarify the requirement to be licensed in order to grant loans to consumers, in light of emerging models**
- **Intervene to enforce provisions already in force regarding representations made to consumers, in order to avoid misleading them;**
- **Inject the necessary funds to promote consumer literacy**
- **Consider chargebacks in situations when a credit card is not used**

That businesses:

- **Provide consumers with adequate information, in compliance with contracts, about the financing products offered and their consequences**
- **Provide consumers with adequate customer service and dispute resolution services**
- **Comply with the requirements of the regulations in force**

That consumers:

- **Learn about the products and the consequences of using them before making a commitment**
- **Compare the various products on the market as well as the related protections**

- **Find out about possible remedies in the event of a problem**

Appendix 1 – Discussion guide

Option consommateurs
Discussion groups, French version
Animation guide

INTRODUCTION (5 mins)

PRESENTATION

- Presentation of the facilitator
- nothing to sell
- Confidentiality, no person's name is mentioned in our report
- The information collected will only be used for the purposes of the study.

DISCUSSION RULES

- Registration
- Talking one person at a time, speaking time distribution
- Importance of spontaneity and personal opinions
- No wrong answer

OBJECTIVE OF THE MEETING

BIP Research was commissioned by Option consommateurs to carry out a study on “Buy now, pay later” (BNPL) financing, in connection with your purchases. We increasingly offers consumers the option of paying for their purchases with products like Affirm, PayBright, Afterpay, Klarna, Sezzle, etc., in just a few instalments. To ensure that we are all talking about the same thing, here are some elements that stand out from the definition of this method of payment:

- This mode of financing applies to small purchases (generally less than \$1,000).
- The payment is spread over a short period, often 2 to 4 months.
- Charges are made on the credit card or debit card.

We want to know your experience with these products, your perceptions of these new payment methods, the risks or the absence of risks that they represent in your eyes, what motivates you to use them.

Accumulation: 5 min

PRESENTATION OF THE PARTICIPANTS (5 min)

ROUND TABLE: Tell me a little about you:

- Your city
- Your occupation
- Your family situation: student, head of household, etc.
- Which BNPL payment methods did you use (Affirm, PayBright, Afterpay, Klarna, Sezzle or other)?
- How many times have you used this payment method?

Accumulation: 10 min

SECTION 1 – Experience (25 min)

- How did you learn about BNPL financing?
Leave the question open at the beginning. If necessary, offer:
 - *Advertisement*
 - *Word of mouth*
 - *By.merchant*
 - *When paying for my product*
- During recruitment, you all told us that you had already used these products. What motivates you to use them?
Leave the question open at the beginning. If necessary, offer:
 - *Ease of use*
 - *No interest payable*
 - *Fits easily into the budget*
 - *The option was offered at the time of payment (this method appeared as a choice among other payment methods, such as Visa or Mastercard)*
- What purchases have you financed with BNPL and why? Can you tell us about it?
- Was it shopping online or in person? On which site, in which store? *(In principle, it would be online, but you have to validate if some have done it in person.)*
- The duration/period of the loan was suggested/recommended/imposed (for example, 2 months) or you had the choice of the period?
- Did you know the interest rate and penalties in case of default?

- How was the classification for financing made? For example, were you asked to provide any particular information before being told whether or not you were eligible to use the BNPL?
 - *If yes, what type of particular information?*
Leave the question open at the beginning. If necessary, offer:
 - *Information questionnaire on the ability to pay (income, debts)*
 - *Credit investigation*
 - *Question to find out if you have ever been denied credit before*
 - *Other information*

Accumulation: 35 min

SECTION 2 – Classification of the product and financing companies (25 min)

- How would you qualify the BNPL product? Is it a loan, a credit, something else?
- What form does this financing take? Is it:
 - By issuing a BNPL company credit card for future purchases?
 - By using an app that allows you to make additional purchases?
 - Or otherwise? Specify.
- Have you signed a contract with the BNPL company separate from that of the purchase of your property (the contract with the business selling the property) to obtain financing?
 - *If yes, were you sent a copy of the contract and financing conditions or did you just have to click on the Accept option on the website to activate the contract?*
- Do you have a (credit) limit that exceeds the sum needed to pay for the purchased good, so that the excess can be used to buy other goods? For example, your item cost \$40 but you were awarded \$50.
- What is the longest period over which you have spread the payment for your purchases:
 - 2 to 4 months?
 - 4 to 8 months?
 - More than 8 months?
 - Or did you have the option of a payment holiday for a period of time before repaying the loan in full?
- To your knowledge, have you paid interest or other types of fees (eg administration fees, late fees, etc.) on a purchase financed with BNPL?

- Did you have the possibility to cancel the financing during a certain period following the purchase (ex: 48 hours)?
 - *For participants who do not know, ask instead:* Do you think that you had the option to cancel the financing for a certain period of time following the purchase?
- Did you have the right to pay for your entire purchase faster?
- In your opinion, what are these companies that offer a BNPL?
Leave the question open at the beginning. If necessary, ask:
 - Do you believe these are banks?

Accumulation: 60 min

SECTION 3 – Rights and Remedies (25 min)

- Have you ever missed (skipped) a payment?
 - *If yes, what were the consequences?*
 - *Otherwise, what if you happen to miss a payment?*
Leave the question open at the beginning. If necessary, ask:
 - *Would you be asked to immediately pay the full amount of debt/full balance on your purchase?*
 - *Would the merchant take back the item?*
- Have you ever experienced a problem during your contract when buying BNPL
If yes
 - What kind of problem? What were the consequences?
Leave the question open at the beginning. If necessary, offer:
 - *Good not in accordance with the order, need to exchange or return the good, etc.*
 - Was the problem directly related to the BNPL financing?
 - What was the impact on BNPL financing?
 - How was the problem solved?*Otherwise*
 - Would you know what to do in the event of a problem?
- Have you ever requested a refund for a BNPL purchase from your Visa or Mastercard or other credit card issuer (chargeback)?
 - *If yes, what was his response?*
 - *Otherwise, would you have who to contact in the event of a problem with your BNPL financing, if you had a request for reimbursement?*

Cumulative: 85 mins

SECTION 4 – Debt (25 min)

- Would you have made the purchases you made without the BNPL financing?
- Where were payments taken for your BNPL?
 - -Bank account (eg checking account, savings account)?
 - -Credit card (Visa, Mastercard)?
 - -Other ? Specify.
- According to your experience or knowledge, do some institutions (banks) prohibit users from paying back their BNPL accounts with their credit cards? (Ex: Capital One)
- Have you ever accumulated 2 or more BNPLs at once?
- Would you say that the prospect of using the BNPL encourages you to make more purchases?
- Have you ever missed paying other bills to repay your BNPL?
- Have you ever deprived yourself of anything because you had to pay your BNPL?
- Have you ever felt anxious about repaying your BNPL?
- In your opinion, are there any risks associated with BNPL? Which ?

Cumulative: 110 mins

CONCLUSION (10 mins)

- On a scale of 1 to 10, how would you rate your experience with BNPL financing?*The question was asked during the participant selection questionnaire. Ask it again only if we have time.*
- Has your perception of the BNPL changed over the course of the exchanges or is it the same as at the start of the meeting?
- If you had one thing to change when it comes to BNPL financing, what would it be?

- Finally, do you have any questions or are there any topics that are important to you that we haven't talked about?

The moderator listens to the questions of the observers.

Thank you for your participation !

Cumulative: 120 mins

Option consommateurs
Focus groups, English version
Moderator's Guide

INTRODUCTION (5 mins)

INTRODUCTION

- Moderator's introduction
- Nothing to sell
- Confidentiality, no names of individuals are mentioned in our report
- The information collected will be used only for the purposes of the study.

DISCUSSION RULES

- Recording
- Speaking one person at a time, distribution of speaking time
- Importance of spontaneity and personal opinions
- No wrong answers

OBJECTIVE OF THE MEETING

BIP Research has been mandated by Option Consommateurs to conduct a study on Buy Now Pay Later (BNPL) financing, in connection with your purchases. Consumers are increasingly offered to pay for their purchases with products such as Affirm, PayBright, Afterpay, Klarna, Sezzle, etc. in a few facilities. To make sure we're all talking about the same thing, here are a few things to keep in mind when defining this payment method:

- This method of financing applies to small purchases (generally under \$1,000).
- Whose payment is spread over a short period of time, often 2 to 4 months.
- By making withdrawals from your credit card or debit card.

We want to know your experience with these products, your perceptions on these new payment methods, the risks or lack of risks they represent for you, which motivates you to use them.

Accumulation: 5 min

INTRODUCTION OF THE PARTICIPANTS (5 mins)

ROUND TABLE: Tell me about yourself:

- your city
- Your job / occupation
- Your family situation: student, head of family, etc.
- Which BNPL payment methods have you used (Affirm, PayBright, Afterpay, Klarna, Sezzle, or another)?
- How many times have you used this payment method?

Accumulation: 10 min

SECTION 1 – Experience (25 mins)

How did you learn about BNPL financing?

Leave the question open at the beginning. If necessary, ask:

- *Advertisements*
 - *word of mouth*
 - *From a retailer*
 - *When paying for my product*
- During the recruitment process, you all told us that you had already used these products. What motivates you to use them?
Leave the question open at the beginning. If necessary, ask:
 - *User friendly*
 - *No interest to be paid*
 - *Can be easily integrated into the budget*
 - *The option was offered at the time of payment (this method appeared as a choice among other payment methods, such as Visa or Mastercard)*
 - What items did you fund with the BNPL financing methods and why? Can you tell us about them?
 - Was it online or in person? Which site, which store? (Normally it would be online, but validate if some did it in person.)
 - Was the length/period of the loan suggested/recommended/imposed (eg, 2 months) or did you have a choice?
 - Did you know the interest rate and penalties in case of a payment failure?

- How did you qualify for financing? For example, were you asked to provide any specific information before you were told whether you were eligible or not to use the BNPL?
 - Yes, what type of specific information?
Leave the question open at the beginning. If necessary, ask:
 - Questionnaire on the ability to pay (income, debts)
 - Creditcheck
 - Questions to find out if you have been denied credit before
 - Other information

Accumulation: 35 min

SECTION 2 – Classification of the product and the financing companies (25 mins)

- How would you describe the BNPL product? Is it a loan, credit, something else?
- What form does this financing take? Is it:
 - By issuing a BNPL company credit card to make future purchases.
 - By using an application that allows you to make additional purchases.
 - Or otherwise? Specify
- Did you sign a contract with the BNPL company separated from the contract for the purchase of your property (the contract with the business that sells the property) to obtain the financing?
 - Yes, were you sent a copy of the contract and financing terms or did you just have to click and accept an option on the website to activate the contract?
- Do you have a (credit) limit that exceeds the amount needed to pay the item purchased, so that the excess is used to purchase other goods? For example, your item cost \$40 but you were given \$50.
- What is the longest period over which you have spread the payment of your purchases:
 - 2 to 4 months?
 - 4 to 8 months?
 - More than 8 months?
 - Or did you have the option of a payment vacation for a period of time before paying off the loan in full?
- To your knowledge, have you paid interest or other types of fees (eg, administration fees, late fees, etc.) on a purchase financed with a BNPL?

- Did you have the option to cancel the financing within a certain period of time after the purchase (eg, 48 hours)?
 - *For participants who don't know, ask instead:* Do you believe you have the ability to cancel the financing for a certain period of time following the purchase?
- Did you have the right to pay for your entire purchase faster?
- Who do you think are these companies that offer BNPL financing?
Leave the question open at the beginning. If necessary, ask:
 - Do you think they are banks?

Accumulation: 60 min

SECTION 3 – Appeals and Remedies (25 mins)

- Have you ever missed (skipped) a payment?
 - Yes, what were the consequences?
 - *If no, what would happen if you miss a payment?*
 - *Leave the question open at the beginning. If necessary, ask:*
 - Would you be asked to pay the full amount of the debt/full balance of your purchase immediately?
 - Would the retailer take the item back?
- Have you ever experienced a problem during your contract when making a BNPL purchase?
Yes
 - What type of problem? What were the consequences?
 - *Leave the question open at the beginning. If necessary, ask:*
 - Good not compliant with the order, need to exchange or return the good, etc.?
 - Is the problem directly related to the BNPL financing?
 - What was the impact on the BNPL financing?
 - How was the problem solved?
If no
 - Would you know what to do in the event of a problem?
- Have you ever requested a refund for a BNPL purchase from your Visa or Mastercard or other credit card issuer (chargeback)?
 - Yes, what was the answer?
 - *If no, would you know who to contact in the event of a problem with your BNPL financing, if you had a request for a refund?*

Cumulative: 85 mins

SECTION 4 – Debt (25 mins)

- Would you have made the purchases you did without the BNPL financing?
- Where were the payments for your BNPL taken from?
 - Bank Account (eg, checking account, savings account)?
 - Credit Card (Visa, Mastercard)?
 - Other? Specify
- In your experience or knowledge, do some institutions (banks) prohibit users from paying off their BNPL accounts with their credit cards?
- Have you ever accumulated 2 or more BNPLs at the same time?
- Would you say that the prospect of using the BNPL incites you to make more purchases?
- Have you ever failed to pay other bills to repay your BNPL?
- Have you ever gone without something because you had to pay your BNPL?
- Have you ever felt anxious about repaying your BNPL?
- In your opinion, are there any risks associated with the BNPLs? What are they?

Cumulative: 110 mins

CONCLUSION (10 mins)

On a scale of 1 to 10, how would you evaluate your experience with the BNPL financing? *The question was already asked during the screening. Ask only if there is time.*

- Has your perception of the BNPLs changed over the course of the discussion, or is it the same as it was at the beginning of the meeting?
- If you had something to change about BNPL financing, what would it be?

- Finally, do you have any questions or are there any topics that are important to you that we haven't talked about?

Moderator takes questions from the observers.

Thank you for your participation!

Cumulative: 120 mins