June 1994 Charlottetown PE

Third Interim Report on Cost of Credit Disclosure

By: Richard H. Bowes, The Alberta law reform Institute

ATTENTION: La version française de toute la documentation préparée à l'avance à l'intention de la réunion annuelle est maintenant disponible sur demande. Ce document s'intitule: Loi sur la Divulgation du Cout du Crédit, [versions 3.2 et 3.21] Dispositions et Analyse.

About this Report

This report discusses issues relating to cost of credit disclosure legislation ("ccdl") that the Uniform Law Section will be asked to consider at the 1994 Conference. This report supplements and is intended to be read with the following documents:

- Cost of Credit Disclosure Act, Draft 3.21 ("CCDA 3.21" or "CCDA 3.2")
- Discussion Notes on CCDA 3.2 and 3.21 (Incorporated with CCDA 3.21)
- Proposed Interest Act, Draft 2.0 ("PIA 2.0")

Most of the issues discussed in this report relate to comments on CCDA 3.2 received during May and June of this year.

Table of Contents

Appendix A - Written Comments on CCDA 2 and PIA 1
Appendix B - Extract from Internal Trade Agreement

REFERENCES TO LEGISLATION

References to Canadian Legislation

References in this report to provincial ccdl are generally to "Alberta's Act", "Quebec's Act", etc. The actual names of the relevant acts are as follows:

- Alberta -- *Consumer Credit Transactions Act*
- B.C.-- *Consumer Protection Act*
- Manitoba -- *The Consumer Protection Act*
- New Brunswick -- *Cost of Credit Disclosure Act*
- Newfoundland -- *The Newfoundland Consumer Protection Act*
- Nova Scotia -- *Consumer Protection Act*
- Ontario -- *Consumer Protection Act*
- P.E.I. -- *Consumer Protection Act*
- Quebec -- *Consumer Protection Act*
- Saskatchewan -- *The Cost of Credit Disclosure Act*
- Canada -- Since 1992, the various federal acts governing banks and other federally incorporated financial institutions have contained virtually identical disclosure requirements. For convenience, this report refers only to the *Bank Act* and the Cost of Borrowing (Banks) Regulations ("CBBR"), but such references should be considered to include the relevant legislation and regulations governing federally incorporated insurance, loan and trust companies.

Legislation in Other Countries

United States

References in this report to "the U.S. Act" or to "TILA" are to the *Truth in Lending Act*

United Kingdom

References to the "U.K. Act" or "CCA" are to the *Consumer Credit Act, 1974*.

Australia

References to the "Australian Code" are to the Draft *Consumer Credit Code.* The Code, constitutes the major part of Draft Uniform Consumer Credit Laws released for comment by the Ministerial Council on Consumer Affairs in July, 1993. The draft gives effect to an Agreed Policy Statement endorsed by Ministers on May 14, 1993, and was released "for consultation on technical matters only".

PROCESS

LAST YEAR'S CONFERENCE

At last years Conference the Uniform Law Section considered the *Second Interim Report on Cost of Credit Disclosure Legislation*. That report proposed the following work plan.

1. At the 1993 meeting the Uniform Law Section should establish a review committee to assist and give direction to the drafter. Consumer affairs and other provincial and federal government departments with responsibilities in this area should be represented on the review committee.

2. The drafter, taking into account comments on the February materials, should prepare the second draft of CCDA and PIA, with commentary, for consideration by the review committee. This draft should be in the hands of the review committee by the end of December, 1993.

3. The review committee should resolve any outstanding policy issues by the end of February, 1994, and should give appropriate directions to the drafter.

4. The drafter should prepare a final draft of CCDA and PIA, in accordance with the review committee's directions, by the end of March, 1994. The final draft should be reviewed and approved by the review committee by

the end of April, 1994, at which time it would be distributed in the normal fashion to ULCC delegates.

5. The final draft of CCDA and PIA would be considered and, hopefully, adopted at the 1994 ULCC meeting.

As will be detailed in the next section, other events have affected the implementation of this work plan. Regarding the prospects for implementation, the impact of these events has been positive, but the same thing cannot be said about their impact on the ULCC's proposed timetable for adopting uniform legislation.

DEVELOPMENTS DURING THE PAST YEAR

Cost of Credit Incorporated in Internal Trade Negotiations

Last summer federal and provincial governments initiated negotiations aimed at reducing barriers to trade within Canada, the objective being to reach a comprehensive internal trade agreement ("ITA") by June 30 of this year. The topics for negotiation were divided into various sectors, one of which was the consumer related measures sector ("CRMS"). Last fall I was informed that cost of credit disclosure legislation ("ccdl") had been included as one of the topics to be addressed by CRMS negotiators, although at that time there was no guarantee that ccdl would actually find its way into any trade agreement that might be reached. My understanding is that the topic was adopted largely because the CRMS negotiators were aware of and interested in taking advantage of the work already being done by the ULCC and ALRI.

Revised Draft of CCDA (Draft 3.1)

It was not until December of 1993 that we had received enough input on CCDA 2 to justify doing a revised draft. CCDA 3.1 was completed in February and circulated to members of an informal working group on cost of credit disclosure legislation.

Working Group Considers CCDA 3.1 and PIA 1

After learning of the inclusion of ccdl in the internal trade negotiations, John Gregory invited each jurisdiction's CRMS negotiator to join (or nominate a representative for) an informal cost of credit working group ("the working group"). The working group was eventually constituted and met in Toronto on March 1 and 2. A representative of every province except Prince Edward Island participated in the meeting either in-person or by telephone. The federal Department of Finance and Industry Canada (Consumer Affairs Bureau) also were represented at the meeting. John Gregory chaired the meeting and Peter Lown participated by telephone. The working group reviewed CCDA 3.1 in considerable detail and PIA 1 in less detail. There was a substantial measure of agreement on most of the issues addressed by CCDA 3.1, although there were a number of issues that proved to be controversial, or upon which the consensus of the group was that further consultation was required.

Before the working group meeting, we had hoped that the group might perform the functions envisioned for the "review committee" in item 3 of the work plan: to resolve all outstanding policy issues. However, although the meeting was extremely useful, it was clear that most jurisdictions regarded it as an opportunity to discuss the issues, and perhaps reach some tentative conclusions, rather than an opportunity to make final decisions on issues of policy.

Following the working group meeting, John Gregory and I drafted a two-part document that we thought reflected the consensus of the working group on a lot of issues. The first part of the document set out some general principles for harmonization of ccdl across Canada and the second part proposed more detailed principles for harmonization. The document was given to CRMS negotiators who met the following morning (March 3). We had hoped that negotiators could be persuaded to use the entire document as the framework for a possible agreement on cost of credit harmonization to be included in the ITA that was supposed to be reached by the end of June. However, several negotiators made it clear that the most that could be expected by the end of June was an "agreement to agree" on harmonization of ccdl in accordance with the general principles set out in the first part of the document.

Revised Draft of CCDA (Draft 3.2) and PIA (Draft 2.0)

Following the working group meeting, I prepared a modestly revised draft of the CCDA. The main purpose of this draft -- CCDA 3.2 -- was to make changes that reflected the consensus of the working group. I circulated Draft 3.2 and its accompanying Discussion Notes for comment towards the end of April. Prospective commentators were asked to provide comments by a "best before" date of May 20, but I have received comments well into June (and expect to receive additional comments between now and August). As of June 29, this latest round of consultation has produced written comments -- ranging from less than a page to about ten pages -- from the following individuals and organizations:

Working Group Members

- Don Bence -- Alberta Municipal Affairs, Consumer Services Division
- Luis Curras -- Quebec Office de la protection du consommateur
- Linda Enns -- Saskatchewan Justice
- John Gregory -- ULCC
- Barbara Jones Gordon -- Nova Scotia Department of Housing and Consumer Affairs

Other Individuals and Organizations

- E.R. Arditti -- Chrysler Canada
- Jennifer Babe -- Miller Thomson, Barristers & Solicitors (Toronto)
- Brigitte Goulard -- Trust Companies Association of Canada
- J.B. Gregorovich -- Association of Canadian Financial Corporations
- Linda Lusby -- Coordinator, Environmental Science Programs, Acadia University
- Sue McGregor -- Human Ecology Department, Mount Saint Vincent University
- Patricia Miquelon -- Federated Co-operatives Limited

A few of the comments -- primarily drafting suggestions of John Gregory -- were incorporated in a very minor redraft which I have labelled as CCDA 3.21. This is the version of CCDA that ULCC delegates will receive; for all intents and purposes it is identical to CCDA 3.2.

I turn now to PIA, which has received less attention than CCDA. PIA 1 was circulated with CCDA 2 commencing in February of 1993. I have received some comments on PIA 1, but not nearly as many as on CCDA. Therefore, the issues addressed (or raised) by PIA have not been aired as fully as those addressed by CCDA. We have not received the sort of detailed comments on PIA 1 that would allow me to do a redraft that would be a great improvement on the original. Nevertheless, at the working group meeting I told participants that I would do a second draft of PIA that, instead of setting out detailed "balance calculation rules" (as in PIA 1), would authorize regulations to that end. In May I prepared PIA 2.0. As I had indicated to the working group, the main change in PIA 2.0 from PIA 1 is that the detailed balance calculation method is now consigned to the regulations. PIA has **not** been circulated for comment.

Recent Internal Trade Developments

Since the working group meeting in March, I have received several versions of the portion of the draft ITA that deals with harmonization of ccdl. For our purposes, the crucial portion of the draft ITA is paragraphs 7-10 of Annex 807.1, which is reproduced as Appendix B. Paragraphs 7-9 are descended from the first ("general principles") part of the document that John Gregory and I drafted after the working group meeting in early March. Paragraph 10 was not part of the document prepared after the working group meeting. Early versions of Annex 807.1 referred to 199X as the dates for agreement and implementation, and it was not until some time in May that actual dates were inserted, and even then they were in square brackets. Late in May John wrote to the CRMS co-chairs suggesting that it should be possible to reach agreement on the details of ccdl well before January 1, 1996, and suggesting that January 1, 1995 would be a more appropriate target date. Apparently, the CRMS negotiators discussed this further amongst themselves and have decided that they would be more comfortable with their originally proposed date of January 1, 1996 for reaching agreement on the details of harmonized ccdl.

PROCESS ISSUES

Coordination with CRMS Negotiations: CCDA

The inclusion of ccdl within the ITA has obvious benefits for our project. That the relevant jurisdictions have committed themselves to harmonization cannot hurt the prospects for implementation of the ultimate product of the project. There is nothing in the ITA that commits the jurisdictions to harmonize ccdl according to any particular model, such as CCDA, but it is fair to say that our project is the only game in town at the moment. On the other hand, inclusion of ccdl within the ITA does create some interesting coordination problems. Specifically, it raises the issue of how to coordinate the ULCC's process for adopting a uniform act (or acts) with the process contemplated by the ITA for harmonizing ccdl.

Given the commitment of all jurisdictions to the harmonization of ccdl, by 1997, I think it is worthwhile for the ULCC to coordinate its process with that of the government officials who are responsible for reaching agreement on the contents of harmonized ccdl. In particular, insofar as it is possible to do so, there is much to be said for ensuring that the uniform CCDA adopted by the ULCC is substantially "pre-approved" by the organs of government who must agree on the contents of harmonized ccdl.

As noted earlier, CRMS negotiators were unable to commit themselves to reaching an agreement on "the final elements of cost of credit harmonization" before January 1, 1996. John Gregory informs me that during his June 20 meeting with the CRMS co-chairs they expressed some optimism that it might be possible to reach such an agreement by the spring of 1995, at the earliest. Obviously, that would preclude the use of the ULCC's "February 28" rule to publish the final text of a uniform act in the 1994 proceedings. In light of all this, it seems to me that the Uniform Law Section can choose between one of the following two processes (or some variation of one of them) for adopting the final text of a uniform act.

Option 1

The Uniform Law Section would treat this year's Conference as its final kick at the cat, so to speak. The Uniform Law Section would make final decisions on all outstanding issues in August and adopt a final text of CCDA, subject to the "February 28" rule. The approved text would be published in the 1994 Proceedings as the ULCC's last word on the subject. Essentially, this would end the ULCC's involvement. CCDA, as adopted by the ULCC, would not be pre-approved by the jurisdictions responsible for implementing it. Therefore, I assume that the negotiators would pay attention to CCDA but would proceed on the basis that everything is still subject to negotiations. I also presume that interest groups who are unhappy with particular aspects of CCDA, as adopted by the ULCC, would do their best to persuade negotiators to change those aspects to suit their tastes. I suspect that what the negotiators eventually agreed upon would bear a strong resemblance, but would be far from identical, to the text adopted by the ULCC.

Option 2

At this August's meeting the Uniform Law Section would take the following steps.

(a) Consider the issues raised by this report and make decisions that reflect the Uniform Law Section's current view as to the best approach to those issues.

(b) Appoint a drafting/liaison committee to represent the ULCC in continuing consultations with CRMS negotiators.

If the CRMS negotiators reach agreement on all outstanding issues relating to ccdl by the spring of 1995, the drafting/liaison committee would prepare a final draft of CCDA that reflects that agreement. This draft would be formally adopted at the 1995 Conference.

If the CRMS negotiators fail to reach agreement on all outstanding issues by the spring of 1995, the drafting/liaison committee would prepare a proposed final draft of CCDA for consideration at the 1995 Conference. The draft would reflect the consensus on those issues where a consensus has been achieved. On other issues, the draft would represent the recommended approach of the drafting/liaison committee. The draft CCDA would be adopted, with any changes considered desirable by the Uniform Law Section, at the 1995 Conference.

I recommend Option 2.

Recommendation 1:

Adopt the process (or some variation of the process) described in Option 2, above.

Proposed Interest Act

As mentioned earlier, we have not received as much comment on PIA 1 as on CCDA. I suspect that this is partly attributable to understandable scepticism that the federal government could be persuaded to do anything significant about the *Interest Act*.. However, because paragraph 9(c) of Annex 807.1 specifically refers to the *Interest Act*, the federal government seems to have committed itself to at least consider amendment or replacement of the *Interest Act*. To be sure, that the *Interest Act* is mentioned in Annex 807.1 does not compel the federal government to do anything in particular, such as enacting legislation based on PIA. Unlike the situation with CCDA, I do not think there is much prospect of the relevant government authorities having committed themselves to PIA by the time it is adopted by the ULCC. But that is not necessarily a great tragedy.

As mentioned on previous occasions, Part 2 of PIA is designed to work in conjunction with CCDA to ensure that consumers receive consistent disclosure of all elements of the cost of credit. The reason for this division of labour is constitutional, rather than logical.[1] The principles intended to be implemented by PIA 2 are ordinary cost of credit disclosure principles. The main task of Part 2 of PIA is to lay down a single balance calculation method for all consumer credit transactions. I have previously stated the case for having such a method for all consumer loans and will not repeat it here. It is important to note that CCDA assumes that there will be a single balance calculation method. However, so far as CCDA is concerned, what is of primary importance is that there be a legislatively prescribed balance calculation method; the actual details of the method are of less importance.[2] Thus, PIA stands on a somewhat different footing than CCDA. Since the latter is intended to be adopted by multiple jurisdictions, uniformity will not be achieved unless all jurisdictions adopt essentially the same text. But since only one jurisdiction will be enacting a replacement for the *Interest Act*, it is more important that Parliament enact legislation that implements certain principles underlying PIA than that it enact the exact text of PIA, as adopted by ULCC.

My suggestion is that the ULCC adopt a version of PIA at the same time that it adopts CCDA. However, it should be made clear that PIA is put forward by the ULCC as one possible implementation, not the only possible implementation, of certain principles. It is the principles, rather than the actual text of PIA, that need to be implemented as part of the process of harmonizing ccdl. The following are the principles that I think should be implemented by any replacement for the *Interest Act*.

1. There should be a single basic balance calculation method for all consumer credit transactions, subject to such adjustments or exceptions as may be necessary or desirable to deal with special circumstances. The balance calculation method could either be set out in the act or prescribed by regulation.

2. In general, only one rate of interest should apply at any given time to the balance outstanding on a consumer loan.

3. The interest rate on fixed loans should either be predetermined for the whole term of the loan or indexed.

4. A lender should not unilaterally be able to change the index or the margin between the index and interest rate for an indexed rate loan.

The first two principles are more crucial than the latter two.

Recommendation 2:

Adopt PIA at the same time CCDA is adopted (see Options 1 and 2, above). It should be made clear that PIA is one possible implementation of certain cost of credit disclosure principles that, because of our constitutional arrangements, are most appropriately dealt with by the federal government.

SUBSTANCE

This part of the report focuses on issues that have arisen regarding the text of CCDA 3.2. Most of the issues have been raised by one or more of the individuals or organizations (referred to as "commentators") who provided comments on CCDA 3.2. However, some of the issues arose out of the discussions during the working group meeting in March, a few were raised last year by commentators on CCDA 2, and some are raised by me. I will begin by identifying certain topics that CCDA does not deal with. Next, I will identify and discuss a few "fundamental" issues. Finally, I will discuss, on a section by section basis, a miscellaneous assortment of policy issues raised by commentators.[3]

TOPICS NOT DEALT WITH BY CCDA

From the beginning of this project we have made it clear that we are not attempting to deal with the whole field of consumer credit. Our intention has been to deal comprehensively with disclosure of the cost of credit in consumer credit transactions and with certain other matters that are very closely related to cost of credit disclosure. It is assumed that where a particular topic is not dealt with by CCDA, each province would be free to deal with that topic as it sees fit. Some of these topics are closely related to cost of credit disclosure and might well be suitable subjects for uniform "consumer credit" legislation, but they have been excluded from this project on the "don't bite off more than you can chew" principle. My intention here is to identify some consumer-credit related topics that are not dealt with by CCDA, and briefly indicate why not.

Agreements for Sale of Land

CCDA is not intended to cover "agreements for sale" regarding land. In other countries, ccdl does apply to the sale of land "on credit", and it would be difficult to deny that the arguments for requiring full disclosure of the cost of mortgage loans apply with equal force where consumers finance the purchase of homes by means of agreements for sale. The main, but not entirely satisfactory, reason why CCDA does not cover agreements for sale is that no Canadian ccdl that I know of currently applies to such financing arrangements. Moreover, I suspect that a very small proportion of consumer home purchases are financed by means of agreements for sale. However, I would be hard pressed to think of a good reason why, in principle, agreements for sale should not be covered by CCDA.

Reverse Mortgages

Reverse mortgages are a relatively recent innovation and are not yet common in Canada. As the following passage indicates, they are not all that common in the United States, either:

A quick way to understand the "reverse mortgage" is to take most of what you know about the traditional mortgage lending process and turn it around. When a bank makes a reverse mortgage -- more officially known as a "home equity conversion mortgage " -- it sends monthly checks to the borrower, rather than vice- versa. Credit evaluation is unnecessary, in part because the members of the target market likely don't have the income necessary to pay the loan back. And if your bank goes into this business, chances are it will have the field to itself, unlike the fiercely competitive first- and second-mortgage businesses. Reverse mortgages are aimed at senior citizens who are house-rich but cash-poor. The loans enable them to draw on the equity they've built up in their homes without having to leave it. Unlike a home equity loan or credit line, however, reverse mortgages don't have to be paid back on a current basis. The lender typically looks to the eventual sale of the home for repayment of both principal and interest . . . [4]

As this passage indicates, and its name suggests, almost everything about a reverse mortgage loan is the opposite of a traditional consumer mortgage loan. The disclosure requirements in CCDA are not designed with reverse mortgages in mind, and would not be well-suited to the circumstances of such transactions. I think the appropriate course of action would be to flag such transactions for exclusion by regulations under CCDA section 3(5)(b).

Certain Issues Relating to the Sale of Goods or Services

CCDA treats a sale of goods or services (collectively, a "product") on credit as a type of loan agreement (supplier credit) and requires disclosure of the cost of credit for such a transaction. But CCDA is not intended to deal with every issue that might arise in connection with the sale of a product on credit.

Matters that would arise in connection with cash sales

CCDA does not deal with issues that are common to both cash and credit sales. For example, one commentator wondered why CCDA does not require disclosure of express or statutorily implied warranties in a disclosure statement, noting that this is important information. This point is well taken, but it is as true of cash sales as it is of credit sales. This is more a sale of goods issue than a cost of credit issue.

Lender's liability for seller's warranties

Later in this report is a discussion of CCDA section 68(3), which makes an assignee subject to defences that a borrower would have against the original credit grantor. CCDA does not, however, deal with the more general issue of to what extent, or in what circumstances, a lender who finances the purchase of a consumer product should be liable for claims or defences that the consumer may have against the supplier. For example, suppose that D is a retailer. F, a finance company, has no formal ties with D, but has an ongoing business relationship under which it provides financing to D's customers. The relevant transactions are not set up as conditional sales contracts between D and the buyer (B), which D then assigns to F. Instead, F has provided D with forms of loan agreement between F and B. The forms provide for a loan from F to B with a direction for F to pay the loan proceeds directly to D. Thus, when B signs the form, he or she enters into a direct contractual relationship with F. Being the lender, F would be responsible for making the disclosures required by CCDA. However, there is nothing in CCDA that would make F responsible for, say, B's breach of an implied warranty of merchantability, or for a misrepresentation as to the quality of the goods by one of B's sales persons.

It is recognized that there are arguments for imposing liability on lenders in a position similar to that of F, and that consumer protection laws in some jurisdictions would actually do so. CCDA does not do so simply because it is considered to be beyond the scope of this project to consider in what circumstances a lender should incur liability for breaches of warranty or misrepresentations by a supplier with whom the lender has some sort of business relationship. Since this topic is outside CCDA's scope, it is assumed that provinces will deal with this issue as they see fit.

Disclosure to Guarantors

Additional Reference: Discussion Notes, Part A.1.b (p. 4)

CCDA does not deal with disclosure to guarantors. The reasons are set out in the Discussion Notes.

Restricting Lenders' Remedies -- Acceleration Clauses

I think that no one has expected CCDA to deal with the issue of how lender's go about enforcing loan agreements when a borrower defaults. However, there is one issue that is arguably closely enough related to cost of credit disclosure to have been dealt with. This is the issue of how to deal with "acceleration clauses", clauses that purport to make the entire balance of a loan payable when the borrower misses or is late in paying one instalment, or otherwise defaults on any of his or her obligations under the loan. Consumer protection legislation usually requires the lender to give the borrower notice of default and an opportunity to cure the default before the acceleration clause can be activated. CCDA does not purport to deal with this issue.

FUNDAMENTAL ISSUES

Detailed Disclosure Requirements Versus General Principles

One commentator raised the issue of what I have called the "detailed requirements" approach versus the "full and fair disclosure" approach. The commentator first observed that "the proposed ccdl 3.2 is a model of clarity in comparison to any ccdl legislation which has previously existed in Canada", but then argued that the act still was not "accessible, even to lawyers." The argument (which is developed in some detail) ends with the conclusion that, since implementation of the detailed requirements approach is bound to produce legislation that is too difficult for non-specialists to understand and apply, the full and fair disclosure approach should be adopted instead.

I remain convinced that the detailed requirements approach is the better approach. There is a good reason why not only every Canadian jurisdiction, but also the United States, the United Kingdom (and the rest of the European Union), and Australia have adopted the detailed requirements approach.[5] Whatever its drawbacks, it is the only approach that has any prospect of ensuring that consumers receive the same cost of credit information in the same format from different credit grantors. And only where this happens will consumers have a reasonable opportunity to compare the cost of credit from different sources.

Having said that, I take the commentator's point about accessibility. In particular, there are some changes of terminology that would, I think, address some of the specific concerns that led the commentator to conclude that CCDA is not accessible to ordinary business persons and other non-specialists. I will come back to this point when we get to the definitions in section 1.

Flat Charge for Fixed Loans

Additional References:

Discussion Notes, Part A.2.a (p. 5-6)

CCDA 3.2: ss. 1(1)(t), 8

CCDA 2 largely abandoned the concept of a calculated annual percentage rate ("APR") in favour of a system in which (1) lenders must disclose the annual interest rate ("AIR") and (2) there are explicit restrictions on non-interest charges.[6] The possible non-interest charges are divided into four categories:

disbursement charges (called "loan setup charges" in CCDA 2);

flat charges;

prepayment charges (only permitted for mortgage loans); and default charges.

Commentators appeared to be satisfied with the basic approach of CCDA, but there were differing views on exactly what non-interest charges should be permitted. The main point of controversy was over flat charges for fixed loans. To explain the controversy, it is necessary first to set out the rationale for CCDA's approach to flat charges for fixed loans. To this end, I have reproduced an edited extract from the Commentary on CCDA 2. [All footnotes except for footnote are from the original.]

One way to define the range of permitted non-interest charges for internal administrative costs would be to say that there are none. Lenders would be required to recover all of their internal administrative costs by adjusting their interest rates to ensure that the interest charges cover the internal administrative costs associated with each loan. If required to do so, lenders could indeed recover internal administrative costs by making appropriate adjustments to their interest rate structures for fixed loans. But the resulting rate structures will not necessarily simplify things for consumers or make it easier to find the cheapest sources of credit.

Suppose that Acme Finance Corp. specializes in smaller personal loans: from $500 to $5,000. The process -- and, therefore, Acme's direct internal cost -- of setting up a loan is pretty much the same regardless of the loan amount: say, $25 per loan. Most of Acme's loans have terms from 6 to 36 months, and it will be assumed that Acme's cost of funds is the same for all its loans. Acme has found that the simplest way to price its loans to ensure that loans of different amounts and terms are profitable is to charge a flat "administration fee" of $25 and to set the interest rate at 10% per annum for all loans. The $25 fee is generally added to the amount of the loan. Acme's typical advertisement looks something like this:

Loans from $500 to $5000. Terms: 6 months to 3 years. Interest rate: 10% per year. Administration fee: $25

It is pointed out to Acme, however, that its ads violate ccdl because lenders cannot impose a non-interest charge such as the $25 fee.[7] The interest rate must account for all internal charges, as well as the cost of funds. Acme could adjust its interest rates so that it will get exactly the same cash flow from any given loan that it would have got by charging $25 and 10%. The following chart indicates the interest rate that would have to be charged on different loans to get the same cash flow on each loan as is achieved through the combination of a $25 administrative charge and a 10% interest rate.

INTEREST RATE EQUIVALENT TO $25 ADD-ON FEE AND 10% INTEREST

Loan Amount	6 Month Term	12 Month Term	24 Month Term	36 Month Term
$500.	27.2%	19.3%	14.9%	13.4%
$1000.	18.7%	14.7%	12.5%	11.7%
$2000.	14.3%	12.4%	11.2%	10.9%
$3000.	12.9%	11.6%	10.8%	10.6%
$4000.	12.2%	11.2%	10.6%	10.4%
$5000.	11.7%	10.9%	10.5%	10.3%

Thus, Acme could respond to the "interest only" requirement by introducing a flexible interest rate policy: 27.2% for a 6 month, $500 loan, 12.4% for a 1 year, $2000 loan, and so on.[8] The overall effect of this policy on consumer awareness of credit cost would not necessarily be all to the good. Here are a couple of possible drawbacks.

It will be harder to give consumers advance information about the cost of loans. Acme's advertisements might now look more like this:

Loans from $500 up to $5000. Terms: 6 months to 3 years. Interest rates vary, depending on amount and duration of loan.

Acme cannot provide any interest rate information in its advertisements that will apply across the whole range of its loans.

Converting the $25 non-interest charge into interest has its most dramatic effect on smaller, shorter-duration loans. There is perhaps something to be said for letting borrowers know that $25 and 10% on a $500 loan over six months translates into 27.2% per year. On the other hand, the smaller the amount and the shorter the duration of a loan, the less useful APR becomes as a measure of the cost of credit. For example, from the table it will be noted that the annual interest rate on a $500 loan declines quite sharply when the term goes from 6 months to a year (or longer). It drops from 27.2% for a six month loan to 19.3% for a one year loan and 14.9% for a two year loan. Borrowers might conclude from this that it must be wiser to pay back a $500 loan over one or even two years because the interest rate will be much lower. But such a decision would cost the borrower money because the dollar cost of the loan would increase as the term increases, despite the lower rates.[9]

Thus, requiring lenders to recover all of their internal administrative costs by adjusting their interest rates would have drawbacks, even from consumers' point of view. In particular, consumers might well have to deal with a more complicated rate structure than they would have to deal with if lenders could recover certain internal costs through an administration charge.

This leads to the question of whether there is some mechanism or combination of mechanisms that will do all of the following:

preserve the value of the annual interest rate as a reliable indicator of the cost of credit from different sources.

allow lenders to recover certain internal administrative costs through non-interest charges.

be easy to apply, in the sense that there will be little or no room for argument as to whether a given non-interest charge is permitted or not.

It is suggested that the flat charge mechanism meets these criteria. The definition of "flat charge" [CCDA 3.2, s. 1(1)(t)] is based on the proposition that a lender's direct internal costs of setting up or administering a given loan should be relatively insensitive to the amount of the loan. The steps that a lender must take to administer a $5,000 loan are pretty much the same as the steps it must take to administer a $25,000 loan. Hence, the direct administrative costs for the two loans should be roughly the same, and the amount that needs to be charged to a borrower to recover this cost should also be the same.

But what is to prevent lenders from setting the amount of their flat charges much higher than the internal costs they are supposed to cover?

The answer is that market forces should deter lenders from setting flat charges higher than is necessary to cover such costs. Consumers are quite sensitive to non-interest charges, especially when those charges are high in relation to the amount of the loan. A charge that a borrower might hardly notice if imposed in connection with a $10,000 loan might be much more noticeable in connection with a $1000 loan. Therefore, a lender who is required to impose the same flat charge for a $1000 loan as for a $10,000 loan will have to consider the reaction of borrowers of smaller amounts when setting the amount of the flat charge for a class of loans. Thus, the requirement to establish a single flat charge for a class of loans over a range of values should act as a brake on any temptation to inflate flat charges.

The Commentary went on to propose legislated caps on the amount of flat charges for fixed loans to ensure that lenders do not inflate their flat charges. CCDA 2 proposed caps of $25 for non-mortgage loans and $100 for mortgage loans.

The comments on CCDA 2's approach to flat charges for fixed loans focused on the proposed cap. Commentators argued that the cap was unnecessary, because market forces would keep the amount of flat charges at competitive levels. I found these arguments persuasive enough to change CCDA's approach to caps. CCDA 3.2 does not impose quantitative caps on flat charges but holds them in reserve, so to speak. Section 8(6) provides for regulated caps on flat charges or for regulatory prohibition of flat charges for any type of fixed loan.[10]

However, at the working group meeting in March it became apparent that some members were strongly opposed to allowing flat charges for fixed loans, with or without caps on their amount. The gist of their argument is captured in the following passage from a letter sent to me by a working group member:

I disagree with the entire concept of a flat charge for fixed credit. Mostlenders would automatically charge the allowable "cap" if set at the suggested $25 or $100 whereas high pressure lenders would charge excessive amounts to unsophisticated borrowers if no "cap" or a high "cap" was set. The cost of acquisition, internal investigation, documentation preparation, etc. of a lender or credit seller is as much a part of their business overhead as rent, telephone costs, salaries, etc. and should be included in their product prices or interest rates as a cost of doing business. An exception should be made for "open credit", not because of the above costs but because of the cost of monthly statements and frequent transactions. Annual card fees or item transaction costs would be acceptable with competition providing controls.

This issue was discussed at length during the working group meeting but was not resolved.

The Discussion Notes for CCDA 3.2 invited comments on the issue of flat charges for fixed loans, and several commentators took up the invitation. Not surprisingly, commentators expressed different views on the subject. On the one hand, some commentators argued that prohibiting flat charges for fixed loans would have unwelcome consequences:

It would force lenders to recover internal costs that would otherwise have been recovered through a flat charge by means of across-the-board interest rate increases. This would result in cross subsidization of people who borrow small amounts by people who borrow large amounts.[11]

If interest rates are customized to take account of the size and duration of loans, the rates on smaller, shorter loans would be much higher than on larger, longer loans. This would create a misleading impression that borrowers of smaller amounts are being charged much higher interest rates than are borrowers of larger amounts.

If flat charges are not permitted, mainstream lenders might simply decline to offer fixed loans for relatively small amounts. Instead, consumers who want small loans will be forced to look to non-mainstream lenders for a fixed loan or borrow through an open credit agreement.[12]

In addition to the consequences mentioned by commentators, I would suggest the following possibility.

Even if interest rates are customized for each loan, the initial costs of setting up a non-mortgage loan (for which no prepayment charges are permitted) will be recovered only if the original payment schedule is adhered to. If the loan is prepaid, the initial costs will not be fully recovered from the borrower. They will be recovered from someone else, another form of cross-subsidization.

Other commentators pointed out possible drawbacks of allowing flat charges. In addition to those mentioned in the passage quoted earlier, these include:

Allowing flat charges for fixed loans will impair the value of the annual interest rate as a means of comparing the cost of credit from different source if all lenders do not impose the same flat charge.

Many consumers would not appreciate that flat charges can significantly increase the true annualized cost of the loan.

I would add another potential problem with flat charges:

The higher the flat charge a lender imposes, the more it reduces its "prepayment risk". Where a loan is prepayable without a prepayment penalty (i.e. any non-mortgage loan) a lender might well be tempted to lock in its rate of return by inflating the flat charge and reducing the interest rate. But the essential characteristic of a flat charge -- its flatness -- and competitive considerations would make it awkward to use flat charges for this purpose.

I believe that CCDA's approach is reasonable and workable, and that the advantages of allowing flat charges -- for both consumers and lenders -- outweigh the disadvantages. On the other hand, there is a potential for abuse of flat charges in certain contexts. The potential for such abuse is recognized by section 8(6), which authorizes regulations that would cap, or even, prohibit flat charges in certain circumstances.

Recommendation 3:

Adopt CCDA 3.2's approach to flat charges for fixed loans.

Disclosure of Finance Charge Information for Certain Leases

Additional Reference: Discussion Notes, Part A.6 (pp. 16-17).

The main issue regarding CCDA's provisions regarding long term leases of goods concerns the proposed requirement to disclose certain "finance charge information" for some leases. Finance charge information consists of (1) the cash value of the goods, (2) the implicit annual interest rate and (3) the implicit dollar finance charge. CCDA 3.2 would require disclosure of finance charge information for any lease where the lessee has a right to buy ("RTB lease") and any lease with a guaranteed residual value ("GRV") provision.

One commentator questioned whether finance charge information was of any benefit to prospective lessees. I disagree. I think finance charge information, while it would not necessarily be decisive, could be quite useful to consumers for comparison purposes **where it is practicable to provide such information.**

This leads to the issue raised by a commentator who did not directly question the benefit of finance charge information to consumers, but argued that it would be impracticable to provide this information in many of the situations contemplated by CCDA 3.2. This latter commentator took issue with the term "guaranteed residual value lease", suggesting that "finance lease" would be a better term to describe the relevant sort of lease. More importantly, the commentator observed that finance leases are confined to the business leasing context simply because "[w]e are not aware of any consumer who has found a finance lease attractive." With respect to RTB leases, the commentator drew a distinction between leases where the option price represents a genuine pre-estimate of the market value of the leased goods and leases where the option price is nominal. The commentator characterized the latter as disguised conditional sales contracts and suggested that they be treated as such (or, in CCDA's terms, as supplier loans). However, with respect to leases with market value purchase options, the commentator argued that disclosure of finance charge information would be impractical.

The second commentator's comments were directed only to automobile leasing because "leases of other movables/personal property to consumers are a negligible activity in Canada". This raises a semantic point regarding the term "lease". This term is not defined in CCDA, but was meant to include any bailment for hire. Short term contracts for the rental of goods were meant to be included within the term "lease", although most short term rental contracts would be excluded from the application of Part 5 by section 48(2)(a). One type of rental arrangement not involving automobiles to which Part 5 is definitely meant to apply is "rent to own" contracts for household goods. Although the dollar value of the rent to own market is undoubtedly dwarfed by that of the automobile leasing market, the rent to own market is significant for our purposes.

In evaluating the commentators' concerns, it will be helpful to undertake a very brief review of how leasing is presently (or proposed to be) dealt with by ccdl in Canada and several other countries.

CANADA

Currently three provinces' ccdl deals with long-term consumer leases of goods.

Alberta

Alberta's Act has disclosure requirements for consumer leases with terms of 4 months or more and total payments of $50,000 or less. It does not contain any special disclosure requirements for RTB or GRV leases and does not require disclosure of finance charge information.

Manitoba

Manitoba's *Consumer Protection Act* applies to "retail hire-purchase" agreements, which, by definition are leases with an option to purchase. There is, however, an important exclusion:

a hiring in which the hirer is given an option to purchase the goods exercisable at any time during the hiring and which may be determined by the hirer at any time prior to the exercise of the option on not more than two months' notice without any penalty.

I am informed that most leasing contracts in Manitoba are written so as to come within this exception, and that very few leases are entered into that come within the definition of a "retail hire purchase". Where the act does apply, it requires disclosure of finance charge information and gives the consumer a prepayment right.

Quebec

Quebec's *Consumer Protection Act* applies to leases in similar circumstances as Alberta's Act. The act requires disclosure of finance charge information for "a contract of lease with guaranteed residual value".[13] However, the act does not require disclosure of finance charge information for leases with an option to purchase.

United States

Consumer leases are dealt with in two separate federal Acts: TILA and the Consumer Leasing Act ("CLA"). TILA defines the term "credit sale" ("supplier credit" under CCDA) so as to include a lease with an option to purchase if the option price is nominal. More precisely:

The term ["credit sale"] includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

Such lease arrangements attract the same disclosure requirements as any other credit sale (including disclosure of a calculated APR).[14]

The CLA does not apply to lease arrangements coming within the definition of "credit sale" in TILA. Apart from that, it applies in more or less the same circumstances as Alberta's Act and Quebec's Act. The CLA does not require disclosure of finance charge information for the consumer leases to which it applies.

United Kingdom

The U.K. Act divides the world of consumer leasing into "hire-purchase" and "consumer hiring". The former is basically a consumer lease with an option to purchase and the latter is a consumer lease without the purchase option. Unlike the U.S. legislation, the U.K. Act is not concerned with whether the option price is nominal or based on the estimated market value of the goods at the end of the term. The U.K. Act treats all hire-purchase agreements as just another form of credit agreement to which the normal disclosure requirements apply. This includes disclosure of finance charge information. The U.K. Act also gives the hirer (lessee) under a hire-purchase the right to exercise the option before the end of the term and get a partial rebate of the "total cost of credit" in accordance with a prescribed formula.

The Act applies to consumer hire agreements (leases without options to purchase) unless they are for a definite term of less than three months. The disclosure requirements for such agreements are similar to those for long-term leases in other jurisdictions. Disclosure of finance charge information is not required.

Australia

The Code's approach is similar to that of the U.K. Act. Section 10 provides that "a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods is to be regarded as a sale of the goods by instalments". Leases **without** an option to purchase are dealt with in Part 10, entitled "Consumer Leases". Part 10 does not apply to leases for a fixed period of 4 months or less or to leases for an indefinite period. The disclosure requirements for consumer leases do not include disclosure of finance charge information.

It can be seen that the classification scheme and disclosure requirements for leases varies considerably from jurisdiction to jurisdiction. CCDA's approach is yet another variation. Its approach is most similar to that followed by the U.K. Act and the Australian Code. CCDA does not actually deem RTB leases to be loan agreements but its disclosure requirements -- in particular, the requirements relating to finance charge information -- are similar to those that would be required for a supplier loan. Moreover, CCDA gives lessees under RTB leases prepayment rights that are very similar to those provided to buyers under supplier loans. In particular, the implicit annual interest rate for a RTB lease is used to calculate the balance outstanding on a RTB lease at any given time.

As noted above, a commentator argued that it is impracticable to disclose finance charge information for RTB leases with a market-value option price. The reason is related to the difficulty of stipulating a cash value for such a transaction, particularly where the lease is arranged by a dealer, but is administered during the term by a finance supplier. In such cases, the commentator maintains that it would not be appropriate to use the price for which the individual dealer might be prepared to sell a vehicle to a cash buyer as the cash value for a RTB lease involving the same vehicle.

I am convinced that it would be useful for consumers to get finance charge information for any RTB lease. It would also be useful to provide a standardized method for calculating the balance outstanding at any time on an RTB lease, based on the implicit annual interest rate. The issue is whether it is always reasonably possible for lessors to provide finance charge information and whether there are circumstances where it would be inappropriate to apply a standardized balance calculation method. Further consultation on these issues would be extremely useful before any final decision is made. I would suggest that, for the time being, CCDA 3.2's basic approach to disclosure of finance charge information for RTB leases should be confirmed as the ULCC's preferred approach, subject to further consultation regarding its practicality. I would make the same suggestion regarding GRV (or "finance") leases.

Recommendation 4:

CCDA 3.2's basic approach to disclosure of finance charge information for RTB and GRV leases should be adopted as the ULCC's preferred approach, subject to confirmation that the approach is practicable.

Civil Remedies for Non-compliance

Additional Reference: Discussion Notes, Part A.7 (pp 17-20)

CCDA 2 did not contain any "compliance" provisions, although the Commentary on CCDA 2 did solicit input on appropriate compliance provisions. It would be fair to say that CCDA 3.2's compliance provisions have not been subject to nearly as much scrutiny as have its other provisions. CCDA 3.2's provisions dealing with "criminal" and administrative sanctions are fairly conventional, but its approach to the civil consequences of non-compliance is somewhat unconventional and merits close scrutiny.

As mentioned in the Discussion Notes, CCDA 3.2 provides two sorts of civil consequences of non-compliance: compensatory remedies and civil penalties. This in itself is not particularly innovative; what sets CCDA 3.2 apart from other ccdl is its approach to determining when a lender may be subject to a civil penalty, and what that penalty is. One possible objection to CCDA 3.2's approach is that the whole concept of civil penalties is wrong in principle. Another line of attack might be that civil penalties are imposed in inappropriate circumstances, or that the particular civil penalties provided by CCDA are too harsh (or not harsh enough). Given the importance of this issue, it would be useful to begin with a brief (relatively speaking) survey of different approaches to this issue in Canada and abroad.

CANADA

Interest Act

The consequences of noncompliance with section 4 or section 6 of the *Interest Act* are strict and inflexible. Non-compliance with section 4 means that a lender is limited to an annual rate of 5%. Non-compliance with section 6 means that the lender cannot recover any interest. Of course, no one knows for sure when section 4 or 6 applies, or what constitutes non-compliance when they do apply.

Federally Incorporated Financial Institutions

The civil consequences of a lender's failure to comply with the *Bank Act's* disclosure requirements are easy to state because there are none. The provisions dealing with disclosure do not impose any specific civil consequences on a lender who fails to comply with those provisions. And section 568 of the *Bank Act* provides:

Unless otherwise expressly provided by this Act, a contravention of this Act or the regulations does not invalidate any contract entered into in contravention of the provision.

So the consequences of non-compliance with the disclosure requirements of the *Bank Act* are confined to administrative or penal provisions of the act.[15]

First Generation ccdl

The ccdl of New Brunswick, Newfoundland, Nova Scotia and Ontario contains a provision along the following lines:

(1) A borrower is not liable to pay to a lender, as a cost of borrowing, a sum that exceeds the amount or rate disclosed in accordance with [the section(s) setting out the disclosure requirements].

(2) Nothing in this Act deprives a lender of, or interferes with, his right to collect from a borrower

(a) the principal of a debt, loan or credit, or

(b) the amounts that the borrower is obliged to pay as cost of borrowing set out in accordance with section 15.[16]

Second Generation ccdl

More recent provincial ccdl tends to set out the civil consequences of non-compliance a little more explicitly than does first generation ccdl. Although the details vary from jurisdiction to jurisdiction, British Columbia, Quebec, Alberta and Saskatchewan all take a similar approach. A lender who fails to comply with the disclosure requirements cannot collect any cost of borrowing ("credit charges" in Alberta), unless the case comes within the terms of a "saving provision". For instance, section 35 of British Columbia's CPA provides:

(1) A lender who

(a) fails to provide the debtor with a disclosure statement in accordance with sections 26 and 27 and the regulations; or

(b) fails to give the debtor a completed copy of the prescribed lending transaction documents on or before the date on which a cost of borrowing starts to accrue

is not entitled to collect any cost of borrowing.

(2) A lender shall be deemed to have complied with the prescribed regulations on disclosure described in subsection (1), notwithstanding any error, omission, or incorrect or insufficient description in the disclosure, where a court is satisfied that such error, omission, or incorrect or insufficient description is not of a nature to mislead or deceive the debtor to his prejudice or disadvantage.

(3) The burden of proof that the error, omission, or incorrect or insufficient description is not of a nature to mislead or deceive the debtor to his prejudice or disadvantage is on the lender.

Section 271 of Quebec's Act is to a similar effect, although it also allows the borrower the option of demanding the nullity of the contract. Under both the B.C. and Quebec acts, the "saving provision" takes what might be described as an all or nothing approach. If the borrower has been even a little bit prejudiced, the court does not seem to have the discretion to allow the lender to recover any of the cost of borrowing.

Section 8 of Alberta's Act takes a similar approach to the B.C. and Quebec acts, except that the saving provision gives the court a somewhat wider discretion:

an amount, if any, in respect of the credit charges that a court, having regard to the intent of this Act, considers appropriate in the circumstances.

In other words, once a contravention of the disclosure requirements is established, the recovery of any credit charges depends on the discretion of the court. The Alberta Act also provides for the situation where there is an inconsistency between the APR and the dollar credit charges stated in a credit agreement; any inconsistency must be resolved in the borrower's favour. Section 10 of Saskatchewan's Act first sets out the "non-compliance means no cost of borrowing is recoverable rule" and then provides the following two exceptions:

except where the failure in compliance results from:

(e) a *bona fide* error in the quotation of the cost of credit . . . in which case the seller or the assignee of the seller shall have the right to recover the lesser of the dollar and cent cost expression or the annual percentage or scale of annual percentages expression; or

(f) a *bona fide* error other than in the quotation of the cost of credit and such error did not prevent the buyer or borrower from having knowledge of the essential elements of the agreement in which case the rights of the seller to recover the cost of borrowing shall not be affected.

Manitoba's Act deals with civil consequences of non-compliance in several different provisions dealing with different types of credit transactions. Rather than depriving the lender of all cost of borrowing, it limits the borrower to the "legal rate", which is defined as the rate payable under the *Interest Act* on liabilities on which interest is payable but no other rate is fixed. For example, section 23, which deals with non-compliance in the context of retail sales of goods on credit (section 4) and retail hire-purchase agreements (section 5), provides:

(1) Except as otherwise provided in the *Interest Act* (Canada), and subject to subsections (2) and (3), if a writing required by subsection 4 or 5

(a) does not contain a statement of the true annual rate of the cost of borrowing or understates it by more than the margin permitted by the regulations; or

(b) omits or states incorrectly [other required disclosures]

the seller may recover from the buyer no more than the total cash price with simple interest . . . at the legal rate . . . and if the buyer has paid the seller more than that amount, he may recover the excess from the seller or if the writing has ben assigned, from the assignee.

(2) Where clause (1)(a) applies, the court may permit the seller to recover [more than the cash price and simple interest at the legal rate] if it is

satisfied that the omission or misstatement was due to inadvertence; but the seller may not, in any case, recover or keep a cost of borrowing which would exceed the rate stated in the writing to be the true annual rate.

(3) Where clause (1)(b) applies, the court may permit the seller to recover . . . the full amount that the buyer has agreed to pay, if it is satisfied that the omission or misstatement was due to inadvertence and the buyer has not thereby been misled as to the amount he had to pay; but where the result of a misstatement is to produce, in the writing, inconsistencies that make it uncertain how much the buyer has to pay, the seller may not, in any event, recover from the buyer more than the lowest amount which the writing can reasonably be construed to require.

Section 23 goes on to provide that where a credit grantor makes a claim of "inadvertence" the court must not adjudicate the dispute until the director has been advised of the situation and had a chance to investigate. The director can then introduce evidence and make submissions when the court hears the matter.

UNITED KINGDOM

A number of provisions of the U.K. Act provide that a creditor who fails to observe certain requirements in connection with a credit agreement may enforce the agreement only by applying to the court for an enforcement order. Section 65 is one such provision:

(1) An improperly executed[17]

Section 127 sets out the principles to be applied by a court in deciding whether to grant such an order:

(1) In the case of an application for an enforcement order under --

(a) section 65 . . .

the court shall dismiss the application if, but . . . only if, it considers it just to do so having regard to --

(i) prejudice caused to any person by the contravention in question, and the degree of culpability for it;

(ii) the powers conferred on the court by subsection (2) and sections 135 [power to impose conditions, or suspend operation of order] and 137 [power to vary agreements and securities].

(2) If it appears to the court just to do so, it may in an enforcement order reduce or discharge any sum payable by the debtor or hirer, or any surety, so as to compensate him for prejudice suffered as a result of the contravention in question.[18]

It would appear that a lender is entitled to an enforcement order unless the borrower convinces the court that he or she has been prejudiced by the error.

UNITED STATES

The U.S. Act creates several different sorts of civil consequences for non-compliance, and deals with the subject in much more detail than any Canadian legislation. The following describes the general contours of some very intricate legislative terrain.

Adjustments ordered by enforcement-agency

Section 108 of the Act (TILA) gives each enforcement agency (there are several) extensive powers, and in certain cases duties, to order a creditor to make adjustments to a borrower's account when the agency discovers that the creditor has inaccurately disclosed the annual percentage rate or finance charge. The adjustment is designed to ensure that the borrower pays only the lesser of an amount that reflects the disclosed APR and the disclosed finance charge.

Damages for non-compliance

Unlike most current Canadian ccdl (and CCDA 3.2), TILA does not expressly deprive a creditor of the finance charge as a consequence of non-compliance with the act's disclosure requirements. Instead, it provides borrowers with remedies in damages. Section 130(a) imposes liability to pay damages on a creditor "who fails to comply with any [disclosure, etc.] requirement with respect to any person". The damages to which such a creditor is liable are the sum of any actual damage suffered by the person as a result of the failure;

the following statutory damages:

in an individual action, twice the amount of the finance charge, with minimum damages of $100 and a ceiling of $1000;

in a class action, whatever the court allows, but there is no minimum amount for each member of the class and the creditor's total liability is limited to the lesser of $500,000 and 1% of the creditor's net worth;

attorney's fees

Limitations on liability

There are a number of provisions that may reduce or eliminate a creditor's civil liability for contravention of TILA's requirements.

Section 130(b) provides that a creditor or assignee has no liability for a violation if, within 60 days after discovering an error, the creditor or assignee voluntarily notifies the person concerned and makes whatever adjustments are necessary to ensure that the person will only pay the properly disclosed charges.

Section 130(c) provides that a creditor or assignee may not be held liable for a violation if it "shows by a preponderance of evidence that the error was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." It provides a non-exclusive list of examples of bona fide errors, including "clerical", and states that it does not include "an error of legal judgment with respect to a person's obligations under this title".[19]

Section 130(f) provides that provisions of the act imposing liability to not apply "to any act done or omitted in good faith in conformity" with official interpretations of the act of one sort or another.

In addition to the general limitations on liability, section 131 gives most assignees special protection. First, an action that can be brought against a creditor can only be maintained against an assignee if the relevant violation "is apparent on the face of the disclosure statement, except where the assignment was involuntary." Second, unless an assignee has knowledge to the contrary, a written acknowledgement of receipt of a disclosure statement by a person to whom a statement must be given is conclusive proof of delivery in an action by or against the assignee .

It should be stressed that I have glossed over many of the details, qualifications and exceptions to TILA's civil liability provisions.

AUSTRALIA

The provisions in the Code dealing with civil liability are rather elaborate. The relevant provisions are found in Part 6, which is entitled "Civil Penalties for Defaults of Credit Providers". The provisions start with the concept of "key requirements"; section 102 lists a series of key requirements for credit contracts. Section 103 then provides for the forfeiture of interest where a credit provider has contravened a key requirement. The general rule is that all interest charges under the contract are forfeited; one exception is that where the contravention relates to a statement of account under a "continuing credit contract" (i.e. open credit), the credit provider only loses the interest for the relevant statement period.

A credit provider who contravenes a key requirement has several avenues for recovering the interest charges that would otherwise be forfeited under section 103.

Section 112 sets out a procedure by which the credit provider may rectify a contravention on its own initiative. To rectify a contravention, the credit provider must notify the debtor and the State Consumer Agency of the error, provide any corrected information, and give the debtor the benefit of any inconsistent information or reimburse the debtor for any unauthorized fee or charge. It is too late to rectify an error once it has been brought to the attention of the court by the debtor. Such a rectification can be set aside by the court if the court is satisfied (on an application by the debtor or the State Consumer Agency) that the contravention was intentional or reckless.

Section 109 is headed "Minor errors". A credit provider may apply to the court, on notice to the State Consumer Agency, for an order restoring interest charges "on the ground that the contravention is a minor error". This is defined as "an error which is unlikely to disadvantage the debtors concerned in any significant respect". The court must restore the whole of the interest charge if satisfied that the contravention "is a minor error and ought reasonably to be excused"; otherwise, the court must direct that the matter be dealt with under the more elaborate procedure provided by section 106.

Section 106 allows a credit provider to apply for an order restoring interest that would otherwise be forfeited, and the court may restore the whole or any part of the interest charge "if satisfied that the contravention of the credit provider ought reasonably to be excused." The court must consider a list of factors in making its decision on this point: e.g. the conduct of the parties; whether the contravention was deliberate or not; any systems or procedures of the credit provider to prevent or identify contraventions; any action taken by the credit provider to remedy the contravention or compensate the borrower; and so on.

Section 107 provides that the State Consumer Agency must be given notice of an application for restoration of interest charges under section 106. It also allows such an application to be made regarding multiple contracts or to a class of credit contracts in respect of which the same contravention may have occurred. It also makes provision for giving notice of the application to affected debtors by means of newspaper advertisements.

Section 113(1) places a cap on a credit provider's total liability (i.e. the amount of interest of which it can be deprived) for any one contravention. The amount of the cap depends on the assets of the credit provider in Australia. The cap ranges from $20,000 for a credit provider with assets under $50 million to $5 million for a credit provider with assets over $50 billion. Moreover, section 113(2) directs the court to "have regard primarily to the prudential standing" of the credit provider, and in light of its assessment of the credit provider's prudential standing the court may reduce the amount of interest forfeited. But in any event, "the amount of interest forfeited is to be not less than the amount of the loss" actually suffered by a debtor because of the contravention.

BACK TO CCDA 3.2

If nothing else, our brief world tour of compliance provisions makes it clear that, with one notable exception, legislators have considered that the goals of ccdl are most likely to be achieved if there are meaningful civil consequences of non-compliance. The lone exception is Canadian federal legislation applicable to banks and other federally incorporated financial institutions, which does not seem to impose any civil consequences for non-compliance with its requirements. Most jurisdictions create two basic types of civil consequences -- compensatory remedies and civil penalties -- and also provide a mechanism or mechanisms by which the lender can avoid the full sting of the civil penalties.

If you have diligently waded your way through the foregoing survey of compliance provisions, you will note that few, if any, elements of CCDA 3.2's package of civil remedies are unique. However, CCDA 3.2 puts these elements together in a somewhat different manner than any other existing or proposed act. The question is whether CCDA 3.2 strikes the right balance between encouraging lenders to comply with the act's requirements, compensating borrowers for injury, and ensuring that the civil consequences of non-compliance are fair and reasonable. I believe that the general approach strikes a reasonable balance, but concede that certain adjustments might be necessary or desirable.

Commentators expressed a range of views regarding the civil remedies provided by CCDA 3.2. Some commentators thought that the overall approach was reasonable and fair. One commentator expressed such a view, but cautioned that it might be more difficult for small businesses than for large lenders to set up an effective compliance procedure.[20] Another commentator who supported the suggested approach noted that where a lender is restricted to recovering only the amount advanced to the lender, it may be appropriate to make it clear that the borrower can still pay the balance off over the original term of the loan. The lender should not be able to require immediate payment of the balance.

At the other end of the spectrum, one commentator strongly disagreed with the proposed approach:

Philosophically, I am opposed to bringing into Canada the American concept of the "private Attorney-General". What may work under their system of Justice does not necessarily work in Canada. The reality is that reputable lenders comply with statutes. They could not stay in business unless they did. I must admit that I do not understand the need for the complicated and discretionary system being proposed.

It should be noted, though, that CCDA's approach to civil penalties is not radically different from that of more recent Canadian provincial ccdl. The existing legislation of British Columbia, Alberta, Saskatchewan and Quebec follows the same basic pattern:

a lender who contravenes the disclosure requirements is prevented from recovering any "cost of borrowing"; but

a "saving provision" allows such a lender to recover all or a portion of the cost of borrowing in certain circumstances (which vary from province to province); and

if the lender provides inconsistent information to the borrower, the contract must be applied in accordance with the information that is most favourable to the borrower.

CCDA 3.2 does go further than any of this legislation in one respect. CCDA section 57 would not allow a lender who was guilty of a "deliberate contravention" to recover any non-interest or interest charges, and would even put the principal at risk.

The most significant departure of CCDA 3.2 from existing Canadian ccdl is in its concept of an "excusable error", which focuses on the steps that the lender took both to avoid the error in the first place and to remedy the error when it did occur. One commentator made the following point regarding CCDA's approach:

Although the suggested divisions of categories of lenders and sanctions appear at first glance very attractive, we believe that in view of the severity of the sanctions and their negative impact this proposal should be re-examined.

The suggested sanctions could effectively result in a borrower being able to walk away from a mortgage should he or she demonstrate that the lender misled them regarding any matters pertaining to the loan. For example, an institution may be required to write off the mortgage in its totality if the consumer has been misled on a minor item such as a $10 administration fee. The sanction in such a situation would definitely not reflect the harm done.

This commentator went on to express a preference for giving consumers who have suffered loss as a result of being deliberately misled by a lender a right to proceed by class action to recover that loss.[21] I have some sympathy for the commentator's point. I will get to the sympathetic part of my response momentarily, but first I will reiterate a point made in the Discussion Notes. The civil penalty for deliberate non-compliance is indeed severe (loss of interest and non-interest charges and potential loss of principal), and the penalty for "careless" non-compliance is rather sobering as well (possible loss of all interest and non-interest charges). However, these penalties have these characteristics so as to give lenders lots of incentive to avoid incurring them. The method of avoiding them is (I think) clearly spelled out: to adopt an effective compliance procedure and promptly remedy errors that do occur once they are discovered. As emphasized in the Discussion Notes and CCDA itself, an "effective" compliance procedure is **not** synonymous with a "perfect" compliance procedure. For a lender that adopts an effective compliance procedure and acts quickly to remedy any errors that do occur, the civil penalties for deliberate non-compliance or careless non-compliance should be of little concern.

Having said that, I cannot casually dismiss the argument that the civil penalties provided for deliberate or careless contraventions of the act are too severe -- or at least too cumbersome -- in certain circumstances. It might be argued that the goal of encouraging lenders to adopt an effective compliance procedure could be achieved without making the consequences of deliberate or careless non-compliance quite so onerous. There are numerous ways in which this could be done. For example, instead of expressly depriving the lender of any portion of the interest or non-interest charges, the lender could be made liable for statutory damages, in the manner of TILA.[22] Another possible approach, suggested by a commentator, would be to expressly provide for the granting of substantial exemplary damages.

In summary, for the reasons mentioned in the Discussion Notes, I think it makes sense to rely on robust civil remedies to ensure a high level of compliance with the disclosure requirements. In particular, the remedies should be designed to encourage lenders to adopt effective internal procedures to ensure compliance. This is the object of CCDA's division of contraventions into three categories: (1) excusable errors; (2) deliberate contraventions; and (3) other contraventions. I think this division is a reasonable approach but that the exact consequences of dealing with contraventions in each category certainly warrants further consideration.

Recommendation 5:

The Uniform Law Section should decide upon the basic approach to the civil consequences of non-compliance with CCDA. In particular, the following questions should be answered:

(1) Is it appropriate for CCDA to provide for any civil consequences of non-compliance?

(2) Is it appropriate for CCDA to provide for "civil penalties"?

(3) Are the circumstances in which CCDA would impose a civil penalty appropriate?

(4) Are the civil penalties themselves appropriate, or should they be more or less severe?

ISSUES REGARDING SPECIFIC SECTIONS

Part 1 -- Definitions and Application

Section 1 -- Definitions

Before dealing with specific defined terms, I should refer to a point raised by the commentator who preferred the "full and fair disclosure" approach to the "detailed requirements" approach of CCDA. Part of the commentator's unhappiness with CCDA 3.2 was with some of its terminology. In particular, the commentator expressed concern that some terms were more appropriate in the context of cash loans than in the context of vendor credit. For example, one would ordinary refer to the parties to a conditional sales contract as the buyer and the seller, rather than as the "lender" and the "borrower", and one would not refer to the transaction itself as a "loan agreement". A similar point had been raised by a commentator on CCDA 2, but working group members did not consider the terminology to be a problem so I had left it unchanged for CCDA 3.2. However, the point having been raised again, I have thought about it again, and I must admit that there is a lot to be said for using terminology that is as close as possible to the terms with which "users" will be familiar. Therefore, I propose to change some of the defined terms (without changing the actual definitions).

Recommendation 6:

Certain defined terms should be changed:

- "borrower" to "customer" (or "debtor");
- "fixed loan" to "fixed credit";
- "lender" to "credit grantor" (or "creditor");
- "loan agreement" to "credit agreement";
- "supplier loan" to "supplier credit".

"cash value" (Clause (1)(j))

Additional Reference: Discussion Notes, Part A.3.a (pp. 7-8)

At least two commentators expressed similar concerns regarding subclause (iv) of the definition of "cash value". The concern, in a nutshell, is that this subclause would not allow the seller and the credit buyer to negotiate a price; the cash value would have to be based on the "lowest price for which the seller would sell the product to a cash customer". This "lowest price" could be difficult to determine in many cases. In any event, it would deprive the seller of the opportunity to negotiate a price with each customer.

The cash value of a product purchased on credit terms is intended to serve as a reasonably objective measure of the monetary value of what the consumer receives in the transaction. This is important for the reasons summarized in section A.3.a. of the Discussion Notes, especially:

1. to facilitate comparison of the cost of financing the purchase through the seller with the cost of borrowing money from an independent source to pay cash (or charging it to a credit card), and

2. to ensure that a buyer who prepays the outstanding balance does not pay unearned finance charges.

All ccdl uses the concept of a cash price or cash value of goods sold on credit, and anchors this to the amount that would be paid by a cash customer. For example, the U.S. Regulation Z's definition of "cash price" reads, in part:

the price at which a creditor, in the ordinary course of business, offers to sell for cash the property or service that is the subject of the transaction . . . [23]

In tying the cash price to the amount for which the seller ("creditor") offers to sell the goods to cash purchasers, Regulation Z's definition is similar to subclause (iii) of CCDA's definition. Where the seller offers the product in question to cash customers for a predetermined price (i.e. the situation covered by subclause (iii) of the definition), this price provides a reasonably objective measure of the current monetary value of the product. But where a product is not offered for sale to cash customers for a predetermined price, the appropriate method of determining the cash value is less obvious. For example, car dealers sometimes do not put a price sticker on the car, but instead wait for offers from prospective purchasers.

Why not simply use the sale price agreed to by the seller and the credit buyer as the cash value? The problem is that this would give a lender who is so inclined an excellent opportunity to bury the finance charge in the cash price that is stated in the sales contract. Suppose, for example, that a car dealer does not put a "sticker price" on its cars. Instead, it waits to receive offers from prospective buyers, or discloses a price only when a prospective buyer makes enquiries. Since the price is negotiable, the price for which the dealer sells any particular model (with the same options) will vary from customer to customer. Suppose that the

average price for which the dealer sells a particular model to cash customers is $16,000. On the other hand, the terms of sale to a typical credit customer are as follows:

Price: $19,000

Interest Rate: 0%

Downpayment: $2000

Term: 3 Years (36 monthly payments)

Payments: $472.22

Obviously, an implicit finance charge is built in to the price for which a car is sold to credit customers, so the statement that the interest rate is 0% is somewhat misleading. Moreover, if the cash value of the car were regarded as being $19,000 for all purposes the full finance charge would be payable even if the buyer decided to prepay (or refinance) the loan after a year.

Admittedly, determining an objective cash price in the type of situation envisaged by subclause (iv) is not a precise science, because different cash customers may pay different prices. The idea of anchoring the cash value to the "lowest price for which the seller would sell the product to a cash customer" comes from the Australian Code:

"cash price" of land, goods or services to which a credit contract relates means the lowest price . . . that a cash purchaser might reasonably be expected to pay for them (either from the supplier or, if not available for cash from the supplier, from another supplier)

However, it may be that subclause (iv) is too inflexible. A car dealer might be prepared to sell a particular car to a personal friend at its wholesale price, but it is not obvious that this should determine the cash value of the car for the purposes of CCDA. What we are really after is a value that reflects a reasonable estimate of what a typical cash purchaser could be expected to pay for the product. Accordingly, I would recommend such a revision to subclause (iv). This should give a seller a reasonable amount of leeway in disclosing the cash price while still ensuring that the disclosed cash value is a reasonable approximation of what a typical cash customer would pay for the product. A seller who finds the requirements of subclause (iv) too burdensome could relieve itself of this burden through the simple expedient of offering the goods to cash customers for a predetermined price.

Recommendation 7:

Subclause (iv) of the definition of "cash value" in CCDA should be revised to read as follows:

(iv) in any other case, its agreed cash value, not exceeding the seller's reasonable estimate of the amount that a typical cash customer would pay for the product.

Section 3 Application

There is widespread support for putting all references to monetary amounts in regulations. I agree, so long as uniformity is not affected.

Recommendation 8:

Monetary limits should be moved to the regulations.

Note

I suspect that some provincial governments will decide to extend the application of the act to certain loan agreements that would not otherwise be covered. For example one working group member agreed with the exclusion of business loans, but added their province would continue to include loans to farmers for their farming operations.

Part 2 -- Charges and Calculations

Section 7 Permitted disbursement charges

One commentator asked whether life or disability insurance on the loan would be a permitted disbursement charge. The short answer is that optional life or disability insurance would be treated as an optional service, and the premiums would be regarded as an optional service charge, not a non-interest charge. There are specific requirements regarding disclosure of optional service charges in several places in CCDA: see e.g. s. 5, 25(c)(d)(k).

What if the insurance is not optional, but is a condition of getting the loan? For example, what if a prospective lender requires a borrower to purchase some sort of life insurance to ensure that the loan will be paid off if the borrower dies during the term? The answer depends on whether or not the premium would be payable to the lender or an associate of the lender. If it would, the premium would fall within the definition of a "non-interest charge". But it would not be a permitted disbursement charge. Thus, a requirement to purchase some form of insurance from the lender or an associate of the lender would violate the act.

The situation is different if the lender requires the lender to purchase insurance or any other service from a third party (who is not an associate) as a condition of entering into the loan. CCDA 3.2 does not restrict or require any particular disclosures for such a transaction. CCDA 3.2's failure to restrict or impose disclosure requirements regarding charges of independent third parties is deliberate. It was assumed that the third party would necessarily have to disclose its charges to the borrower in the ordinary course of events. For example, if a mortgage lender requires a borrower to provide a survey certificate at the borrower's own cost, the surveyor who provides the certificate will presumably provide the borrower with a bill for the service. Similarly, it is reasonable for a lender to require a borrower to keep the subject matter of the lender's security interest (e.g. a house or car) insured and it is also reasonable to assume that the insurer (or insurance agent) will disclose the premium to the borrower.

However, CCDA's failure to impose any restrictions at all on payments to third parties is a potentially serious defect that needs to be addressed in some fashion. The following scenario illustrates the potential problems.

A lender (L) offers second mortgage loans at very attractive rates: lower than the prevailing rates on first mortgages. However, prospective borrowers (B) soon discover that they cannot obtain one of these loans without buying and paying for "default insurance" from a particular provider of such insurance (U). L is the beneficiary of this insurance, for which the premium paid by the borrower is typically 5% of the initial loan balance. If B defaults, U will pay the outstanding balance but will be subrogated to L's rights against B. U is not an associate of L, but pays L a "referral fee" for each borrower who buys this default insurance.

The preceding is a worst case scenario that illustrates several problems with the existing gap in CCDA's requirements:

1. Essentially, B is paying U to assume the risk that B will default on the loan, a risk that normally would be borne by L and would be reflected in the interest rate. Unlike the types of expenses that are meant to be covered by a flat charge, "risk cost" does vary with the amount of the loan and the length of time it is outstanding. Obviously, the main reason why the interest rate is so low is that a substantial portion of the loan cost that would normally be reflected in the interest rate has been transferred to the premium for the default insurance. It is also worth noting that by converting what is really a charge for the use of funds into an insurance premium that is paid up front, this arrangement will deprive the borrower of much of the benefit of prepaying the loan (unless some provision was made for a partial rebate of the premium upon prepayment of the loan).

2. Although the premium is not paid directly to L, and thus is not caught by the current draft, the "referral fee" is in substance a payment from B to L. It increases L's return on the funds it advances. Moreover, the fact that U provides L with this referral fee ("kickback") suggests that the amount of the premiums is set at a level that is intended to do more than cover the risk of default.

3. Not only is B required to buy the default insurance, it is required to buy it from U. This prevents B from shopping for the least expensive "default insurance".

I can think of specific provisions that would address the problems identified in points 2 and 3. However, the fundamental problem is the one described in point 1: the current version of CCDA would give lenders who are inclined to do so a relatively easy method of artificially reducing the interest rate on their loans by transferring a cost that would normally be reflected in the interest rate to a third party and requiring the borrower to pay the third party to accept those costs. One method of dealing with this problem would be to insert a provision in CCDA along the lines of "Section 6.1", which follows:

6.1 Payments to third parties by borrower

(1) A lender must not, as a condition of extending credit, require a borrower or prospective borrower to purchase any product from or make any payment to a third person except in the circumstances described in subsection (2).

(2) A lender may require a borrower to purchase a product from or make a payment to a third person if

(a) the object of the loan agreement is to finance the purchase of that product; [e.g. the house, car, boat or whatever whose acquisition is the whole object of the loan]

(b) the payment relates to a liability to which the borrower would be subject whether or not they entered into the loan agreement; [e.g. property taxes]

(c) it is a product that a reasonable borrower might be expected to purchase if not required to do so as a condition of entering into the loan agreement, and

(i) the lender does not require the borrower to purchase the product from a particular source, and

(ii) the lender does not receive a commission or fee from the supplier of the product;

[e.g. property insurance or life insurance that benefits the borrower, but **not** default insurance that does not benefit the borrower]

(d) the payment relates to a charge that would be a permitted disbursement charge under section 7(1) if the payment were made to the lender. [e.g. an appraisal fee]

It will be noted that this provision would not affect a lender's ability to offer optional services. It only deals with situations where the lender **requires** a borrower to purchase some product or make a payment as a condition of obtaining credit. I believe that it would deal with the problems discussed above without imposing undue burdens on lenders. However, it should be recognized that outside parties have not yet had an opportunity to comment on this issue or this particular provision.

Recommendation 9:

The Uniform Law Section should tentatively adopt section 6.1, subject to further discussion with affected parties.

Section 8 Permitted flat charges

Additional Reference: Discussion Notes, Part A.2.b (p. 6)

You will recall (I hope) that one of the fundamental issues discussed earlier in this report was whether lenders should be able to impose a flat charge for fixed loans. Several working group members are strongly opposed to allowing any flat charges for fixed loans. However, CCDA 3.2 would allow a lender to impose one flat charge at the outset of a loan agreement and another flat charge each time the loan is renewed. CCDA 3.2 is identical to CCDA 2 in this respect. However, several commentators have argued that lenders should be able to impose an additional flat charge when a mortgage loan has been paid off and the erstwhile borrower wants the lender to provide a registerable discharge of mortgage. The purpose of the flat charge would be to compensate the lender for the cost of preparing the discharge.

When a commentator on CCDA 2 first suggested that lenders should be able to impose a flat charge for providing a discharge my reaction was that the lender's cost of preparing a discharge when a mortgage loan has been paid off must be very small. After all, it must be readily apparent to a lender whether a loan has been paid off or not; if it has been paid off, the word processor does the rest. In any event, if there are significant internal costs involved in preparing a registerable discharge, they can be taken into account in the initial flat charge. The lender cannot know exactly how much it will cost to prepare a discharge 20 years down the road, but the current cost of doing so is known and should be a reasonable guide to the **present value** of the cost that will be incurred 20 years from now.

Not everyone is convinced by the foregoing arguments. Two or three commentators on CCDA 3.2 have reiterated that lenders who are asked to prepare a discharge should be able to charge for doing so. One of these commentators argued that a borrower who has paid off a loan has a common law right to prepare a discharge and require the execute it without charge. However, a borrower who wants the lender to prepare the discharge should be prepared to pay a fee for this service. Another commentator reiterated their earlier point that lenders should be able to charge for preparing a discharge at the time of doing so, because the cost of doing so cannot be known in advance. I am still not convinced that lenders should be able to impose a charge for preparing a discharge of mortgage.

One final point. Alberta's *Law of Property Act* requires a lender whose mortgage loan has been paid off to provide the borrower, without fee, a registerable discharge of mortgage. I have been advised that Ontario does not have such a provision. I do not know what the situation is in other provinces.

Recommendation 10:

CCDA should not be changed to allow for an additional flat charge for preparing a discharge of mortgage.

Section 9 Permitted prepayment charges

Section 10 Prepayment of non-mortgage loans

A commentator noted that allowing unrestricted prepayment of non-mortgage loans without penalty shifts costs from consumers who prepay to consumers who pay in accordance with the original payment schedule. It is true that allowing unrestricted prepayment of non-mortgage loans is not cost-free. However, these provisions reflect longstanding Canadian policy. Throughout this project we have assumed that Canadian legislators have no desire to depart from this policy.

Section 11 Permitted default charges

A commentator took issue with the exclusion of amounts paid to employees from the amount recoverable as default charges. The commentator wondered why, for example, legal fees paid to an outside law firm could be recovered but the expenses of an in-house lawyer could not be. The commentator noted the difference between the approach of this section and the approach of section 7(3) to "in-house" disbursement charges, and argued that this section should make similar provision for in-house default charges.

The current version of section 11 is modelled on section 11 of the Cost of Borrowing (Banks) Regulations. When the working group met in March, CCDA 3.1 section 11 read as follows:

Subject to any applicable rule or practice of court, permitted default charges are charges that cover specific, documented costs incurred by the lender because of the borrower's default.

This version of section 11 had been supported by most commentators on CCDA 2; however, members of the working group thought that it was too flexible. Thus, the working group favoured the provision based on section 11 of the CBBR.

I have considerable sympathy for the commentator's point. As is the case with disbursement charges, it is difficult to see why, in principle, costs incurred by a lender because of a borrower's default should be treated differently depending upon whether the cost relates to work done by the lender's own employees or to services performed externally. Of course, in many cases it will be easier to identify and quantify a cost when a service is performed externally and billed to the lender than where the relevant work is performed internally. But disallowing all internal expenses arguably goes further than is necessary to ensure that default charges are reasonable, which is presumably the object of a section such as this. On the other hand, requiring that the charges relate to amounts paid to external service providers does not guarantee that they will be reasonable.

Recommendation 11:

Adopt the following changes to section 11, subject to further consultation with interested parties. Firstly, subsection (1) should be modified by the addition of the word "reasonable" at the beginning of each clause. Secondly, subsection (2) should be modified to read as follows:

(2) An amount paid to an employee or associate of the lender may be recovered as a default charge only if the amount relates to legal costs mentioned in subsection (1).

The requirement in the modified subsection (1) that the charges be reasonable would automatically be imported into subsection (2). It will be noted as well that the internal expenses must be "legal costs", not the more general category of costs mentioned in clause (1)(b).

Section 12 Brokerage fees

Clarification

One commentator wondered whether a payment (e.g. a referral fee) from the lender to a broker would be regarded as a brokerage fee to which this section applies. The answer is that it is not intended to be caught. Note that subsection (1) refers to a brokerage fee or charge "imposed on or collected from a borrower". A fee paid by the lender to a broker does not meet this description.

Issue 1

Two commentators made similar points regarding the requirement for the broker to provide a separate brokerage fee disclosure statement. One commentator suggested that getting two disclosure statements relating to the same transaction might confuse many consumers. The other commentator noted that in some cases a broker might not have all the information necessary to do the calculations required by this section, and suggested that the section should allow either the lender or the broker to provide the disclosure statement.

Recommendation 12:

Section 12 should be modified to allow the brokerage fee disclosure statement to be incorporated in the lender's disclosure statement and delivered by the lender to the borrower.

Issue 2

A commentator noted that subsection (3) might adversely affect legitimate brokers who charge a refundable fee. The commentator suggested that perhaps the restriction should apply only to non-refundable fees.

First, it should be pointed out that clause 12(3)(b) is not essential to uniform cost of credit disclosure legislation. Different provinces could deal with this issue in different ways without affecting the essential uniformity of ccdl. On the other hand, quite apart from any "uniformity" considerations the clause does serve an important purpose. The main purpose of not allowing the broker to accept payment of a brokerage fee until the loan is advanced is to ensure that prospective borrowers will only pay a brokerage fee for loans that are actually made. It is certainly not unheard of for prospective borrowers to pay a brokerage fee and never get a loan. The requirement in subsection (3)(b) that the broker provide the brokerage fee disclosure statement on or before the day the borrower receives the initial disclosure statement ties in with the special right given to the borrower by sections 27 (non-mortgage loans) and 28 (mortgage loans). This is the right to back out of the loan and avoid liability for any flat charge or brokerage fee by taking certain steps within two business days of receiving the disclosure statement.

The policy underlying sections 11(3)(a), 27 and 28 might be implemented by means other than the "no fee until funds are advanced" rule. As the commentator suggests, brokers could be allowed to charge refundable brokerage fees. It should be kept in mind, though, that a rule providing for refundable brokerage fees will necessarily be more complicated than a rule that states that a broker cannot require or accept payment of a brokerage fee until the funds are advanced. It would be necessary to describe with considerable precision the circumstances that entitle the borrower to a refund, and there would also be the problem of ensuring that prospective borrowers actually get refunds to which they are entitled.

Recommendation 13:

Clause 12(3)(a) should be left as is, but as an optional provision; different jurisdictions could take different approaches to payment and refund of brokerage fees without seriously impairing uniformity.

Section 14 / 14.1 Rebates and discounts

Additional Reference: Discussion Notes, Part A.3.b (pp. 8-10)

The issue here is how to deal with rebate or low-rate financing ("RLRF") programs. Section 14, which takes the same basic approach as CCDA 2, would not allow rebates or low-rate financing to be offered as alternatives to each other under any circumstances; any rebate given to cash customers would also have to be given to credit customers. Section 14.1 takes the same approach as section 14 where the rebate or discount is offered by the seller of the product or an associate of the seller. However, it would allow a third person (most likely, a manufacturer or distributor) to offer a rebate or low-rate financing as alternatives to each other, provided that certain disclosure requirements were met.

In the recent round of consultation on CCDA 3.2, six commentators addressed this issue. One commentator supported the approach embodied by section 14, on the basis that it would make financing costs more transparent. The other five commentators supported an approach along the lines of section 14.1. One of the commentators observed that "the table as suggested provides a very clear means of communication and still permits consumers to make a reasoned choice."

For my own part, I am not convinced that the approach embodied by section 14 would deprive any consumers of any meaningful choice. Moreover, borrowers who end up prepaying the loan (or refinancing) will almost certainly be better off with the market rate loan that starts off with a smaller initial balance (smaller by the amount of the rebate). As discussed elsewhere, I suspect that RLRF programs are structured so that consumers who take the low-rate financing option could have got the same monetary benefit by taking the rebate, and applying it against a loan at the prevailing market interest rate. The Discussion Notes specifically invited prospective commentators to provide evidence that would show that this suspicion was unfounded, that is, that credit customers might sometimes be better off with the low-rate financing option than with the rebate. The closest any commentator came to addressing this question was in the following observation:

Whether your comment about consumers not being better off under low rate financing is true or not is irrelevant. For whatever reason, today, a considerable number of our customers has chosen to take low rate financing for reasons that are meaningful to them. Why should they be deprived of this choice?

My answer to the question posed by the commentator is found in the Discussion Notes and in previous project documents.

I prefer the approach of section 14, but recognize that there is wide support for an approach along the lines of section 14.1. The table contemplated by section 14.1(5) would provide consumers with a pretty good comparison of the rebate and low-rate financing options. My main concerns about the approach embodied by section 14.1 are as follows:

1. The table does not illustrate the relative disadvantages of the low-rate financing option if the consumer prepays the loan.

2. The table provides information for a representative transaction. The relative cost of the alternatives would be affected by departures in the terms of an actual transaction from those of the representative transaction.

3. Section 14.1(4) deals only with advertising. It does not provide for any special disclosure at the time of the transaction. It may be that the initial disclosure statement for an actual transaction should contain a table such as the one required for advertisements. Such a table would allow the consumer to compare the relative advantages and disadvantages of the two options for the actual transaction.

Reluctant Recommendation 14:

Adopt the approach embodied by section 14.1 rather than section 14. However, the exact requirements should be finalized after further discussion with affected parties.

Part 3 -- Fixed Credit

General Issues Regarding Part 3

Notice of negative amortization: Discussion Notes, A.4.c (pp 12-13)

The issue here is how to address situations where a rise in interest rates creates a situation where scheduled payments do not cover the interest that accrues between payments. Such a situation could arise quite easily where variable rate loan has a long amortization period. The proposed provision set out at page 13 of the Discussion Notes would require the lender to notify a borrower of a negative amortization situation that persists for two consecutive payment periods, and to "invite" the borrower to increase the payments to cover the interest that is generated in each payment period.

The response of commentators to the suggested provision was generally favourable, but there were some concerns and suggestions. One concern was that the proposed requirement might be expensive for some lenders to implement. My impression was that this concern related mainly to the initial costs of implementing such a requirement rather than to its ongoing costs. One commentator thought that requiring the lender to "invite" the borrower to increase the payments to cover the interest did not go far enough; there should be a requirement to increase the payments so as to cover the interest. However, another commentator noted that it will generally be in a lender's own best interest to ensure that the periodic payments are at least sufficient to cover the interest. Another commentator suggested that if the payments are increased and the rates later decline, the borrower should have the option of leaving the payments at the higher level or going back to the original payments. Finally, one commentator enquired

whether the potential for a future negative amortization situation during the term of the loan with full up front client disclosure of the potential and subsequent ramifications, could be considered deliberate and therefore not subject to the provisions as set out in the Discussion Draft.

This question undoubtedly related to the comment on page 13 of the Discussion Notes that "of course, [the proposed provision] would not apply where the negative amortization situation is deliberate and has been disclosed in advance." The comment to which the commentator referred was actually a reference -- albeit a rather vague reference -- to "reverse mortgage", which are discussed earlier in this document.

The comment in the Discussion Notes about deliberate negative amortization situations was not meant to suggest that the special disclosure provision would not apply if the borrower had been informed at the outset of the loan that future increases in the interest rate could create a situation where the scheduled payments would not cover the interest. Such advance disclosure of the potential for negative amortization is desirable, but would not ensure that borrowers are informed when their scheduled payments in fact do not cover the interest generated in each payment period. It is one thing to know that a negative amortization situation might arise because of future interest rate increases; it is quite another to know that such a situation has actually arisen. Therefore, the special disclosure requirement set out in the

Discussion Notes would be triggered even if the borrower had been advised that future increases in interest rates might lead to the interest generated in each payment period exceeding the payment due at the end of the period.

Recommendation 15:

The special disclosure provision set out on page 13 of the Discussion Notes should be adopted.

Balloon payments: Discussion Notes Part A.4.d (p. 14)

The Discussion Notes point out that CCDA does not restrict "balloon payment" arrangements, while noting that one province (Quebec) currently does not allow balloon payment arrangement for non-mortgage loans and that several other provinces have expressed sympathy for taking the same approach. The Discussion Notes state that individual jurisdictions could decide whether or not to prohibit balloon payment arrangements. Only two commentators commented on this aspect of the Discussion Notes. One commentator argued that balloon payment loans benefit consumers by allowing for smaller monthly payments. The second commentator expressed grave misgivings about the decision not to include a provision in CCDA that prohibits balloon payment loans, because balloon payment provisions reduce the transparency of the actual cost of credit.

Recommendation 16:

No change. CCDA should not prohibit or restrict balloon payment arrangements, leaving individual jurisdictions free to do so if they choose.

Annual notice: Discussion Notes, Part A.4.e (pp 14-15)

The Discussion Notes sets out a possible provision (on p. 14) that would require lenders to provide borrowers with an annual statement for all fixed loans with terms in excess of two years.[24] The basic purpose of the notice would be to let borrowers know what progress they have made in paying off the loan and how the payments have been applied.

Commentators were asked to address the issues of whether this provision would create practical problems for lenders and whether it would be more appropriate to provide such statements "on request" than on an annual basis.

Several commentators commented on this provision. The range of views is indicated by the response of one credit grantors' organization:

The suggested provision for the annual statement creates problems for some of our member companies as they do not have the necessary systems to comply with the requirement to provide an annual statement. However, other members would prefer distributing these statements to our customers on a one time basis rather than when it is requested.

Another commentator pointed out that few borrowers ask for such statements, but that when they do the statements are provided as a matter of "customer relations and law". This commentator thought that a requirement for an annual statement would be costly and would be useful to very few borrowers. Most commentators, however, supported the idea of annual statements for loans with a term in excess of two years.

Recommendation 17:

Either

(1) Adopt a provision based on the provision set out on page 14 of the Discussion Notes; or

(2) Lenders should be required to provide borrowers with information regarding the application of payments upon request without charge, subject to reasonable restrictions on the frequency of such requests.

Section 16 Requirements for variable rate agreements

Additional Reference: Discussion Notes, Part A.4.a (pp 10-11)

Note

The Discussion Notes asked whether requiring that variable rate fixed loans be indexed would create significant difficulties for consumers or lenders. Several commentators responded to this question. None thought that it would create significant difficulties. One commentator pointed out that it is important to ensure that the differential between the rate and the index is fixed for the length of the contract and does not change on default. This point is dealt with in section 6 of PIA 2, and is one of the four principles that I suggested earlier should be implemented by any replacement for the *Interest Act*.

Section 18 Disclosure triggered by mention of interest rate for constant-rate loan

Clarification

One commentator wondered what was meant by the "nature" of disbursement charges in clause (c). What is meant, and hopefully this is clear from the context, is that the advertisement must disclose what sort of disbursement charges (e.g. legal fees) may be imposed on the borrower, but is not required to disclose their amount.

Sections 24 Timing of initial disclosure[25]

Additional Reference: Discussion Notes, Part A.4.b (pp 11-12)

Two commentators objected to allowing borrowers who exercise their special two-day cancellation right to escape liability for flat charges (ss 24(2), 27(3)). They argued that it is wrong in principle to allow borrowers to avoid charges for expenses, even internal expenses, that have been incurred by the lender to set up the loan in question. This will shift the cost from prospective borrowers who back out of the loan to actual borrowers.

These points are well taken. However, for the reasons set out in the Discussion Notes, I believe that borrowers who decide not to proceed with the loan (or who repay it) within two days of receiving the disclosure statement should not be responsible for any flat charges. As already discussed, several provinces and commentators have strong reservations about allowing flat charges at all for fixed loans. The proposed "two days to think about it" rule is intended to be one mechanism for keeping the amount of flat charges at competitive levels. Of course, if flat charges were not permitted at all, this would be a moot point.

Recommendation 18:

Confirm the "two days to think about it rule" in sections 24(2) and 27(3) and 28(3).

Section 30 Contents of initial disclosure statement

Issue

Subsection (3) relieves the lender of the requirement to disclose the total amount of the payments and the dollar cost of credit for loans with a **term** exceeding five years. The corresponding provision in CCDA 2 referred to loans with an **amortization period** exceeding five years. The rationale for this exclusion was discussed in the Commentary to CCDA 2 (Commentary: Part II.F.3.b.(2)). The Commentary noted that existing disclosure legislation does not require disclosure of the total payments or dollar cost of credit for mortgage loans. The Commentary provided a rationale for this exclusion that focused on the long amortization period for most mortgage loans and the fact that the amortization period for mortgage loans generally exceeds their term. The Commentary argued that the rationale for the exclusion applied to any loan with a relatively long amortization period, not just to mortgage loans: hence, CCDA 2's reference to loans with an amortization period of more than five years. However, the working group thought that the exclusion should be limited to loans whose term exceeds 5 years, and CCDA 3.2 has been modified accordingly.

One commentator on CCDA 3.2 argued that the change from "amortization period" to "term" was inappropriate. The commentator referred to the rationale for the exclusion set out in the Commentary, which focuses on the length of the amortization period rather than the length of the term. This is correct; the Commentary's rationale for not requiring disclosure of the total payments and dollar cost of credit in certain circumstances focuses on the length of the amortization period. Indeed, the strongest argument for not disclosing the total payments and dollar cost of credit can be made where the term is short but the amortization period is long. In retrospect, the safest and simplest solution is to maintain the existing distinction between mortgage and non-mortgage loans. That is, disclosure of the total amount of payments and dollar cost of credit would be required for loans other than mortgage loans.

Recommendation 19:

Modify subsection 30(3) so the exclusion applies to mortgage loans, rather than loans with a term [or amortization period] exceeding 5 years.

Section 31 Variable rate loans

A commentator wondered why subsection (2) does not require the lender to disclose the new annual rate before it comes into effect. If the new rate is only disclosed after it comes into effect, the borrower may miss out on an opportunity to renegotiate the loan. But it should be kept in mind that non-mortgage loans are always prepayable without penalty, so the borrower is always in a position to "renegotiate" such a loan. Moreover, given the nature of an indexed rate, it might not be possible for the lender to give advance notice of the new rate to the borrower.

Section 33 Renewal agreements

The equivalent of subsection (5) in CCDA 2 would have required the disclosure statement to provide the relevant information for different renewal options that are given to the borrower. One or more commentators on CCDA 2 objected to that requirement, on the grounds that a borrower might have many options available for renewing the loan. This point was addressed in CCDA 3.2 by allowing, but not requiring, the lender to provide the relevant information for different renewal options available to the borrower. One commentator on CCDA 3.2 expressed a preference for the earlier formulation because "lenders will provide information only on options that are to their benefit resulting in biased information rather than allowing for full disclosure so consumers can make their own decisions."

I still agree with the original commentator that it is impractical to require lenders to disclose the relevant information for every option that might be available to the borrower. One cannot force a lender to offer to renew a loan on conditions that the lender does not perceive to be for its own benefit. On the other hand, lenders will have a built-in incentive to provide borrowers with attractive renewal options, because borrowers can refinance the loan through other lenders. Indeed, the main purpose of requiring the lender to provide the disclosure statement in advance of the renewal date is to allow the borrower to compare the renewal terms offered by the lender with the terms offered by other lenders.

Part 4 -- Open Credit

General Issues Regarding Part 4

Application to overdraft facilities: Discussion Notes, Part A.5 (p. 15)

The Discussion Notes discuss the issue of whether CCDA's disclosure requirements for open credit should apply to the sort of prearranged overdraft facilities that are often associated with deposit accounts. CCDA does not specifically refer to overdraft facilities, but they would fall within the definition of "open credit". The question is whether such facilities should be excluded from CCDA or whether they should attract less rigorous disclosure requirements than other forms of open credit. It was noted that under some existing ccdl the disclosure requirements for overdraft facilities are less rigorous than for other forms of open credit. Section 8(1)(a) of the Cost of Borrowing (Banks) Regulations, for example, provide that disclosure must be made

in the case of an overdraft, by means of a written statement or by a notice that is displayed in each branch of the bank.

The Discussion Notes questioned the efficacy of "posting in the branch" disclosure, when the proliferation of automatic banking machines makes it unnecessary for most consumers to set foot in their branch in order to attend to most of their banking business. The Discussion Notes conceded that one reason for excluding overdraft facilities from CCDA would be if it were considered more appropriate to deal with all aspects of financial institution deposit accounts in one place.

One commentator on CCDA 3.2 took issue with the proposition that overdraft facilities should be put on the same footing as other forms of open credit:

Our members object to this comparison [with open credit]. Overdraft facilities do not have the same characteristics as other forms of open credit. Such facilities are not intended or marketed as a regular form of credit. They are intended for emergencies or when the customer inadvertently does not deposit sufficient funds to cover a payment. The high interest rate associated with overdraft facilities reflect the fact that the customer is not encouraged to use them.

Customers who use overdraft facilities must monitor their financial affairs very closely and are thus encouraged to have regular contacts with the personnel within their branch.

The commentator went on to express support for the CBBR's approach to overdraft disclosure requirements. This view was not shared by all commentators, several of whom expressed support for the proposition that consumers should get the same sort of disclosure for overdraft facilities as for other forms of open credit. One commentator noted that "[m]any consumers balance their monthly budgets using overdraft!" I would also reiterate the assertion made in the Discussion Notes that CCDA's disclosure requirements for open credit do not seem unduly onerous when applied to an overdraft facility. In any event, if it is considered appropriate to exclude overdraft facilities from CCDA, this could be done through a regulation under section 3(5)(b).

Recommendation 20:

No special provision should be made for overdraft facilities in CCDA: they would be treated as a form of open credit. But overdraft facilities might be excluded by regulation if it were considered more

appropriate to deal with them in legislation or regulations regarding deposit accounts.

Section 34 Application of this Part

There is a significant omission here regarding open credit agreements to which section 35 applies. It should be made clear that the rest of this Part does not apply to open credit agreements to which section 35 applies; all requirements for such agreements are contained in section 35 itself.

Recommendation 21:

A subsection (2) should be added to section 35:

(2) Sections 36 through 46 do not apply to an open credit agreement to which section 35 applies.

Section 43 Early disclosure of cost information

The point marked "N.B." in the "across the page" Discussion Notes was quite controversial at the working group meeting. I am satisfied with the approach of section 43, but others might not be.

Section 44 No unsolicited credit cards

The "across the page" discussion note for section 44 refers to the controversy over whether consumers should be able to apply for credit cards over the phone, or whether all applications for credit cards should be required to be in writing. I know that there are strong views on either side of this issue (although none were expressed in the most recent round of consultation). I lean towards allowing "over the phone" applications for credit cards. Even if the card is applied for over the phone, the customer must be given a written disclosure statement before receiving any advances under the credit card agreement. And customers will not be liable for any non-interest charges if they cancel the card (without using it) within 30 days of receiving the disclosure statement. But this argument certainly did not convince all members of the working group that it is appropriate to allow "over the phone" applications for credit cards.

Recommendation 22:

The Uniform Law Section should consider and adopt a position on the "written application" issue.

Section 46 Limitation of liability on loss of credit card

There is still some disagreement as to the wording of clause (3)(b). Several commentators (either on CCDA 2 or CCDA 3.2) were unhappy with the reference to a "reasonable" time, arguing that it was too vague. One commentator suggested the word "immediately" as a replacement and another suggested that a fixed time frame be substituted. The working group thought that the term "within a reasonable time" is a reasonable compromise between the different positions. It was noted that even if the wording says "immediately", its practical effect would be the same as if it said "within a reasonable time". This wording is based on Alberta's Act and the Alberta representative on the working group said that this wording does not seem to have created problems or excessive uncertainty in Alberta.

Part 5 -- Leases of Goods

Section 47 Definitions

"cash value" [clause (a)]

As mentioned in Part B, the definition of cash value is problematic in the case of lease transactions. The following change will not necessarily address all of the problems, but is consistent with the change to the definition of "cash value" discussed earlier in relation to section 1.

Recommendation 23:

Subclause (ii) of the definition should be revised to read:

(ii) in any other case, means their agreed cash value, not exceeding the merchant's reasonable estimate of the amount that a typical cash customer would pay to buy the goods.

Part 6 -- Compliance

Section 59 Offences

The version of CCDA considered by the working group would have imposed criminal liability only for deliberate contraventions of the act. This was in keeping with the emphasis on private remedies as the most effective means of encouraging compliance with the act.[26] However, most members of the working group thought that such a limitation would severely limit administrators' ability to enforce the legislation. As a result, the current version deletes the reference to "deliberate" contravention. One commentator on CCDA 3.2 noted that this provision could in theory impose criminal liability for very minor transgressions of the act. I am not particularly comfortable with this provision.

Recommendation 24

The Uniform Law Section should decide whether this provision needs to be qualified in any way. One possibility would be to identify specific provisions whose contravention will be regarded as an offence.

Part 7 -- General

Section 62 Form of disclosure

With respect to subsection (3), which deals with the presentation of information in advertisements, a commentator made the following point:

Some recognition must be given to the fact that some disclosure information is quite involved. What might be appropriately placed in a magazine or newspaper is unworkable in a TV or radio ad. This matter must be dealt with or certain media will not be able to be used.

The commentator went on to refer to the possibility that TV or radio advertisements could refer viewers or listeners to newspaper advertisements or to dealers for further information. Although the commentator did not do so, he could have supported his argument by mentioning that both houses of the U.S. Congress have recently passed bills that would exempt radio advertisements from normal TILA disclosure requirements, provided that the advertisement give a toll-free number or refer to a locally-published newspaper where the relevant disclosures could be obtained.

Actually, however, I am not convinced that CCDA's disclosure requirements for advertisements would be all that difficult to comply with even in a radio advertisement. CCDA's advertising requirements are not nearly as onerous as TILA's. The one exception to this would be the advertising requirements set out in section 14.1 regarding RLRF programs: obviously, it would be a little difficult to set out the table described in section 14.1(5) in a radio advertisement.

Recommendation 25:

Consideration should be given to providing alternative disclosure requirements for radio or television advertising, but only where it would be impracticable to make the required disclosures in such media.

Section 68

Issue 1

The language of subsection (2) is broader than was intended. As pointed out in the "across the page" Discussion Note, this subsection "is intended to make it clear that the civil consequences of a lender's failure to comply with the act flow through to an assignee". But the wording of subsection (2) is broader than what is required to achieve that purpose; the wording would apply to matters between the borrower and lender that have nothing to do with CCDA. The wording should be confined to matters arising out of contraventions of CCDA.

Recommendation 26:

Subsection (2) should be modified to read as follows:

(2) Where an assignor has contravened this act in relation to a loan agreement prior to the relevant assignment, the assignee has no greater rights regarding the enforcement of the agreement than the assignor had immediately before the assignment.

Issue 2

A commentator pointed out that the relationship between subsection (2) and other relevant provincial legislation needs to be carefully considered. The commentator noted that, for example, Ontario's Act has a provision similar to CCDA section 68, but that the Ontario Act specifically excludes mortgages.[27] The commentator notes that Ontario's *Conveyancing and Law of Property Act* governs the assignment of mortgages, and that the wording of the relevant provision has received considerable judicial interpretation over the years. The commentator notes that the impact of section 68 on other provincial legislation should be closely examined. I concur.

Quite apart from what other legislation might say on the matter, there is a question of whether section 68(2) reflects the appropriate balancing of the interests concerned. Section 68(2) is similar to the approach of existing legislation, but it is worth reiterating that TILA gives a debtor less extensive rights against an assignee than against the original creditor. An assignee incurs civil liability for a violation by the lender only if the violation was apparent on the face of the disclosure statement. Moreover, unless an assignee has knowledge to the contrary at the time of the assignment, written acknowledgment of receipt of a document by a person to whom the document was required to be delivered is conclusive proof of delivery.

Recommendation 27:

Additional consultation is desirable regarding the extent to which assignees should be burdened with the consequences of the assignor's non-compliance with CCDA.

Appendix A

Written Comments on CCDA 2 and PIA 1

[* An asterisk indicates that the comments are on one page, and are either very general or deal with a single issue.]

Date	Name	Affiliation	CCDA 2	PIA 2
21 April, 1993	Mr. J.B. Gregorovich	Association of Canadian Financial Corporations	Yes	Yes
26 April, 1993	Mr. Jack V. Lord	Alberta Municipal Affairs, Consumer Services Division	Yes	Yes
30 April 1993	Ms. Anne M. Preyde	Ministry of Labour, Consumer Services (B.C.)	Yes	Yes
14 May, 1993	Prof M.A. Waldron	Faculty of Law, University of Victoria	Yes	Yes
18 May, 1993	Ms. Denise Costello	The Trust Companies Association of Canada	Yes	No
28 May, 1993	Ms. Laurel Ray	Policy Planning Branch, Ministry of Financial, Institutions (Ontario)	*Yes	No
9 June, 1993	Ms. Kathy L. Milani	Solicitor for Mortgage Loans Association of Alberta	Yes	No
15 June, 1993	Ms. Rae Matonovich	Saskatchewan Justice	Yes	No
6 July, 1993	Mr. James Girling	Legal Services Branch, Ministry of Consumer & Commercial Relations (Ontario)	Yes	No
16 July, 1993	Mr. David Phillips	Canadian Bankers Association	Yes	No
7 August, 1993	Ms. Denise Costello	The Trust Companies Association of Canada	Yes	No
23 Sept., 1993	Mr. S. N. Pincus	Goodman & Goodman (Toronto)	No	Yes

12 Oct., 1993	Mr. David E. Phillips	Canadian Bankers Association	Yes	No
19 Oct., 1993	Prof. Benjamin Geva	Osgoode Hall Law School	Yes	No
11 Nov., 1993	Ms. Margaret Crowle	Professional Home Economist	Yes	Yes
23 Nov., 1993	Mr. J.B. Gregorovich	Association of Canadian Financial Corporations	Yes	Yes
1 Dec., 1993	Ms. Rae Matonovich	Saskatchewan Justice	Yes	Yes
3 Dec., 1993	Mr. J.B. Gregorovich	Association of Canadian Financial Corporations	Yes	No
3 Dec., 1993	Dr. Sue McGregor	Department of Human Ecology, Mount Saint Vincent University	Yes	Yes
3 Dec., 1993	Dr. Ruth Berry Dr. Karen Duncan Ms. Jacqueline Wasney	Faculty of Human Ecology, University of Manitoba	*Yes	No
22 Dec., 1993	Mr. David E. Phillips	Canadian Bankers Association	Yes	Yes
18 Jan., 1994	M. Luis Curras	Office de la protection du consommateur (Quebec)	Yes	No
25 Jan., 1994	Prof. Karl J. Dore	Faculty of Law, University of New Brunswick	*Yes	No
1 Feb., 1994	Prof. Linda Lusby	Faculty of Science, Acadia University	Yes	Yes
Feb., 1994	Ms. Forbes Anderson	Family Financial ConsultantsYes	Yes	Yes
Feb., 1994	Ms. Anne M. Preyde	Ministry of Housing, Recreation & Consumer Services, Consumer Policy & Legislation Branch	Yes	No
28 Feb., 1994	Mr. Al Peabody	Consumer Affairs, New Brunswick	Yes	Yes

Appendix B

Extract from Internal Trade Agreement

3. Cost of Credit Disclosure

(a) Parties agree to the implementation of harmonized cost of credit disclosure legislation across Canada. The objectives of such legislation include:

- ensuring that consumers receive fair, accurate, comparable information about the cost of credit when they are making credit-purchasing decisions so they can use that information to get the most economical source and form of credit for their needs;
- with respect to non-mortgage credit, preserving and reinforcing the current policy that consumers are entitled to pay off their loans at any time and, if they do so, to pay only those finance charges that have been earned at the time they pay off the loan;
- ensuring disclosure requirements are as clear and as simple as possible, given the inherent complexity of many of the disclosure issues that arise in relation to any form of credit.

(b) Parties agree that uniform cost of credit disclosure legislation will apply to all forms of consumer credit including:

- fixed credit (eg. loans for a fixed sum to be repaid in instalments)
- open credit (eg. lines of credit or credit cards)
- loans secured by mortgage of real property
- supplier credit (eg. conditional sale agreements)
- long-term leases of consumer goods.

Relevant federal legislation includes disclosure provisions in the *Bank Act* and the cost of borrowing regulations, and equivalent legislation for other federally incorporated financial institutions.

Agreement between the Parties on the final elements of cost of credit harmonization will be completed by [January 1, 1996 with implementation of such measures by January 1, 1997.][28]