

# Canada Interest Act - Preliminary Background Paper 2007

## **CIVIL LAW SECTION**

### **Preliminary Background Paper on the Canada Interest Act**

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### **Introduction\***

[1] All of the current provisions of the Canada Interest Act[1] can be traced back to the late nineteenth century. Although the Constitution Act granted Parliament exclusive jurisdiction over the subject of “interest”[2] in 1867, the federal government moved very gradually towards enacting national legislation dealing with interest. The essential elements found in today’s Interest Act were added piecemeal over a twenty year period between 1880 and 1900 and were never the subject of a comprehensive debate which examined all facets of the legislation at one time.[3] Today the legislation has been described as “hopelessly dated”[4] and “functionally dead.”[5]

[2] Although the Act may no longer be serving its original nineteenth century purpose the legislation continues to remain an irritant for courts, lawyers, lenders and borrowers who try and understand its effect, scope and modern day purpose. There are approximately 828 reported and unreported cases in the LexisNexis Quicklaw database that have considered the Interest Act.[6] Approximately 75 per cent of those cases have been decided since the beginning of 1980. This preliminary background paper examines the original purpose of the Interest Act and compares these original purposes with how the Act is being interpreted in light of the commercial reality of the present day.

[3] The Interest Act deals with five main issues. First, the Act does not seek to govern fairness in lending by fixing or capping interest rates.[7] Rather, s. 2 provides (subject to the Act and other Acts of Parliament) that “any person may stipulate for, allow and exact, on any contract or agreement whatever, *any rate of interest* or discount that is agreed on.”[8] Second, s. 3 of the Interest Act establishes the default rate of 5 per cent, where interest is payable under an agreement or by law, and no rate is fixed by the agreement or by law. Third, ss. 4 and 6 provide a disclosure regime for non-mortgage and mortgage transactions. Fourth, s. 8 prevents mortgage lenders from increasing the rate of interest or charging fines or penalties after default. Finally, s. 10 provides individual mortgagors “with limited rights to pay their mortgage loans after five years, irrespective of the mortgage term.”[9]

[4] Part I of this paper will provide an analysis of ss. 2 and 3. Part II of the paper will consider the provisions relating to mortgage transactions: ss. 6, 8 and 10. Part III examines the disclosure regime for non-mortgage loans in s. 4.

## **Part I: Sections 2 and 3**

### **1. Freedom of Contract and Section 2**

[5] The Interest Act adopts a laissez-faire policy in relation to the rate of interest charged.[10] The policy underlying s. 2 can be traced back to

nineteenth century concerns about usury legislation.[11] Usury legislation, which had the effect of limiting the rate of interest, was in force in some provinces at the time of Confederation. When Parliament enacted the original version of s. 2 in 1886 it did so with the goal of abrogating usury laws then in force in some of the provinces.[12]

[6] Much of the modern case law emphasizes that s. 2 represents freedom of contract.[13] Freedom of contract is not, however, absolute. A lender will be required to comply with other relevant sections of the Interest Act. Non compliance with other parts of the Act will affect the interest rate charged. Thus the rate may be fixed by s. 4 at 5 per cent or the interest component may be eliminated altogether by s. 6. In addition, the lender must comply with other Acts of Parliament which affect interest rates. To some extent Parliament's original intention to abolish usury legislation has not been maintained. As s. 2 is limited by other Acts of Parliament, this must include s. 347 of the Criminal Code, which according to the Supreme Court of Canada in *Garland v. Consumers' Gas Co.* "created Canada's first general anti-usury provision since Confederation." Before the enactment of s. 347, "lenders and borrowers enjoyed absolute freedom under federal law to agree upon any rate of interest, subject only to the contractual restraints imposed at common or civil law and the special disclosure requirements arising under the Interest Act." [14]

## 2. The Default Rate: Section 3

[7] Section 3 provides a default rate of 5 per cent. The provision applies "[w]hensoever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law." The default rate was originally established at 6 per cent in 1886 and had been derived from the Province of Canada statute of 1858.[15] The rate was reduced to 5 per cent in 1900[16] and has remained unchanged since that time.

Commentary from the case law suggests that Parliament chose 5 per cent as a reflection of the financial conditions at the turn of the century.[17] The Alberta Court of Appeal in *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* noted that in 1900 Province of Ontario bonds bore interest at 3.51% and that "an interest rate of 5% would appear to be in line with lending rates at financial institutions at that time." [18]

[8] While s. 3 appears to have broad application, the utility of the section has been significantly reduced since it was initially enacted in 1886.[19] The Supreme Court of Canada in *British Pacific Properties Ltd. v. Province of B.C.* concluded that s. 3 only applied “when there is no provision made in an applicable statute or in an agreement and no mechanism is provided by which a rate can be fixed.”[20] Several courts have made use of contractual terms as an appropriate mechanism to calculate an interest rate and thereby exclude the default rate. According to the Ontario Court of Appeal, even where the terms of the agreement do not provide for interest at any specified rate, the default rate in s. 3 will not apply where the interest component of an instalment payment was “capable of precise calculation.”[21]

[9] Apart from private agreements, the default rate has potential scope to apply where “interest is payable... and no rate is fixed ...law.” However, the growth of provincial prejudgment interest legislation since the initial adoption of the Interest Act has limited the scope of this aspect of s. 3.[22] In the 1977 decision of *Prince Albert Pulp Co. v. Foundation of Canada Co.* Martland J. concluded that where prejudgment interest is awarded under provincial law, “the rate which [the court] fixes is payable by law and the rate is fixed by law. In such a case...section [s. 3] would not be applicable.”[23]

[10] In 1980, the Supreme Court further limited the scope of s. 3 in *British Pacific Properties Ltd. v. Province of B.C.*[24] In that case Laskin C.J. adopted a liberal construction of the words “fixed by law”. This liberal interpretation included a rate fixed by statute or the fixing of a rate where the statute permits delegation. Laskin C.J. concluded: “[w]hether a statute under which interest is payable... itself prescribes the rate or remits the award and the rate to a judge or to an adjudicator or adjudicative agency or provides a rate formula, the rate arises under law and is, accordingly, fixed by law.”[25]

[11] The Ontario Court of Appeal in *Pizzey Estate v. Crestwood Lake Ltd.* recently summarized the underlying rationale in *Prince Albert Pulp* and *British Pacific*: “That rationale is to narrow the scope of s. 3 to the *rare* case, if any, where a court or statutory body cannot legitimately

award interest.”[26] These situations may be rare indeed. Professor Waldron concludes that the expansion of prejudgment interest legislation and the Supreme Court jurisprudence may mean that a mechanism to fix an interest rate could be found in “virtually every case in which a court or statutory body can legitimately award interest.”[27]

## **PART II: Mortgage Transactions**

[12] In 1880, Parliament enacted what were to become (as renumbered) s. 6 (mortgage disclosure), s. 8 (control of default rates) and s. 10 (5 year right of repayment). The Bill that was finally produced was far from a coherent statute. In the concluding moments of the debates, a Senator urged the Senate not to “place a law upon the Statute book which is not well digested.” The Bill was “crude and incoherent. Some of the best legal minds in this House disagree as to its effect.”[28] Another Senator concluded that drafters of the Bill had produced something that “ordinary readers will never be able to understand.”[29]

### 1. Section 6: Mortgage Disclosure

#### *(a) The Origins of Section 6*

[13] For mortgage transactions, Parliament “wanted to ensure disclosure of something approaching the effective cost of a loan to the borrower.”[30] More specifically, “spurious building and loan associations” had emerged and required blended payments as part of the mortgage terms.[31] In the House of Commons Edward Blake explained that mortgages frequently adopted a method:

by which a particular amount, being but the principal and interest, are blended, and a fixed equal, annual re-payment, including principal and interest, is agreed for; it not appearing on the mortgage what is the real rate of interest, and the calculation being so complicated as to be quite beyond the powers of ordinary borrowers. I regret to say that by some...of these societies, deceptions have been practiced on borrowers....The advertisements have stated their rates of interest at moderate figures, but

these figures have been reached...by no proper calculation, by no honest process.[32]

[14] Blake reached the conclusion that mortgages should “contain a declaration of the amount really advanced, and of the rate of yearly interest to be paid; then the borrower would know the true rate of interest.”[33]

*(b) The Interpretation of Section 6*

[15] Mortgages, which are being repaid on one of three separate repayment plans specified in the statute, are required to provide a “statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance.”[34] Without this disclosure the lender will not be able to collect any interest. In accordance with Parliament’s original intention a number of cases have paid lip service to the overriding importance of disclosure.[35] In the 1917 decision of *Canadian Mortgage Investment Co. v. Cameron* the Alberta Court of Appeal stated:

The evil which the section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system, without the protection which this section affords, a highly usurious rate of interest might be wrapped up in these innocent appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it.[36]

[16] However, the reality is that underlying aim of disclosure has not been met given that most cases have restricted the scope of the application of s. 6.[37] The policy of disclosure will have no effect where the section does not apply. Indeed the Supreme Court of Canada in the 1930 decision of *London Loan & Savings Co. of Canada v. Meagher* urged a rather strict interpretation of s. 6:

As to all mortgages that fall within the description set out in section 6, the Act takes away from the mortgagee part of what the mortgagor has agreed to pay, and would be obliged to pay, were it not for the Act. This

results, quite irrespective of whether or not the terms are fair under the circumstances and have been agreed to by the mortgagor with full knowledge and appreciation of their meaning and effect, and irrespective also of whether or not the mortgagor would be entitled to relief under the ordinary rules of law. *The application of the Act therefore must be confined to mortgages that come clearly within the description set out in the Act itself.*[38]

[17] Further, the courts have grappled with the imprecise and obscure language of s. 6. In one of the first Supreme Court of Canada decisions on the Interest Act, Davies J. observed that the provisions of ss. 6 and 7 “are carelessly drawn, and the language used somewhat ambiguous. It is not to be wondered at therefore that there has been much difference of judicial opinion as to their meaning.”[39]

[18] Section 6 applies to three types of repayment plans that might conceal the true cost of credit: “(1) a sinking fund plan; (2) a plan under which the payments of principal money and interest are blended; and (3) a plan that involves an allowance of interest on stipulated repayments.”[40] However, the case law does not provide clear definitions for all of these plans. At least one court suggested: “It is not particularly helpful to attempt to define the three plans referred to in s. 6.”[41]

#### i) Sinking Fund Plan

[19] A sinking fund plan has not been the subject of consideration by the courts.[42] A sinking fund plan has been defined in one text as:

In some cases, the principal of a long-term investment may be repaid on the maturity date, but the interest is paid periodically when it is due. Since a long-term debt is usually for a large amount, debtors often periodically deposit a sum of money in a fund, known as a sinking fund, in order to retire the principal on the maturity date.[43]

[20] The absence of case law suggests that a sinking fund plan is either rare or more likely to be utilized by corporate borrowers in transactions involving legal representation where there are no problems relating to adequate disclosure.[44]

## ii) Allowance of Interest on Stipulated Repayments

[21] A plan that involves “an allowance of interest on stipulated repayments” is also within s. 6 and thus requires disclosure. Although this type of plan has been considered infrequently by the courts, case law consistently finds that the relevant mortgages are not within this type of repayment plan.[45] The court in *Bowman v. Denison*[46] held that s. 6 did not apply but admitting however that “I am not sure that I know what is meant by the words ‘on any plan which involves the allowance of interest on stipulated repayments’”. [47]

[22] The case law in this area has failed to provide any clear definition of “an allowance of interest on stipulated repayments.” However, one theme emerges. The courts are reluctant to give a broad reading of this type of plan for fear that it would widen the scope of s. 6.[48] In *Aston v. Zettler*[49] the British Columbia Court of Appeal was of the view that the allowance of interest had to be related to a payment or payments of principal. The provision did not apply to any amount sanctioned or permitted under the mortgage since that would cover any interest payment. Similarly, this type of plan could not cover a mortgage involving compound interest since nearly every mortgage contained such a clause. The Court concluded that all three plans in s. 6 involved periodic payments and interest payments in connection with instalments. However, with respect to an allowance of interest on stipulated repayments the Court stated:

In my opinion the allowance of interest which gives rise to the application to this part of the section is an allowance which must relate to a stipulated repayment. A plan involving allowances which apportion interest in relation to a repayment or repayments of principal would probably conceal from the borrower the real rate of interest being exacted by such plans and offend the section.....[A]n interest only mortgage of this type does not fall within any of the three plans to which the section applies.[50]

## iii) Blended Payments

[23] Much of the case law on s. 6 has focussed “on any plan under which the payments of principal money and interest are blended.” The objection

to the blending of principal and interest “is that a mortgagor may undertake an obligation to pay interest at a higher rate than he or she understands to be charged.”[51] However, the Supreme Court of Canada has taken a restrictive view of the meaning of blended payments of principal and interest. In *Kilgoran Hotels v. Samek* the Court defined blended as “mixed so as to be inseparable and indistinguishable.”[52] In this particular case principal and interest were “distinguished by the very wording” of the mortgage clause. The Court observed that the “arithmetical calculation involved on each payment could scarcely be simpler.”[53]

[24] Professor Waldron suggests that *Kilgoran* provides courts with three methods for finding that a payment is not blended. First, where a mathematical calculation permits the division of the payment into principal and interest. Second, where there is a repayment clause which distinguishes principal from interest “by a statement that payments will be applied first to interest and then to principal.” Third, where the calculation of interest is “simple.”[54] The Supreme Court of Canada in *Ferland v. Sun Life Assurance Company of Canada*[55] relied upon *Kilgoran* for the proposition that “principal and interest are blended only if the deed does not disclose the true rate of interest.”[56] Several courts have since emphasized the mathematical calculation to find that a payment is not blended.[57]

[25] The restrictive interpretation of blended payments has several implications for Parliament’s original intention. In 1880 Edward Blake lamented the fact that blended mortgage payments required a “calculation being so complicated as to be quite beyond the powers of ordinary borrowers.”[58] However, the *Kilgoran* and *Ferland* jurisprudence have undermined this original intention given that “even the most complex system of combining principal and interest components in a payment will not qualify the payment as blended, as long as the information given allows the true rate to be computed.”[59] As a result the most common type of mortgage in Canada (amortized mortgage with half-yearly compounding and fixed monthly payments containing an element

of principal and an element of interest that changes each month) “is probably not covered” by section 6.[60]

*(c) What Must Be Disclosed*

[26] What must be disclosed is far from understandable. If the mortgage falls within one of the three repayment plans above, s. 6 will apply and requires the mortgage to contain “a statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance.” Failure to disclose will result in “no interest whatever shall be chargeable.” What actually must be disclosed has been the subject of much debate. In *Standard Reliance Mortgage Corp. v. Stubbs*[61] the Supreme Court of Canada stated that the meaning of “‘the rate of interest chargeable thereon calculated yearly or half-yearly not in advance’ is not perhaps altogether clear.”[62]

[27] As Professor Waldron notes, the mandated disclosure “does not tell the borrower the actual dollar cost of his loan, nor does it even necessarily disclose the effective annual rate since the half-yearly equivalent may be (and traditionally is) used.” In standard cases the required disclosure under s. 6 does not even provide the borrower with an indication of what portion of the payments will be applied to interest or principal and “unless he is relatively sophisticated, he will have considerable difficulty working it out.”[63]

[28] The position of the borrower is further undermined by the case law on what must be disclosed. In *Standard Reliance Corp v. Stubbs*, Sir Charles Fitzpatrick concluded that the “Act says nothing about enabling illiterate or inexperienced men to understand a calculation which requires a skilled actuary to understand and is beyond the understanding of the majority of even educated men.”[64] He concluded that there was no obligation under the Act to set forth “all these calculations.” Perhaps more significantly, Justice Anglin was willing to imply an annual compounding date even where the contract did not provide one. Further the Court was willing to imply that the 10 per cent interest rate was to be computed “not in advance” even though no express statement had been made to that effect.[65]

[29] Subsequent cases have taken up the majority view in *Stubbs*. In *Weinberg v. Elliott Hotel (Toronto) Ltd.*[66] the Ontario Court of Appeal concluded that it was not necessary for the mortgage document to contain a “separate statement to comply verbatim with its terms or that the mortgage should contain the precise words ‘calculated yearly or half-yearly not in advance.’”[67] Section 6 is complied with as long as the rate of interest is specified despite the fact that “yearly” or “half-yearly” and “not in advance” are omitted.[68]

[30] The disclosure provisions have been further weakened by the practice of lump sum administration fees or bonuses.[69] A mortgage with a stated interest rate plus a lump sum bonus makes it difficult for the borrower to calculate the true cost of the loan and makes it very difficult to make effective comparisons between prospective lenders.[70] In *London Loan and Savings Co. v. Trans-Canada Theatres Ltd. (Liquidator of)*[71] the court concluded that a \$3000 bonus was separate from the mortgage and enforceable. *London Loan* has been subsequently applied in a number of cases.[72] Professor Waldron concludes that the practice of allowing bonuses outside the disclosure regime “has defeated one of the most useful purposes of the section.”[73] Since interest does not include bonuses the disclosed rate may be manipulated by adding bonuses and thus keeping the disclosed rate at “an attractively lower level.”[74]

## 2. Penalties, Fines, and Increased Interest on Default: Section 8

### *a) Origins of s. 8*[75]

[31] Section 8 only applies to mortgages.[76] In general s. 8 will preclude the lender from increasing the rate of interest on default. Parliament enacted the provision at a time when the courts were still developing contract law jurisprudence dealing with default provisions.[77] Further, the origins of s. 8 clearly pre-date the development of unconscionability doctrines and unconscionability legislation.[78] Parliament in 1880 had a clear idea of the abusive lending practices which it aimed to cure. Section 8 was designed to preclude the imposition of fines and penalties where the borrower was in arrears as well as preventing a lender from increasing the rate of interest on default.[79] Blake noted that building societies had

been able to extract “large fines for arrears, under rules unknown to...those who borrow from them, to the oppression, in many cases of the borrower.”[80] A lender would tell a “borrowing farmer that you are charging him 10 per cent; but under your rules, of which he knows or understands nothing, in case he makes default, he is called on to pay you 1 per cent a month, or 12 per cent a year.”[81] Blake concluded that “neither party should gain by defaults; but that the same rate of charge should be exacted on arrears as was stipulated for on the loan.”[82]

### *b) The Interpretation of Section 8*

[32] Section 8 has been raised as a defence to a wide range of mortgage terms “providing for interest payments, bonuses, options for early payment, and waivers of interest charges.”[83] Although there is extensive case law on s. 8, the British Columbia Court of Appeal, in *Reliant Capital Ltd. v. Silverdale Development Corp.*, concluded that “the only thing on which the courts seem to agree is the difficulty of construing the language of s. 8 in the context of the modern commercial world.”[84]

[33]A number of courts have emphasized the overriding purposes of providing relief for a borrower when faced with an increased interest charge or penalty on default.[85] In *Construction St-Hillaire Ltée. v. Immeubles Fournier Inc.*[86]the Supreme Court of Canada stressed that s. 8 applies not only to interest but also to any fines or penalties. The intention of s. 8 is to “prohibit recovery of any form of additional payment.”[87]

[34] In *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.* the British Columbia Court of Appeal concluded that s. 8 was intended “to protect borrowers against penalties and oppression at the hands of a ruthless lender.”[88] Since s. 8 relates only to mortgages, in *Reliant* the British Columbia Court of Appeal concluded that the purpose of s. 8 was to: protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default...a still higher rate or greater charge on the arrears would render foreclosure all but inevitable.[89]

[35] Unlike s. 6, courts have been more willing to find non-compliance with s. 8. The cases “indicate that the courts have had little difficulty finding a violation of s. 8” in situations of “evident or direct” instances of fines, penalties or an increased interest rate.[90] Courts have applied s. 8 to prevent the lender from relying on a clause which allows increased interest rates[91] or charges, such as a bonus (i.e. requiring the payment of three months interest)[92] on default. Bonus charges or increased interest rates have also been excluded even after the maturity of the mortgage.[93] Monthly non-payment charges have been held to offend s. 8.[94]

[36] The courts have also had to consider whether a mortgage providing for 10 per cent both before and after maturity, but providing for a waiver of interest if the principal is paid before the due date is a penalty and thus prohibited by s. 8. One line of reasoning suggests that in the case of default, 10 per cent is due under the agreement and thus there is no penalty. Another line of reasoning looks at the substance of the transaction and concludes that the mortgage produces a higher rate of interest when there is a default compared to a non-default situation.[95] It was this second line of reasoning which the court in *Re Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce*[96] adopted to find a breach of s. 8. However, not all cases have adopted this line of reasoning.[97]

[37] Although the courts have demonstrated a willingness to utilize s. 8, there is also a recognition that the parties should have some freedom to structure their transactions and not every challenge under s. 8 has been successful. Some courts have emphasized that the starting point is freedom of contract under s. 2 and that s. 8 is an exception to that general principle.[98] Further, the British Columbia Court of Appeal in *Reliant* concluded that a “strict or narrow interpretation of s. 8 is required, so long as that interpretation does not frustrate or impair the overall purpose of the legislation.”[99]

[38] A number of courts have found that s. 8 will have no application in the context of mortgage that provides for no interest[100] before default but stipulates a rate of interest after maturity and after default.[101]

Further, s. 8 will have no application where a borrower seeks an early discharge and is faced with a demand for a sum representing legal costs and lost future income.[102] Similarly a clause which requires the payment of a bonus equal to three months interest as a pre-payment charge does not offend s. 8.[103]

[39] Fees charged to renegotiate a loan whereby the lender increases the loan facility are not regarded as a fine or penalty under s. 8.[104] Loan renewal fees, which are required to obtain an extension, have been held not to breach s. 8.[105] Loan processing and administrative fees do not breach s. 8 when properly assessed within the context of the commercial transaction.[106] Further, a clause requiring the debtor to reimburse the creditor's extra-judicial legal fees does not violate s. 8.[107] A mortgage that provides for an increase of an interest rate after the passage of time does not impose a penalty or fine. The change in rate is not linked to default.[108]

[40] Perhaps the willingness of courts to find that s. 8 does not apply in many situations may be explained by the "inventive drafting"[109] of solicitors who have sought to avoid the application of the provision in light of the case law. One of these techniques, which has been gaining acceptance, provides for an increased interest rate shortly before the maturity of the loan. In *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.* the solicitors involved in the transaction specifically amended the loan documentation to avoid possible problems with s. 8. The amended mortgage provided that no interest would be paid until three days before closing and thereafter at prime plus 3 per cent. The British Columbia Court of Appeal concluded that the "arrangement was entirely fair and carried none of the stench of coercion, intimidation or penalty." [110]

[41] The case law reveals a tension on how s. 8 should be interpreted. In *T.D. Trust Co. v. Guinness*[111] Tysoe J. asked where one should draw the line in deciding whether there was a contravention of s. 8. "In my view, the line should be drawn between interest provisions which are intended to extract a higher rate of interest in the event of default and *interest provisions which have a legitimate commercial purpose.*"[112] However, the more recent British Columbia Court of Appeal decision in *Reliant* has

clearly rejected the “legitimate commercial purpose test” as an “unnecessary and unhelpful gloss on s. 8.”[113] The Court feared that one might always be able to find a legitimate commercial purpose for measures which sought to compensate the lender for a high-risk loan.[114]

### 3. Repayment Rights: Section 10

#### *a) Origins of s. 10*

[42] Section 10, which provides for a repayment right after 5 years, was Parliament’s response to the prevailing practice in 1880 of long term mortgages. It was commercial practice to draft mortgages with long terms that matched the amortization period.[115] In the House of Commons, Edward Blake set out the borrower’s problem:

Some loan societies issue loans repayable at a great interval of time, sometimes at fifteen and twenty years.....[I]t is liable to abuse...[I]t sometimes happens also that long before the end of the term the borrower finds himself no longer in want of the money; he would repay it; but he is nevertheless burdened with the payment of interest....He has to pay an enormous premium for the privilege of repayment in advance, a premium of which he would have no adequate conception from the representations made to him.[116]

[43] Blake concluded that since the opportunities for deception were so great that “whatever the length of the loan, the borrower might, after the term of say five or seven years, repay the principal and interest to the date of payment, on six months’ notice, or by paying six months’ interest, and so discharge the loan.”[117] By the time the debates moved to the Senate the proposed section provided for a 5 year repayment right. “[A]fter a mortgage runs for a period of five years, the mortgagor may, if he chooses, pay up the mortgage by paying three months’ interest in advance.”[118]

[44] By 1890, however, Parliament recognized that the provision should not apply to mortgage transactions involving corporate borrowers and in that year subsection (2) was added to limit the scope of s. 10 to individual

borrowers.[119] Section 10 had created difficulties for corporate borrowers in obtaining long term financing. With the adoption of s. 10 in 1880 lenders were reluctant to provide a long term mortgage when corporate borrowers had the statutory right to repay after five years even though the mortgage was closed. Section 10(2) was designed to help re-establish the long term mortgage market for corporate borrowers.[120]

*(b) The Interpretation of Section 10*

[45] Under s. 10(1) if there is a mortgage of a term of more than five years, after five years the borrower may tender principal and interest together with three months interest in lieu of notice. Where such tender occurs no further interest is chargeable or recoverable. The practical result of s. 10(1), as it was originally envisioned, was that all mortgages after five years became open and gave the borrower an unrestricted right to pre-pay.[121] However, lending practices have significantly changed since 1880. As noted by the Alberta Law Reform Institute, “today the commercial reality is short-term mortgages with long amortization periods.”[122] With the advent of unstable rates lenders moved to shorter terms of six months to 5 years. At the end of the short term the lender often expected or required a renewal for another short term period.[123]

[46] If s. 10(1) was originally designed to deal with the problem of long term mortgages, does it have any role to play in the context of short term mortgages? What is the effect of an extension or a renewal? The Supreme Court of Canada in *Potash v. Royal Trust Co.*[124] redefined the purpose of s. 10 and found a new role for the provision to play in the context of renewals and extensions:

While there is no doubt that the legislature at the time it enacted s. 10 did so in light of the commercial practices of the day, I do not believe that this precludes the court from giving it an interpretation consonant with today's commercial reality if such an interpretation is equally compatible with the legislative language. In the late nineteenth century when the section was first enacted the term of a mortgage and its amortization period coincided. Today this is seldom the case, most residential mortgages being for less than five years but amortized over twenty or

thirty years. This was a situation not envisaged by legislatures in the 1880s and 1890s.[125]

[47] The Court concluded that the purpose of s. 10(1) “is to ensure that mortgagors have the right to pay off their mortgages at the end of each five-year period. They cannot be ‘locked in’ for more than five years.”[126] However, when that five year period began and ended depended on the original term of the mortgage, and whether and how it was renewed.

[48] The Court established that where there is a mortgage term which exceeds five years (the original 1880 problem) the mortgagor will have the right to pay off the mortgage at the end of five years. Similarly where there is a mortgage term of five years or less and there is an extension of that mortgage (without altering the date of the original mortgage) the five year period will begin from the date of the original mortgage.

[49] However, in the *Potash* scenario where the mortgagor has not exercised his or her s. 10(1) rights and enters into a “renewal” (the terms of which deem the date of the original mortgage to be the date of maturity) the mortgagor cannot pay off the mortgage until the end of the five year renewal period.[127] In summarizing *Potash* the Ontario Court of Appeal stated: “[s]imply put, the Court held that a renewal or extension agreement effectively re-dates the mortgage so as to commence another locked in period of up to five years.”[128] Thus re-dating the mortgage through a renewal starts the five year period again. An initial five year mortgage which is renewed for a further five years will not permit the borrower to pay of the mortgage until the end of the five year *renewal period*. [129]

[50] Section 10(1) is limited by s. 10(2) which provides that “nothing in this section applies to any mortgage on real property given by a joint stock company or other corporation....” Section 10(2) however, has provided another source of litigation. The Ontario Court of Appeal in *Litowitz v. Standard Life Assurance Co. (Trustee of)*[130] recognized that while s. 10(1) and the right of prepayment represented a limit on the freedom of contract, s. 10(2) reflected a “legislative choice that freedom of contract should govern where a mortgage is given by a company.”[131] The court

was aware of the potential danger to the lending markets if subsection (1) applied broadly as it would create significant risks for lenders who would be deterred from providing long term mortgages.[132]

[51] Robins J.A. noted that the exclusion in s. 10(2) is not based upon the distinction between “commercial” and “consumer mortgages”. The exemption “granted by subsection 2 must be determined by reference to the identity of the mortgagor and not by reference to the nature or purpose of the mortgage.”[133] An individual obtaining a mortgage for commercial purposes would be able to utilize the s. 10(1) prepayment rights. Conversely a corporation will not have a statutory right of prepayment notwithstanding that the mortgage was obtained for a non-commercial purpose.[134] Thus a non-profit corporation does not have a statutory right of prepayment although it has a non-profit and charitable purpose.[135]

[52] The very scope of the s.10(2) exemption was at issue in the three appeals before the Court in *Litowitz*. Does the exemption clause apply when the corporate mortgagor is a nominee or trustee for a non-corporate beneficial owner? Which identity prevailed in looking to s. 10(2): the corporate mortgagor or the individual beneficial owner? In the first two appeals the Court held that the exemption did not apply notwithstanding that individuals were beneficial owners of the property. What was relevant was the identity of the mortgagor. As the mortgagor was a corporation the exemption did not apply. In the third appeal, there was an individual co-mortgagor with a corporate mortgagor. The individual’s right of prepayment was valid and not extinguished by the existence of a corporate co-mortgagor. The individual was able to rely upon s. 10(1) regardless of the purpose of the loan.[136]

## FOOTNOTES

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Western Ontario law students Marie Bruchet, Heather Dawe and Ruth Trask.

[1] R.S.C. 1985, c. I-15 [hereafter Interest Act or Act].

[2] Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 91(19). For a rationale for the inclusion of a federal of interest power see *Lynch v. The Canada North-West Land Co.* (1891), 19 S.C.R. 204 at p. 212.

[3] S.C. 1880, 43 Vict., c. 42, ss. 1-4 (adding present day ss. 6, 8,10); R.S.C. 1886, c. 127, ss. 1-8 (adding present day ss. 2, 3); S.C. 1897, 60-61 Vict., c. 8 (adding present day s. 4); S.C. 1900, 63-64 Vict., c. 29, s. 1 (reducing default rate to 5%).

[4] J. Ziegel, "Is Canadian Consumer Law Dead?" (1994-95), 24 C.B.L.J. 417 at p. 421.

[5] Mary Ann Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 C.B.L.J. 161 at p. 162.

[6] Search conducted August 3, 2008. The statistic does not include appeals. The number would be higher if appellate decisions were considered.

[7] B. Ziff, *Principles of Property Law*, 3<sup>rd</sup> ed., (Toronto: Carswell, 2000) at p. 406.

[8] Interest Act, s. 2 [emphasis added].

[9] Mary Ann Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997), 29 C.B.L.J. 161 at p. 174.

[10] J. Ziegel, "Bill C-44: Repeal of the Small Loans Act and Enactment of a New Usury Law" (1981), 59 Can. Bar Rev. 188 at pp. 190-191.

[11] *Board of Trustees of Lethbridge Northern Irrigation District v. I.O.F.*, [1940] A.C. 513 (P.C.); *Report on Consumer Credit* (Special Joint Committee of the Senate and House of Commons on Consumer Credit and the Cost of Living, February 1967) at pp. 37-38.

[12] R.S.C. 1886, c. 127, s. 1. *Asconi Building Corporation and Vermette v. Vocisano*, [1947] S.C.R. 358 at p. 369.

[13] See e.g. *Asconi Building Corporation and Vermette v. Vocisano*, [1947] S.C.R. 358 at p. 369; *Board of Trustees of Lethbridge Northern Irrigation District v. I.O.F.*, [1940] A.C. 513 (P.C.); *Construction St-Hilaire Ltée. v. Immeubles Fournier Inc.*, [1975] 2 S.C.R. 2; *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, [1992] 1 W.W. R. 577 (Alta C.A.) affd [1994] 1 S.C.R. 552; *Ontario (Attorney General) v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570.

[14] [1998] 3 S.C.R. 112 at para 23. See also *Metropolitan Trust Co. of Canada v. Twin Grand Developments Ltd.*[1995] 10 W.W.R. 576 (Sask. C.A.).

[15] R.S.C. 1886, c. 127, s. 2; S.C. 1858, 22 Vict., c. 85, s. 5.

[16] S.C. 1900, 63-64 Vic., c. 29, s. 1.

[17] *Plenderleith v. Parsons* (1907), 14 O.L.R. 619 at p. 622 (H.C.). See also *British Canadian Loan and Agency Co. v. Farmer* (1904), 15 Man. R. 593 (K.B.).

[18] (1987), 38 D.L.R. (4th) 575 (Alta. C.A.) affd [1994] 1 S.C.R. 552

[19] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Thomson, 1992) at p. 80.

[20] [1980] 2 S.C.R. 283 at p. 290.

[21] *I.A.C. Ltd. v. Guerrieri* (1982), 139 D.L.R. (3d) 352 (Ont. C.A.). See also *P.E.I. Potato Marketing Board v. Martin* (1983), 44 Nfld. & P.E.I.R. 289 (S.C.); *Huber v. Commcorp Financial Services Inc.*, [1996] 7 W.W.R. 506 (Sask. Q.B.); *Toronto-Dominion Bank v. F.G. Connolly Ltd.* (1982), 56 N.S.R. (2d) 289 (T.D.); *Monashee Petroleums Ltd. v. Pan Cana Resources Ltd.* (1986), 70 A.R. 277 (Q.B.) affd on other grounds (1988), 85 A.R. 183 (C.A.); *McLeod Young Weir Ltd. v. Nunziata*, [1991] O.J. No. 701 (Gen. Div.).

[22] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Thomson, 1992) at p. 82.

[23] [1977] 1 S.C.R. 200 at p. 211 citing *Toronto Railway Co. v. City of Toronto*, [1906] A.C. 117 (P.C.). See also *Pizzey Estate v. Crestwood Lake Ltd.* (2004), 236 D.L.R. (4th) 177 (Ont. C.A.).

[24] [1980] 2 S.C.R. 283.

[25] *Ibid.*, at pp. 189-190. See also *Merck & Co. v. Apotex Inc* (2006) 276 D.L.R. (4th) 686 (F.C.A.) at para. 143.

[26] (2004), 236 D.L.R. (4th) 177 (Ont. C.A.) at para. 37 (Emphasis added).

[27] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Thomson, 1992) at p. 83.

[28] Senate Debates (7 May 1880) at p. 559.

[29] Senate Debates (7 May 1880) at p. 559.

[30] Mary Ann Waldron, "Sections 6 and 7 of the Canada Interest Act: Curiouser and Curiouser" (1984), 62 Can. Bar Rev. 146 at pp. 147-148.

[31] C. Shnier, "Calculated Half-Yearly Not in Advance: An Analysis of Canadian Mortgage Interest Practice" (1987), 42 R.P.R. 21 at pp. 29, 31-32.

[32] House of Commons Debates (31 March 1880) at p. 964.

[33] House of Commons Debates (31 March 1880) at p. 964.

[34] Interest Act, s. 6.

[35] *Kilgoran Hotels Ltd. v. Samek*, [1968] S.C.R. 3 at p. 5. See also *Saskatchewan Co-operative Financial Services Ltd. v. Tarel Hotel Ltd.* (1995), 125 Sask. R. 1 (C.A.); *Farm Credit Corp. v. Lacombe Nurseries Ltd.* (1992), 89 D.L.R. (4th) 732 (Alta. C.A.).

[36] [1917] 2 W.W.R. 18 (Alta. S.C. (A.D.)) revd (1917), 55 S.C.R. 409 cited in *Standard Reliance Mortgage Corp. v. Stubbs* (1917), 38 D.L.R. 435 at para 4 (S.C.C.). See also *London Loan and Savings Co. of Canada v. Meagher* [1930] S.C.R. 378; *Asconi Building Corporation and Vermette v. Vocisano*, [1947] S.C.R. 358.

[37] Mary Ann Waldron, "Can Canadian Commercial Law Be Rehabilitated? A Question of Interest" (1992), 20 C.B.L.J. 357 at p. 365.

[38] [1930] S.C.R. 378 at p. 382. Strict interpretation may be the result of the dire consequences of a breach: no interest. See Mary Ann Waldron, "Sections 6 and 7 of the Canada Interest Act: Curiouser and Curiouser"

(1984), Can. Bar. Rev. 146 at p. 178; *504119 Ontario Ltd. v. Income Trust Co.*, [1990] O.J. No. 1120 (Ont. C.A.); *Pittao v. Radovanov* (1992), 34 A.C.W.S. (3d) 508 (Ont. Ct. (Gen. Div)).

[39] *Canadian Mortgage Investment Co. v. Cameron* (1917), 55 S.C.R. 409 at p. 414.

[40] As summarized by *Inhat et al. v. Weston et al.* (1978), 89 D.L.R. (3d) 595 (Ont. C.A.) at p. 596.

[41] *Beechy Savings and Credit Union v. Warwaruk* [1993] 1 W.W.R. 765 (Sask. Q.B.) at para. 11.

[42] LexisNexis Quicklaw search July 30, 2007. See also Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Thomson, 1992) at p. 101.

[43] G. Mullings and S.P. Shao, *Mathematics for Management and Finance* (Toronto: Gage, 1979) at p. 418 cited in Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Thomson, 1992) at p. 101.

[44] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Thomson, 1992) at p. 101.

[45] See e.g. *Re Brown* (1928), 61 O.L.R. 602 (S.C. A.D.); *Commonwealth Savings Plan Ltd., v. Triangle 'C' Cattle Co. Ltd.* (1966), 56 D.L.R.(2d) 453 (B.C.C.A.); *Edmonton Savings & Credit Union Ltd. v. Trison Developments Ltd.* (1988), 90 A.R. 213 (Q.B.).

[46] (1930), 65 O.L.R. 613 (S.C. A.D.).

[47] *Ibid.*, at p. 615. The term has also been considered in *Inhat v. Weston* (1978), 89 D.L.R. (3d) 595 (Ont. C.A.); *Greymac Trust Co. v. Gould* (1983), 30 R.P.R. (Ont. S.C. Master).

[48] See *Farm Credit Corp. v. Lacombe Nurseries Ltd* (1992), 89 D.L.R. (4<sup>th</sup>) 732 (Alta. C.A.).

[49] [1988] B.C.J. No. 1788 (C.A.).

[50] *Ibid.*, at para 5.

[51] W. Traud, ed, *Falconbridge on Mortgages* 5<sup>th</sup> ed. (Toronto: Canada Law Book, loose-leaf) at p. 33-8.

[52] [1968] S.C.R. 3 at p. 5.

[53] *Ibid.*, at p. 6.

[54] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 104; Mary Ann Waldron, "Sections 6 and 7 of the Canada Interest Act: Curiouser and Curiouser" (1984), 62 Can. Bar Rev. 146 at pp. 152-153.

[55] [1975] 1 S.C.R. 266.

[56] *Ibid.*, at para. 4.

[57] See e.g. *Xenobar Inc. v. Seel Mortgage Investment Corp.* (1993), 33 R.P.R. (2d) 243 (Ont. Ct. (Gen. Div.)) affd [1997] O.J. No. 1384 (C.A.); *Saskatchewan Co-operative Financial Services Ltd. v. Tarel Hotel Ltd.* (1995), 125 Sask. R. (C.A.); *Blerot v. Attorney General of Canada* (2001), 203 Sask. R. 73 (C.A.); *Paragon Properties (Finance) Ltd. v. Matthews* (1996), 185 A.R. 158 (Q.B.); *Farm Credit Corp. v. Miller* (1992), 126 A.R. 335 (Q.B.); *Lacroix v. Bank of Montreal* (2004), 28 R.P.R. (4<sup>th</sup>) 285 (Ont. S.C.J.) at para 17.

[58] House of Commons Debates (31 March 1880) at p. 964.

[59] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 105.

[60] *Ibid.*; Mary Ann Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 C.B.L.J. 161 at p.170.

[61] (1917), 55 S.C.R. 422.

[62] *Ibid.*, at p. 424. See also *Lynch v. Elford Estates Ltd.* (1986), 6 B.C.L.R. (2d) 69 (S.C).

[63] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 98.

[64] (1917) 55 S.C.R. 422 at p. 426.

[65] *Ibid.* at pp. 429-430.

[66] [1960] O.J. No. 108 (C.A.). See also *McGoran v. Cowan*, [1973] 3 O.R. 557 (H.C.J.).

[67] *Ibid.* Cf. *Paragon Properties (Finance) Ltd. v. Matthews*, [1996] A.J. No. 323 (Q.B. Master).

[68] *Stoodley v. Co-Operative Trust Co. of Canada*, [1983] S.J. No. 64 (Q.B.).

[69] Mary Ann Waldron, "Section 347 of the Criminal Code: A Deeply Problematic Law" (Proceedings of the Uniform Law Conference of Canada Annual Meeting, Yellowknife, 2002) at p. 4. See *Ontario (Attorney General) v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570.

[70] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 99- 100.

[71] [1930] S.C.R. 378.

[72] See also *Asconi v. Building Corp. and Vermette v. Vocisano* [1947] S.C.R. 358; *Mutual Finance Corporation v. Jost*, [1933] O.W.N. 17 (H.C.J.); *Desrochers v. Soules* (1956), 6 D.L.R. (2d) 293 (Ont. H.C.J.); *Commonwealth Savings Plan Ltd. v. Triangle "C" Cattle Co.* (1966), 56 D.L.R. (2d) 453 (B.C.C.A.); *Balaji Apartments Ltd. v. Manufacturers Life Insurance Co.* (1979), 100 D.L.R. (3d) 695 (Ont. H.C.J.); *North America Life Assurance Co. v. Milobar*, [1977] A.J. No. 127 (Q.B.); *Gilks and Gilks v. Rocca Group Limited* (1977), 20 N.B.R. (2d) 1 (S.C.); *Vercer Mortgage Investments Ltd. v. Batley* (1984), 54 B.C.L.R. 374 (S.C.); *Stendel v. Edelman* (1990), 30 Q.A.C. 202.

[73] Mary Ann Waldron, "Sections 6 and 7 of the Canada Interest Act: Curiouser and Curiouser" (1984), *Can. Bar. Rev.* 146 at p. 162.

[74] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 29, 99- 100.

[75] See *Reliant Capital Ltd. v. Silverdale Development Corp.* (2006), 270 D.L.R. (4<sup>th</sup>) 717 (B.C.C.A.).

[76] See *Chu v. Columbia River Ranches Ltd.* (1986), 10 B.C.L.R. (2d) 72 (S.C.).

[77] H. Irwin, "Interest Obligations in Real Estate Transactions: A Researcher's Guide" (1984), 23 Alta. L. Rev. 204 at p. 213; Mary Ann Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 C.B.L.J. 161 at p. 177.

[78] Mary Ann Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 C.B.L.J. 161 at p. 178.

[79] Senate Debates (28 April 1880) at p. 404.

[80] House of Commons Debates (31 March 1880) at p. 963.

[81] House of Commons Debates (31 March 1880) at p. 963.

[82] House of Commons Debates (31 March 1880) at p. 963.

[83] *Reliant Capital Ltd. v. Silverdale Development Corp.* (2006), 270 D.L.R. (4<sup>th</sup>) 717 (B.C.C.A.) at paras. 68-69.

[84] *Ibid.*

[85] *Beauchamp v. Timberland Investments Ltd.* (1983), 4 D.L.R. (4<sup>th</sup>) 485 (Ont. C.A.) at para 12. See also *Tomell Investments Ltd. v. East Marstock Lands Ltd.* [1975] 1 S.C.R. 974.

[86] [1975] 2 S.C.R. 2

[87] [1975] 2 S.C.R. 2 at para. 12. See also *Mastercraft Properties Ltd. v. El Ef Investments Inc.* (1993), 14 O.R. (3d) 519 (C.A.) at para. 4.

[88] [2000] 7 W.W.R. 46 (B.C.C.A.) at para. 97; *Patrician Land Corp. v. Dillingham Construction Ltd.* (1985), 36 R.P.R. 136 (Alta. C.A.) at p. 139; *Macdonald v. Muncey* [1980] A.J No. 590 (Alta. Q.B. Master) at para. 12.

[89] (2006), 270 D.L.R. (4<sup>th</sup>) 717 (B.C.C.A.) at para. 53.

[90] *Red's Camp Ltd. v. Red's Camp (71) Ltd.* (1991), 96 Sask. R. 52 at para. 36.

[91] *Coupland Acceptance Ltd. v. Walsh*, [1954] S.C.R. 90; *Beauchamp v. Timberland Investments Ltd.* (1983), 4 D.L.R. (4th) 485 (Ont. C.A.); *Pacific Playground Holdings Ltd. v. Endeavour Developments Ltd.* (2002), 1 R.P.R. (4th) 280 (B.C.S.C.); *N.B.Y. Enterprises Inc. v. Duffin*, [2006] O.J. No. 982 (S.C.J.).

[92] See *Levy v. Booksban*, [1931] 2 D.L.R. 1007 (Ont. S.C.); *Tapio v. Kajander*, [1965] 1 O.R. 431; *Glinert v. Kosztowniak* (1972), 25 D.L.R. (3d) 390 (Ont. S.C.); *Standard Mortgage Co. Ltd. v. Naayer*, [1978] 5 W.W.R. 385 (Man. Q.B.); *Parkhill v. Moher* (1977), 17 O.R. (2d) 543 (H.C.J.); *Dickson v. Bluestein (in trust)* (1990), 2 O.R. (3d) 131 (Gen. Div.).

[93] Ann Warner La Forest, *Anger and Honsberger Law of Real Property*, 3<sup>rd</sup> ed, (Toronto: Canada Law Book, loose-leaf) at p. 33-28; *Adams Properties Ltd. v. Sherwood Estates Ltd.* (1976), 144 D.L.R. (3d) 562 (B.C.C.A.); *Beauchamp v. Timberland Investments Ltd.* (1983), 4 D.L.R. (4th) 485 (Ont. C.A.); *459745 Ontario Ltd. v. Wideview Holdings Ltd.* (1987), 59 O.R. (2d) 361 (H.C.J.).

[94] *N.B.Y. Enterprises Inc. v. Duffin*, [2006] O.J. No. 982 (S.C.J.)

[95] B. Ziff, *Principles of Property Law*, 3<sup>rd</sup> ed., (Toronto: Carswell, 2000) at p. 407.

[96] (1981), 121 D.L.R. (3d) 150 (Ont. H.C.J.). W. Traub, ed., *Falconbridge on Mortgages*, 5<sup>th</sup> ed., (Toronto: Canada Law Book, loose-leaf) at p. 33-14. See also *Re Pover*, [1984] B.C.J. No. 832 (S.C.); *Westbank Warehousing Ltd. v. Van den Heuvel*, [1984] B.C.J. No. 224 (S.C.); *Chu v. Columbia River Ranches Ltd.* (1986), 10 B.C.L.R. (2d) 72 (S.C.); *Vohra Enterprises Ltd. v. Creative Industrial Corp.*, [1988] B.C.J. No. 159 (S.C.).

[97] *Paragon Capital Corp. v. 395342 Alberta Ltd.* (2004), 350 A.R. 370 (Q.B.); *Great-West Life Assurance Co. v. Royal Pacific Hotels Ltd.*, [1987] B.C.J. No. 2950. *L'Industrielle, Compagnie De Gestion Inc. v. Kings Mount Holdings Ltd.* (1988), 26 B.C.L.R. (2d) 246 (C.A.).

[98] *Reliant Capital Ltd. v. Silverdale Development Corp.* (2006), 270 D.L.R. (4<sup>th</sup>) 717 (B.C.C.A.) at para. 56; *164618 Canada Inc. v. Cie Montréal Trust*, [1998] A.Q. No. 3059 (C.A.); *Paragon Capital Corp. v. 395342 Alberta*

*Ltd.* (2004), 350 A.R. 370 (Q.B.); *Dillingham Construction Ltd. v. Patrician Land Corp.*, (1985) 36 R.P.R. 136 (Alta. C.A.).

[99] *Reliant Capital Ltd. v. Silverdale Development Corp.* (2006), 270 D.L.R. (4<sup>th</sup>) 717 (B.C.C.A.) at para. 37.

[100] In contrast to a waiver of interest as in *Weirdale*.

[101] See e.g. *Dillingham Construction Ltd. v. Patrician Land Corp.* (1985) 36 R.P.R. 136 (Alta. C.A.); *Annis v. Annis* [1984] O.J. No. 467 (H.C.J.); *Macdonald v. Muncey* [1980] A.J. No. 590 (Q.B. Master); *T.F.P. Investments Inc. (Trustee of) v. Beacon Realty Co.* (1994), 114 D.L.R. (4<sup>th</sup>) 541 (Ont. C.A.). However, cf. *Pemberton Realty Corp Ltd. v. Carter* (1975), 58 D.L.R. (3d) 478 (B.C.S.C.); *Equirex Leasing Corp. v. Clark*, [2005] B.C.J. No. 1974 (S.C.).

[102] *Saperstein v. Royal Trust Corp. of Canada* (1988), 24 B.C.L.R. (2d) 114 (C.A.).

[103] *Mastercraft Properties Ltd. v. El Ef Investments Inc.* (1993), 14 O.R. (3d) 519 (C.A.); *O'Shanter Development Co. v. Gentra Canada Investments Inc.* (1995), 25 O.R. (3d) 188 (Div. Ct.). Cf. *Citizens Trust Co. v. Vyas* (1996), 2 R.P.R. (3d) 30 (B.C.S.C.).

[104] *Canadian Imperial Bank of Commerce v. Sovereign Life Insurance Co.* (1997), 35 B.C.L.R. (3d) 1 (C.A.).

[105] *First Island Financial Services Ltd. v. 557596 B.C. Ltd.*, [2002] B.C.J. No. 2318 (S.C.).

[106] *N.B.Y. Enterprises Inc. v. Duffin*, [2006] O.J. No. 982 (S.C.J.).

[107] *164618 Canada Inc. v. Cie Montréal Trust*, [1998] A.Q. No. 3059 (C.A.).

[108] *Vancouver City Savings Credit Union v. 535401 B.C. Ltd.* (2001), 44 R.P.R. (3d) 274 (B.C.S.C.).

[109] *N.B.Y. Enterprises Inc. v. Duffin*, [2006] O.J. No. 982 (S.C.J.) at para. 25.

[110] [2000] 7 W.W.R. 46 (B.C.C.A.) at para. 100. See also *Reliant Capital Ltd. v. Silverdale Development Corp.* (2006), 270 D.L.R. (4<sup>th</sup>) 717

(B.C.C.A.); *Raintree Financial Ltd. v. Bell* (1993), 82 B.C.L.R. (2d) 28 (S.C.). Cf. *T.D. Trust Co. v. Guinness* (1995), 12 B.C.L.R. (3d) 102 (S.C.).

[111] (1995), 12 B.C.L.R. (3d) 102 (S.C.).

[112] *Ibid.*, at para. 20 (emphasis added). See also *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.* [2000] 7 W.W.R. 46 (B.C.C.A.) at para. 99; *746628 B.C. Ltd. v. 674566 B.C. Ltd.* (2006), 56 B.C.L.R. (4<sup>th</sup>) 140 (S.C.) at para. 6.

[113] *Reliant Capital Ltd. v. Silverdale Development Corp.* (2006), 270 D.L.R. (4<sup>th</sup>) 717 (B.C.C.A.) at 89.

[114] *Ibid.*, at paras. 88-89 citing *Langley* [2000] 7 W.W.R. 46 (B.C.C.A.) at para. 97.

[115] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 91; *Litowitz v Standard Life Assurance Co. (Trustee of)* (1996), 30 O.R. (3d) 579 (C.A.) at para. 7.

[116] House of Commons Debates (31 March 1880) at p. 964.

[117] *Ibid.*

[118] Senate Debates (28 April 1880) at pp. 404-405. Section 10 may also have been a response to the inadequacies of the common law See D. Stevens, "Case Comment: *Potash v. Royal Trust Co.* (1985), 33 R.P.R. 122 at p. 123

[119] S.C. 1890, c. 34, s. 1. See House of Commons Debates (1 May 1890) at p. 4266.

[120] *Litowitz v Standard Life Assurance Co. (Trustee of)* (1996), 30 O.R. (3d) 579 (C.A.) at para. 7.

[121] Mary Ann Waldron, "Section 10 of the Interest Act: All the King's Men" (1988), 13 C.B.L.J. 468 at pp. 473-474.

[122] Alberta Law Reform Institute, *Mortgage Remedies in Alberta*, Report No. 70, (June 1994) at p. 66.

[123] Mary Ann Waldron, "Section 10 of the Interest Act: All the King's Men" (1988), 13 C.B.L.J. 468 at p. 473-474; Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at pp. 91-92; *Potash v. Royal Trust Co.*, [1986] 2 S.C.R. 351 at para.13.

[124] [1986] 2 S.C.R. 351.

[125] *Ibid.*, at para. 32.

[126] *Ibid.*, at para. 43.

[127] *Ibid.*, at para. 43.

[128] *Litowitz v. Standard Life Assurance Co. (Trustee of)* (1996), 30 O.R. (3d) 579 (C.A.) at para. 8.

[129] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at pp. 92-93. See e.g. *233467 B.C. Ltd. v. Montreal Trust of Canada* (1994), 115 D.L.R. (4<sup>th</sup>) 124 (B.C.C.A.).

[130] *Litowitz v. Standard Life Assurance Co. (Trustee of)* (1996), 30 O.R. (3d) 579 (C.A.).

[131] *Ibid.*, at para. 14.

[132] *Ibid.*, at para 15.

[133] *Ibid.*, at para 11.

[134] *Ibid.*

[135] *Pedahbun Lodge v. Canada Mortgage and Housing Corp*, [2007] O.J. No. 135 (S.C.J.).

[136] *Litowitz v. Standard Life Assurance Co. (Trustee of)* (1996), 30 O.R. (3d) 579 (C.A.). See also *Sachs v. Manufacturers Life Insurance Co.* (2000), 33 R.P.R. (3d) 305 (Ont. S.C.J.).

[137] S.C. 1897, 60-61 Vict., c. 8., s. 2.

[138] The default rate established in 1897 was 6%. This was reduced to 5% in 1900. S.C. 1900, 63-64 Vict., c. 29, s.1.

[139] House of Commons Debates (16 June 1897) p. 4253. See also Senate Debates (3 June 1897) at p. 461.

[140] Senate Debates (8 June 1897) at p. 525.

[141] Senate Debates (8 June 1897) at p. 521.

[142] House of Commons Debates (16 June 1897) at p. 4255.

[143] *Ibid.*

[144] *T.N.T. Canada Inc. v. Parmalat Dairy and Bakery Inc.*, [2004] O.J. No. 74 (S.C.J.) at para. 145; *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler and Mills* (1991), 3 O.R. (3d) 123 (C.A.).

[145] *Mitsui & Co. Ltd. v. Ocelot Industries Ltd.*, [1986] 3 W.W.R. 337 (Alta. C.A.) at para. 6.

[146] [1985] 1 S.C.R. 271 at p. 287.

[147] *Ibid.*

[148] *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler and Mills* (1991), 3 O.R. (3d) 123 (C.A.) at para. 4.

[149] *Niagara Air Bus Inc. v. Camerman* (1991), 3 O.R. (3d) 108 (C.A.).

[150] *Re Bearcat Explorations Ltd.* (2004), 368 A.R. 339 (Q.B.) (s. 4 not intended to protect sophisticated borrowers); *T.N.T. Canada Inc. v. Parmalat Dairy and Bakery Inc.*, [2004] O.J. No. 74 at para. 149 (no exception for sophisticated parties); *Zanny Ltd. v. Vero-Kim Developments Inc.* (1994), 47 A.C.W.S. (3d) 160 (Ont. Ct. (Gen. Div.)) (s.4 available to protect corporations and individuals);

[151] See e.g. *Kobi's Cabinets Ltd. v. Canada Permanent Trust Co.* (1980), 115 D.L.R. (3d) 256 (Ont. C.A.); *Banerjee v. Spilchen* (1985), 42 Sask. R. 162 (C.A.); *B. & B. Rentals and Sales Ltd. v. Curtis Lee Ltd.*, [1986] M.J. No. 506 (Q.B.); *Industries Super-Métal Inc v. Sécurité, Cie d'assurances générales*, (1988) 14 Q.A.C. 74; *Golder Associates Ltd. v. Mill Creek Developments* (2004), 48 B.L.R. (3d) 241 (B.C.S.C.).

[152] *Sunnyside Nursing Home v. Builders Contract Management Ltd.*, [1990] 5 W.W.R. 289 (Sask. C.A.) at p. 299. See e.g. *Cadinha v. Chemar Corp.*, [1995] B.C.J. No. 755 (S.C.) (Interest expressed as “interest...at the rate of ten per cent per annum calculated on the basis of a 360 day year” has been held to violate s. 4 leaving the lender with the default rate of 5%).

[153] G. Ross & A. Posno, “Taking an Interest in Interest” (1993), 2 Nat’l Real Prop. L. Rev. 1 at p.8.

[154] *Mel Kitzul Ltd. v. John Wilfort Construction Ltd.*, [1976] A.J. No. 200 (S.C.). Cf. *Thomson v. Thomson* (1926), 59 O.L.R. 661 (C.A.); *Dunn v. Malone* (1903), 6 O.L.R. 484 (H.C.J.).

[155] *Cruikshank v. Murphy Campbell Co.* (1958), 13 D.L.R. (2d) 250 (B.C.S.C.); *Re Federal House Furnishings & Outfitters*, [1954] O.W.N. 701 (S.C.)

[156] *I.A.C. Ltd. v. Guerrieri* (1982), 139 D.L.R. (3d) 352 (Ont. C.A.) at para. 17.

[157] Mary Ann Waldron, “Section 4 of the Interest Act: Truth in Lending” (1990), 48 Advocate 697 at p. 698.

[158] [1986] 3 W.W.R. 337 (Alta. C.A.) at paras. 10-12.

[159] *Urichuk v. Code Hunter* (1986), 68 A.R. 128 (C.A.); *Monashee Petroleums Ltd. v. Pan Cana Resources Ltd.*, (1986), 70 A.R. 277 (Q.B.) affd (1988), 85 A.R. 183 (C.A.); *Mansfield Tek Inc. v. Triple Five Corp.* (1996), 180 A.R. 268 (Q.B.).

[160] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 109. *Industries Super-Métal Inc v. Sécurité, Cie d’assurances générales du Canada* (1988), 14 Q.A.C. 74; *Aluminex Extrusions Ltd. v. Double “D” Glass Ltd.* (1987), 22 B.C.L.R. (2d) 220 (S.C.).

[161] *Sunnyside Nursing Home v. Builders Contract Management Ltd.*, [1990] 5 W.W.R. 289 (Sask. C.A.).

[162] *T.N.T. Canada Inc. v. Parmalat Dairy and Bakery Inc.*, [2004] O.J. No. 74 (S.C.J.) at para. 145; *Hyundai Auto Canada v. Computer Associates Canada Ltd.*, [1999] O.J. No. 384 (Ont. Ct. (Gen. Div.)).

[163] *Wilgosh v. Good Spirit Acres Ltd.*, 2007 SKCA 43 at para 8.

[164] [1992] 1 W.W.R. 577 (Alta. C.A.) affd [1994] 1 S.C.R. 552.

[165] *Ibid.*, at para. 101. See also Mary Ann Waldron, "Does the Consumer Win or Lose? *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*" (1992), Can. Bar. Rev. 357. See also *Upper Yonge Ltd., Mustang Financial Corp. Ltd. and Auroraborealis Inc. v. Canadian Imperial Bank of Commerce* (1990), 75 O.R. (2d) 98 (H.C.J.); *Mchugh v. Forbes* (1991), 4 O.R. (3d) 374 (C.A.).

[166] [1992] 1 W.W.R. 577 (Alta. C.A.) affd [1994] 1 S.C.R. 552.

[167] *Ibid.* at para. 101.

[168] *Ibid.*

[169] Mary Ann Waldron, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at p. 110-112; Mary Ann Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 C.B.L.J. 161 at pp. 165-166. For a thorough examination the calculation of interest see E. Maynes, S. Pincus, C. Robinson, "Calculating Periodic Interest" (1991), 17 C.B.L.J. 415.

[170] (1994), 118 D.L.R. (4<sup>th</sup>) 238 (Ont. Ct. (Gen. Div.)) affd (1995), 26 O.R. (3d) 95 (C.A.).

[171] *Ibid.* at para. 43.

[172] (1981), 33 B.C.L.R. 127 (C.A.); *Movsesian v. Saswan Construction Inc.* (1991), 7 B.C.A.C. 232 (C.A.); *Canadian Fracmaster Ltd. v. Grand Prix Natural Gas Ltd.* (1990), 109 A.R. 173 (Q.B.); *Tower Paint & Laboratories Ltd. v. Stainco Edmonton* (1983), 46 A.R. 229 (Q.B. Master).

[173] (1991), 79 D.L.R. (4<sup>th</sup>) 154 (Ont. C.A.).

[174] *Ibid.* at 11.

[175] *Blerot v. General Motors Acceptance Corp. of Canada Ltd.* (1992), 102 Sask. R. 131 (Q.B.).

[176] (1994), 118 D.L.R. (4<sup>th</sup>) 238 (Ont. Ct. (Gen. Div.)) affd (1995), 26 O.R. (3d) 95 (C.A.).

[177] *Ibid.* at p. 256-257.

[178] *Prince Albert Co-operative Assn v. Rybka* (2006), 289 Sask. R. 92 (C.A.).