

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

PROPOSED AMENDMENTS TO THE *INTEREST ACT*

Presented by Professor Thomas G.W. Telfer for the *Interest Act* Working Group

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Halifax, Nova Scotia
August 2010

UNIFORM LAW CONFERENCE OF CANADA

[1] The Working Group on the Canada *Interest Act*¹ was formed in 2007 following the presentation of a background paper by Professor Thomas Telfer of the University of Western Ontario² in which he considered whether the *Interest Act* had continuing relevance in today's commercial reality, particularly in light of the cost of borrowing disclosure requirements that had been added to many provincial and territorial consumer protection statutes and to federal statutes dealing with banks and other financial institutions.

[2] The Working Group is comprised of the following members: Lisa A. Peters (Lawson Lundell LLP, Vancouver); Professor Thomas Telfer (University of Western Ontario); Katharine Tummon (Director, Consumer, Corporate and Insurance Services, Office of the Attorney General, P.E.I.); Professor Mary Anne Waldron (University of Victoria); David M.W. Young (Lang Michener LLP, Toronto).

[3] The Working Group carried out a study of federal, provincial and territorial statutory provisions dealing with interest rates. It presented a preliminary report³ on its findings and the Working Group's views on the role played by the *Interest Act* in a report presented at the 2008 meeting of the ULCC.

[4] At the 2009 meeting of the ULCC, the Working Group recommended that a consultation process be undertaken. That process went ahead in September of 2009. The Working Group sent out a consultation letter, which is attached as Appendix "B" to this report.

[5] The consultation letter was circulated to banking organizations, organizations representing other financial institutions, branches of the Canadian Bar Association, consumer groups and associations, credit counselling organizations and relevant government ministries (a total of 99 organizations).

[6] The Working Group received only three responses to the consultation letter. It is difficult to tell whether the lack of response reflects satisfaction with the *Interest Act* as currently drafted or reflects the inaccessibility of the concepts or language contained in the particular statutory provisions.

[7] For this final report, the Working Group has prepared proposed amendments to specific sections of the *Interest Act*: the draft model amending Act is attached as Appendix "A". The Working Group has taken into account the feedback it received in the consultation process and the results of its own study of the jurisprudence and the federal, provincial and territorial statutory context in which the *Interest Act* exists.

¹ R.S.C. 1985, c. 1-15.

² [http://www.ulcc.ca/en/poam2/Canada Interest Act Preliminary Background Paper En.pdf](http://www.ulcc.ca/en/poam2/Canada%20Interest%20Act%20Preliminary%20Background%20Paper%20En.pdf).³
<http://www.ulcc.ca/en/poam2/FINALV-1.pdf>.

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[8] In the latter stages of the project, the Working Group was fortunate to be able to call on the drafting expertise of federal legislative draftspersons, Brenda MacKenzie and Michael Aucoin and assistance on civil law concepts and drafting of the French version of the model amending Act from Myriam Ancil, the jurisdictional representative from Quebec.

Section 1

Current Provision:

1. This Act may be cited as the *Interest Act*.

Proposed Amendment:

None.

Section 2

Current Provision:

2. Except as otherwise provided by this Act or any other Act of Parliament, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on.

Proposed Amendment:

None.

Comments:

Section 2 is not an impediment to commerce nor has it given rise to difficulties in interpretation or application like some of the other provisions of the *Interest Act*. Section 2 and the principle of freedom of contract it embraces may influence the interpretation of parties' agreements by the courts. It continues to articulate the federal *laissez-faire* policy first articulated in 1886 – that absent legislation to the contrary, parties are free to stipulate for any agreed upon rate of interest.

Section 3

Current Provision:

3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.

Proposed Amendments:

See section 1 of the draft model amending Act, which is attached as Appendix "A".

Comments:

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Section 3 sets a default rate that applies wherever interest is payable by an agreement or by law but no rate is fixed by the agreement or by law. In the current Act, the default rate is five percent per annum. In the view of the Working Group, the default rate in section 3 should be tied to market rates, as is the case with other federal and provincial legislation identified in the tables accompanying the Working Group's 2008 report. Proposed paragraph (a) of section 1 of the draft model amending Act uses language taken from the formulae for a default interest rate contained in a number of federal regulations. Because confusion can arise as to whether a statutory rate is meant to provide for simple or compound interest, proposed paragraph (b) expressly provides that the default rate is to be calculated as simple interest.

Section 4

Current Provision:

4. Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

Proposed Amendments:

See section 2 of the draft model amending Act, which is attached as Appendix "A".

Comments:

The main deficiency of the current provision is that it provides no guidance as to whether the disclosure required is that of simply the nominal rate of interest (i.e., the actual stated rate) or of an effective rate (i.e., an annual rate that reflects the actual anticipated interest to be paid on the principal from time to time over the period of a year, including periodic payments of interest and principal and compounding of interest). The proposed amendment addresses this deficiency.

The Working Group has concluded that, notwithstanding some overlap with other legislation (primarily federal, provincial and territorial cost of credit disclosure legislation applicable only to consumers), the information provided by section 4 disclosure is useful to borrowers. The requirement for this disclosure does not conflict with other material disclosure requirements, nor does it hamper or restrict transactions to which it applies. Perhaps more importantly, we note that section 4 provides a residual rule for financing and other transactions which stipulate a cost of using money by way of an interest rate in that it will apply to transactions not covered by the consumer protection legislation, including loans to small businesses where the borrowers may be unsophisticated, and to transactions involving an element of financing that do not fall within that legislation, such as overdue utility bills. While the nature of the disclosure (nominal interest rate) may not in all cases reflect the effective rate, it does require disclosure of a rate that in

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many instances will be a close approximation of the effective rate and therefore may be viewed as a beneficial "user-friendly" protective requirement.

At this year's meeting, a concern was raised as to lenders being required to comply with the *Interest Act* regime and provincial/territorial cost of borrowing regimes in certain circumstances. To avoid a requirement of dual disclosure in different forms in circumstances where both cost of borrowing disclosure regimes and section 4 apply, it may be beneficial to include an ordering provision such that compliance with section 4 is not required where the lender has complied with another applicable cost of borrowing disclosure regime.

In summary, in that section 4 does not conflict with provincial and territorial legislation and covers transactions not captured by that legislation, it is not obsolete and we recommend that it be retained with the amendment proposed, but suggest that consideration be given to requiring a lender to comply with only one disclosure regime in circumstances where there is an overlap.

Section 5

Current Provision:

5. If any sum is paid on account of any interest not chargeable, payable or recoverable under section 4, the sum may be recovered back or deducted from any principal or interest payable under the contract.

Proposed Amendments:

None.

Section 6

Current Provision:

6. Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage or hypothec contains 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.

Proposed Amendments:

After receiving input at this year's Conference, the Working Group is recommending repeal of section 6 and the companion provision, section 7. See section 3 of the draft model amending Act, which is attached as Appendix "A".

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Comments:

In the version of this report brought before the Conference, the Working Group was recommending retention of sections 6 and 7, but with significant amendments to reflect criticisms of and difficulties with both provisions. In its deliberations and interim reports to the Conference, the Working Group had considered recommending repeal of these provisions in light of the following factors:

The arcane and inaccessible language found in section 6;

- The questionable usefulness of the information required to be disclosed;
- The fact that the provision requires disclosure in the mortgage document itself, likely after the mortgagor has already committed to the transaction;
- Anecdotal evidence that lawyers were drafting mortgages so as to avoid the application of section 6;
- The limitations placed on the classes of mortgages to which section 6 applies by the jurisprudence;
- The fact that most consumer mortgagors across Canada receive robust cost of borrowing disclosure under provincial and territorial cost of borrowing disclosure regimes;
- The fact that even for commercial borrowers, the protection afforded by section 6 is "hit and miss"; and
- The severity of the penalty in section 7 for failure to make the required disclosure.

Based on debate at the Conference, the Working Group determined that repeal of sections 6 and 7 was the option preferred by the delegates for many of the reasons outlined above and because of concerns about complicating mortgage practice if section 6 was amended and thereby took on new significance. Accordingly, repeal of sections 6 and 7 is the approach recommended in this amended report.

From a policy perspective, the Working Group notes that if sections 6 and 7 were repealed, there will be mortgages to which the provincial and territorial regimes do not currently apply and in relation to which no cost of borrowing disclosure whatsoever would be required. Provinces and territories may wish to reconsider whether the small business borrower is not in need of protection similar to that given to consumers under the existing regimes such that extension of those regimes to certain types of commercial mortgages is justified.

Section 7

Current Provision:

7. Whenever the rate of interest shown in the statement mentioned in section 6 is less than the rate of interest that would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage or hypothec, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in the statement.

Proposed Amendments:

Section 7 sets out the penalty for failure to comply with section 6. As the working group is recommending repeal of section 6, it is also recommending repeal of section 7.

Comments:

See discussion under section 6 above.

Section 8

Current Provision:

8. (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

Interest on arrears

(2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

Proposed Amendments:

See section 4 of the draft model amending Act, which is attached as Appendix "A".

Comments:

As currently drafted, section 8 prevents a lender from increasing the rate of interest on a mortgage on default. Section 8 can be traced back to 1880 and predates the development of consumer lending. Thus, it does not make any distinction between commercial and consumer transactions. The case law that has interpreted section 8 has been inconsistent. Further, the case law demonstrates that creative or inventive drafting of agreements may well have the effect of

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avoiding the effect of section 8. The Working Group's proposed amendment will have the effect of excluding commercial mortgage transactions not covering principal residences.

Commercial lending entails risk taking on the part of both parties. In our May 2008 report, we asked the following question: if the commercial lender has adequately disclosed to a commercial borrower the increased rate of interest that would apply on default and there is no allegation of inequality of bargaining power at the time of the transaction why should the *Interest Act* stand in the way of that consensual transaction? Section 8 may stand in the way of a legitimate transaction for a lender who wishes to guard against the legitimate risk of default by a commercial debtor.

Where the commercial borrower is providing a commercial property to be charged by the mortgage, the transaction is more likely to be consensual and more fully informed. The borrower may have more than one piece of real estate and will also be in a better position to shop the mortgage around to several financial institutions and negotiate better terms. Accordingly, the Working Group is of the view that section 8 should not apply to this type of transaction.

By contrast, a borrower who is giving a mortgage over a principal residence is not in the same position as a commercial borrower. A small business person may have only one asset, the principal residence, to charge with a mortgage. The inability to look to other commercial properties and diversify risk, and the inequality of bargaining power between the individual and the mortgage lender, necessitate the retention of a modified section 8 to protect this latter type of transaction.

As a result of the proposed amendments, most commercial transactions would be excluded from section 8, while the new section 8 would cover a collateral mortgage given by a small business person against his or her home. Although a reformulated section 8 would overlap to some extent with provincial and territorial unconscionability law, the Working Group concluded that a new section 8 would supplement such provincial and territorial law. Retention of a reformulated section 8 is a better solution than outright repeal.

Section 9:

Current Provision:

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under section 6, 7 or 8, the sum may be recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

Proposed Amendments:

None.

Section 10

Current Provision:

10. (1) Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is not, under the terms of the mortgage or hypothec, payable until a time more than five years after the date of the mortgage or hypothec, then, if at any time after the expiration of the five years, any person liable to pay, or entitled to pay in order to redeem the mortgage, or to extinguish the hypothec, tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under sections 6 to 9, together with three months further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time after the payment on the principal money or interest due under the mortgage or hypothec.

(2) Subsection (1) does not apply

(a) to any mortgage on real property or hypothec on immovables given by a joint stock company or any other corporation, nor to any debenture issued by them, for the payment of which security has been given by way of mortgage on real property or hypothec on immovables; or

(b) to any prescribed mortgage on real property or prescribed hypothec on immovables given by a prescribed entity, nor to any prescribed debenture issued by it, for the payment of which security has been given by way of mortgage on real property or hypothec on immovables.

(3) For the purposes of paragraph (2)(b), the Governor in Council may, by regulation,

(a) prescribe entities; and

(b) prescribe classes of mortgages and hypothecs given by those entities and classes of debentures issued by them.

Proposed Amendments:

None.

Comments:

Section 10 provides for a mortgage repayment right after 5 years. This provision was originally enacted in 1880 to deal with the problem of long term mortgages. In the late nineteenth century the term of the mortgage frequently matched an equally long amortization period. Without statutory protection, borrowers had to pay an enormous penalty to repay the mortgage in advance.

Modern lending practices have shifted to short term mortgages with long amortization periods. This raised the question of whether section 10 had any utility in the context of more modern

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lending practices. The section did not expressly indicate how the provision was to apply in a short term mortgage and the renewal of that short term mortgage.

The Supreme Court of Canada's decision on section 10 in *Potash v. Royal Trust Co.*, [1986] 2 S.C.R. 351 has resolved any questions that had arisen due to the shift to shorter term mortgages. It is the Working Group's understanding that the decision has formed the standard in residential real estate. The Supreme Court of Canada concluded that even where there is a short term mortgage for a period of less than five years and there is an extension of the mortgage (without altering the date of the original mortgage), the five year repayment period will begin from the date of the original mortgage.

Prior Unproclaimed Amendments to the *Interest Act*

Parliament proposed amendments to the *Interest Act* in 1996 (S.C. 1996, c. 17, ss. 17 and 18) and in 2001 (S.C. 2001, c. 4, ss. 175 and 176). These provisions have not been brought into force.

The draft model amending Act (in sections 6 and 7) would repeal these unproclaimed provisions as a housekeeping measure as they would, if brought into force, be inconsistent with the amendments proposed in the draft amending model Act.

APPENDIX "A"

MA-DP

Ebauche non révisée
le 1er septembre 2010

An Act to amend the Interest Act, Chapter 17 of the Statutes of Canada, 1996 and Chapter 4 of the Statutes of Canada, 2001.

AMENDMENTS TO THE INTEREST ACT

1. Section 3 of the *Interest Act* is replaced by the following:

3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, both of the following apply:

(a) the interest rate is the rate established weekly by the Bank of Canada as the minimum rate at which it makes short-term advances to members of the Canadian Payments Association for the week during which the legal obligation to pay interest arises; and

(b) unless otherwise provided by the agreement or law, the interest is calculated as simple interest.

2. Section 4 of the Act is renumbered as subsection 4(1) and is amended by adding the following:

(2) For the purposes of subsection (1), the yearly rate or percentage of interest is the interest made payable by the terms of the contract for the period of less than one year multiplied by the number of those periods in a year.

3. Sections 6 and 7 of the Act are repealed.

4. Subsection 8(1) of the Act is replaced by the following:

remplace par ce qui suit :

Loi modifiant la Loi sur l'intérêt, le chapitre 17 des Lois du Canada (1996) et le chapitre 4 des Lois du Canada (2001)

MODIFICATION DE LA LOI SUR L'INTERET

3. Chaque fois que de l'intérêt est exigible par convention entre les parties ou en vertu de la loi, et qu'il n'y est pas fixe de taux :

a) le taux de l'intérêt est celui fixe hebdomadairement par la Banque du Canada qui représente, pour la semaine au cours de laquelle l'intérêt devient exigible, le taux minimum auquel elle consent des avances à court terme aux membres de l'Association canadienne des paiements;

b) sauf indication contraire de la convention ou de la loi, l'intérêt exigible est calculé comme un intérêt simple.

2. L'article 4 de la même loi devient le paragraphe 4(1) et est modifié par l'adjonction, après ce paragraphe, de ce qui suit :

(2) Pour l'application du paragraphe (1), le taux d'intérêt ou pourcentage par lequel équivaut le taux ou pourcentage payer aux termes du contrat est le produit de l'intérêt à payer aux termes du contrat pour la période qui y est prévue et du nombre de telles périodes qu'il y a dans une année.

3. Les articles 6 et 7 de la même loi sont abrogés.

4. Le paragraphe 8(1) de la même loi est remplacé par ce qui suit :

L. R., ch. I-15, art. 4; 2001, ch. 4, art. 91

Taux d'intérêt ou pourcentage par an équivalent

L.R., ch. 1-15, art. 6; 2001, ch. 4, art. 92

L.R., ch. 1-15; art. 8; 2001, ch. 4, art. 94

L.R., ch. 1-18, art. 3

Taux d'intérêt lorsque non fixe

R.S., c. 1-18, s. 3.

Interest rate

R.S., 1985, c. 1-15, s. 4; 2001, c. 4, s. 91.

Equivalent rate or percentage

R.S., 1985, c. 1-15, s. 6; 2001, c. 4, s. 92.

R.S., 1985, c. s. 8; 2001, c. 4, s. 94.

No fine, etc., allowed on payments in arrears

8. (1) When a principal residence within the meaning of section 54 of the *Income Tax Act* is located on real property or i

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movables, no fine, penalty or rate of est shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on the real property or hypothec on the immovables or that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

R.S., c. I-18, s. 9.

5. Section 9 of the Act is replaced by the following:

Overcharge may be recovered back

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under section 8, the sum may be recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

6. Subsection 10(1) of the Act is replaced by the following:

When no further interest payable

10. (1) Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is not, under the terms of the mortgage or hypothec, payable until a time more than five years after the date of the mortgage or hypothec, then, if at any time after the expiration of the five years, any person liable to pay, or entitled to pay in order to redeem the mortgage, or to extinguish the hypothec, tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under sections 8 and 9, together with three months further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time after the payment on the principal money or interest due under the mortgage or hypothec.

8. (1) Lorsqu'une résidence principale au sens de l'article 54 de la *Loi de l'impôt sur le revenu* se trouve sur un immeuble ou un bien réel, il ne peut être stipulé, retenu, réservé ou exigé, sur des arriérages de principal ou d'intérêt garantis par hypothèque sur cet immeuble ou ce bien réel, aucune amende, pénalité ou taux d'intérêt ayant pour effet d'élever les charges sur ces arriérages au-dessus du taux d'intérêt payable sur le principal non arriéré.

Pas d'amende sur les versements arriérés

5. L'article 9 de la même loi est remplacé par ce qui suit :

L.R., ch. 1-18, art 9

9. En cas de paiement d'une somme compte d'un intérêt, d'une amende ou pénalité qui ne sont pas exigibles, payables ou recouvrables en vertu de l'article 8, cette somme peut être recouvrée ou déduite de tout autre intérêt, amende ou pénalité exigibles, payables ou recouvrables sur le principal.

Les surcharges peuvent être recouvrées

6. Le paragraphe 10(1) de la même loi est remplacé par ce qui suit :

10. (1) Lorsqu'un principal ou un intérêt garanti par hypothèque sur immeubles ou biens réels n'est pas payable, d'après les modalités de l'acte d'hypothèque, avant qu'il se soit écoulé plus de cinq ans compter de la date de l'hypothèque, alors, si, à quelque époque après l'expiration de ces cinq ans, la personne tenue de payer ou ayant le droit de payer en vue d'éteindre ou de racheter l'hypothèque offre ou paie à la personne qui a droit de recevoir l'argent la somme due à titre de principal et d'intérêt jusqu'à la date du paiement calculée conformément aux articles 8 et 9, en y ajoutant trois mois d'intérêt pour tenir lieu d'avis, nul autre intérêt n'est exigible, payable ou recouvrable à une époque ultérieure sur le principal ni sur l'intérêt du principal en vertu de l'acte d'hypothèque.

Nul autre intérêt n'est payable

14 novembre 2010

**AMENDMENTS TO CHAPTER 17 OF
THE STATUTES OF CANADA, 1996**

7. Sections 17 and 18 of Chapter 17 of the Statutes of Canada, 1996 are repealed.

**AMENDMENTS TO CHAPTER 4 OF
THE STATUTES OF CANADA, 2001**

8. Sections 175 and 176 of Chapter 4 of the Statutes of Canada, 2001 are repealed.

[Note that sections 7 and 8 will have to be replaced with coordinating amendments if sections 17 and 18 of Chapter 17 of the Statutes of Canada, 1996 and sections 175 and 176 of Chapter 4 of the Statutes of Canada, 2001 come into force before the Bill receives Royal Assent.]

[Note: This draft of an amending Act contains amendments proposed by the Uniform Law Conference of Canada. It does not necessarily conform to the drafting norms of the Department of Justice Canada and has not undergone the ordinary review processes of that department.]

**MODIFICATION DU CHAPITRE 17
DES LOIS DU CANADA (1996)**

7. Les articles 17 et 18 du chapitre 17 des Lois du Canada (1996) sont abrogés.

**MODIFICATION DU CHAPITRE 4
DES LOIS DU CANADA (2001)**

8. Les articles 175 et 176 du chapitre 4 des Lois du Canada (2001) sont abrogés.

[Note : Les articles 7 et 8 devront être remplacés par des dispositions de coordination s'il s'avère impossible d'obtenir la confirmation que les articles 17 et 18 du chapitre 17 des Lois du Canada (1996) et les articles 175 et 176 du chapitre 4 des Lois du Canada (2001) n'entreront pas en vigueur avant la sanction de l'actuel projet de loi.]

[Note : La présente ébauche de loi modificative contient des modifications suggérées par la Conférence pour l'harmonisation des lois au Canada. Elle n'est pas nécessairement conforme aux normes de rédaction du ministère de la Justice du Canada et n'a d'ailleurs pas été soumise au processus de révision habituel de ce ministère.]

le 1er septembre 2010

EXPLANATORY NOTES

Interest Act

Clause 2: Existing text of section 3:

3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.

Clause 3: Existing text of section 4:

4. Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

Clause 3: Existing text of sections 6 and 7:

6. Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage or hypothec contains 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.

7. Whenever the rate of interest shown in the statement mentioned in section 6 is less than the rate of interest that would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage or hypothec, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in the statement.

NOTES EXPLICATIVES

Loi sur l'interet

Article 1: Texte de Particle 3 :

3. Chaque fois que de Pinter& est exigible par convention entre les parties ou en vertu de la loi, et qu'il n'est pas fixe de taux en vertu de cette convention ou par la loi, le taux de Pinter& est de cinq pour cent par an.

Article 2 : Texte de Particle 4 :

4. Sauf a regard des hypothèques sur immeubles ou biens reels, lorsque, aux termes d'un contrat ecrit ou imprime, scene ou non, quelque inter& est payable a un taux ou pourcentage par jour, semaine ou mois, ou a un taux ou pourcentage pour une periode de moins d'un an, aucun inter& superieur au taux ou pourcentage de cinq pour cent par an n'est exigible, payable ou recouvrable sur une partie quelconque du principal, a moins que le contrat n'enonce expressement le taux d'interet ou pourcentage par an auquel equivaut cet autre taux ou pourcentage.

Article 3 : Texte des articles 6 et 7 :

6. Lorsqu'un principal ou un inter& garanti par hypothèque sur immeubles ou biens reels est stipule, par l'acte d'hypothèque, payable d'apres le systhme du fonds d'amortissement, d'apres tout système en vertu duquel les versements du principal et de Pinter& sont confondus ou d'apres tout plan ou systame qui comprend une allocation d'interet sur des remboursements stipules, aucun inter& n'est exigible, payable ou recouvrable sur une partie quelconque du principal prôte, a moins que l'acte d'hypothèque ne fasse mention du principal et du taux de l'interet exigible a son egard, calculd annuellement ou semestriellement, mais non d'avance.

7. Lorsque le taux d'interet mentionne en vertu de Particle 6 est moindre que celui qui serait exigible en vertu de quelque autre disposition, calcul ou stipulation de l'acte d'hypothèque, it n'est exigible, payable ou recouvrable sur le principal avance aucun inter& plus eleve que le taux ainsi mentionne.

le 1er septembre 2010

Clause 5: Existing text of section 8:

8. (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

Clause 5: Existing text of section 9:

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under section 6, 7 or 8, the sum may be recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

Clause 6: Existing text of subsection 10(1):

10. (1) Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is not, under the terms of the mortgage or hypothec, payable until a time more than five years after the date of the mortgage or hypothec, then, if at any time after the expiration of the five years, any person liable to pay, or entitled to pay in order to redeem the mortgage, or to extinguish the hypothec, tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under sections 6 to 9, together with three months further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time after the payment on the principal money or interest due under the mortgage or hypothec.

Chapter 17 of the Statutes of Canada, 1996

Clause 6: Existing text of sections 17 to 18:

17. Section 4 of the *Interest Act* is replaced by the following:

4. (1) Except as to mortgages on real property, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or any rate or percentage for any period less than a year, no interest exceeding the rate or percentage prescribed by regulation shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent, calculated in accordance with the regulations.

Article 4 : Texte du paragraphe 8(1) :

8. (1) Il ne peut être stipulé, retenu, réservé ou exigé, sur des arrérages de principal ou d'intérêt garantis par hypothèque sur immeubles ou biens réels, aucune amende, pénalité ou taux d'intérêt ayant pour effet d'élever les charges sur ces arrérages au-dessus du taux d'intérêt payable sur le principal non arriéré.

Article 5 : Texte de l'article 9 :

9. En cas de paiement d'une somme à compte d'un intérêt, d'une amende ou pénalité qui ne sont pas exigibles, payables ou recouvrables en vertu des articles 6, 7 ou 8, cette somme peut être recouvrée ou déduite de tout autre intérêt, amende ou pénalité exigibles, payables ou recouvrables sur le principal.

Article 6 : Texte du paragraphe 10(1) :

10. (1) Lorsqu'un principal ou un intérêt garanti par hypothèque sur immeubles ou biens réels n'est pas payable, d'après les modalités de l'acte d'hypothèque, avant qu'il se soit écoulé plus de cinq ans à compter de la date de l'hypothèque, alors, si, à quelque époque après l'expiration de ces cinq ans, la personne tenue de payer ou ayant le droit de payer en vue d'otéindre ou de racheter l'hypothèque offre ou paie à la personne qui a droit de recevoir l'argent la somme due à titre de principal et l'intérêt jusqu'à la date du paiement calculé conformément aux articles 6 à 9, en y ajoutant trois mois d'intérêt pour tenir lieu d'avis, nul autre intérêt n'est exigible, payable ou recouvrable à une époque ultérieure sur le principal ni sur l'intérêt du en vertu de l'acte d'hypothèque.

Chapitre 17 des Lois du Canada (1996)

Article 5 : Texte des articles 17 et 18 :

17. L'article 4 de la *Loi sur l'intérêt* est remplacé par ce qui suit :

4. (1) Sauf à l'égard des hypothèques sur biens-fonds, lorsque, aux termes d'un contrat écrit ou imprimé, scellé ou non, quelque intérêt est payable à un taux ou pourcentage par jour, semaine ou mois, ou à un taux ou pourcentage pour une période de moins d'un an, aucun intérêt supérieur au taux ou pourcentage fixe par règlement n'est exigible, payable ou recouvrable sur une partie quelconque du principal, à moins que le contrat n'annonce expressément le taux d'intérêt ou pourcentage par an auquel équivaut cet autre taux ou pourcentage, calculé conformément aux règlements.

le 1er septembre 2010

(2) The Governor in Council may make regulations for the purposes of subsection (1).

18. Section 6 of the Act is replaced by the following:

6. (1) Whenever any principal money or interest secured by mortgage on real property is, by the mortgage, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended, on any plan that involves an allowance of interest on stipulated payments or on any fund or plan described in the regulations, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced unless the mortgage contains an express statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated in accordance with the regulations.

(2) The Governor in Council may make regulations for the purposes of subsection (1).

Chapter 4 of the Statutes of Canada, 2001

Clause 6: Existing text of sections 175 to 176:

175. (1) Subsection 4(1) of the *Interest Act* is replaced by the following:

4. (1) Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or any rate or percentage for any period less than a year, no interest exceeding the rate or percentage prescribed by regulation shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent, calculated in accordance with the regulations.

(2) Subsection (1) comes into force on the later of the coming into force of section 91 of this Act and section 17 of the *Agreement on Internal Trade Implementation Act*, chapter 17 of the Statutes of Canada, 1996.

176. (1) Subsection 6(1) of the *Interest Act* and the heading before it are replaced by the following:

(2) Le gouverneur en conseil peut, par règlement, prendre

les mesures nécessaires à l'application du paragraphe (1).

18. L'article 6 de la même loi est remplacé par ce qui suit :

6. (1) Lorsqu'un principal ou un intérêt garanti par hypothèque sur biens-fonds est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, d'après tout système en vertu duquel les versements du principal et de l'intérêt sont confondus, d'après tout plan ou système qui comprend une allocation d'intérêt sur des remboursements stipulés, ou d'après un fonds ou un système prévu par règlement, aucun intérêt n'est exigible, payable ou recouvrable sur une partie quelconque du principal prêté, à moins que l'acte d'hypothèque ne fasse expressement mention du principal et du taux d'intérêt exigible à son égard, calculé conformément aux règlements.

(2) Le gouverneur en conseil peut, par règlement, prendre les mesures nécessaires à l'application du paragraphe (1).

Chapitre 4 des Lois du Canada (2001)

Article 6 : Texte des articles 175 et 176 :

175. (1) Le paragraphe 4(1) de la *Loi sur l'intérêt* est remplacé par ce qui suit :

4. (1) Sauf à regard des hypothèques sur immeubles ou biens réels, lorsque, aux termes d'un contrat écrit ou imprimé, scellé ou non, quelque intérêt est payable à un taux ou pourcentage par jour, semaine ou mois, ou à un taux ou pourcentage pour une période de moins d'un an, aucun intérêt supérieur au taux ou pourcentage fixe par règlement n'est exigible, payable ou recouvrable sur une partie quelconque du principal, à moins que le contrat n'énonce expressement le taux d'intérêt ou pourcentage par an auquel équivaut cet autre taux ou pourcentage, calculé conformément aux règlements.

(2) Le paragraphe (1) prend effet à l'entrée en vigueur de l'article 91 de la présente loi ou à celle de l'article 17 de la *Loi de mise en œuvre de l'Accord sur le commerce international*, chapitre 17 des Lois du Canada (1996), la dernière en date étant à retenir.

176. (1) Le paragraphe 6(1) de la *Loi sur l'intérêt* et l'intitulé le précédant sont remplacés par ce qui suit :

La loi d'octobre 2010

**INTEREST ON MONEYS SECURED BY MORTGAGE ON
REAL PROPERTY OR HYPOTHEC ON IMMOVABLES**

6. (1) Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended, on any plan that involves an allowance of interest on stipulated payments or on any fund or plan described in the regulations, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced unless the mortgage or hypothec contains an express statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated in accordance with the regulations.

(2) Subsection (1) comes into force on the later of the coming into force of section 92 of this Act and section 18 of the *Agreement on Internal Trade Implementation Act*, chapter 17 of the Statutes of Canada, 1996.

**INTERET SUR DENIERS GARANTIS PAR
HYPOTHEQUE SUR IMMEUBLES OU BIENS REELS**

6. (1) Lorsqu'un principal ou un inter& garanti par hypothèque sur immeubles ou biens réels est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, d'après tout système en vertu duquel les versements du principal et de l'inter& sont confondus, d'après tout plan ou système qui comprend une allocation d'intérêt sur des remboursements stipulés, ou d'après un fonds ou un système prévu par règlement, aucun inter& nest exigible, payable ou recouvrable sur une partie quelconque du principal prêté, à moins que l'acte d'hypothèque ne fasse expressément mention du principal et du taux de l'inter& exigible à son égard, calculé conformément aux règlements.

(2) Le paragraphe (1) prend effet à l'entrée en vigueur de l'article 92 de la présente loi ou à celle de l'article 18 de la *Loi de mise en œuvre de l'Accord sur le commerce intérieur*, chapitre 17 des Lois du Canada (1996), la dernière en date étant à retenir.

APPENDIX "B"

Uniform Law Conference of Canada

Conference pour ('Harmonisation des Lois au Canada

REPLY TO: LISA A. PETERS
DIRECT LINE: (604) 631-9207
lpeters@lawsonlundell.com

September 16, 2009

BY EMAIL

Dear Sirs and/or Mesdames:

Uniform Law Conference of Canada – Project on the *Interest Act*, R.S.C. 1985, c. 1-15

The purpose of this letter is to seek your input on a project undertaken by the Uniform Law Conference of Canada ("ULCC") on the federal *Interest Act*, R.S.C. 1985, c. 1-15.

The ULCC and the *Interest Act* Working Group

The ULCC was founded over 90 years ago, based on a recommendation of the Canadian Bar Association. The ULCC is an independent organization that is not directly responsible to any government or other authority. However, each province and territory appoints delegates (comprised of government lawyers, lawyers from law reform bodies and members of the private bar) who attend at the annual meeting of the ULCC, as does the federal government. Model statutes drafted by the ULCC are frequently adopted by Canadian jurisdictions.

The primary objective of the ULCC is to promote uniformity of legislation throughout Canada on subjects on which uniformity may be found to be possible and advantageous. At the annual meetings of the ULCC, consideration is given to those branches of the law in which it is desirable and practicable to secure uniformity. Between meetings, the work of the ULCC is carried on by correspondence among the members of the Executive, the Jurisdictional Representatives and the Executive Director, and among the members of the *ad hoc* committees (called working groups). Matters for consideration by the ULCC may be brought forward by the delegates from any jurisdiction or by the Canadian Bar Association.

In 2007, Professor Thomas Telfer of the University of Western Ontario presented a preliminary background paper to the ULCC in which he considered whether the federal *Interest Act* had continuing relevance in today's commercial reality. That paper is available on-line at [http://www.ulcc.ca/en/poam2/Canada Interest Act Preliminary Background Paper En.pdf](http://www.ulcc.ca/en/poam2/Canada%20Interest%20Act%20Preliminary%20Background%20Paper%20En.pdf).

Following presentation of Professor Telfer's paper, a working group was formed to consider the issues raised in Professor Telfer's paper and to examine the provisions of the *Interest Act* in the context of provincial legislation dealing with interest and common law developments.

The members of the working group are Professor Telfer, Professor Mary Anne Waldron of the University of Victoria, Lisa A. Peters of Lawson Lundell LLP in Vancouver, David Young of Lang Michener LLP in Toronto and Katharine Tummon, Director, Consumer, Corporate and Insurance Services, Office of the Attorney General of P.E.I.

The working group presented a report at the 2008 meeting of the ULCC. That report is available on line at <http://www.ulcc.ca/en/poam2/FINALV-1.pdf>.

The working group recommended, and the ULCC resolved, that consultations should be carried out with stakeholder groups prior to the working group preparing a final report and drafting any proposed legislative changes.

This letter is meant to initiate that consultation process.

The *Interest Act*

The subject-matter of "Interest" was granted exclusively to the federal Parliament under subsection 91(19) of the *Constitution Act, 1867*. You can review the *Interest Act*, which was enacted pursuant to the federal legislative power, at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-15/latest/rsc-1985-c-i-15.html>.

The main components of the *Interest Act* are:

- A provision that confirms the ability of persons to stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on, subject to the *Interest Act* and other Acts of Parliament (section 2);
- The setting of a default interest rate in section 3;
- A disclosure regime for non-mortgage transactions in section 4 (consequences for the breach of which are set out in section 5);
- A disclosure regime for certain mortgage transactions in section 6 (consequences for the breach of which are set out in section 7);
- A prohibition against increasing the rate of interest or charging fines or penalties after a default in the context of mortgage lending in section 8 (consequences for the breach of which are set out in section 9); and
- A repayment right for the benefit of mortgage borrowers in section 10.

There are numerous provincial and territorial statutes and regulations that contain provisions dealing with interest rates. Of particular note are the provincial consumer protection statutes that contain detailed disclosure regimes related to the cost of borrowing.

There are also provisions in other federal statutes and regulations dealing with interest rates. The working group prepared charts listing these provisions that can be accessed on line. For the provincial and territorial legislation, go to <http://www.ulcc.ca/en/poam2/ULCC-C-2.pdf>. For the federal legislation go to <http://www.ulcc.ca/en/poam2/ULCC-C-1.pdf>.

Objectives of Consultation

The working group is only seeking input on the efficacy and contents of ss. 4, 6, 8 and 10.

The working group report of 2008 does not recommend any changes to section 2. The report recommends that section 3, which sets a default rate of interest at 5%, be tied to market rates.

Sections 5, 7, and 9 deal with the consequences of non-compliance with sections 4, 6 and 8 respectively. In the consultation questionnaire, sections 5, 7 and 9 are dealt with in the context of their companion substantive provisions.

A given organization may only wish to comment on some of the provisions; for example, real estate related groups may only be interested in sections 6, 8 and 10.

Consultation Questionnaire

Attached to this letter is a consultation questionnaire. It sets out some background information in relation to the provisions of the *Interest Act* at issue and then poses specific questions. While it is hoped that organizations consulted will respond to the questions posed, we welcome more general feedback as well.

How to Participate

The preferred method of response would be by a letter or memorandum of points emailed to lpeters@lawsonlundell.com. If you have questions you wish to pose prior to responding, you may contact Lisa Peters, the working group chair, at (604) 631-9207.

We appreciate that for some organizations, a meeting with members present and an opportunity to provide input in person might be the most effective way to participate. The working group has a limited ability to send a representative to meet with stakeholder groups; accordingly, if you would like to participate by way of an in-person meeting please contact Lisa Peters at the number or email address above to discuss this possibility. We will be setting up any in-person consultations to take place from November 2009 to January 2010. Accordingly, any requests for in person meetings with your organization should be made by October 15th at the latest.

Deadline for Responses and Use of Responses

The working group intends to incorporate the results of the consultation into its final report, which must be submitted by May 2010. Accordingly, we request your input by December 31, 2009, at the latest.

The working group intends to incorporate results from the consultation process in its final report. The final report will ultimately be posted on the ULCC website and will be available for public viewing. If your group has any concerns about its views being identified in the working group report, please raise this concern with us in advance. If you respond without raising any concerns

about publication of the consultation results, we will view your response as including consent to use the material in the working group's final report and to publishing it in the context of that report on-line.

Yours very truly,

Lisa A. Peters
(for the *Interest Act* working group)

CONSULTATION QUESTIONNAIRE

Background re Section 4

Section 4 reads as follows:

4. Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

Some criticism has been directed at section 4 because it fails to specify how the interest amount should be calculated (i.e., the frequency of calculation and payment, whether in advance and whether it is to be compounded). The section also provides no guidance as to whether the disclosure required is simply of the nominal rate or of an effective rate, which could be confusing for borrowers seeking to compare interest rates.

There is federal, provincial and territorial legislation mandating disclosure of the cost of credit. The provincial and territorial cost of disclosure legislation applies, almost exclusively, to consumer transactions. The federal legislation cost of borrowing disclosure legislation applies to loans made to "natural persons" for other than business purposes. These cost of disclosure regimes overlap significantly with section 4 of the *Interest Act* in the context of consumer transactions, and the disclosure requirements contained in them are framed very differently than in section 4.

There is some doubt as to whether s. 4 of the *Interest Act* applies only to consumer transactions, or to consumer and commercial lending transactions (if it is the latter, it covers some transactions that would not be covered by the provincial, territorial and federal cost of credit disclosure regimes).

Questions

1. Is there any utility in maintaining s. 4 of the *Interest Act* at all, given its overlap with provincial, territorial and federal legislation requiring disclosure of the cost of borrowing and given the perceived deficiencies of s. 4?
2. Should section 4 be amended to stipulate whether it is intended to require disclosure of a nominal or effective rate?
3. Should s. 4 apply only to non-consumer transactions given the overlap between that provision and consumer cost of credit disclosure legislation?

Background re Section 6

Section 6 reads as follows:

Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage or hypothec contains 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.

Section 6 requires that borrowers who sign certain types of mortgages must receive disclosure in the mortgage document of an interest rate that is compounded yearly or half-yearly. The types of mortgages specified are mortgages repayable by blended payments, on the sinking fund plan or involving an allowance of interest on stipulated repayments. The second and the third of these types of mortgage have never been defined by the courts. The term "blended payments" has been held to apply to mortgages only where the payment contains principal and interest mixed so as to be indistinguishable.

But despite the narrow applicability of section 6, the "half-yearly, not in advance" formula has become a regular feature of Canadian mortgage practice when a mortgage loan is amortized or when payment and interest calculation dates do not coincide. Almost all Canadian mortgages made for residential purchases, for example, contain the form of disclosure required by s. 6. It is important to note that many provinces already regulate the method and content of disclosure of the cost of borrowing for non-commercial transactions.

Questions

1. In your work, have you found that disclosure in the mortgage of a rate compounded yearly or half-yearly is useful information for a borrower?
2. Of the following choices, which would you agree with? Check all that apply. Section 6 of the *Interest Act* should be:
 - (a) amended to provide more robust disclosure;
 - (b) amended to apply to better defined classes of mortgage;
 - (c) amended to require disclosure of the yearly or half-yearly rate at an earlier time in the transaction;
 - (d) repealed;
 - (e) amended to exclude non-commercial mortgages;
 - (f) amended to exclude commercial mortgages;

- (g) repealed and provinces that do not currently regulate mortgage interest disclosure should be encouraged to do so;
- (h) left as it is;
- (i) amended to _____

Background re Section 8

Section 8 reads as follows:

8. (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

In general, section 8 will prevent the lender from increasing the rate of interest on a mortgage in default. However, the section is expressed in terms of its original 1880 language and also precludes the imposition of a fine or penalty exacted on any arrears. In contrast to modern cost of credit legislation (which places an emphasis on disclosure), s. 8 simply prohibits the lender from imposing higher rates of interest after default.

Judicial Interpretation of Section 8

There are numerous examples in the case law where increased interest rates, charges or the payment of a bonus have been held to contravene section 8. However, there is also recognition in the case law that the parties should have some freedom to structure their transactions and not every challenge under section 8 has been successful. Some courts have emphasized that the starting point is freedom of contract under section 2 of the *Interest Act* and that section 8 is an exception to that general principle. This has led to an alternative line of cases in which the courts have concluded that section 8 has not been violated, perhaps in response to the "inventive drafting" of the solicitors seeking to avoid the application of the earlier case law. Yet there appears to be no consistent form of reasoning in how the courts analyze section 8.

Questions

It must be asked whether there is any continued role for section 8 to play as it is currently worded. Section 8 pre-dates the significant development of consumer lending regimes and thus does not distinguish between commercial mortgages and residential mortgages. Commercial mortgage transactions entail risk taking by both parties.

1. If the commercial lender has adequately disclosed to a commercial borrower the increased rate of interest that would apply on default and there is no allegation of inequality of bargaining power at the time of the transaction, should the federal *Interest Act* stand in the way of that consensual transaction?

Should s. 8 be restricted in scope and apply only to mortgages that charge real property primarily used by the borrower as a principal residence?

3. If the recommendation in 2) were to be adopted, should a reformulated section 8 cover a collateral mortgage given by a small business person against his or her home?

The origins of section 8 pre-date the development of contract law jurisprudence dealing with the validity of default provisions. Similarly, section 8 also pre-dates the development of common law unconscionability doctrines as well as unconscionability legislation.

A revised section 8 would overlap to some extent with this provincial unconscionability law.

4. Should a new s. 8 supplement such provincial law or should s. 8 be repealed given the extent of the overlap with provincial law?

Background re Section 10

Subsection 10(1) reads as follows:

10. (1) Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is not, under the terms of the mortgage or hypothec, payable until a time more than five years after the date of the mortgage or hypothec, then, if at any time after the expiration of the five years, any person liable to pay, or entitled to pay in order to redeem the mortgage, or to extinguish the hypothec, tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under sections 6 to 9, together with three months further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time after the payment on the principal money or interest due under the mortgage or hypothec.

Origins of Section 10

Section 10 is an illustration of the wide discrepancy between Parliament's original purpose in 1880 in relation to mortgage repayment rights and modern mortgage lending practices of today. Section 10 provides for a mortgage repayment right after 5 years—this provision was enacted in 1880 to deal with long term mortgages prevalent at that time. Without statutory protection, borrowers had to pay an enormous penalty to repay the mortgage in advance. Since there was no right under common law or equity relating to the right to prepay, a borrower might be unable to pre-pay at all. If a lender did stipulate for a repayment right it could insist on any amount of liquidated damages up to all the interest that would have been earned over the balance of the term. Section 10 enabled the borrower to repay after 5 years by paying 3 months interest in advance.

Modern lending practices have shifted to short term mortgages of 6 months to 5 years with long amortization periods. Could section 10 be of any relevance to a short term mortgage? What if the borrower renewed or extended the original mortgage? When might the five year repayment right begin? A plain reading of section 0 does not provide an answer to questions arising from modern lending practices.

Judicial Interpretation and the New Meaning of Section 10

The 1986 Supreme Court of Canada decision in *Potash v. Royal Trust Co.*, [1986] 2 S.C.R. 351, redefined the purpose of section 10 in light of these modern practices. The Court established that where the borrower had entered into a mortgage which was longer than five years (the situation to which the section originally applied), the borrower could pay off the mortgage at the end of five years. It explained that where the mortgage was for a term of five years or less and there was an extension of the mortgage (without altering the date of the original mortgage), the five year repayment period would begin from the date of the original mortgage.

The Court ruled that where the borrower has not exercised section 10 rights and has entered into a renewal (the terms of which deem the date of the mortgage to be the date of maturity), the borrower cannot pay off the mortgage until five years of the renewal period have elapsed. In other words, re-dating of the mortgage starts the five year period again. For example, an initial five year period which is renewed for a further five years (with the mortgage redated) will not permit the borrower to pay off the mortgage until the end of the five year *renewal period*.

Questions

With respect to s. 10, the working group's 2008 report contains no specific recommendations other than to consult with various stakeholders.

1. To what extent does the decision in *Potash* set the standard in residential real estate mortgage practice?
2. If *Potash* is the standard in residential real estate mortgage practice, what significant problems has it posed for lenders or borrowers?
3. Does your organization prefer the status quo (the existing wording of s. 10 as interpreted by *Potash*) or a reformulated s. 10?
4. What specific recommendations do you have in relation to a revised s. 10?
5. Section 10 overlaps with provisions found in at least two other provincial statutes. The Ontario *Mortgages Act* and the Manitoba *Mortgage Act* both offer a similar repayment right to what is found in section 10 of the *Interest Act*. Should this repayment right be found in federal or provincial legislation? Does the overlap between federal and provincial legislation create problems in real estate practice?