

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

**RESPONSE TO REQUEST FOR COMMENTS ON THE PROPOSALS
CONTAINED IN THE CONSULTATION PAPER ENTITLED,
“ENSURING BUSINESSES ACCESS TO LONG TERM MORTGAGES”**

UNIFORM LAW CONFERENCE OF CANADA

The purpose of this document is to respond to the request for comments on the proposals contained in the consultation paper entitled, “Ensuring Businesses Access to Long Term Mortgages” posted on the Department of Finance website.

1. A working group of the Uniform Law Conference of Canada (“ULCC”) has been considering the *Interest Act* and its interaction with provincial and territorial cost of borrowing regimes for a number of years. The working group presented its final report at this year’s annual meeting held in August, 2010 in Halifax, Nova Scotia. A copy of that final report will be posted shortly at the ULCC website at www.ulcc.ca.
2. As part of the working group’s process, it carried out a consultation in which it sent out a questionnaire to 99 organizations posing questions about the provisions in the *Interest Act*. The working group did not receive any input on, nor does its final report address, s.10(2) of the Act or the question of whether additional types of business entities should be excepted from the application of s. 10(1).
3. In its deliberations, the working group recognized that there are provincial and territorial statutes dealing with cost of credit disclosure which, by and large, are focussed on protection of consumers.
4. Other than in s. 10, the *Interest Act* as it currently exists does not differentiate between consumer borrowers and business borrowers. The proposals for reform contained in the working group’s report recognize that there may be good reason to treat business borrowers differently, provided that any reforms to achieve that end do not remove protection for consumers that is additive or complementary to the existing provincial and territorial regimes.
5. The genesis of s. 10(1) of the *Interest Act* appears to be as a type of consumer protection devised for the benefit of farmers and homeowners in the late 1800’s. The working group accepts the proposition that it may be desirable from a policy perspective to allow business lenders to negotiate their own pre-payment terms as is currently permitted for corporations and joint stock companies by the exemption found in s. 10(2)(a) of the *Interest Act*.
6. The concern we would raise in relation to expanding the list of entities included in the exception in s. 10(2)(b) is that this may result in important protection being taken away from small business operators who, for policy reasons, should be treated like consumers. Small business enterprises may have neither the expertise nor the bargaining power to negotiate favourable pre-payment terms for their mortgages. One way of limiting the impact on small business borrowers could be to stipulate that to fall within the exception, the loan must be made for business purposes and must not be secured on property that is a principal residence.
7. If the list of entities entitled to the exemption is to be expanded, we suggest that it be expanded to include the full range of business entities legislatively available in Canada rather than just the two types listed (partnerships and trusts). As an example, is the intent to include unlimited liability corporations, a type of business entity statutorily established in certain Canadian provinces? Will the extension of partnerships include all types of

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partnerships, including limited partnerships and limited liability partnerships? Is consideration being given to inclusion of not-for-profit entities such as not-for-profit corporations incorporated or continued under the *Canada Not-for-profit Corporations Act* and entities created under similar provincial or territorial statutes?

8. The consultation paper contemplates adding both partnerships and trusts that are settled in whole or in part for business or commercial purposes to s. 10(2)(b). The consultation report also indicates that the intention is not to extend s. 10(2)(b) to entities that are not legal persons. We note that a partnership does not have a separate and distinct legal existence from its partners, although some statutory provisions and trade practice treat a partnership as if it were a legal person for some purposes. We also note that except for specific purposes under specific statutes, such as the *Income Tax Act*, trusts are not generally treated in Canadian law as legal persons (although they may be created in some American jurisdictions and elsewhere as a type of legal person akin to a corporation). We suggest that more clarity is needed in terms of the criteria for selecting some types of business entities for inclusion in s. 10(2)(b) but not others.
9. Finally, we note that there are statutory provisions in both Ontario¹ and Manitoba² dealing with mortgage pre-payment rights that mirror the current version of section 10 of the *Interest Act* both in terms of the substantive pre-payment right itself and the categories of mortgages excepted from the application of the pre-payment provision (mortgages or debentures secured by a mortgage given by joint stock companies or other corporations). Were additional types of entities excepted from application of s. 10(1) of the federal legislation, the existing uniformity as between the provincial legislation and the federal legislation would, at least temporarily, be disrupted.

¹ *Mortgages Act*, R.S.O. 1990, c. M.40, s. 18.

² *The Mortgage Act*, C.C.S.M. c. M200, s. 20(6) and 20(7).