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CIVIL SECTION

SECTION 347 OF THE CRIMINAL CODE OF CANADA:

BUSINESS LAW PROBLEMS REMAIN

Charlottetown

Prince Edward Island

September, 2007

SECTION 347 OF THE CRIMINAL CODE OF CANADA: BUSINESS LAW PROBLEMS REMAIN

Background

[1] Loan sharking is a form of conduct akin to extortion in that the borrower is forced to pay excessive rates of interest. Subsection 291(1) of the *Criminal Code* was adopted in 1953 to address the crime of extortion and reads:

> Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempt to induce any person, whether or not he is the person threatened accused or menaced or to whom violence is shown, to do anything or to cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This section 291(1) from the *Criminal Code*, S.C. 1953-54, c. 51 received Royal Assent on June 26, 1954 and proclaimed into force on April 1, 1955. With the same wording, it became section 305 of the *Criminal Code*, R.S.C. 1970, c. C-34, and is now section 346 to the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The regulation of rates of interest arose in the *Small Loans Act*, R.S.C, 1970, c. S-11. That statute was repealed by *An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code*, S.C. 1980-81-82-83, C. 43, which added section 305.1 to the *Criminal Code*, making it a crime to contract for, or receive payment, of the prescribed criminal rate of interest. Section 305.1 was re-enacted unchanged as section 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. Section 347 is quite lengthy and its full text is set out in Schedule A.

[3] In her paper entitled, "*Section 347 of the Criminal Code: A Deeply Problematic Law*". (the "Waldron Report"), Professor Mary Anne Waldron gives the following history[1] of the criminal interest rate:

> " [2] Canada, unlike other countries, has never had much appetite for regulating the cost of borrowing. From the earliest of debates in the House of Commons, the widespread commitment to treating money as a marketable commodity for which the market must set a value is clear.5 Indeed, for many years, faithful members of the New Democratic Party took a principled stand against that trend and presented an annual private member's bill to regulate interest charges. It never succeeded.6

> It remained, until 1981, a surprising feature of our generally mixed economy that interest rates were largely unregulated, contrasted to the arguably more free market economy of the United States where a patchwork of usury laws still abounds.
>
> [3] So repeal of the Small Loans Act[7] made both practical sense and fit with the Canadian economic wisdom. But the same statutes[8] by which the Small Loans Act was repealed also enacted a usury limit of general application and enshrined it in the *Criminal Code*.[9] The stated justification was not consumer protection in the same sense as the Small Loans Act had been consumer legislation, but to give the police a clear test to aid in prosecution of loan sharks. Loan sharking, as prohibited under the previous law, required proof of some kind of threatening or violent behaviour. This was difficult to obtain, such persons who were victims in the cases generally being unwilling to appear in court. An objective test of a fixed interest rate was therefore desirable."[10]

[4] A review of WestlaweCarswell shows that the adoption of this objective test in section 347 is not effective as there are very few cases considering section 347 styled as "Regina v. [an accused]". But there are many cases where the section is cited in commercial litigation. A WestlaweCarswell search printout done on March 12, 2007 on section 347 cases is attached as Schedule B.

[5] At the 2002 Yellowknife meeting, the Conference received the Waldron Report. A copy of the Waldron Report is available on the Conference's website: http://www.chlc.ca/en/poam2/index.cfm?sec=2006&sub=2006g under the heading, Proceedings of the Annual Meetings, 2002, Yellowknife.

[6] At the 2002 meeting, the Conference requested that the Waldron Report be made available for consultation and that a further report with final recommendations be presented to the 2003 meeting. Although consultations were undertaken, little response was received. Professor Waldron's supplemental report was considered by the Conference during the 2003 annual meeting in Fredericton and the 2002 report was then accepted by the Conference. A copy of this supplemental report is available at: http://www.chlc.ca/en/poam2/index.cfm?sec=2006&sub=2006g under the heading, Proceedings of the Annual Meetings, 2003, Fredericton.

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[7] Professor Waldron points out that the section encompasses two ways of committing a criminal offence with respect to interest. First, one may enter into a contract which sets the interest at a rate above 60% per annum, effective annual rate. Second, even if one has not contracted for a criminal rate of interest, one may still commit the offence if, at the end of the day, one receives interest at what turns out to be a criminal rate. Both these, she says, are problematic in the commercial arena because she suggests, of the very provisions that are essential to make them useful in criminal prosecution[2].

[8] The Waldron Report dealt with the business and real estate law problems caused by section 347 in how it defines "interest" and the cases arising from the actuarial method of the calculation of interest prescribed by the section. For example, loans payable over a short time period, such as a real estate bridge loan for a house transaction, or stock issued by a start up business to a high risk or mezzanine financier that pays a large dividend [an "equity kicker"], can both offend section 347 and be found to be unlawful and unenforceable:

> "[58] Lawyers report concerns with the effect of s. 347 on their commercial practice. Academics have called for its repeal. As we have seen, the two most obvious commercial problems are with short term lending and with venture capital financing in which some profit participation is desirable to a lender. The three aspects of s. 347 that cause these difficulties are, in combination of effect, the broad definition of "interest", the conversion of all costs and charges to an annualized rate of interest, and the provisions for "wait and see" in s. 347 (1) (*b*). All three of these features are important measures to protect the integrity of any criminal provisions that use as a test of criminality only the rate of interest charged."[3]

[9] Following the 2003 adoption of the Waldron Report, the Conference wrote to the federal Justice Minister on January 28, 2004, recommending that section 347 of the *Criminal Code* be amended as recommended in the Waldron report. A copy of that letter is attached in Schedule C. It lists the recommended amendments. These ULCC recommendations have not been enacted to date.

[10] The Supreme Court of Canada has interpreted section 347 three times over the past ten years. Two of these cases are mentioned in the Waldron report and one decision was released after that Report was issued. These cases are:

i) *Garland v. Consumers' Gas* [1998] 3 S.C.R. 112; 40 O.R. (3d) 479; (1998), 165 D.L.R. (4th) 385: dealing with 5% late payment penalty on consumers' gas bills;

ii) *Degelder Construction Co. v. Dancorp Developments Ltd.* [1998] 3 S.C.R. 90; 165 D.L.R. (4th) 417; 20 R.P.R. (3d) 165; 5 C.B.R. (4th) 1: dealing with the contract terms for repayment vs. the time actually taken to repay the mortgage loan; and

iii) *Transport North American Express Inc. v. New Solutions Financial Corp.* [2004] 1 S.C.R. 249; (2004), 235 D.L.R. 385: dealing with an arms length loan to a borrower in financial trouble, represented by legal counsel, and applying notional severance to the offending contract interest provisions vs. the "blue pencil test" adopted by the Ontario Court of Appeal.

None of these three cases deals with the crime of loan sharking. All of these cases deal with a party to a transaction trying to have a contract term found to be unenforceable by reason of illegality.

[11] On November 4, 2004, Senator Plamondon introduced Bill S-19 seeking to amend section 347 to introduce new provisions aimed at curbing pay day loan lenders, pawn brokers and others lending to financially vulnerable Canadians. Bill S-19 would have lowered the criminal rate of interest from 60% per annum, to the Bank of Canada over night rate plus 35% per annum.[4]

[12] I appeared as a representative of the Canadian Bar Association at the hearings on Bill S-19 on February 3, 2005 before the Senate's Standing Committee on Banking, Trade and Commerce, to highlight that Bill S-19 did not address the business and real estate loan problems addressed in the Waldron report. After the hearings, Bill S-19 was amended to exclude from its applications loans that exceeded $100,000 in principal, which amendment would have greatly assisted in lessening the business problems. Bill S-19 failed when the last election was called.

[13] On October 6, 2006, Bill C-26 was introduced, which again focuses on payday lenders and others lending to financially vulnerable Canadians. If enacted, Bill C-26 will amend section 347 to exclude from its application loans for less than a $1,500 principal amount where the lender is regulated by a province or territory.[5]

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[14] As at March 19, 2007, the six jurisdictions listed in Schedule D have introduced legislation to regulate payday and like lenders, chiefly by having a provincial body set a maximum amount of "cost of borrowing" and other amounts that the lender may charge, which amounts have yet to be determined. These statutes are alike but regretfully, they are not uniform.

[15] It is my understanding that Quebec has not moved to enact separate legislation in that:

i) its regulators have been refusing to issue the mandatory permits to certain lenders under its *Consumer Protection Act*, R.S.Q., c.P-40. 1; and

ii) in addition, Quebec consumers have been relying on Quebec court decisions that have interpreted section 8 of that same statute to reduce interest and other charges to below 35% to 40% per annum. Section 8 provides that, "The consumer may demand the nullity of a contract or a reduction in his obligations.., where the obligation of the consumer is excessive, harsh or unconscionable." Quebec courts have used this section to reduce interest and like charges.[6]

[16] Nothing in Bill C-26 or these provincial statutes addresses the business problems remaining in section 347 nor have they taken into account the recommendations contained in the Waldron report.[7] The problems remain exactly as outlined in the Waldron Report.

[17] On March 19, 2007, I as chair of the Business Section and George Lamontagne as chair of the Real Property section of the Canadian Bar Association wrote to the Senate's Standing Committee on Banking, Trade and Commerce, which is studying Bill C-26, and highlighted to the Committee that Bill C-26 does not address these business problems. A copy of that letter is attached as Schedule E.

Recommendations:

[18] There have been the following recommendations to amend section 347 to deal with the business and real estate loan problems:

i) the Waldron recommendations put forward by the ULCC, as largely endorsed by the Canadian Bar Association to the Minister, which included raising the interest rate

limit, amending the definition of "interest", excluding from the application of the section federally and provincially regulated lenders, and restricting the civil consequences of a violation of the section, unless the transaction is subject to criminal prosecution; and

ii) the Senate amendment to Bill S-19 to exempt from its application loans in the principal amount of more than $100,000. This amendment seems to have followed some United States precedents where some statutes exempt form usury laws, loans over certain threshold amounts. See Schedule F where the Senate Committee asked the Canadian Bar Association to provide follow up information on New York State laws in this area, and such was provided.

For whatever reasons, none of these possible solutions has been taken up. All of them together, would solve the business problems caused by section 347.

[19] The recommendation that I am putting forward, is that:

The Criminal Section of the Uniform Law Conference of Canada consider examining the issue of the usefulness for criminal law purposes of section 347 of the *Criminal Code*, and the range of options for possible reform of this offence, from fundamental reform that would focus solely on the threats, coercion and violence characteristic of "loan sharking", to adjustments such as those recommended in the paper entitled "*Section 347 of the Criminal Code: A Deeply Problematic Law*". (M. A. Waldron, ULCC, 2002), and report back to ULCC in 2008.

Respectfully submitted:

Jennifer E. Babe
March 21, 2007

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1 Waldron Report para [2] and [3]

2 Waldron Report para [11]

3 For a complete review of these issues see the Waldron Report paragraphs. [11] to [57]

4 http://www2.parl.gc.ca/content/Senate/Bills/381/public/S-19/S-19_3/S-19_text-e.htm

5 http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2669595&Language=e&Mode=1&File=24

6 C. Masse, *Loi sur la protection du consommateur analyses et commentaires* (Cowansville: Les Editions Yvon Blais, 1999), at pp. 142 to 146.

7 [95] The experience of the profession and the comments of academics and judges suggest that s. 347 needs to be re-thought. Repeal is obviously the simplest and most often suggested reform. However, current impact of the section is not solely on commercial transactions. It is used to prosecute loan sharks and, although the test of a fixed rate of interest may not be the ideal description of the crime of loan sharking, it has practical benefits that are difficult to assess. It is not, I suggest, possible to recommend repeal by focusing solely on the commercial problems with the statute.

[96] Apart from repeal, the alternatives are to limit the definition of interest in ways that will not seriously erode the purposes of the section in controlling criminal behaviour; to raise the commercial rate; to exempt certain transactions or lenders; or to limit the civil consequences of exceeding the statutory rate. As with most complex issues, while one might wish the situation could be simplified, a complex solution is probably the most likely to produce the desirable results while minimizing the unintended consequences.

[97] In conclusion, I propose the following amendments to the section: a) The definition of "interest" should exclude the value of consideration for a loan that takes the form of participation in the borrower's profits, whether by an equity share, by royalty for use of property, or by a genuine pre-estimate of profits. It should also exclude the value of fees paid to independent professionals. b) The criminal rate of interest should be raised significantly. The figure should be selected in consultation with law enforcement authorities. c) The civil consequences of violating the criminal rate should be restricted unless the transaction is subject of a criminal prosecution. d) Certain industries which are subject to separate regulation should be exempted from the operation of the statute entirely. This could include payday lenders, should provincial legislation regulating their activities be enacted, as well as utilities subject to the scrutiny of regulatory agencies.

[98] These amendments should virtually eliminate the typical case in which the sophisticated corporate borrower, in the words of the Ontario Court of Appeal, "attempt[s]on technical grounds to avoid performance of an important business obligation." It will further reduce the risk for lenders and their lawyers that the transaction will be criminal in its effect or unpredictable in its civil results. Moreover, the suggested changes will not complicate the application of the section to the criminal law. None of these suggestions should impact on the ability of the section to provide a clear, simple to use test for loan sharking.

Schedule A

SCHEDULE "A"

CRIMINAL INTEREST RATE

Criminal interest rate

347. (1) Notwithstanding any Act of Parliament, every one who

(*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or

(*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

Definitions

(2) In this section,
"credit advanced"
«*capital prêté* »

"credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

"criminal rate"
«*taux criminel* »

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

"insurance charge"
«*frais d'assurance* »

"insurance charge" means the cost of insuring the risk assumed by the person who advances or is to advance credit under an agreement or arrangement, where the face amount of the insurance does not exceed the credit advanced;

"interest"
«*intérêt* »

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

"official fee"
«*taxe officielle* »

"official fee" means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

"overdraft charge"
«*frais pour découvert de compte* »

"overdraft charge" means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons or a deposit taking institution the deposits in which are insured, in whole or in part, by the Canada Deposit Insurance Corporation or guaranteed, in whole or in part, by the Quebec Deposit Insurance Board;

"required deposit balance"
«*dépôt de garantie* »

"required deposit balance" means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

Presumption

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

Proof of effective annual rate

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

Notice

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

Cross-examination with leave

(6) An accused or a defendant against whom a certificate referred to in subsection (4) is produced may, with leave of the court, require the attendance of the actuary for the purposes of cross-examination.

Consent required for proceedings

(7) No proceedings shall be commenced under this section without the consent of the Attorney General.

Application

(8) This section does not apply to any transaction to which the *Tax Rebate Discounting Act* applies.

R.S., 1985, c. C-46, s. 347; 1992, c. 1, s. 60(F).

Schedule B

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3 criminal cases

Auto Fric inc. c. Doucet
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Language: fr
Quebec > Court of Quebec

Smith c. Ferland Vachon
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Language: fr
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Ayrton v. PRL Financial (Alta.) Ltd.
Citation : 2004 ABQB 787 **Date:** November 2, 2004 **Language:** en
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Kebet Holdings Ltd. v. 351173 B.C. Ltd.
Citation : 1992 CanLII 2284 (BC C.A.) **Date:** November 4, 1992
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British Columbia > Court of Appeal

Kebet Holdings Ltd. v. 351173 B.C. Ltd.
Citation : 1992 CanLII 521 (BC C.A.) **Date:** December 22, 1992
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Vandekerkhove v. Litchfield
Citation : 1995 CanLII 1737 (BC C.A.) **Date:** January 27, 1995
Language: en
British Columbia > Court of Appeal

Noranco Capital Corp. v. Lee
Citation : 1998 CanLII 5758 (BC C.A.) **Date:** July 13, 1998 **Language:** en
British Columbia > Court of Appeal

J.D.M. Capital Ltd. v. Smith
Citation : 1998 CanLII 6433 (BC C.A.) **Date:** December 18, 1998
Language: en
British Columbia > Court of Appeal

Eron Mortgage Development (Judicial Trustee of) v.

- (•) All
- ( ) Appellate High Courts
- ( ) None

Endeavour Developments Ltd.
Citation : 1999 BCCA 666 **Date:** November 17, 1999 **Language:** en
British Columbia > Court of Appeal

Eron Mortgage Corp. (Trustee of) v. Endeavour Developments Ltd.
Citation : 2000 BCCA 211 **Date:** March 28, 2000 **Language:** en
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Konkolsky v. Elperin
Citation : 2003 BCPC 411 **Date:** November 10, 2003 **Language:** en
British Columbia > Provincial Court of British Columbia

Prudential Insurance Co. of America v. Cedar Hills Properties Ltd.
Citation : 1994 CanLII 2864 (BC S.C.) **Date:** January 11, 1994
Language: en
British Columbia > Supreme Court of British Columbia

Wei v. Oliver
Citation : 1994 CanLII 3162 (BC S.C.) **Date:** September 22, 1994
Language: en
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North Shore Credit Union v. 482021 B.C. Ltd.
Citation : 1997 CanLII 3560 (BC S.C.) **Date:** April 22, 1997 **Language:** en
British Columbia > Supreme Court of British Columbia

J.D.M. Capital Ltd. v. Smith
Citation : 1997 CanLII 2923 (BC S.C.) **Date:** December 10, 1997
Language: en
British Columbia > Supreme Court of British Columbia

MacKinnon v. National Money Mart Co. et al
Citation : 2004 BCSC 1534 **Date:** June 18, 2004 **Language:** en
British Columbia > Supreme Court of British Columbia

MacKinnon v. Vancouver City Savings Credit Union
Citation : 2004 BCSC 1604 **Date:** November 17, 2004 **Language:** en
British Columbia > Supreme Court of British Columbia

Lawson v. Poirier
Citation : 1998 CanLII 9787 (NB Q.B.) **Date:** May 7, 1998 **Language:** en
New Brunswick > Court of Queen's Bench of New Brunswick

Lamothe c. 9029-8480 Québec Inc.
Citation : 2002 IIJCan 20699 (QC C.Q.) **Date:** October 17, 2002
Language: fr
Quebec > Court of Quebec

9019-1552 Québec Inc. c. Trainor
Citation : 2003 IIJCan 46269 (QC C.Q.) **Date:** November 26, 2003

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R. c. Théodore
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Carignan c. Viau
Citation : 2006 QCCS 4916 **Date:** August 29, 2006 **Language:** fr
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Bénéficial Canada Inc. c. Sirois
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Les Investissements Rodi Inc. c. Armstrong
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Quebec > Court of Quebec

Yaya c. Pétrement (Cregesmo)
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3479552 Canada Inc. c. 9048-2332 Québec Inc.
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Poirier c. Tremblay
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Collington v. A1-Pawn Ltd.
Citation : 2004 ABPC 216 **Date:** November 25, 2004 **Language:** en
Alberta > Provincial Court

McLaughlin v. Valley Ridge Co-ownership Co-operative Ltd.
Citation : 2000 ABQB 157 **Date:** March 13, 2000 **Language:** en

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- ( ) None

Alberta > Court of Queen's Bench

Re Bearcat Explorations Ltd. (Bankrupt)
Citation : 2005 ABQB 639 **Date:** August 22, 2005 **Language:** en
Alberta > Court of Queen's Bench

Helo Enterprises Ltd. v. Standard Trust Co. (Liquidator of)
Citation : 1993 CanLII 957 (BC C.A.) **Date:** December 20, 1993 **Language:** en
British Columbia > Court of Appeal

Eron Mortgage Corp. (Trustee of) v. Endeavour Development Ltd.
Citation : 1999 BCCA 531 **Date:** September 17, 1999 **Language:** en
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De Maeseneer v. Degamo
Citation : 2002 BCPC 303 **Date:** July 23, 2002 **Language:** en
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A OK Payday Loan Inc. v. Watt
Citation : 2004 BCPC 467 **Date:** December 16, 2004 **Language:** en
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Georgia 50.4 Syndicate v. Butler
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British Columbia > Supreme Court of British Columbia

Simon v. Kopas & Burritt Funding Inc.
Citation : 1991 CanLII 1593 (BC S.C.) **Date:** September 23, 1991 **Language:** en
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Kebet Holdings Ltd. v. 351173 B.C. Ltd.
Citation : 1992 CanLII 1586 (BC S.C.) **Date:** April 29, 1992 **Language:** en
British Columbia > Supreme Court of British Columbia

The Toronto-Dominion Bank v. Cariboo Trail Hotel Ltd.
Citation : 1996 CanLII 2543 (BC S.C.) **Date:** December 5, 1996 **Language:** en
British Columbia > Supreme Court of British Columbia

Noramco Capital Corp. v. 485039 B.C. Ltd.
Citation : 1997 CanLII 3795 (BC S.C.) **Date:** March 19, 1997 **Language:** en
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Gee v. 458513 B.C. Ltd.
Citation : 1998 CanLII 6545 (BC S.C.) **Date:** June 25, 1998 **Language:** en
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Price Waterhouse v. Hilda Schiel
Citation : 2002 BCSC 123 **Date:** January 28, 2002 **Language:** en
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Huston v. Century Services Inc.
Citation : 2002 BCSC 684 **Date:** May 6, 2002 **Language:** en
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CIBC Mortgage v. Schiel
Citation : 2003 BCSC 551 **Date:** April 11, 2003 **Language:** en
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Oceanus Marine Inc. v. Saunders
Citation : 1996 CanLII 5309 (NS C.A.) **Date:** July 26, 1996 **Language:** en
Nova Scotia > Nova Scotia Court of Appeal

Berwick Electric Commission, (Re)
Citation : 2001 NSUARB 79 **Date:** October 30, 2001 **Language:** en
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New Glasgow (Town), Re
Citation : 2003 NSUARB 123 **Date:** October 14, 2003 **Language:** en
Nova Scotia > Nova Scotia Utility and Review Board

Port Hawkesbury (Town) (Re)
Citation : 2007 NSUARB 11 **Date:** February 13, 2007 **Language:** en
Nova Scotia > Nova Scotia Utility and Review Board

Jagela v. Beniusis
Citation : 1995 CanLII 951 (ON C.A.) **Date:** January 27, 1995 **Language:** en
Ontario > Court of Appeal for Ontario

Stoyka, Re

- (•) All
- ( ) Appellate High Courts
- ( ) None

Citation : 1991 CanLII 207 (ON L.S.D.C.) **Date:** June 20, 1991 **Language:** en
Ontario > Law Society of Upper Canada Discipline Committee / Convocation

Alexopoulos v. Resciniti
Citation : 2004 CanLII 4791 (ON S.C.) **Date:** July 27, 2004 **Language:** en
Ontario > Superior Court of Justice

Kumar v. Ramdewar
Citation : 2004 CanLII 21277 (ON S.C.) **Date:** July 19, 2004 **Language:** en
Ontario > Superior Court of Justice

Joseph v. Lefaivre Investments (Ottawa) Ltd.
Citation : 2005 CanLII 19830 (ON S.C.) **Date:** June 2, 2005 **Language:** en
Ontario > Superior Court of Justice

Smith v. National Money Mart Co.
Citation : 2005 CanLII 22225 (ON S.C.) **Date:** June 22, 2005 **Language:** en
Ontario > Superior Court of Justice

Decision No. 1801/06
Citation : 2006 ONWSIAT 2373 **Date:** October 23, 2006 **Language:** en
Ontario > Ontario Workplace Safety and Insurance Appeals Tribunal

Charbonneau c. Location financière d'autos M. & P. Inc.
Citation : 2004 IIJCan 9121 (QC C.Q.) **Date:** April 20, 2004 **Language:** fr
Quebec > Court of Quebec

Consumers Coalition of Alberta v. Alberta Energy and Utilities Board
Citation : 2000 ABCA 258 **Date:** September 29, 2000 **Language:** en
Alberta > Court of Appeal

Cash Store (Advance Finance Co.) v. Lajoie
Citation : 2002 ABPC 96 **Date:** June 11, 2002 **Language:** en
Alberta > Provincial Court

685231 Alberta Ltd. v. 512130 Alberta Ltd.
Citation : 1998 ABQB 47 **Date:** February 5, 1998 **Language:** en
Alberta > Court of Queen's Bench

Paragon Capital Corporation Ltd. v. 395342 Alberta Ltd.
Citation : 2004 ABQB 25 **Date:** January 21, 2004 **Language:** en
Alberta > Court of Queen's Bench

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Legislation Collection types

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- ( ) None

Case Law Collection types

English index: contains english as well as untranslated french documents

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D.C. Properties Ltd. v. 1100 Properties Ltd.
Citation : 1990 CanLII 349 (BC C.A.) **Date:** June 27, 1990 **Language:** en
British Columbia > Court of Appeal

Terracan Capital Corp. v. Pine Projects Ltd.
Citation : 1993 CanLII 2655 (BC C.A.) **Date:** February 3, 1993 **Language:** en
British Columbia > Court of Appeal

ITV Games Inc. v. Nichele
Citation : 2002 BCCA 38 **Date:** January 22, 2002 **Language:** en
British Columbia > Court of Appeal

Brehnan v. Outback Products Inc.
Citation : 2004 BCCA 272 **Date:** May 17, 2004 **Language:** en
British Columbia > Court of Appeal

Consolidated Financial v. Fords and Gentile
Citation : 2005 BCPC 209 **Date:** May 25, 2005 **Language:** en
British Columbia > Provincial Court of British Columbia

Bcorp Financial Inc. v. Baseline Resort Developments Inc.
Citation : 1990 CanLII 1734 (BC S.C.) **Date:** May 16, 1990 **Language:** en
British Columbia > Supreme Court of British Columbia

Furry Creek Timber Corp. v. Laad Ventures Ltd.
Citation : 1992 CanLII 378 (BC S.C.) **Date:** November 2, 1992 **Language:** en
British Columbia > Supreme Court of British Columbia

Bon Street Developments Ltd. v. Terracan Capital Corp.
Citation : 1992 CanLII 754 (BC S.C.) **Date:** December 18, 1992 **Language:** en
British Columbia > Supreme Court of British Columbia

Fine v. BLM Holdings Ltd.
Citation : 1994 CanLII 3101 (BC S.C.) **Date:** March 2, 1994 **Language:** en

- (•) All
- ( ) Appellate High Courts
- ( ) None

British Columbia > Supreme Court of British Columbia

Rotvold v. Rocky mountain Diesel Ltd.
Citation : 1994 CanLII 1620 (BC S.C.) **Date:** December 1, 1994
Language: en
British Columbia > Supreme Court of British Columbia

Keevil v. PT Southern Cross Aqua Culture Indonesia
Citation : 1995 CanLII 396 (BC S.C.) **Date:** November 23, 1995
Language: en
British Columbia > Supreme Court of British Columbia

Falcon Pacific Financial Corp. v. Kerkhoff Investment Syndication Corp.
Citation : 1996 CanLII 1461 (BC S.C.) **Date:** October 3, 1996
Language: en
British Columbia > Supreme Court of British Columbia

North American Property Corp. v. Kerlin Homes Ltd.
Citation : 1996 CanLII 660 (BC S.C.) **Date:** November 27, 1996
Language: en
British Columbia > Supreme Court of British Columbia

J.D.M. Capital Ltd. v. Smith
Citation : 1997 CanLII 4159 (BC S.C.) **Date:** June 18, 1997 **Language:** en
British Columbia > Supreme Court of British Columbia

Kosky v. Quadra Credit Union
Citation : 1999 CanLII 5247 (BC S.C.) **Date:** December 23, 1999
Language: en
British Columbia > Supreme Court of British Columbia

5908 Holdings Ltd. v. Hu Enterprises Ltd.
Citation : 2002 BCSC 942 **Date:** June 25, 2002 **Language:** en
British Columbia > Supreme Court of British Columbia

MacKinnon v. National Money Mart Co. et al
Citation : 2004 BCSC 1533 **Date:** June 18, 2004 **Language:** en
British Columbia > Supreme Court of British Columbia

Canadian Business Centre Ltd. v. Bridge Holdings Ltd.
Citation : 2005 BCSC 1772 **Date:** December 20, 2005 **Language:** en
British Columbia > Supreme Court of British Columbia

426008 B.C.Ltd. v. Catherine Ann Simons, Harvey Arthur Simons et al
Citation : 2006 BCSC 1809 **Date:** June 23, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

Western Canadian Coal Corp. v. Fawcett
Citation : 2006 BCSC 463 **Date:** February 24, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

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Case Law Collection types

English index: contains english as well as untranslated french documents

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Scarlett v. FortisBC Inc.
Citation : 2007 BCSC 43 **Date:** January 11, 2007 **Language:** en
British Columbia > Supreme Court of British Columbia

Artell Developments Ltd. v. 677950 Ontario Ltd.
Citation : [1993] 2 S.C.R. 443, 1993 CanLII 94 (S.C.C.) **Date:** June 4, 1993 **Language:** en
Canada > Supreme Court of Canada

Keystone Finance Inc. v. Phillipot
Citation : 2006 MBQB 266 **Date:** November 20, 2006 **Language:** en
Manitoba > Court of Queen's Bench of Manitoba

Burton v. 271053 N.B. Ltd.
Citation : 1996 CanLII 4838 (NB C.A.) **Date:** October 23, 1996 **Language:** en
New Brunswick > Court of Appeal of New Brunswick

Oceanus Marine Inc. v. Saunders
Citation : 1996 CanLII 5465 (NS S.C.) **Date:** February 5, 1996 **Language:** en
Nova Scotia > Supreme Court of Nova Scotia

Glenelg Homestead Ltd. v. Wile
Citation : 2003 NSSC 155 **Date:** July 24, 2003 **Language:** en
Nova Scotia > Supreme Court of Nova Scotia

William E. Thomson Associates Inc. v. Carpenter
Citation : 1989 CanLII 185 (ON C.A.) **Date:** September 5, 1989 **Language:** en
Ontario > Court of Appeal for Ontario

Milani v. Banks
Citation : 1997 CanLII 1765 (ON C.A.) **Date:** March 24, 1997 **Language:** en
Ontario > Court of Appeal for Ontario

Berthin, Re
Citation : 1994 CanLII 1026 (ON L.S.D.C.) **Date:** September 22, 1994 **Language:** en

- (•) All
- ( ) Appellate High Courts
- ( ) None

Ontario > Law Society of Upper Canada Discipline Committee / Convocation

1512759 Ontario Ltd. v. OLE Canada Inc.
Citation : 2002 CanLII 35569 (ON S.C.) **Date:** November 21, 2002
Language: en
Ontario > Superior Court of Justice

Shenkman Corp. v. Pondev Gardens Ltd.
Citation : 2005 CanLII 1061 (ON S.C.) **Date:** January 19, 2005
Language: en
Ontario > Superior Court of Justice

Bérubé v. Ottawa (City)
Citation : 2005 CanLII 2749 (ON S.C.) **Date:** February 4, 2005
Language: en
Ontario > Superior Court of Justice

Stop 'N Cash 1000 Inc. v. 1553785 Ontario Ltd.
Citation : 2005 CanLII 14013 (ON S.C.) **Date:** April 29, 2005
Language: en
Ontario > Superior Court of Justice

Markson v. MBNA Canada Bank
Citation : 2005 CanLII 45967 (ON S.C.D.C.) **Date:** December 9, 2005
Language: en
Ontario > Divisional Court

Metropolitan Trust Co. of Canada v. Twin Grand Developments Ltd.
Citation : 1994 CanLII 4961 (SK Q.B.) **Date:** October 12, 1994
Language: en
Saskatchewan > Court of Queen's Bench for Saskatchewan

Piscines Dauphin ltée, Re
Citation : 1998 IIJCan 13263 (QC C.A.) **Date:** February 17, 1998
Language: fr
Quebec > Court of Appeal

Hanny Magnetics Ltd. v. 5908 Holdings Ltd.
Citation : 2003 BCCA 32 **Date:** January 9, 2003 **Language:** en
British Columbia > Court of Appeal

Brehnan v. Outback Products Inc.
Citation : 2003 BCCA 415 **Date:** July 16, 2003 **Language:** en
British Columbia > Court of Appeal

Kebet Holdings Ltd. v. 351173 B.C. Ltd.
Citation : 1992 CanLII 134 (BC S.C.) **Date:** August 11, 1992
Language: en
British Columbia > Supreme Court of British Columbia

Cabott v. 564546 B.C. Ltd.
Citation : 2000 BCSC 579 **Date:** April 4, 2000 **Language:** en
British Columbia > Supreme Court of British Columbia

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MacKinnon v. Vancouver City Savings Credit Union
Citation : 2004 BCSC 125 **Date:** January 30, 2004 **Language:** en
British Columbia > Supreme Court of British Columbia

Middleton and Malic v. Farquharson et al.
Citation : 2004 BCSC 32 **Date:** January 13, 2004 **Language:** en
British Columbia > Supreme Court of British Columbia

Choi v. Canada (Minister of Citizenship and Immigration)
Citation : 2000 CanLII 15347 (F.C.) **Date:** May 8, 2000 **Language:** en
Canada > Federal Court of Canada

Garland v. Consumers' Gas Co. Ltd.
Citation : 1996 CanLII 1022 (ON C.A.) **Date:** September 18, 1996 **Language:** en
Ontario > Court of Appeal for Ontario

Smith v. National Money Mart Company
Citation : 2006 CanLII 14958 (ON C.A.) **Date:** May 8, 2006 **Language:** en
Ontario > Court of Appeal for Ontario

Garland v. Enbridge Gas Distribution Inc.
Citation : 2006 CanLII 36243 (ON S.C.) **Date:** September 25, 2006 **Language:** en
Ontario > Superior Court of Justice

Joseph v. Quik Payday Inc.
Citation : 2006 CanLII 40873 (ON S.C.) **Date:** December 1, 2006 **Language:** en
Ontario > Superior Court of Justice

Kolb v. Lebovics
Citation : 2003 CanLII 15634 (QC C.Q.) **Date:** December 15, 2003 **Language:** en
Quebec > Court of Quebec

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El Roi, llc c. Pousoulidis
Citation : 2006 QCCS 5093 **Date:** February 14, 2006 **Language:** en
Quebec > Superior Court

- (•) All
- ( ) Appellate High Courts
- ( ) None

Metropolitan Trust Company of Canada v. Twin Grand Developments Ltd.
Citation : 1995 CanLII 4023 (SK C.A.) **Date:** September 14, 1995
Language: en
Saskatchewan > Court of Appeal for Saskatchewan

Compagnie de finance Household du Canada c. Robillard
Citation : 2001 IIJCan 10346 (QC C.Q.) **Date:** November 6, 2001
Language: fr
Quebec > Court of Quebec

Dean's Cash Connection Ltd. v. Nelson-Wiger
Citation : 2001 ABPC 44 **Date:** March 1, 2001 **Language:** en
Alberta > Provincial Court

Goulet v. Da Silva
Citation : 2002 ABQB 369 **Date:** April 8, 2002 **Language:** en
Alberta > Court of Queen's Bench

MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.
Citation : 2004 BCCA 137 **Date:** March 10, 2004 **Language:** en
British Columbia > Court of Appeal

ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.
Citation : 2005 BCCA 605 **Date:** December 8, 2005 **Language:** en
British Columbia > Court of Appeal

Pacific National Developments Ltd. v. Standard Trust Co.
Citation : 1991 CanLII 1644 (BC S.C.) **Date:** January 29, 1991
Language: en
British Columbia > Supreme Court of British Columbia

Genera Investments Inc. v. Chester
Citation : 1991 CanLII 2286 (BC S.C.) **Date:** November 27, 1991
Language: en
British Columbia > Supreme Court of British Columbia

Vandekerhove v. Litchfield
Citation : 1993 CanLII 660 (BC S.C.) **Date:** June 18, 1993 **Language:** en
British Columbia > Supreme Court of British Columbia

360305 British Columbia Ltd. v. Pay Less Gas Co.
Citation : 1994 CanLII 791 (BC S.C.) **Date:** August 25, 1994
Language: en
British Columbia > Supreme Court of British Columbia

First Island Financial Services ltd. v. Kirkstone Management ltd.
Citation : 1995 CanLII 629 (BC S.C.) **Date:** March 21, 1995 **Language:** en
British Columbia > Supreme Court of British Columbia

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Price Waterhouse Ltd. v. Endeavour Development Ltd.
Citation : 1999 CanLII 5941 (BC S.C.) **Date:** July 27, 1999 **Language:** en
British Columbia > Supreme Court of British Columbia

Companies' Creditors Arrangement Act & iTV Games Inc. Estate
Citation : 2001 BCSC 1391 **Date:** October 10, 2001 **Language:** en
British Columbia > Supreme Court of British Columbia

Brehnan v. Outback Products Inc.
Citation : 2003 BCSC 703 **Date:** May 6, 2003 **Language:** en
British Columbia > Supreme Court of British Columbia

Eha v. Genge
Citation : 2006 BCSC 1249 **Date:** August 16, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

Kotello v. Loan
Citation : 2002 MBCA 179 **Date:** December 18, 2002 **Language:** en
Manitoba > Court of Appeal

Kotello v. Dimerman
Citation : 2006 MBCA 77 **Date:** July 4, 2006 **Language:** en
Manitoba > Court of Appeal

C.A.P.S. International Inc. v. Kotello
Citation : 2002 MBQB 142 **Date:** April 25, 2002 **Language:** en
Manitoba > Court of Queen's Bench of Manitoba

Smith v. National Money Mart Company
Citation : 2005 CanLII 36153 (ON C.A.) **Date:** October 7, 2005 **Language:** en
Ontario > Court of Appeal for Ontario

Payne v. Pearson
Citation : 2005 ABPC 225 **Date:** August 22, 2005 **Language:** en
Alberta > Provincial Court

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- All
- Appellate High Courts
- None

R. v. Marsy
Citation : 2006 ABPC 371 **Date:** December 21, 2006 **Language:** en
Alberta > Provincial Court

Discount Auto Sales v. Cash Store Inc.
Citation : 2005 ABQB 212 **Date:** March 23, 2005 **Language:** en
Alberta > Court of Queen's Bench

Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.
Citation : 2006 BCCA 373 **Date:** August 15, 2006 **Language:** en
British Columbia > Court of Appeal

Barnett v. Rademaker, et al
Citation : 2004 BCSC 1060 **Date:** August 16, 2004 **Language:** en
British Columbia > Supreme Court of British Columbia

Mackinnon v. National Money Mart Company et al
Citation : 2005 BCSC 271 **Date:** March 1, 2005 **Language:** en
British Columbia > Supreme Court of British Columbia

Degelder Construction Co. v. Dancorp Developments Ltd.
Citation : [1998] 3 S.C.R. 90, 1998 CanLII 765 (S.C.C.) **Date:** October 30, 1998 **Language:** en
Canada > Supreme Court of Canada

Lawson v. Poirier
Citation : 1999 CanLII 13929 (NB C.A.) **Date:** April 28, 1999 **Language:** en
New Brunswick > Court of Appeal of New Brunswick

Globex Foreign Exchange Corporation v. Kelcher
Citation : 2005 ABCA 419 **Date:** November 30, 2005 **Language:** en
Alberta > Court of Appeal

Ayrton v. PRL Financial (Alta.) Ltd.
Citation : 2006 ABCA 88 **Date:** March 16, 2006 **Language:** en
Alberta > Court of Appeal

ICI Mortgage Managers Inc. v. Brantec Developments Inc.
Citation : 2004 ABQB 395 **Date:** May 28, 2004 **Language:** en
Alberta > Court of Queen's Bench

Tschritter v. Rent Cash Inc.
Citation : 2004 ABQB 590 **Date:** August 3, 2004 **Language:** en
Alberta > Court of Queen's Bench

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Bearcat Explorations Ltd. (Bankrupt)
Citation : 2004 ABQB 601 **Date:** August 10, 2004 **Language:** en
Alberta > Court of Queen's Bench

Degelder Construction Co. v. Dancorp Developments Ltd.
Citation : 1996 CanLII 1434 (BC C.A.) **Date:** March 22, 1996 **Language:** en
British Columbia > Court of Appeal

Dahl v. Royal Bank of Canada
Citation : 2004 BCCA 419 **Date:** August 3, 2004 **Language:** en
British Columbia > Court of Appeal

Princeton Light & Power Co. Ltd. v. MacDonald
Citation : 2005 BCCA 296 **Date:** May 30, 2005 **Language:** en
British Columbia > Court of Appeal

Bodnar v. The Cash Store Inc.
Citation : 2006 BCCA 260 **Date:** May 25, 2006 **Language:** en
British Columbia > Court of Appeal

Degelder Construction Co. Ltd. v. Dancorp. Developments Ltd.
Citation : 1994 CanLII 1203 (BC S.C.) **Date:** September 16, 1994 **Language:** en
British Columbia > Supreme Court of British Columbia

JDM Capital Ltd. v. Smith
Citation : 1999 CanLII 4457 (BC S.C.) **Date:** October 29, 1999 **Language:** en
British Columbia > Supreme Court of British Columbia

Boyd v. International Utility Structure Inc.
Citation : 2001 BCSC 559 **Date:** April 17, 2001 **Language:** en
British Columbia > Supreme Court of British Columbia

Owners Strata Plan LMS 1816 (Owners) v. British Columbia Hydro and Power Authority
Citation : 2002 BCSC 485 **Date:** April 5, 2002 **Language:** en
British Columbia > Supreme Court of British Columbia

- (•) All
- ( ) Appellate High Courts
- ( ) None

Bodnar v. Payroll Loans Ltd. et al
Citation : 2006 BCSC 1132 **Date:** July 24, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

Kilroy v. A OK Payday Loans Inc.
Citation : 2006 BCSC 1213 **Date:** August 9, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)
Citation : 2006 FC 50 **Date:** January 19, 2006 **Language:** en
Canada > Federal Court of Canada

Transport North American Express Inc. v. New Solutions Financial Corp.
Citation : [2004] 1 S.C.R. 249, 2004 SCC 7 **Date:** February 12, 2004 **Language:** en
Canada > Supreme Court of Canada

Transport North American Express Inc. v. New Solutions Financial Corp.
Citation : 2002 CanLII 41979 (ON C.A.) **Date:** June 17, 2002 **Language:** en
Ontario > Court of Appeal for Ontario

Great America Leasing Corp. v. Yates
Citation : 2003 CanLII 16128 (ON C.A.) **Date:** December 4, 2003 **Language:** en
Ontario > Court of Appeal for Ontario

Markson v. MBNA Canada Bank
Citation : 2004 CanLII 6214 (ON S.C.) **Date:** July 28, 2004 **Language:** en
Ontario > Superior Court of Justice

Re Bearcat Exploration Ltd. (Bankrupt)
Citation : 2003 ABQB 788 **Date:** September 17, 2003 **Language:** en
Alberta > Court of Queen's Bench

Ayrton v. PRL Financial (Alta.) Ltd.
Citation : 2005 ABQB 311 **Date:** April 22, 2005 **Language:** en
Alberta > Court of Queen's Bench

Globex Foreign Exchange Corporation v. Kelcher
Citation : 2005 ABQB 676 **Date:** September 13, 2005 **Language:** en
Alberta > Court of Queen's Bench

Canada Trustco Mortgage Co. v. Regis and Velma Renard
Citation : 2006 BCSC 1609 **Date:** October 31, 2006 **Language:** en
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Garland v. Consumers' Gas Co.
Citation : [1998] 3 S.C.R. 112, 1998 CanLII 766 (S.C.C.) **Date:** October 30, 1998 **Language:** en
Canada > Supreme Court of Canada

Smith v. National Money Mart Company
Citation : 2007 CanLII 186 (ON S.C.) **Date:** January 5, 2007
Language: en
Ontario > Superior Court of Justice

Mccutcheon v. Cash Store Inc.
Citation : 2006 CanLII 15754 (ON S.C.) **Date:** May 10, 2006
Language: en
Ontario > Superior Court of Justice

Markson v. MBNA Canada Bank
Citation : 2005 CanLII 39888 (ON S.C.D.C.) **Date:** October 27, 2005
Language: en
Ontario > Divisional Court

Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd. et al
Citation : 2006 BCSC 1018 **Date:** June 30, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

Parsons v. Coast Capital Savings Credit Union
Citation : 2006 BCSC 552 **Date:** April 6, 2006 **Language:** en
British Columbia > Supreme Court of British Columbia

Garland v. Consumers' Gas Co.
Citation : [2004] 1 S.C.R. 629, 2004 SCC 25 **Date:** April 22, 2004
Language: en
Canada > Supreme Court of Canada

Garland v. Consumers' Gas Company Ltd.
Citation : 2001 CanLII 8619 (ON C.A.) **Date:** December 3, 2001
Language: en
Ontario > Court of Appeal for Ontario

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- (•) All
- ( ) Appellate High Courts
- ( ) None

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January 28, 2004

The Honourable Irwin Cotler
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Sir:

Re: Amendment of s. 347 of the *Criminal Code of Canada*

The Uniform Law Conference of Canada is an inter-governmental forum comprised of lawyers and policy analysts from the federal Department of Justice and the Departments of Justice of the provinces and territories as well as private lawyers and academics. Its object is to harmonize provincial and territorial law and, where appropriate, federal law. The Conference meets each August. The head of the Canadian delegation on the civil side is Ms. Kathryn Sabo, Acting Senior General Counsel, Public Law, Policy Section, Department of Justice and on the criminal side, Ms. Catherine Kane, Senior Counsel/Director, Policy Centre for Victim Issues, Department of Justice.

At the meeting of the Uniform Law Conference of Canada held in August, 2002 Yellowknife, Northwest Territories, the Conference considered a paper submitted by Professor Mary Anne Waldron of the Faculty of Law of the University of Victoria on the effect of s. 347 of the *Criminal Code of Canada*. Professor Waldron's paper identified concerns created by s. 347 with respect to activities in the area of commercial lending which may constitute a criminal offence given that the effective annual rate on credit advanced under an agreement or arrangement may be in excess of 60% and contained the following recommendations for amendments to s. 347:

1. The definition of "interest" should exclude the value of consideration for a loan that takes the form of participation in the borrower's profits, whether by an equity share, a royalty for use of property or a genuine pre-estimate of profits. It should also exclude the value of fees paid to independent professionals.

2. The criminal rate of interest should be raised significantly. The figure should be selected in consultation with law enforcement agent authorities.

3. The civil consequences of violating the criminal provision should be restricted unless the transaction is the subject of a criminal prosecution.

4. Certain industries which are subject to separate regulation should be exempted from operation of the statute entirely. This could include pay day lenders, as well as utilities already subject to scrutiny by regulatory agencies.

At the 2002 meeting, the Conference requested that the paper be made available for consultation and that a further report with final recommendations be made to the 2003 meeting.

Although the consultation was undertaken, there was not a significant response. Professor Waldron's further report was considered by the Conference at its 2003 meeting in Fredericton, New Brunswick. The Conference resolved to accept Professor Waldron's recommendations and to forward them to you for your consideration.

I trust that you will give this matter your consideration. If I can be of any further assistance, please do not hesitate to contact me.

Yours truly,

Gregory K. Steele, Q.C.
President
GKS/mf

Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Irwin Cotler, P.C., O.C., M.P./c.p., o.c., député
Ottawa, Canada K1A 0H8

NOV 3 2004

Mr. Gregory K. Steele, Q.C.
President
Uniform Law Conference of Canada
c/o 622 Hochelaga Street
Ottawa, Ontario K1K 2E9

Dear Mr. Steele:

Thank you for your correspondence concerning the Uniform Law Conference of Canada's recommendations for amendments to section 347 of the *Criminal Code*. I regret the delay in responding.

Issues relating to section 347 of the *Criminal Code* have been a matter of ongoing review by federal, provincial, and territorial officials. This examination has focused on short-term consumer credit, such as "pay-day loans." Professor Mary Ann Waldron's paper entitled *Section 347 of the Criminal Code: "A Deeply Problematic Law,"* from which the Uniform Law Conference drew its recommendations, examines the issue of short-term consumer credit, and also considers issues related to this section from a larger perspective, including its effect on commercial loans. In providing this broader perspective, Professor Waldron's analysis is a valuable addition to the policy review process.

The policy review currently underway has not determined what, if any, changes to the law may be advisable in this area. However, I am grateful for the input of the Uniform Law Conference of Canada, which will be of significant assistance in the consideration of the issue.

Thank you again for writing.

Yours sincerely,

Irwin Cotler

Irwin Cotler

Canada

Schedule D

Payday Loans & Lending - Provincial Legislation & Contacts – May 22, 2007

Jurisdiction	Legislation	Status	Proclamation	Contact
Alberta	Policy decision re any legislation has not been made. Any legislation would very likely amend the regulations under the *Fair Trading Act*			**Brock Ketcham** Project Advisor Consumer Programs Service Alberta 3rd fl Commerce Place 10155 – 102nd Street Edmonton, AB, T5J 4L4 780-422-3637
British Columbia	Business Practices and Consumer Protection (Payday Loans) Amendment Act, 2007, Bill 27. Private Member Bill	1st Reading – April 18, 2007		**Anne Preyde** Manager of Legislation Corporate Policy and Planning Office Ministry of Public Safety and Solicitor General 11th Fl - 1001 Douglas Street Victoria, BC, V8V 1X4 250-356-2932
	Payday Lending Act, Bill M 206 Private Member Bill	1st Reading - May 8, 2006		
	Payday Lending Act, Bill M 209 Gov't Bill	1st Reading - March 26, 2007		

Jurisdiction	Legislation	Status	Proclamation	Contact
Manitoba	Consumer Protection Amendment Act (Payday Loans), S.M., 2006, c. 31	Royal Assent – Dec. 7, 2006	Not yet proclaimed in force	**Ms. Nancy Anderson** Director Consumers' Bureau Consumer and Corporate Affairs Manitoba Finance Department 302 – 258 Portage Avenue Winnipeg, MB R3C 0B6 (204) 945-4062
New Brunswick	An Act Respecting Payday Loans, Bill 38	1st Reading – March 2, 2007		**Ms. Marilyn Evans Born** Chief Rentalsman Rentalsman / Justice and Consumer Affairs Kings Place 440 King Street Fredericton, New Brunswick E3B 5H8 Canada (506) 453-2659
Newfoundland & Labrador	No legislation			**Mr. Gerard Burke** Director of Trade Practices Trade Practices and Licensing Consumer & Commercial Affairs Government Services P.O. Box 8700, 5 Mews Place St- John's, NL, A1B 4J6 709-729-2717

Jurisdiction	Legislation	Status	Proclamation	Contact
North West Territories	No legislation.			**Mr. Michael Gagnon** Senior Policy Advisor, Community Operations Municipal and Community Affairs #600, 5201-50th Avenue Yellowknife, NT X1A 2L9 (867) 873-7125
Nova Scotia	Consumer Protection Act (Amendment Act), S.N.S., 2006, c. 25 (previously Bill 87)	Royal Assent – Nov 23, 2006	Not yet proclaimed in force	**Mr. Richard Shaffner** Director Consumer & Business Policy Service Nova Scotia And Municipal Relations 1505 Barrington Street 8th South P.O. Box 1003 Halifax, N.S. B3J 3K5 902-424-0676
Nunuvut	No legislation.			**Ms. Leah Aupaluktuq** Senior Consumer Affairs Officer Department of Community & Government Services Government of Nunavut Box 440, 267 Lagoon Drive Baker Lake, NU X0C 0A0 (867) 793-3303

Jurisdiction	Legislation	Status	Proclamation	Contact	
Ontario	Bill 205, Consumer Protection Amendment Act (Payday Loans), 2007 Private Member Bill	1st Reading – April 16, 2007		**Mr. Jeff Hurdman** Senior Policy Adviser - Policy Branch 5th Flr 777 Bay St Toronto ON, M7A2J3 416- 326-8882 Jeff.Hurdman@ontario.ca (new contact – April 20, 2007)	**Mr. Rob Harper** Senior Policy Advisor Ministry of Government Services Policy Branch 250 Yonge Street, 35th Floor Toronto, ON M5B 2N5 416-326-8865
	New regulations under the *Consumer Protection Act, 2002* will require additional loan document and signage disclosures by "pay day lenders" to tell consumers the total cost of the loan	Published April 27, 2007	August first, 2007		
PEI	Payday Loans Act, Bill 100	1st Reading – Nov. 23, 2006		**Ms. Katharine Tummon** Corporate Counsel/Registrar of Consumer Affairs Consumer, Corporate and Insurance Division Office of the Attorney General 95-105 Rochford Street Charlottetown, PE, C1A 7N8 (902) 368-4542	

Jurisdiction	Legislation	Status	Proclamation	Contact
Quebec	Under Quebec's Consumer Protection Act (CPA) a lender must have a license to operate in Quebec (Banks and Credit Unions are exempted from this requirement). The Agency may refuse to issue a license if (under section 325 CPA) "there are reasonable grounds to believe that the permit must be refused to ensure, in the public interest, that the business activities contemplated in this chapter will be performed with honesty and competence." Section 8 of the CPA allows a consumer to : «demand the nullity of a contract or a reduction in his obligations there under where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable» In the past, consumers challenged in courts credit agreements on the ground that they were in breach with section 8 CPA. Courts generally ruled that a credit contract with an interest rate higher than approx. 35% is unconscionable under section 8 CPA. Therefore, in order to comply with those rulings, the Agency determined that a license may be issued only if the lender demonstrates the he is not claiming credit charges over the rate of 35%. This requirement is not provided by regulation. It is a decision taken, case-by-case, under section 325 CPA. Sections 8 & 325 of the *Consumer Protection Act* are attached.			**Mr. André Allard** Office de la protection du consommateur Direction des affaires juridiques et des pratiques commerciales 5199 Sherbrooke Street East Suite 3671 Montréal, QC H1T 3X2 (514) 253-6556 x3422

Jurisdiction	Legislation	Status	Proclamation	Contact
Saskatchewan	The Payday Loans Act, Bill 43	1st Reading – Mar. 12, 2007 2nd Reading - May 9, 2007 Sent Standing Committee on Intergovernmental Affairs & Infrastructure – 3rd Reading – May 14, 2007 Royal Assent – May 17, 2007		**Ms. Karen Pflanzner** Crown Counsel Legislative Services Branch Saskatchewan Justice 800 - 1874 Scarth Street Regina, SK, S4P 34B3 (306) 787-8107
Yukon	Possible amendments re payday loans are under legislative review by the Policy Branch.			**Ms. Roberta Allen** Consumer Relations Officer Consumer & Safety Services Community Services The Andrew A. Philipsen Law Centre 3rd Floor, 2130 Second Avenue, Y1A 5H6 P.O. Box 2703 Whitehorse, YK, Y1A 5H6 (867) 667-5360

Schedule E

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

March 19, 2007

The Honourable Senator Jerahmiel S. Grafstein, Q.C.
Chair
Senate Committee on Banking, Trade and Commerce
The Senate
Ottawa, ON K1A 0A4

Dear Senator Grafstein:

Re: Bill C-26 and *Criminal Code* section 347

We are writing on behalf of the National Business Law and Real Property Sections of the Canadian Bar Association to highlight some problems that will remain unsolved if the pending amendments to section 347 of the *Criminal Code* in Bill C-26 are adopted.

When the Senate Banking Committee considered Bill S-19 in 2005, the CBA brought to your attention that it would have the unintended effect of making many legitimate loan transactions between business parties unlawful.[1] Your Committee amended Bill S-19 to address the problem. That Bill died on the Order Paper. Unfortunately, Bill C-26 fails to address the business problems caused by section 347.

For example, short-term bridge financing in a real estate project may have an annualized rate of interest in excess of 60% per annum when extrapolated to the full year. High-risk business, such as start-ups and technology companies, often borrow money from "mezzanine financing" lenders by providing an "equity kicker" to the party prepared to make the loan. Such equity amounts can take the annual "interest" earned by the lender in excess of 60% per annum. Indeed, in the three cases relating to criminal interest considered in the past ten years by the Supreme Court of Canada[2], none had to do

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1 Letter to Senator Grafstein from Catherine Wade and Richard Wenner, dated January 25, 2005. Copy attached for ease of reference.

2 *Garland v. Consumers' Gas,* [1998] 3 S.C.R. 112; 40 O.R. (3d) 479; (1998), 165 D.L. R. (4th) 385. (5% late payment penalty on consumers' gas bills); *Degelder Construction Co. v. Dancorp Developments Ltd,* [1998] 3 S.C.R. 90; 165 D.L.R. (4th) 417; 20 R.P.R. (3d) 165; 5 C.B.R. (4th) 1. (contract terms for repayment vs the time actually taken to repay the mortgage loan); *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249; (2004), 235 D.L.R. 385. (arms length loan to borrower in financial trouble, represented by legal counsel, and applying notional severance to the offending contract interest provisions vs "blue pencil test" adopted by the Ontario Court of Appeal).

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with the targeted crime of loan sharking, but rather with commercial disputes where a party was endeavouring to find a contractual provision unenforceable by reason of illegality for breach of section 347 of the *Criminal Code*.

In 2005, the CBA commended to the Senate Banking Committee the work of the Uniform Law Conference of Canada.[3] We recommended changes to section 347 to avoid business and real estate contracts contravening the section:

1. The definition of "interest" should exclude the value of consideration for a loan that takes the form of participation in the borrower's profits, whether by an equity share, a royalty for use of property or a genuine pre-estimate of profits. It should also exclude the value of fees paid to independent professionals.

2. The criminal rate of interest should be raised significantly. The figures should be selected in consultation with law enforcement agent authorities. (Although, unlike ULCC, we would restrict this to non-commercial financing).

3. The civil consequences of violating the criminal provision should be restricted unless the transaction is subject to criminal prosecution.

These recommendations have not yet been incorporated into section 347 and should be. Bill C-26 presents an ideal time to do so.

The CBA applauds the government's efforts to better protect consumers of payday loan operations. However, business problems caused by section 347, which have nothing to do with the crime of loan sharking, remain a real issue for Canadians. We urge you to consider further amendments to section 347.

Yours truly,

Original signed by Tamra L. Thomson for Jennifer Babe and George Lamontagne

Jennifer Babe
Chair
National Business Law Section

George Lamontagne
Chair
National Real Property Section

cc. Line Gravel, Clerk, Senate Banking Committee

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[3] Prof. Mary Anne Waldron, "Section 347 of the Criminal Code: A Deeply Problematic Law", prepared for Uniform Law Conference of Canada. See paper and 2003 annual meeting presentations at www.ulcc.ca.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

January 25, 2005

The Honourable Senator Jerahmiel S. Grafstein, Q.C.
Chair
Standing Committee on Banking, Trade and Commerce
The Senate
Ottawa ON K1A 0A4

Dear Senator Grafstein:

Re: Bill S-19: Criminal Interest Rate

We write as Chairs of the Canadian Bar Association Business Law and Real Property Law Sections (CBA Sections) to express our concerns about the impact of the amendment to section 347 of the *Criminal Code* proposed in Bill S-19.

The CBA is a national association representing over 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

Bill S-19 would amend the designated rate of criminal interest from 60% per annum, to the inter-bank rate plus 35% per annum.[1] While the laudable intent of Bill S-19 may be to increase consumer protection against payday loan operations, the unintended effect will be to make many legitimate loan transactions between business parties unlawful. For example, short-term bridge financing in a real estate project may have an annualized rate of interest in excess of 60% per annum when extrapolated to the full year. High-risk business, such as start-ups and technology companies, often borrow money from "mezzanine financing" lenders by providing an "equity kicker" to the party prepared to make the loan. Such equity amounts can take the annual "interest" earned by the lender in excess of 60% per annum.

The Uniform Law Conference of Canada (ULCC) has recommended amendments to the definition of "interest" in section 347 which would take these consensual business financings out of the application of section 347. We endorse the ULCC's recommendations that deal specifically with business:

[1] The current inter-bank rate is 2.5%, so the rate designated to be criminal would be 2.5% + 35% = 37.5%

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1. The definition of "interest" should exclude the value of consideration for a loan that takes the form of participation in the borrower's profits, whether by an equity share, a royalty for use of property or a genuine pre-estimate of profits. It should also exclude the value of fees paid to independent professionals.
2. The criminal rate of interest should be raised significantly. The figures should be selected in consultation with law enforcement agent authorities. (Although, unlike ULCC, we would restrict this to non-commercial financing).
3. The civil consequences of violating the criminal provision should be restricted unless the transaction is subject to criminal prosecution.

The issues raised by the ULCC are of key concern for business deals and should be taken into consideration in draft specific amendments to section 347. If Bill S-19 becomes law without changing the definition of "interest" for arms length commercial financing, the result will be to make *bona fide* business loans unlawful.

We enclose the letter from the ULCC to the Minister of Justice of January 28th, 2004 for your reference. The papers of Professor Waldron referred to in it are available at www.ulcc.ca.

We strongly recommend against the adoption of Bill S-19 without the necessary changes to the definition of interest. The CBA Sections would welcome the opportunity to meet with the Senate committee to discuss Bill S-19 at greater length.

Yours truly,

(Original signed by Trevor M. Rajah on behalf of Catherine E. Wade and Richard Wenner)

Catherine E. Wade
Chair, Business Law Section

Richard Wenner
Chair, Real Property Law Section

cc: The Honourable Senator Madeleine Plamondon

Encl.

Schedule F

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

The Voice of the Legal Profession

La voix de la profession juridique

February 14, 2005

The Honourable Senator Jerahmiel S. Grafstein, Q.C.
Chair
Standing Committee on Banking, Trade and Commerce
The Senate
Ottawa ON K1A 0A4

Dear Senator Grafstein:

Re: Bill S-19: Criminal Interest Rate

I refer to my appearance on February 3, 2005, before the Standing Committee on Banking, Trade and Commerce on behalf of the Canadian Bar Association Business Law and Real Property Law Sections (CBA Sections).

As per the request of the Committee, I enclose an article on New York State usury rules.[1] The article makes it clear that the law is not simple. There is indeed a 16% state law for usury and also a federal 25% cap for criminal usury. However, there are other laws affecting compounding, first mortgages, prepayment, and the like. The article notes that many loans are exempted, with the result:

- virtually all business loans over $2.5 million are exempted from these statutes
- loans from certain federally regulated lenders are exempted

There are also other exemptions and cases that reinforce the CBA Sections' point that there is no "simple" fix to the situation and this is not achieved by merely adjusting the rate.

Yours truly,

(Original signed by Trevor M. Rajah on behalf of Jennifer E. Babe)

Jennifer E. Babe
Vice Chair, Business Law Section

cc: The Honourable Senator Madeleine Plamondon

Encl.

[1] Joshua Stein, "Confusory Unraveled: New York Lenders Face Usury Risks when in Atypical or Small Transactions", 2001 New York State Bar Association Journal, (July/August).

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Confusury Unraveled: New York Lenders Face Usury Risks When in Atypical or Small Transactions

By Joshua Stein

New York State Bar Association Journal, July/August 2001

Joshua Stein is a real estate and finance partner in the New York office of Latham & Watkins (e-mail joshua.stein@lw.com). A member of the American College of Real Estate Lawyers, he serves as chair of the Practising Law Institute annual seminar on commercial real estate financing. This article, an updated and revised version of a review of usury law that appeared in the fall 1993 newsletter of the NYSBA Real Property Law Section, is to be a chapter in the author's forthcoming book, New York Commercial Mortgage Transactions (Aspen Law & Business). The author is a graduate of the University of California at Berkely and received his J.D. degree from Columbia University.

New York's usury law consists of a scrambled collection of statutes, most of which appear in the New York General Obligations Law.[1] Combined with federal preemption in certain areas described below, these statutes exempt most substantial commercial lending transactions from any usury restrictions.[2]

"Usury" remains a potential trap only for the unwary loan shark (who probably does not care, because the judicial system is not highly relevant to his activities anyway) and participants in a few other atypical or small lending transactions.[3]

In the occasional weird case where usury restrictions do apply, a violation can invalidate the entire loan and constitute a felony.[4] A practitioner must be alert to this risk whenever considering any loan transaction that is small or involves a borrower other than a corporation or limited liability company.[5]

As in any other area, the practitioner should always refer to the most current version of the applicable statutes and other law before rendering any advice on New York usury law.

The following discussion of New York usury law does not cover any loan

restrictions beyond usury and compound interest, such as prepayment, attorneys' fees, discount points, prepaid interest, and late charges. Adjustable-rate residential mortgages are subject to their own interacting federal and state limitations and disclosure requirements, which are beyond the scope of this article.[6] Exemptions for broker-dealer loans are also not addressed.[7] For ordinary mortgage loan transactions, the most common escape hatches from usury include those discussed below.

The flowchart accompanying this article is designed to summarize New York's usury maze. The flowchart analysis begins on page __, with the oval marked "START." It continues down the page. Lines indicate the sequence of issues to consider. Diamond boxes indicate decision points, each with a question that can be answered "YES" or "NO." Depending on the answer, the analysis continues down one path or the other. [NOTE: ADD FLOWCHART.]

The paths of analysis sometimes lead to more diamond boxes, each another decision point. Eventually, all roads lead to rectangles, representing conclusions. Some of these rectangles represent incomplete conclusions. In those cases, the rectangle has a second path leading out of it, and the analysis continues down that path because one must ask more questions.

Most boxes on the flowchart contain small reference number(s). Each such number refers to a footnote in the following discussion, directing the reader to the text and footnotes where a discussion of the particular issue begins. That discussion contains citations, details, qualifications, and more information to consider. The flowchart should be considered only in the context of this article as a whole.

Do not take this flowchart too literally. It merely summarizes information in a way that many people find practical and interesting. An attorney considering a particular set of facts may find that by using some other order or approach instead, the attorney will achieve the best possible result and the most appropriate analytical basis for it.

Maximum Rate

In the rare factual circumstance where New York's usury ceiling actually applies and federal law does not preempt it, a lender usually cannot charge interest higher than 16% per annum.[8] The Banking Law contains similar provisions.[9] "Interest" includes certain other charges payable to the lender on account of the loan. The usury ceiling rises by 150 basis points to 17.5% per annum for loans secured by cooperative apartments.[10]

Floating-rate loans and loans that contemplate future advances create a few special complications of their own, which are beyond the scope of this article.[11]

The courts have established some rules for calculating just how much interest a lender is actually collecting on a loan (such as the effect of prepayment of interest). These rules can be crucial in close cases but are outside the scope of the present discussion.

Compound Interest

Independent of the usury restrictions, New York limits a lender's ability to collect compound interest. Even if a loan is not usurious, the lender may be barred from charging interest on the borrower's unpaid interest. In general, New York prohibits compound interest on any loan of $250,000 or less, except in the following cases:

• *Certain Business Loans.* Business loans of $100,000 or more secured under the Uniform Commercial Code with a rate at or below prime plus 8% percent per annum; [12]

• *Certain UCC Loans.* Demand loans of $5,000 or more secured by certain Uniform Commercial Code documents [13]; and

• *Other.* Statutory exceptions enacted for particular industries. [14]

New York prohibits compound interest on any loan, regardless of amount, secured by a "one or two family owner-occupied residence," including a cooperative apartment. [15]

If a lender illegally charges compound interest and the net effective interest rate after compounding is at or below the usury ceiling, he or she must refund the "compounded" part of the interest but not the other interest already paid. In that case, the lender faces no other forfeiture risk. If the effective interest rate, after compounding, exceeds the usury ceiling, then the severe penalties for regular "usury" will apply. [16]

Until 1989, New York courts had, for almost two centuries, invalidated compound interest in a number of cases, as if interest payable on unpaid dollars of "interest" was something completely different from interest payable on unpaid dollars of "principal." Although in recent years courts have sometimes apparently struggled to find exceptions to the general New York rules against compound interest, New York has retained its rule against compound interest. The Legislature solved the problem in 1989 primarily at the urging of Martin E. Gold, formerly director of corporate law in the New York City Law Department and now with Sidley Austin Brown & Wood in Manhattan. [17]

If a mortgage loan that provides for "compound" interest does not run afoul of New York's rules in this area, the lender must still confront another old friend, the mortgage recording tax. If the loan documents provide, or the parties ever agree, that unpaid interest shall be added to principal (for example, as part of a workout), then the loan thereby incurs additional mortgage recording tax on the resulting new "principal indebtedness." Moreover, the Department of Taxation and Finance takes the view that as soon as interest starts to accrue on previously accrued interest, the previously accrued interest becomes principal and hence itself subject to mortgage recording tax. [18]

Penalties for Usury

If a loan is usurious, it becomes wholly void. [19] The lender forfeits all

principal and interest [20] (the loan becomes a gift) and the borrower can also recover the usurious portion of the interest previously paid. [21] If the lender is "a savings bank, a savings and loan association or a federal savings and loan association" or within certain other categories of institutional lender, the statute provides a different penalty: the lender forfeits all interest (not just the usurious part of the interest), but not principal, and may also be required to repay the borrower twice the interest actually paid. [22]

Criminal Usury

New York has a separate criminal usury ceiling of 25% per annum on nonexempt loans. Any lender that knowingly collects criminally usurious interest commits a felony. [23] The criminal usury ceiling applies to some loans that are not subject to civil usury restrictions at all: loans of $250,000 or more; and certain secured loans of $5000 or more that are payable on demand.

In these cases, however, New York law does not appear to give the victim of usury any express civil remedy against the lender. [24] A few cases say that banking institutions are exempt from criminal liability for usury. [25] The only penalty available against them would thus appear to be forfeiture.

Federal Preemption for Residential First-Mortgage Loans

Federal law preempts all state interest-rate restrictions, presumably both "usury" and "compound interest" restrictions, for residential first-mortgage loans (including first-lien co-op loans) made to any borrower by any federally insured institution, federally regulated lender, federal government agency, lender approved by the Federal Home Loan Mortgage Corporation (Freddie Mac), any other lender that regularly makes residential mortgage loans totaling more than $1,000,000 a year, or a number of other lenders regulated by or connected with the federal government.

Although Congress allowed the states to override the federal usury preemption for residential first-mortgage loans, New York did not. To the contrary, New York affirmed the federal override. [26] As a result, virtually all residential first mortgages [27] are exempt from New York usury restrictions. [28] Federal law also supersedes state usury restrictions for certain other categories of loans, but these miscellaneous exemptions generally will have no practical effect given the other exemptions and preemptions available and today's rate environment. [29]

Junior Mortgages; Other Institutional Lender Exemptions

A New York state-chartered bank or trust company or licensed mortgage banker may make junior mortgage loans to individual borrowers at whatever interest rate is "agreed to by the [lender] and the borrower." [30] By implication these loans are exempt from the usury ceiling in the New York General Obligations Law. [31]

Similar exemptions-by-implication would probably apply to certain "personal loans" made by a state bank or trust company, foreign bank, or other licensed

lenders. [32] Other state banking-related statutes may permit specific regulated lenders to charge interest above the usury ceiling.

Loans of $2,500,000 or More

Any loan of $2,500,000 or more (including obligatory future advances), is exempt from all usury restrictions, including criminal usury. [33] This simple provision of New York law basically solves the usury problem for all substantial commercial loans and is a major part of the reason that multistate loan transactions are often governed by New York law.

If, however, the loan is secured by a "one or two family owner-occupied residence," including a cooperative apartment, [34] the lender still cannot collect compound interest. [35] For most residential first mortgages, however, as previously described, federal law would preempt even the restriction on compound interest.

Limited Liability Company and Corporate Borrowers

A limited liability company (LLC) or corporate borrower cannot "interpose the defense of usury in any action," [36] nor can a guarantor of a corporation's debt. [37] The same logic would suggest that a guarantor of a limited liability company's obligations should also not be able to raise a usury defense. The courts do not seem, however, in any reported case to date to have addressed the implications for a guarantor.

Some very old cases suggest that a corporation also cannot affirmatively commence an action to invalidate a usurious obligation. [38] No recent New York case has considered this question. The courts' general attitude in this area would indicate, however, that a corporation (presumably also an LLC) probably could not assert usury even as an affirmative claim. A New York corporate or LLC borrower can still assert the invalidity of compound interest on loans of $250,000 or less. [39] The usury exemption for loans made to a corporate or LLC borrower does not apply to entities formed to own a one- or two-family dwelling. [40] Finally, a corporate loan remains potentially subject to criminal usury restrictions, as described elsewhere in this article, although these restrictions are enforceable solely by the state.

A commentator on New York usury law recently described the remaining usury restrictions on corporate loans as being much like "the appendix in humans and wings on flightless birds," and as an economic matter "not only useless, but unsound as well." [41]

Loans of $250,000 or More

Any loan of $250,000 or more not "secured primarily by an interest in real property improved by a one or two family residence" is treated the same as any loan of $2,500,000 or more, except that criminal usury restrictions still apply. [42]

Various additional statutory exemptions sometimes also come into play. [43]

Usury Savings Clauses

Lenders will often include in their documents "usury savings clauses," language saying that if the loan turns out to be usurious, then any payments by the borrower above the allowable rate shall be retroactively recharacterized as repayments of principal. In the few cases that have considered the validity and effectiveness of such clauses, the results were not encouraging for lenders.

The decision in *Federal Home Loan Mortgage Corporation v. 333 Neptune Avenue Limited Partnership* offers an interesting, though typically unilluminating, example. [44] There, a bankruptcy court applying New York law initially found that the loan, although usurious, was saved by the "usury savings" clause. The District Court for the Eastern District of New York rejected that reasoning, concluding instead that the "'usury-avoidance' provision does not save the otherwise usurious loan. Since the loan is usurious, it is void." [45] The court followed by analogy an old and well-established line of New York cases holding that a lender cannot cure an otherwise usurious loan by simply returning to the borrower (or alternatively, allowing credit for) interest payments above the usury cap. [46]

On appeal of the *333 Neptune Avenue* case, the Second Circuit explicitly refused to adjudicate the issue, saying that the "usury savings" provision raises "knotty and undecided questions of New York state law that are best avoided by federal courts." [47] The appellate court vacated and remanded the decision of the District Court. No published opinion was available at the time of this research.

A few years earlier, the Appellate Division in a memorandum decision ignored a "usury savings" provision. Although the loan documents in that case said that if the interest rate were found to be usurious it would drop to the legal rate, the court decided this was not enough to make the loan nonusurious. [48]

The court cited its own 1965 decision, *Durst v. Abrash*, where it had concluded that even if the parties agree to arbitrate any disputes over the interest rate, the courts can still examine whether a loan is usurious and impose appropriate remedies. [49] Over a dissent that implied the usury statutes may be second- or third-class citizens in the statute books, [50] the *Durst* majority concluded that usury statutes are to be taken seriously and the parties should not be able to sidestep them. [51] By citing the *Durst* case in its 1994 case on usury savings clauses, the court suggested that it regards usury savings clauses as the functional equivalent of using arbitration to avoid usury issues.

The question of the enforceability of usury savings clauses has not been resolved by the New York Court of Appeals. The reported cases to date suggest serious skepticism regarding such clauses, though they would appear to do no harm.

In contrast, it is the author's sense that practitioners in this area do place some weight on usury savings clauses. Practitioners may assume that usury

savings clauses work based perhaps on the general theories that (a) the courts don't like usury law very much; and (b) words in a document usually mean what they say. The preceding discussion demonstrates, however, that neither assumption is necessarily correct in the area of usury savings clauses. Practitioners should place little or no reliance on usury savings clauses. In particular, if counsel is asked to opine that a loan is not usurious, counsel should reach that conclusion based on something other than a usury savings clause.

Usury Summary and Conclusion

Considered as a whole, the usury exemptions and preemptions summarized above virtually assure that any significant commercial loan, and almost every residential mortgage loan, will be exempt from New York usury restrictions. Aside from the exemptions and preemptions discussed above, particular factual situations may suggest other usury defenses and definitional exclusions found in the cases but not discussed here.

Common escape hatches from usury include: (1) interest after default or after maturity; (2) deferred purchase price [52]; (3) waiver; (4) burdens of proof; (5) standing (the usury defense is available only to the original borrower); (5) application of another state's law; (7) estoppel (including the borrower's delivery of an estoppel certificate [53]); and (8) other equitable defenses.

Does title insurance solve any possible usury problem? No. The American Land Title Association 1992 standard loan policy of title insurance expressly excludes any coverage for usury. [54] And the New York title insurance industry's rate manual does not allow title insurance companies to insure against usury risks, such as by issuing a usury endorsement.

Given how easy it is to steer clear of usury problems in New York commercial transactions, however, the lack of title insurance protection against New York usury rarely causes much concern in this area of practice.

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Endnotes

[1] For a more on New York usury law, *see* Bruce J. Bergman, Bergman on New York Mortgage Foreclosures, Volume 1 at 6-4 (Matthew Bender, updated annually).

[2] Although this work generally disregards residential transactions, they must be taken into account to provide a reasonable summary of New York usury law.

[3] This article is based in substantial part on the author's previous article on New York usury law. *See* Joshua Stein, *Confusury Unravelled: A Road Map of New York's Usury Law*, N.Y. STATE BAR ASS'N REAL PROP. L. SECTION NEWSL., Fall 1993, at 17. That article was extensively updated and expanded for this republication.

[4] *See* N.Y. PENAL LAW §§ 190.40, 190.42 (McKinney 1999).

[5] Thus New York, which prides itself on being more practical and business-like than California, ends up with a usury law functionally the same as California's, which one article described as follows:

> [U]sury law [in California] does not seriously inconvenience most lenders and offers very little protection to most borrowers. The law in this area has a loud bark but rarely bites. However, its rare bite can be painful indeed. This may be good politics, but it makes for complex law.

E. Rabin & R. Brownlie, "Usury Law in California: A Guide Through the Maze," 20 U.C. Davis L. Rev. 397, 440 (Spring 1987).

[6] *See* 12 U.S.C. § 3803(c) (1998); 12 C.F.R. § 226.19 (1999); N.Y. BANKING LAW §§ 6-f, 6-g (McKinney 1999)..

[7] *See* N.Y. GEN. OBLIG. LAW ("GOL") § 5-525 (McKinney 1999).

[8] *See* GOL § 5-501(1) (maximum usury rate 6% unless otherwise provided in N.Y. BANKING LAW § 14-a); N.Y. BANKING LAW § 14-a(1) (McKinney 1999) (16% maximum usury rate for purposes of GOL § 5-501). GOL § 5-501(3)(b) sets special rules for most residential loans where the annual interest rate exceeds 6%. In these cases, the borrower has the statutory right to prepay at any time. The lender cannot collect a prepayment fee unless the prepayment occurs in the first year and the documents expressly provide for such a fee. See GOL §5-501(3)(b). This statute expressly provides for federal preemption.

[9] See N.Y. BANKING LAW § 14-a(1) (McKinney 1999); see also, e.g., N.Y. BANKING LAW §§ 108(1) (state bank or trust company), 173(1) (private bankers), 202(1) (foreign banks), 510-a (investment companies) (McKinney 1999); 3 N.Y. COMP. CODES R. & REGS. tit. 3, § 4.1 (McKinney 1999).

[10] N.Y. BANKING LAW §§ 103(5), 235(8-a), 380(2-a) (McKinney 1999).

[11] GOL § 5-501(4), (4-a); N.Y. BANKING LAW § 14-a(1)-(2); N.Y. COMP. CODES R. & REGS. tit. 3, §§ 4.1-4.2 (regulations adopted by Banking Board) (McKinney 1999).

[12] GOL § 5-526. The prime rate means "the average prime rate on short term business loans which is published by the board of governors of the federal reserve system for the most recent week which was publicly available from the board of governors of the federal reserve system on the previous business day." GOL § 5-526(4).

[13] GOL § 5-523.

[14] See, e.g., N.Y. INS. LAW § 3203(a)(8)(G) (McKinney 1999); Martin E. Gold, New York Approves Law Legalizing Compound Interest, 62 N.Y. STATE BAR J. 26, 27-28 (October 1990) (citing other industry-specific statutory exceptions).

[15] See GOL § 5-527(2). The statute defines "residence" to "include" a cooperative apartment, but says nothing about condominiums. A court would probably say "residence" also includes a condominium apartment.

[16] Giventer v. Arnow, 37 N.Y.2d 305 (1975).

[17] The history of compound interest in New York and the 1989 legislation are described in two articles by Mr. Gold: Compound Interest: Legalization Wins Approval, N.Y.L.J., June 15, 1989, page 1; and New York Approves Law Legalizing Compound Interest, N.Y. STATE BAR J., October 1990, page 26.

[18] See Op. N.Y. State Dep't of Taxation & Fin., Ticor Title Guarantee Company, N.Y. St. Tax Rptr. (CCH) 401-177 at 46,171 (June 25, 1993) (mortgage recording tax imposed on capitalized interest "as if the interest had been actually paid to the mortgagee and the mortgagee then loaned the same amount back to the mortgagor"). Goldberg asks whether the parties might avoid this result by recharacterizing the "compound interest" as simple interest calculated using a different formula. "If interest has become due, and the lender then agrees to defer payment of that interest in return for the borrower's agreement to pay interest on the deferred interest, or if the borrower exercises an option to capitalize interest, then it would seem that the deferred interest has become principal. However, if the initial loan agreement provided that interest would be compounded, then it would seem, although this is not the present state of the law, that the compounding is merely the means of calculating the cost of borrowing the original principal." David M. Goldberg, Transfer and Mortgage Recording Taxes in New York Title Closings § 6-13(a) (Lexis Law Publishing, republished annually). In Cosmopolitan Broadcasting Corp. v. State Tax Comm'n, 435 N.Y.S.2d 804 (App. Div. 1981), the court required payment of mortgage recording tax on the total amount of principal indebtedness when the documents failed to distinguish between principal and interest. If unpaid interest is added to principal, the logical extension of this case would require payment of mortgage recording tax on the additional principal indebtedness.

[19] GOL § 5-511(1) (unless lender is savings bank, savings and loan association, or federal savings and loan association). See also Eikenberry v. Adirondack Spring Water Co., 65 N.Y.2d 125, 126 (1985).

[20]

[21] GOL § 5-511, 5-513 (McKinney 1999). But see GOL § 5-519 (granting partial relief if lender repays excess interest).

[22] GOL §§ 5-511(1), 5-513; see also, e.g., N.Y. BANKING LAW §§ 108(6), 202(7), 235-b, 380-e, 510-(a)(1) (McKinney 1999).

[23] N.Y. PENAL LAW §§ 190.40, 190.42 (McKinney 1999).

[24] See American Express Co. v. Brown, 392 F. Supp. 235, 238 (S.D.N.Y. 1975) (discussing the inability of the victim "to personally enforce the criminal usury law of the state") (dictum).

[25] See Flushing Nat'l Bank v. Pinetop Bldg. Corp., 387 N.Y.S.2d 8 (2d Dep't. 1976), citing Franklin Nat'l Bank v. DeGiacomo, 248 N.Y.S.2d 586 (App. Div. 1964); Reisman v. Hartman & Sons, 273 N.Y.S.2d 295 (1966). See also Tides Edge Corp. v. Central Fed. Sav., F.S.B., 542 N.Y.S.2d 763 (App. Div. 1989).

[26] N.Y. BANKING LAW § 14-a(7) (McKinney 1999).

[27] The term "first mortgage" would probably not include a wraparound mortgage. See Mitchell v. Trustees of U.S. Mut. Real Estate Inv. Trust, 375 N.W.2d 424, 430 (Mich. Ct. App. 1985). This type of mortgage arises where the parties want to preserve an existing mortgage, probably with a below-market interest rate. The borrower signs a new mortgage, part of which is "new money" and part of which just replicates the principal indebtedness secured by the old underlying mortgage. The borrower makes payments only to the holder of the "wraparound," who is supposed to pay the "underlying" mortgage. Typically the holder of the wraparound mortgage benefits from the difference between a low interest rate on the underlying mortgage and a higher rate on the entire wraparound mortgage. These transactions are less common today than they once were, for several reasons. First, interest rates are relatively low. Second, most existing mortgages categorically prohibit any further mortgages. Third, wraparound mortgages create substantial risks for all parties except the holder of the wraparound — risks that were not adequately identified, analyzed, and dealt with during the last wave of wraparound financing. Finally, those risks created unique problems for cooperative apartment corporations, which were often left as potential bagholders in the early Nineties when a sponsor took back a wraparound mortgage, assigned it to "Wrap, Inc." (literally, in at least one case), then defaulted on maintenance payments for the unsold apartments, yet continued to collect payments on the wraparound mortgage. The "wraparound mortgage" structure is not highly favored today, but is still occasionally seen.

[28] Common exceptions include mortgages involving unusual lenders and careless lenders taking a mortgage on a "residential manufactured home" that fail to comply with certain consumer protection requirements. See 12 U.S.C. § 1735f-7a(c), (d), (e)(4); Quiller v. Barclays American/Credit Inc., 764 F.2d 1400 (11th Cir. 1985) (construing the transaction as nevertheless complying with federal regulations because language allowing borrower a right to cure implied borrower would receive notice of default), aff'g en banc 727 F.2d 1067, 1072 (11th Cir. 1984) (denying protection of federal preemption because a contract term allowed lender to commence foreclosure without notice upon default); 12 C.F.R. §

590.1-4 (1999) (implementing regulations for consumer protection).

[29] See, e.g., 12 U.S.C. § 1735f-7a (1998) (loans insured under Titles I and II of National Housing Act); 38 U.S.C. § 3728 (1998) (Veterans Administration guaranteed loans); 12 U.S.C. § 85 (1998) (national banks not subject to states' discriminatory rate caps or caps below discount rate plus 1%); 12 U.S.C. § 1831d (1998) (preempting state usury ceilings below discount rate plus 1%); Depository Institutions Deregulation and Monetary Control Act of 1980, § 511(a), Pub. L. No. 96-221, 94 Stat. 132 (1980) (certain business and agricultural loans made between 1980 and 1983); GOL § 5-501(5) (loans insured by "federal housing commissioner" or pursuant to "Servicemen's Readjustment Act of 1944") (McKinney 1999). The foregoing does not purport to list all banking-related statutes that could preempt New York usury laws.

[30] See N.Y. BANKING LAW §§ 103(4-a) (state bank or trust company), § 591-a(1) (licensed mortgage bankers, limiting security to residential real property on mortgage that is not a first lien) (McKinney 1999).

[31] See Novelty Textile Mills, Inc. v. Hopkins, 547 N.Y.S.2d 516, 517 (Sup. Ct. 1989).

[32] See N.Y. BANKING LAW §§ 108(4)(b), (5)(b), 202(4)(b), 352(a) (McKinney 1999). These "exemptions-by-implication" might not avoid criminal usury problems.

[33] See GOL § 5-501(6)(b) (McKinney 1999).

[34] The statute does not expressly refer to condominium apartments. One would expect a court to treat condominium apartments the same as cooperative apartments, as they would seem to be functionally equivalent at least for purposes of usury and consumer protection.

[35] See GOL § 5-527(2) (McKinney 1999).

[36] GOL § 5-521(1) (McKinney 1999); N.Y. Ltd. Liab. Co. Law § 1104 (McKinney 1999).

[37] See First Nat'l Bank of Amenia v. Mountain Food Enter., Inc., 553 N.Y.S.2d 233, 234 (App. Div. 1990). The documents in this case were vague about whether the corporation or the individual guarantor was the true borrower. The court decided that the availability of the usury defense hinged on "whether the loan was made to repay personal obligations or to further a profit-oriented enterprise." Id. at 235. If the latter, then neither borrower nor guarantor could raise a usury defense.

[38] See, e.g., Atlantic Trust Co. v. Proceeds of the Vigilancia, 68 F. 781, 782 (S.D.N.Y. 1895) (stating that the usury statute is, in effect, repealed as to corporations, citing Merchants Exch. Nat'l Bank v. Commercial Warehouse Co., 49 N.Y. 635 (1872); Rosa v. Butterfield, 33 N.Y. 665 (1865); Curtis v. Leavitt, 15 N.Y. 9 (1857)).

[39] Although loans to a borrower of this type remain subject to

"criminal usury" limits, that statute is a criminal one enforceable only by the State.

[40] See GOL § 5-521(2) (McKinney 1999).

[41] Paul Golden, Evolution of Corporate Usury Laws Has Left Vestigial Statutes That Hinder Business Transactions, N.Y. STATE BAR J., May 2001, page 20. Mr. Golden is right on all counts.

[42] See GOL § 5-501(6)(a) (McKinney 1999).

[43] These include the following: Any loan of $5,000 or more, payable on demand, secured by a pledge of documents of title or negotiable instruments under Article 3, 7, or 8 of the Uniform Commercial Code, is exempt from all restrictions on interest rates and interest compounding, except criminal usury. See GOL § 5-523 (McKinney 1999). The Banking Law contains similar provisions. See, e.g., N.Y. BANKING LAW § 510-a(2) (McKinney 1999) (loans by investment companies) (McKinney 1999). In general, no usury restrictions apply, not even criminal usury, when a corporation borrows $100,000 or more (not including future discretionary advances) for business purposes, at a rate of up to prime plus eight percent per annum, granting a UCC security interest as security. See GOL § 5-526 (McKinney 1999).

[44] the usury savings clause at issue stated in relevant part:

Under no circumstances shall Mortgagor be charged under the note or this Mortgage, more than the highest rate of interest which lawfully may be charged by the holder of this Note and paid by the Mortgagor on the indebtedness secured hereby . . . Should any amount be paid to Mortgagee in excess of such legal rate, such excess shall be deemed to have been paid in reduction of the principal balance of the Note.

201 F.3d 431, 1999 WL 1295933, 3 (2d Cir. 1999) (as quoted in an unpublished Second Circuit opinion).

[45] Federal Home Mortgage Corp. v. 333 Neptune Avenue L.P., 1999 WL 390837 (E.D.N.Y. 1999).

[46] See Babcock v. Berlin, 475 N.Y.S.2d 212 (Sup. Ct. Suffolk County 1984); Bowery Sav. Bank v. Nirenstein, 269 N.Y. 259 (1935). See also Yakutsk v. Alfino, 349 N.Y.S.2d 718 (1st Dep't 1973) (giving credit for excess interest will not cure a usurious loan).

[47] 201 F.3d 431, 1999 WL 1295933, 3 (2d Cir., 1999).

[48] See Simsbury Fund, Inc. v. New St. Louis Assocs., 611 N.Y.S.2d 557 (1st Dep't. 1994).

[49] Durst v. Abrash, 253 N.Y.S.2d 351, 355, *aff'd*, 17 N.Y.S.2d 445 (1965) ("[if] usurious agreements could be made enforceable by the simple device of employing arbitration clauses the courts would be surrendering their control over public policy in a way in which the Court of Appeals . . . made very clear could not happen.").

[50] This is a characterization with which the author would agree, at

least in the world of commercial mortgage loans.

[51] Id. at 356 ("The welter of legislation in this area makes clear that the concern is one of grave public interest and not merely a regulation with respect to which the immediate parties may contract freely").

[52] See, e.g., Mandelino v. Fribourg, 23 N.Y.2d 145, 295 N.Y.S.2d 654 (1968); Christopher v. Gurrieri, 655 N.Y.S.2d 654, 655 (App. Div. 1997) (mem.) (where promissory note arose from purchase of business, it "was neither a loan nor a forbearance . . . but was in the nature of a purchase money mortgage which is not subject to the usury laws"). Compare, C&M Air Systems, Inc. v. Custom Land Dev. Group II, 692 N.Y.S.2d 146 (App. Div. 1999) (upholding an interest rate defined in the documents as "the highest rate of interest permitted," without deciding whether the transaction was an exempt purchase money loan). The usury exemption for deferred purchase price may also be available to a third-party lender that finances an acquisition. Dallas vs. Dallas, 582 N.Y.S.2d 835, 836 (3rd Dep't. 1992) ("[a] mortgage given to secure money, borrowed for the purpose of purchasing real property, is generally held to be a purchase-money mortgage, notwithstanding that the mortgage was given to a person other than the seller," citing Barone v. Frie, 472 N.Y.S.2d 119, 121 (App. Div. 1984)). But see Bruce J. Bergman, Usury and the Purchase Money Mortgage — An Appellate Division Faux Pas (?)(!), 21 N.Y. STATE BAR ASS'N REAL PROP. L. SECTION NEWSL. 4 (January 1993) (describing Dallas case as "manifestly incorrect"). There is no reason to think that New York's usury exemption for purchase-money mortgages applies only to first mortgages, although the author is not aware of any authority on point.

[53] In Hammelburger v. Foursome Inn Corp., 54 N.Y.2d 580, 584, 446 N.Y.S.2d 917, 919 (1981), the Court of Appeals concluded that, based on delivery of an estoppel certificate in connection with an assignment of the loan, the mortgagor "will be estopped from asserting the defense of criminal usury" unless the assignee knew about the problem or knew that the estoppel certificate was obtained under duress. If criminal usury arises whenever the rate exceeds 25% per annum, how could an assignee claim ignorance of the criminal usury problem? Answer: the rate in the documents might have been 24%, but if the original lender had extracted a 10% loan fee, not mentioned in the documents, this would probably bring the effective interest rate above 25%, depending on the term of the loan. Such a loan might be criminally usurious, but the assignee might not know it. If an estoppel certificate can immunize an otherwise usurious loan, can the original holder use this principle protectively, such as by requiring the borrower to deliver an estoppel certificate either at the closing or shortly thereafter to induce the holder to agree to some modification of the loan? Can the original holder rely on such an estoppel certificate?

[54] See "Exclusion from Coverage" No. 5 in the ALTA 1992 Loan Policy of Title Insurance.

Top of Document

"official fee"
«*taxe officielle* »

"official fee" means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

"overdraft charge"
«*frais pour découvert de compte* »

"overdraft charge" means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons or a deposit taking institution the deposits in which are insured, in whole or in part, by the Canada Deposit Insurance Corporation or guaranteed, in whole or in part, by the Quebec Deposit Insurance Board;

"required deposit balance"
«*dépôt de garantie* »

"required deposit balance" means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

Presumption

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

Proof of effective annual rate

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

Notice

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

Cross-examination with leave

(6) An accused or a defendant against whom a certificate referred to in subsection (4) is produced may, with leave of the court, require the attendance of the actuary for the purposes of cross-examination.

Consent required for proceedings

(7) No proceedings shall be commenced under this section without the consent of the Attorney General.

Application

(8) This section does not apply to any transaction to which the *Tax Rebate Discounting Act* applies.

R.S., 1985, c. C-46, s. 347; 1992, c. 1, s. 60(F).