

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM COURT OF APPEAL OF ALBERTA)**

**BETWEEN:**

**Krayzel Corporation**

Appellant  
(Appellant/Subsequent Encumbrancer)

- and -

**Equitable Trust Company**

Respondent  
(Respondent/Plaintiff)

**AND BETWEEN:**

**Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson and  
Heritage Property Corporation**

Appellants  
(Appellants/Defendants)

- and -

**Equitable Trust Company**

Respondent  
(Respondent/Plaintiff)

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**FACTUM OF THE APPELLANTS**

KRAYZEL CORPORATION, THE LOUGHEED BLOCK INC.,  
NEIL JOHN RICHARDSON, HUGH DARYL RICHARDSON and  
HERITAGE PROPERTY CORPORATION (APPELLANTS)  
*Rule 42 of the Rules of the Supreme Court of Canada (SOR/2002-156)*

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## FACTUM OF THE APPELLANTS

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### Part I: Overview and Statement of Facts

#### **A. Overview – Advocating for the Continued Protection of Vulnerable Borrowers**

1. In this appeal, the Supreme Court of Canada has the opportunity to correct the erosion of long-standing statutory protections resulting from the Alberta Court of Appeal decision, and ensure the continued prohibition of predatory and abusive lending practices.

2. Section 8 of the *Interest Act*, RSC 1985, c I-15 (the "*Interest Act*")<sup>1</sup> plays an essential role in protecting property owners at risk of abuse when contracting with mortgage lenders. It applies to all types of mortgagors, be they individual or corporate, young or old, inexperienced or sophisticated, and to both residential and commercial properties.

3. The Majority decision of the Alberta Court of Appeal appealed from contains critical errors by giving section 8 a narrow and strict interpretation, with adverse impacts for mortgage-secured borrowing across the country. A fair and proper interpretation of section 8 meets the objectives of the legislation and prevents lenders from using creative drafting to avoid the protection afforded by section 8.

4. Section 8 of the *Interest Act* prohibits penalties, fines and interest increases that have the effect of charging a higher interest rate on monies in arrears. Without the prohibition, such clauses could be used by predatory lenders to strip defaulting property owners of their equity in the property. Absent a purposive interpretation of section 8, lenders can and will draft interest rate increases which will effectively obliterate an owner's equity or a secondary lender's mortgage security.

5. This case concerns two such clauses, drafted by the lender, the Respondent, Equitable Trust Company ("Equitable"), in two consecutive mortgage renewals, as well as "default administration fees" charged due to the borrower's missed payments. The First Renewal (as later defined herein) artificially added on an extra "seventh month" at a grossly inflated interest rate.

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<sup>1</sup> *Interest Act*, RSC 1985, c I-15, s 8 (the "*Interest Act*") [Appellants' Factum, Part VII, Tab C].

The Second Renewal (as later defined herein) charged an increased interest rate on monies in default. The Respondent Equitable capitalized on the weak negotiating position of the borrower, the Appellant, Lougheed Block Inc. ("Lougheed"), at a time when it was at the mercy of Equitable and without options. During the inevitable foreclosure, Equitable sought to appropriate all equity remaining in the subject property.

6. The decision of the Majority of the Alberta Court of Appeal allowed Equitable's contractual abuse, which had the effect of charging an increased interest rate and "mortgage renewal fees" when Lougheed defaulted on payments.

7. These penalties grossly increased the amount owed by Lougheed, increased the exposure of the Appellant guarantors, Heritage Property Corporation, Neil John Richardson and his elderly father, Hugh Daryl Richardson, and completely eroded the remaining equity available for subsequent encumbrancers, including the Appellant, Krayzel Corporation ("Krayzel"), which held a second mortgage on the subject property.

8. The Alberta Court of Appeal's Majority decision renders the 130-year old protection impotent by drastically restricting its application and adds to the inconsistency in judicial interpretation that has characterized the jurisprudence regarding section 8. By allowing this appeal, this Court has the opportunity to confirm the intended interpretation of section 8 and preserve the protection that has been provided by section 8.

## **B. Summary of Mortgage, Renewals and Foreclosure**

### ***1) The Equitable Mortgage***

9. The Appellant borrower, Lougheed, was the registered owner of a heritage office building and land located in downtown Calgary (the "Property").<sup>2</sup>

10. On November 8, 2006, Lougheed granted the Respondent lender, Equitable, a mortgage and charge against the Property (the "Equitable Mortgage").<sup>3</sup>

11. The Equitable Mortgage was \$27 million, with interest at Equitable's prime interest rate plus 2.875% per annum.<sup>4</sup> While initially included as a term of the mortgage, Lougheed was able

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<sup>2</sup> Memorandum of Decision of Master Hanebury at para 2 [**Appellants' Record, Part I, Tab 1**].

<sup>3</sup> Memorandum of Decision of Master Hanebury at para 3 [**Appellants' Record, Part I, Tab 1**]; The Equitable Mortgage – Exhibit "A" to the Affidavit of Jennifer Shaw filed June 23, 2009 [**Appellants' Record, Part III, Volume I, Tab 1A**].

to successfully negotiate the removal of a 25% interest bump in the final month of the mortgage term.<sup>5</sup>

## 2) *The First Renewal*

12. On June 30, 2008, the Equitable Mortgage matured and Lougheed was unable to pay. Lougheed had secured a commitment from another lender for \$26 million, but this was insufficient to discharge the Equitable Mortgage.<sup>6</sup>

13. As the Equitable Mortgage was not discharged, the Equitable Mortgage stipulated that monthly interest charges then commenced. Lougheed failed to pay the first interest charge for the month of July 2008 of \$171,562.50 and was then in arrears. Equitable, applying the penal provisions of its mortgage, charged a \$10,000 default administration fee for the missed payment. An additional \$181,121.20 interest was charged for the month of August 2008, which then went into arrears.<sup>7</sup>

14. It was apparent that Lougheed was in financial distress, both being unable to pay the mortgage and in default on monthly interest payments. Equitable then offered an opportunity for temporary relief, on harsher terms, and securing the ability to recover a greater amount of equity from the Property.

15. On August 27, 2008, Appellant Lougheed and the Respondent Equitable entered into a letter agreement (the "Letter Agreement") confirmed by a Mortgage Amending Agreement effective August 1, 2008 (the "Mortgage Amending Agreement"), which renewed the Equitable Mortgage for a further seven months until March 1, 2009 (collectively, the "First Renewal").<sup>8</sup>

16. Equitable presented temporary relief for the Appellant, but introduced an interest increase that would secure its hold over an increased amount of equity in the Property if Lougheed went into default. Negotiated as a six month renewal, the First Renewal was at an interest rate of

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<sup>4</sup> Memorandum of Decision of Master Hanebury at paras 3-4 [**Appellants' Record, Part I, Tab 1**].

<sup>5</sup> Affidavit of Neil Richardson sworn November 2, 2009 at para 6 [**Appellants' Record, Part III, Volume I, Tab 3**].

<sup>6</sup> Memorandum of Decision of Master Hanebury at para 5 [**Appellants' Record, Part I, Tab 1**].

<sup>7</sup> Affidavit of Ken Lai, sworn June 8, 2010 at Exhibits "A" and "B" [**Appellants' Record, Part III, Volume II, Tab 8A and 8B**].

<sup>8</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**]; The First Renewal Letter Agreement – Exhibit "F" to the Affidavit of Jennifer Shaw filed June 23, 2009 [**Appellants' Record, Part III, Volume I, Tab 1F**]; The Mortgage Amendment – Exhibit "F" to the Affidavit of Daniel Krayzel filed November 30, 2009 [**Appellants' Record, Part III, Volume II, Tab 7F**].

Equitable's prime interest rate plus 3.125% per annum for the first six months. However, a fictional seventh month was added to the term, during which interest increased to 25% per annum.<sup>9</sup> Based on a six-month term, the 25% interest would have come into effect upon maturity and after Loughheed had again gone into default. This 25% interest rate would secure Equitable's rapidly-escalating claim to equity in the Property.

17. The First Renewal also capitalized the interest charges in arrears, a \$417,000 renewal fee assessed immediately, the \$10,000 default administration fee, and \$20,458.41 in "estimated legal fees", which all became part of the principal sum of \$27,801,000 under the First Renewal, and increased Equitable claim to equity in the Property.<sup>10</sup>

18. The relevant provisions in the First Renewal are as follows:

2. The interest rate provided for in the Mortgage is amended so that:

a. for the period commencing on the Effective Date and ending on January 31, 2009, the term 'Interest Rate' as used in the Mortgage shall mean the prime interest rate adopted by the Equitable Trust Company from time to time in determining interest payable by its most creditworthy commercial customers, plus 3.125 percent per annum, compounded and payable monthly, not in advance, on the first day of each calendar month. If it is necessary for The Equitable Trust Company to prove the prime interest rate adopted from time to time in determining interest payable by its most creditworthy commercial customers, the production of a written certificate setting out the aforementioned prime interest rate at that time by The Equitable Trust Company shall be conclusive proof for that purpose; and

b. for the period commencing on February 1, 2009 and continuing thereafter until the principal sum has been repaid in full, the term 'Interest Rate' as used in the Mortgage shall mean twenty five percent (25%) per annum, compounded and payable monthly, not in advance, on the first day of each calendar month.

3. The term of the Mortgage is extended, so that the full balance of the principal sum and any unpaid interest thereon and any other amounts owing pursuant to the Mortgage shall become due and be paid on the 1<sup>st</sup> day of March, 2009.

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<sup>9</sup> The First Renewal Letter Agreement – Exhibit "F" to the Affidavit of Jennifer Shaw filed June 23, 2009 [Appellants' Record, Part III, Volume I, Tab 1F]; The Mortgage Amendment – Exhibit "F" to the Affidavit of Daniel Krayzel filed November 30, 2009 [Appellants' Record, Part III, Volume II, Tab 7F].

<sup>10</sup> The First Renewal Letter Agreement – Exhibit "F" to the Affidavit of Jennifer Shaw filed June 23, 2009 [Appellants' Record, Part III, Volume I, Tab 1F].

...

9. Except as specifically modified by this agreement, the Mortgage and all collateral security for the obligations secured thereby shall remain in full force and effect according to their original terms.<sup>11</sup>

### 3) *The Second Renewal*

19. On March 1, 2009, when the First Renewal matured, Lougheed remained in default but now owed Equitable even more principal due to the additional capitalized charges. The full principal and unpaid interest became due and payable and Lougheed was once again in default.

20. Lougheed was unable to obtain alternate financing. Equitable again offered a temporary fix. Just as designed, the 25% escalated interest rate in the seventh month of the First Renewal forced a further renewal. On April 28, 2009, Lougheed and Equitable executed an agreement for a further renewal of an additional 12 months, effective February 1, 2009 (the "Second Renewal").<sup>12</sup> The term of the Second Renewal overlapped and replaced the artificial final seventh month of the term of the First Renewal.

21. The Second Renewal was stated to be at an interest rate of 25% per annum, but Lougheed was only required to make payments on a monthly basis in an amount equal to the greater of 7.5% per annum or Equitable's prime interest rate plus 5.25% per annum. The 25% per annum interest rate was drafted as a discount, but operated as a penalty, enforceable by Equitable upon default by Lougheed. Like the First Renewal, the Second Renewal required Lougheed to pay a \$556,000 renewal fee no later than June 30, 2009, immediately escalating Equitable's claim to the remaining equity in the Property.

22. The relevant provisions in the Second Renewal are:

1. Interest shall be calculated, on the full outstanding Loan balance, at the rate of 25% per annum compounded monthly, from February 1, 2009 until the date of repayment in full.

2. Lougheed Block Inc. ('LBI') shall pay to TCC [Trez Capital Corporation] a renewal fee of \$556,000 ('Renewal Fee'), which fee shall be due upon

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<sup>11</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**]; The Mortgage Amendment – Exhibit "F" to the Affidavit of Daniel Krayzel filed November 30, 2009 [**Appellants' Record, Part III, Volume II, Tab 7F**].

<sup>12</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**]; The Second Renewal – Exhibit "G" to the Affidavit of Jennifer Shaw filed June 23, 2009 [**Appellants' Record, Part III, Volume I, Tab 1G**].

execution of this letter by LBI [Lougheed Block Inc.] and payable in accordance with paragraph 6 and 7 of this letter agreement, an in any event, no later than June 30, 2009.

3. LBI shall be required to make monthly payments, on or before the 15<sup>th</sup> day of each and every month starting May 15, 2009 and ending January 15, 2010, in an amount equal to the greater of 7.5% per annum, compounded and payable monthly, and Equitable Trust Company Prime Rate + 5.25% per annum, compounded and payable monthly (the 'Pay Rate')

...

8. Should, at any time, LBI default under any of the obligations contained in this agreement or contained in the Commitment Letter, the Renewal Letter or any other agreement given as security for this Loan, provided TCC has agreed to allow the default to be cured, the Pay Rate shall be 25% from the date of the default until the date that the default is cured and shall only return to the rate set out in paragraph 3 upon rectification of the default.

9. Should, at any time, LBI default under any of the obligations contained in this agreement or contained in the Commitment Letter, the Renewal Letter or any other agreement given as security for this Loan and TCC elects not to voluntarily permit the default to be cured this agreement shall be in default; the Pay Rate shall increase to 25% and all Accrued Interest to the date of the default shall become forthwith due and payable.

By signing this letter, you also hereby acknowledge that:

...

2. The interest rate payable is 25% per annum, calculated and payable monthly;

3. The Loan matured on March 1, 2009 and is now, and continues to be fully due and payable;

4. You are not in a position to fully repay the loan, as required.<sup>13</sup>

#### **4) *Foreclosure and Judicial Sale***

23. The true nature of the Second Renewal is apparent. It explicitly acknowledged Lougheed's inability to pay, it purported to solidify the exorbitant 25% interest rate going forward, and it required the Appellant Lougheed to pay a \$556,000 payment immediately. The

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<sup>13</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**]; The Second Renewal – Exhibit "G" to the Affidavit of Jennifer Shaw filed June 23, 2009 [**Appellants' Record, Part III, Volume I, Tab 1G**].

Respondent Equitable had again increased the amount of equity that it would acquire when, as was obvious to the Respondent, Lougheed failed to meet its obligations.

24. On May 20, 2009, less than a month after execution of the Second Renewal, Equitable served the Appellant Lougheed written notice of default and demanded payment of \$30,180,321.35. The amount it claimed owing was based on calculation of interest at 25% per annum interest and the addition of the \$556,000 renewal fee to the principal owing. The Respondent Equitable brought foreclosure proceedings under the Second Renewal on June 2, 2009.<sup>14</sup>

25. As of June 7, 2010, Equitable claimed \$37,994,738.85 to be due and owing under the Second Renewal, based upon interest accruing at the rate of 25% per annum after February 1, 2009 plus the monthly default administration fees from June 2009 to June 2010 (totaling \$120,000). In the alternative, if the 25% per annum interest rate was found to breach section 8 of the *Interest Act*, Equitable then calculated \$30,008,294.55 owing under the Second Renewal.<sup>15</sup>

26. The Property was ultimately sold by judicial sale for \$30,653,148.97.<sup>16</sup> Equitable received \$29,147,618.37 in distributions from the proceeds, being the full value of its principal advanced and interest at the lower non-penalty interest rate. If the 25% per annum interest rate is applied, the remaining \$1,505,529.60 will also be awarded to Equitable, leaving nothing for subsequent encumbrancers like Krayzel. Equitable would then pursue the personal guarantors, the Appellants Neil John Richardson and his elderly father, Hugh Daryl Richardson, for the additional \$7,000,000 that Equitable claims is owed.<sup>17</sup>

### **C. Courts Below Split on Enforceability of 25% Interest**

#### ***1) Court of Queen's Bench – Master***

27. The Appellants and Respondents brought applications for determination of the amount owing under the Equitable Mortgage. Lougheed and Krayzel sought a declaration that the 25%

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<sup>14</sup> Memorandum of Decision of Master Hanebury at para 14 [**Appellants' Record, Part I, Tab 1**]; Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**]; Affidavit of Ken Lai, sworn June 8, 2010 at Exhibits "A" and "B" [**Appellants' Record, Part III, Volume II, Tab 8A and 8B**].

<sup>15</sup> Affidavit of Ken Lai, sworn June 8, 2010 at Exhibits "A" and "B" [**Appellants' Record, Part III, Volume II, Tab 8A and 8B**].

<sup>16</sup> Order of Master Prowse dated July 6, 2010 [**Appellants' Record, Part II, Tab 9**].

<sup>17</sup> Memorandum of Decision of Master Hanebury at para 15 [**Appellants' Record, Part I, Tab 1**].

interest rate was contrary to section 8 of the *Interest Act* and Equitable sought affirmation of the 25% interest claim.<sup>18</sup>

28. Master Hanebury correctly interpreted section 8 as related to fines, charges or penalties that have the effect of increasing interest on money in arrears over that not in arrears; she held that the focus of the court's inquiry is on the substance of the transaction, not its form. Interest rate increases provided for in the First Renewal and Second Renewal offended section 8 of the *Interest Act* and the default administration fees of \$10,000 per month charged by Equitable were unenforceable.<sup>19</sup>

## 2) *Court of Queen's Bench – Justice*

29. The Respondent Equitable appealed the decision of Master Hanebury on the interpretation of section 8.<sup>20</sup>

30. The Honourable Madam Justice Romaine of the Court of Queen's Bench of Alberta allowed the appeal, holding section 8 of the *Interest Act* required a strict and narrow interpretation, this misinterpretation being contrary to the remedial approach in the *Interpretation Act*, RSC 1985, c I-21 and the modern approach to statutory interpretation.<sup>21</sup>

31. Madam Justice Romaine found section 8 to be an exception to the general principle of freedom of contract. She failed to consider the purpose of the *Interest Act* and the beneficial nature of the section, which demand a fair and liberal interpretation. Justice Romaine failed to consider section 8 within the context of the *Interest Act* as a whole, which has two distinct and separate purposes. The first, embodied in section 2, is the freedom to contract with respect to interest rates. The second is the protection of borrowers in the context of mortgage lending. Justice Romaine found that neither the terms of the First Renewal nor the Second Renewal breached the *Interest Act*.<sup>22</sup>

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<sup>18</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**].

<sup>19</sup> Memorandum of Decision of Master Hanebury at paras 58, 73 and 82 [**Appellants' Record, Part I, Tab 1**].

<sup>20</sup> Reasons for Decision of the Hon. Mme. Justice Romaine at para 1 [**Appellants' Record, Part I, Tab 3**].

<sup>21</sup> Reasons for Decision of the Hon. Mme. Justice Romaine at para 45 [**Appellants' Record, Part I, Tab 3**]; *Interpretation Act*, RSC 1985, c I-21, s 12 ("*Interpretation Act*") [**Appellants' Factum, Part VII, Tab D**]; *Rizzo v Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 at para 21 ("*Rizzo*") [**Appellants' Book of Authorities, Tab 16**].

<sup>22</sup> Reasons for Decision of the Hon. Mme. Justice Romaine at paras 45, 65 and 81 [**Appellants' Record, Part I, Tab 3**].

### 3) *Court of Appeal of Alberta*

32. A consolidated appeal was heard by the Court of Appeal of Alberta on October 8, 2013.<sup>23</sup>

33. The Court of Appeal was unanimous in finding that the First Renewal did not breach section 8 of the *Interest Act*. It was dispositive in its view that the increase in interest rate contemplated by the First Renewal arose due to the passage of time, not due to default, and applied equally to interest or principal in arrears as well as principal not in arrears.<sup>24</sup>

34. With respect to the Second Renewal, the Honourable Madam Justice Hunt, writing for the Majority, found the Court of Appeal bound by its prior decision in *Dillingham Construction Ltd. v Patrician Land Corp.* ("*Dillingham*") and dismissed the present Appellants' appeal.

35. Justice Hunt erred in failing to find the *Dillingham* case distinguishable on its facts and in spite of the explicit challenge to *Dillingham* by the Appellants. The Majority found that, absent a formal application to reconsider, the Court was bound by *Dillingham*.

36. In its view, the Court in *Dillingham* concluded that section 8 only prohibits penalties, fines and interest rate increases that take the form of a penalty for default. Because the increase in the Second Renewal was constructed as a discount for prompt payment, it was permitted under section 8 of the *Interest Act*.<sup>25</sup>

### 4) *Dissenting Reasons (Justice Berger)*

37. Contrary to the Majority, Justice Berger found that the Court of Appeal was not bound by its decision in *Dillingham*. *Dillingham* had different mortgage terms and was, in his opinion, distinguishable on its facts. In *Dillingham*, the Court was unable to determine whether there was an increase in interest on arrears above that of principal money not in arrears because maturity of the mortgage and default coincided when the mortgagor failed to make the last payment.<sup>26</sup>

38. Justice Berger's reasons focused on the purpose and intention of section 8 and found:

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<sup>23</sup> Consent Consolidation Order of the Hon. Mme. Justice P.A. Rowbotham [**Appellants' Record, Part II, Tab 16**].

<sup>24</sup> Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 1 [**Appellants' Record, Part I, Tab 5**]; Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [**Appellants' Record, Part I, Tab 5**].

<sup>25</sup> *Dillingham Construction Ltd. v Patrician Land Corp.*, 65 AR 220, 1985 CarswellAlta 65 (CA) ("*Dillingham*") [**Appellants' Book of Authorities, Tab 4**]; Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 23-24 [**Appellants' Record, Part I, Tab 5**].

<sup>26</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at paras 70-72 [**Appellants' Record, Part I, Tab 5**].

[A]t least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable.<sup>27</sup>

39. Justice Berger found that "[i]t is trite law that in considering s. 8, the Court should not confine itself to the form of a mortgage provision but should look to its substance." In accordance with the purpose and nature of section 8, he analyzed the effect of the Second Renewal and concluded that the mortgage clause effectively increased the rate to 25% per annum upon Loughheed's default and held that it was a violation of section 8.<sup>28</sup>

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<sup>27</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 48 [**Appellants' Record, Part I, Tab 5**], citing *Reliant Capital Ltd. v Silverdale Development Corp.*, 2006 BCCA 226, 2006 CarswellBC 1090, leave to appeal denied [2006] SCCA No 265 ("*Reliant*") [**Appellants' Book of Authorities, Tab 15**].

<sup>28</sup> Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at paras 49, 64 [**Appellants' Record, Part I, Tab 5**].

**Part II: Statement of Questions in Issue in the Appeal**

40. This appeal raises the following issues:

**Protection from Punitive Borrowing Terms: Does the proper interpretation of section 8 of the *Interest Act* prohibit creative mortgage drafting that has the effect of imposing a penalty rate on amounts in arrears, despite not being structured as a penalty?**

Subissue 1: Does section 8 of the *Interest Act* require a fair, large and liberal reading?

Subissue 2: Does section 8 of the *Interest Act* prohibit a clause that increases the interest rate shortly before maturity, as in the First Renewal?

Subissue 3: Does section 8 of the *Interest Act* prohibit a clause that imposes a higher interest rate on default, but is structured as a discount for prompt payment, as in the Second Renewal?

**Part III: Statement of Argument**

**A. Summary of Answers to Questions in Issue**

**1) *Protection from Punitive Borrowing Terms: Does the proper interpretation of section 8 of the Interest Act prohibit creative mortgage drafting that has the effect of imposing a penalty rate on amounts in arrears, despite not being structured as a penalty?***

41. A proper interpretation of section 8 of the *Interest Act* prohibits mortgage provisions that have the effect of charging greater interest on amounts in arrears. Application of section 8 to mortgage interest clauses requires consideration of the clause in light of the following guiding principles:

- a. Parties should be free to negotiate such terms of interest as the parties consider appropriate to their transaction unless the terms violate section 8 of the Act;
- b. An additional charge on arrears is prohibited, whether expressed as such or simply having 'the effect' of increasing the charge in respect of arrears;
- c. A fair, large and liberal application of section 8 is required when determining whether a provision has the prohibited effect;
- d. Each case must be decided on its own particular facts, looking to the substance of the provision more than the form;
- e. Application of section 8 to the provision must not frustrate or impair the overall purpose of the protective legislation, namely the protection of borrowers against penalties and oppressive lending practices; and
- f. The character and sophistication of the parties to the mortgage ought not be considered when determining whether section 8 prohibits the provision.

42. Based on these principles, it is clear that section 8 should not be strictly interpreted to allow creative drafting of mortgage provisions to avoid the prohibition.

**2) *Subissue 1: Does section 8 of the Interest Act require a fair, large and liberal reading?***

43. Application of the modern approach to statutory interpretation requires that section 8 of the *Interest Act* be given a fair, large and liberal reading. The modern approach requires

consideration of the plain, textual meaning of the statutory provision in the context of the purpose and intent of the legislation and the provision. It also requires consideration of the broader context of the legislation, in particular other interpretive guidance such as the *Interpretation Act* and established legal norms. All these factors contribute to the conclusion that section 8 must be read liberally and given an interpretation as befits its protective purpose.

**3) *Subissue 2: Does section 8 of the Interest Act prohibit a clause that increases the interest rate shortly before maturity, as in the First Renewal?***

44. Interpreting section 8 purposively, it prohibits the interest rate escalation in the First Renewal. The effect of the interest clause, particularly in the factual context of the artificial addition of an extra month to the term of the extension, was to raise the rate of interest on monies in arrears over the interest rate charged on monies not in arrears. Permitting this type of creatively-drafted clause, which has the same effect as a penalty interest rate, would result in absurd consequences that are contrary to the purpose and intent of section 8. As such, the interest rate escalation in the seventh month of the First Renewal term is unenforceable pursuant to the prohibition in section 8 of the *Interest Act*.

**4) *Subissue 3: Does section 8 of the Interest Act prohibit a clause that imposes a higher interest rate on default, but is structured as a discount for prompt payment, as in the Second Renewal?***

45. Section 8 also prohibits the interest rate discount in the Second Renewal. The effect of the interest clause is to charge a higher interest rate when the borrower goes into default. The interest rate charged on monies in arrears is therefore higher than that on monies not in arrears. This type of contractual gimmick, designed to avoid the section 8 prohibition, is contrary to the purpose and intent of section and is unenforceable pursuant to a liberal reading of section 8.

**B. Standard of Review**

46. The standard of review for questions of law is correctness. Statutory interpretation is a question of law, reviewable on the correctness standard.<sup>29</sup>

**C. Interest Act Provisions**

47. The legislative provisions at issue in this Appeal are sections 2 and 8 of the *Interest Act*:

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<sup>29</sup> *Housen v. Nikolaisen*, 2003 SCC 33, [2002] 2 SCR 235 at paras 8-9 [**Appellants' Book of Authorities, Tab 6**].

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

...

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

(2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.<sup>30</sup>

48. This Appeal is a question of statutory interpretation and the interaction between sections 2 and 8. As is later submitted, interpretation of these sections in accordance with the principles of statutory interpretation establishes that Equitable's creatively-drafted clauses violate the *Interest Act* and are therefore unenforceable.

#### **D. Interpretive Rules Require a Fair, Large and Liberal Reading of Section 8**

49. The modern approach described by Sullivan and Driedger continues to be the guiding rule for statutory interpretation in Canada.<sup>31</sup>

Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.<sup>32</sup>

50. In interpreting section 8, the modern principle requires that a court form an impression of the meaning of the text from the full context and wording of the provision in order to determine what rule the legislature intended to enact. To do so, a court must take into account the purpose of the provision and all relevant context.

<sup>30</sup> *Interest Act*, *supra* note 1, ss 2 and 8 [Appellants' Factum, Part VII, Tab C].

<sup>31</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed (Markham: LexisNexis, 2014) at 7 ("Sullivan, Statutes") [Appellants' Book of Authorities, Tab 22]; E.g. *John Doe v Ontario (Finance)*, 2014 SCC 36, [2014] 2 SCR 3 at para 18 [Appellants' Book of Authorities, Tab 8]

<sup>32</sup> *Rizzo*, *supra* note 21 at para 21 [Appellants' Book of Authorities, Tab 16]

*1) The textual meaning of section 8 is inclusive, not restrictive*

51. The modern principle of statutory interpretation requires a reading of the section in its "grammatical and ordinary sense."<sup>33</sup> A reading of the ordinary meaning of section 8 demonstrates that a liberal approach must be taken to assessing what types of mortgage clauses constitute prohibited penalties. Section 8 applies to creatively-drafted mortgage clauses, as well as those that obviously violate the prohibition.

52. A break-down of section 8 into its component parts and analysis of the textual meaning reveals the inclusive nature of the prohibition and its application to mortgage clauses.

- a. "fine, penalty or rate of interest" – Section 8 pertains to more than just penalty rates of interest. The inclusion of fines and penalties indicates that the provision ought to be interpreted purposively to include other ways that secured lenders can effectively charge an increased interest rate. Fines and penalties that have the same effect as an increased interest rate are prohibited. This indicates a liberal interpretation of section 8 is necessary.
- b. "stipulated for, taken, reserved or exacted" – Again, section 8 is worded so as to include the multitude of ways in which the penalty can be charged. The section 8 prohibition applies whether the penalty is immediately charged or reserved to a later date. It is apparent from this wording that section 8 requires an inclusive approach to interpretation.
- c. "that has the effect of" – Parliament's choice of words in section 8, particularly the inclusion of the phrase "that has the effect of," indicates that the section calls for a substantive and purposive approach to assessing provisions that may constitute prohibited penalties. The focus of the prohibition is necessarily on the effect of the penalty, fine or rate of interest, not the structure of the drafting. The effect that is prohibited is a charge on arrears higher than the rate of interest payable on principal money not in arrears. The principles of statutory interpretation assume that the legislature chose its language deliberately. If Parliament had not intended that section 8 go to the "effect" of the provision, then it would not have used the phrase "has the effect of" in expressing its will.

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<sup>33</sup> Sullivan, *Statutes*, *supra* note 31 at page 28-29 [**Appellants' Book of Authorities, Tab 22**]

53. This initial analysis of the "ordinary meaning" of section 8 asks what is "the natural meaning which appears when the provision is simply read".<sup>34</sup> From this type of natural reading of the provision, it is apparent that the prohibition applies to any type of mortgage clause that purports to charge a borrower a penalty upon default, in such a way that the effect of the penalty is a charge on arrears greater than the initial interest on principal.

2) *Statutory context and purpose of section 8 requires liberal interpretation*

54. Legislative intent can be drawn from the legislative history of the *Interest Act* and jurisprudence regarding section 8, both of which emphasize the remedial, protective nature of section 8 and the necessity for a fair, large and liberal reading. In particular, in order to be understood in its entire context, section 8 must be read in light of the scheme and object of the *Interest Act* and the purpose of section 8.

55. Determination of legislative intent requires that the purpose of section 8 be considered in the context of the *Interest Act* as a whole. An understanding of the purpose of the statute is essential to determining the scope and application of section 8. Whether the section should be read narrowly or liberally can turn on the overall purpose of the legislation, in that the correct interpretation must accord with the purpose and intent of the legislation itself.<sup>35</sup>

56. The *Interest Act* is divided into two parts that set out the dual purposes of the Act. The first, embodied in section 2, is to enact freedom of contract with respect to interest rates. The second purpose, embodied in sections 6 through 10, is to enact protections for borrowers when monies are secured by mortgage on real property or hypothec on immovables. One of these protections is the section 8 prohibition against penalties charged on monies in arrears.

57. The special protective treatment for mortgages secured on real property is highlighted in *Reliant Capital Ltd. v. Silverdale Development Corp.* ("*Reliant*");

It is not uncommon now in the commercial world for loan contracts, other than mortgage loans, to require a substantially higher interest rate if the loan becomes in arrears. Common sense suggests that this is recognized as a legitimate and effective way to ensure the prompt or timely repayment of the loan.

<sup>34</sup> Sullivan, *Statutes*, *supra* note 31 at 30 [**Appellants' Book of Authorities, Tab 22**].

<sup>35</sup> *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961, 1999 CanLII 648 at para 25 [**Appellants' Book of Authorities, Tab 10**].

The prohibition against extra charges on arrears remains in place for loans secured by a mortgage. Moreover, the additional charge on arrears is prohibited in mortgage loans whether that charge is expressed as such, or whether the interest provision simply has "the effect" of increasing the charge in respect of arrears. [Emphasis Added]<sup>36</sup>

58. The protective purpose has been consistent since the initial enactment of the *Interest Act* in 1880 (43 Victoria, c 42). At the time that section 8 was introduced, the rules of equity would relieve against a penalty in the mortgage that was phrased as such. Provisions that had an identical effect to a penal provision but were phrased as discounts or forgiveness clauses were not enforced by the courts.<sup>37</sup>

59. Statutes are to be read remedially<sup>38</sup> and, given the pre-existing equitable rule regarding penalties that were framed as such, it is difficult to see what ill section 8 was intended to remedy if not to broaden the category of penalty prohibited by the law.

60. At the time of enactment, section 8 of the *Interest Act* has been described as serving two purposes. First, the provision was enacted to address the harm of lenders taking advantage of inexperienced, ill-informed borrowers in a weak negotiating position. Second, section 8 has been said to have been intended to do away with the distinction between penalties for default and rebates for prompt payment that existed in the common law, such that borrowers would be protected from penalties in form and in substance.<sup>39</sup>

61. Section 8 is in substantially the same form that it was when enacted in 1880.<sup>40</sup> There have been few substantive amendments to section 8. Most recently, in 2008, an amendment caused the

<sup>36</sup> *Reliant*, *supra* note 27 at paras 51-52 [Appellants' Book of Authorities, Tab 15].

<sup>37</sup> *Ibid*, at paras 38-39 [Appellants' Book of Authorities, Tab 15].

<sup>38</sup> *Interpretation Act*, *supra* note 21, s 12 [Appellants' Factum, Part VII, Tab D]

<sup>39</sup> Thomas G.W. Telfer, "Preliminary Background Paper on the Canada Interest Act" (Paper delivered at the Uniform Law Conference of Canada, Proceedings of the Eighty-Ninth Annual Meeting, 2007), available online: <<http://www.ulcc.ca/en/2007-charlottetown-pe/216-civil-section-documents/578-canada-interest-act-preliminary-background-paper-2007>> at para 31 ("ULCC Background Paper") [Appellants' Book of Authorities, Tab 23]; Mary Anne Waldron, Q.C., "The 'Legitimate Commercial Purpose' Test Revisited – Case Comment on *Reliant Capital Ltd. v Silverdale Development Corporation*" (2008) 41 UBC L Rev 101 at para 3 ("Waldron, 'Case Comment on Reliant'") [Appellants' Book of Authorities, Tab 25]; Mary Anne Waldron, *The Law of Interest in Canada* (Scarborough: Thomson Canada Ltd., 1992) at 86 ("Waldron, *The Law of Interest*") [Appellants' Book of Authorities, Tab 24].

<sup>40</sup> *Immeubles Fournier Inc. et al v Construction St-Hilaire Ltée*, [1975] 2 SCR 2 at 21-22, 1974 CanLII 155. ("Immeubles") [Appellants' Book of Authorities, Tab 7].

provision to apply to both mortgages on real property (as it had since 1880) and hypothecs on immovables.<sup>41</sup>

62. Courts are in agreement that the purpose and intent behind section 8 is to protect property owners against abusive lending terms and practices.<sup>42</sup> This purpose was described in *Reliant*, which description has since been adopted by the Ontario Court of Appeal in the recent case of *P.A.R.C.E.L. Ltd. v Acquaviva* ("*P.A.R.C.E.L.*")<sup>43</sup>:

Parliament has singled out mortgages on real estate for special treatment, or at least treatment that differs from loans that are not secured on real property. I infer that at least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable. [Emphasis added]<sup>44</sup>

63. A liberal reading of section 8 in accordance with its remedial purpose is not inconsistent with the *Interest Act's* other purpose as set out in section 2. That is, freedom to contract for whatever interest rate is appropriate in the circumstances is not violated by the limitation prescribed in section 8. Parties are free to negotiate and agree to whatever interest rate reflects the commercial agreement of the parties. High levels of risk can be compensated for with a high interest rate. Changing risk level can be accounted for with an increased interest rate, so long as that increase does not have the prohibited effect of charging a penalty interest rate when the borrower goes into arrears (where the loan is secured by property). Such was the case here, where Equitable negotiated a higher base interest rate upon each renewal, reflecting the increasing risk associated with the loan. Enforcing section 8 does not deprive parties of enforcing the negotiated interest rate; it simply prevents abusive lending practices following default that erode a borrower's equity.

64. The freedom to contract for whatever interest rate the parties choose is not absolute. It is constrained by criminal interest rate of 60%, as set out in the *Criminal Code of Canada*, RSC

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<sup>41</sup> *Federal Law-Civil Law Harmonization Act, No. 1*, SC 2001, c 4, s 94 [Appellants' Factum, Part VII, Tab B].

<sup>42</sup> Reasons for Decision of the Hon. Mme. Justice Romaine at para 37 [Appellants' Record, Part I, Tab 3].

<sup>43</sup> *P.A.R.C.E.L. Ltd. v Acquaviva*, 2015 ONCA 331, 2015 CarswellOnt 6733 at para 51-52 ("*P.A.R.C.E.L.*") [Appellants' Book of Authorities, Tab 13].

<sup>44</sup> *Reliant*, *supra* note 27 at para 53 [Appellants' Book of Authorities, Tab 15].

1985, c C-46, s 347 (the "*Criminal Code*")<sup>45</sup> and by the restrictions set out in the *Interest Act*. As such, freedom of contract as legislated in the *Interest Act* is tempered by fairness-based restrictions. Freedom to contract for any interest rate that the parties agree to is not freedom to use creative drafting to get around the restrictions that Parliament has deemed necessary.

65. Based on this understanding of the purpose of section 8 in the context of its statutory scheme, it is apparent that it should not be unduly restricted so as to permit creatively-drafted but punitive mortgage clauses. The section 8 prohibition ought to be interpreted inclusively to protect vulnerable borrowers from lending practices designed to strip their equity in real property upon default or make redemption impossible.

**3) *Liberal interpretation aligns with broader context and established legal norms***

66. Beyond examination of the purpose and statutory context, interpretation of section 8 of the *Interest Act* is guided by broader contextual factors and established legal norms.

**(a) Interpretation Act Requires Liberal Approach**

67. A liberal and remedial approach to legislation is supported by the *Interpretation Act*, which applies to all federal enactments.<sup>46</sup> Section 12 of the *Interpretation Act* states that a statute is "deemed remedial and shall be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects."<sup>47</sup>

68. This Court has incorporated section 12 of the *Interpretation Act* as part of the guiding principles of statutory interpretation of federal statutes.<sup>48</sup> As such, this approach applies to interpretation of the *Interest Act*.

**(b) Generous Approach to Protective Legislation**

69. A generous approach should be taken in interpreting statutes with social-benefits or consumer protection laws. When there is a question as to the application of the legislation, it should be construed in favour of the parties that it is intended to protect. The Supreme Court of

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<sup>45</sup> *Criminal Code of Canada*, RSC 1985, c C-46, s 347 (the "*Criminal Code*") [**Appellants' Factum, Part VII, Tab A**].

<sup>46</sup> *Interpretation Act*, *supra* note 21, s 3 [**Appellants' Factum, Part VII, Tab D**].

<sup>47</sup> *Ibid*, at section 12 [**Appellants' Factum, Part VII, Tab D**].

<sup>48</sup> E.g. *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 SCR 476 at para 20 [**Appellants' Book of Authorities, Tab 1**].

Canada has consistently interpreted protective legislation liberally and the same approach should be taken in respect of section 8, which has the object of protection of vulnerable borrowers.

70. In *Rizzo & Rizzo Shoes Ltd., Re.*, this Court considered the interpretation of Ontario's *Employment Standards Act*. The Court found that a plain meaning interpretation was counterintuitive to the scheme of the legislation. As benefits-conferring legislation, it ought to be interpreted in a fair and generous manner and not in the overly-restrictive manner adopted by the Court of Appeal.<sup>49</sup>

71. Similarly, in *Seidel v Telus Communications Inc.*, this Court considered section 172 of British Columbia's *Business Practices and Consumer Protection Act*. Its comments highlight that the protective nature of a provision mandates a generous interpretation.

As to statutory purpose, the *BPCPA* is all about consumer protection. As such, its terms should be interpreted generously in favour of consumers: *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30 (CanLII), [2002] 2 S.C.R. 129, and *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605 (CanLII), 48 B.C.L.R. (4th) 328. The policy objectives of s. 172 would not be well served by low-profile, private and confidential arbitrations where consumers of a particular product may have little opportunity to connect with other consumers who may share their experience and complaints and seek vindication through a well-publicized court action. [Emphasis added]<sup>50</sup>

72. It is submitted that the Supreme Court's treatment of protective legislation also applies when a protective provision of a statute is considered. It would be contrary to the legislative scheme and purpose of section 8 to take a strict approach, particularly given the standard liberal and generous approach to protective legislation.

### (c) Purposive Approach to Criminal Interest

73. The Supreme Court of Canada has also taken an expansive approach when considering potential violations of section 347 of the *Criminal Code*, pertaining to criminal interest rates.<sup>51</sup> Section 347 of the *Criminal Code* prohibits interest at a "criminal rate", which is defined in subsection (2) as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60 per cent on the credit advanced under

<sup>49</sup> *Rizzo*, *supra* note 21 at para 36 [Appellants' Book of Authorities, Tab 16].

<sup>50</sup> *Seidel v Telus Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 532 at para 37 [Appellants' Book of Authorities, Tab 17].

<sup>51</sup> *Criminal Code*, *supra* note 45 at s 347 [Appellants' Factum, Part VII, Tab A].

an agreement or arrangement." Like section 8 of the *Interest Act*, section 347 of the *Criminal Code* has the purpose of protecting the public from abusive lending practices and focuses on the "effective" interest rate.

74. The Supreme Court of Canada considered section 347 of the *Criminal Code* regarding criminal interest rates in *Garland v Consumers' Gas Co.*<sup>52</sup> That case concerned an arrangement whereby a gas company gave customers a number of days to pay their bills without interest but imposed a late payment penalty after the payment due date. This was characterized in the arrangement as a discount that was forfeited if payment was not made by the due date, or as a premium imposed for making payment over a longer period of time. This Court in *Garland* found that despite the drafting, it was a penalty that breached the *Criminal Code*. At pages 131-132, the Court observed that the "broad" language in the definition of "interest" was intended to prevent avoidance of section 347 by manipulation of the form that the interest took.

It is apparent from this definition that for the purposes of section 347 "interest" is an extremely comprehensive term, encompassing many types of fixed payments which would not be considered interest proper at common law or under general accounting principles.... The broad language of section 347 was presumably intended... to prevent creditors from avoiding the statute simply by manipulating the form of payment exacted from their debtors... It is the substance, and not merely the form, of the charge or expense which determines whether it is governed by s. 347.<sup>53</sup>

75. In the companion case of *Degelder Construction Co. v Dancorp Developments Ltd.*,<sup>54</sup> the Court made similar observations that to tailor interpretation based on the form, rather than the substance, of a credit transaction could invite manipulation by lenders and would defeat the basic purpose of section 347.<sup>55</sup>

76. While the Court did not comment on section 8 of the *Interest Act* in either case, it is apparent that the purpose and principles governing section 347 are similar to those pertaining to section 8. There is strong support that a liberal, inclusive approach that focuses on substance over form should also be taken in interpreting and applying section 8.

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<sup>52</sup> *Garland v Consumers' Gas Co.*, [1998] 3 SCR 112, 1998 CanLII 766 at para 27 [**Appellants' Book of Authorities, Tab 5**].

<sup>53</sup> *Ibid* at 131-132 [**Appellants' Book of Authorities, Tab 5**].

<sup>54</sup> *Degelder Construction Co. v Dancorp Developments Ltd.*, [1998] 3 SCR 90, 1998 CanLII 765 [**Appellants' Book of Authorities, Tab 3**].

<sup>55</sup> *Ibid* at para 30 [**Appellants' Book of Authorities, Tab 3**].

(d) **Presumption Against Absurd Consequences**

77. No interpretation of section 8 should result in absurd consequences and courts will reject such an interpretation in favour of an alternative that avoids the absurdity.<sup>56</sup> This includes those interpretations that are contrary to accepted norms or reasonableness, have unjust or inequitable consequences, or defeat the purpose of the statute. It is an absurd consequence if interpretation of section 8 allows a lender to creatively draft its way around a statutory prohibition but prohibits clearly-drafted penalties.

78. The Supreme Court of Canada has on numerous occasions rejected interpretations that lead to absurdity.

Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.<sup>57</sup>

It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.<sup>58</sup>

79. Section 8 been characterized as an exception to the general rule that lenders and borrowers are free to negotiate and agree on any rate of interest on a loan.<sup>59</sup> The Appellants acknowledge that a clause framed as an exception to a rule may attract a strict and narrow reading in some cases. However, such an approach cannot conflict with the protective purpose of the provision.

As exceptions to the general rule, there is an argument for a narrow interpretation of these provisions in this part of the Interest Act. (See: Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 369-70) However, the interpretation of the Interest Act must also ensure "the attainment of its objects", and to that end must be given a "fair, large and liberal construction and interpretation" in accordance with s. 12 of the Interpretation Act. (See: *Beauchamp v. Timberland Investments Ltd.* (1983), 44 O.R. (2d) 512, 4 D.L.R. (4th) 485 (Ont C.A.)) I conclude that a strict or narrow interpretation of s. 8 is required, so long as that interpretation

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<sup>56</sup> Sullivan, *Statutes*, *supra* note 31 at 307 [**Appellants' Book of Authorities, Tab 22**].

<sup>57</sup> *Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031, 1995 CanLII 112 at para 65 [**Appellants' Book of Authorities, Tab 12**].

<sup>58</sup> *Rizzo*, *supra* note 21 at para 27 [**Appellants' Book of Authorities, Tab 16**].

<sup>59</sup> E.g. *P.A.R.C.E.L.*, *supra* note 43 at para 51 [**Appellants' Book of Authorities, Tab 13**]; *Reliant*, *supra* note 27 at para 37 [**Appellants' Book of Authorities, Tab 15**].

does not frustrate or impair the overall purpose of the legislation. [Emphasis Added]<sup>60</sup>

80. The purpose of the section is the protection of borrowers, calling for a fair and liberal interpretation. The nature of section 8, applying as it does, equally to all borrowers and to both residential and commercial property, makes it all the more important that these protections be maintained. A watchdog group for elder rights, for example, observed that if section 8 protections are interpreted narrowly, "a shrewd predatory lender would have little difficulty in evading the grasp of the *Interest Act*."<sup>61</sup> The *Interest Act* is legislation designed to protect borrowers, not lenders.

81. In recent years, decisions have gradually reduced the protections afforded by section 8. Courts have struggled with the dual purposes of the *Interest Act* and the value of freedom of contract. In doing so, they have attempted to avoid the relief of section 8 in situations where the mortgage term is technically prohibited, but carries "none of the stench of coercion, intimidation or penalty" that Parliament intended to address.<sup>62</sup>

82. Some courts have permitted creatively-drafted clauses that arguably have the effect of an additional charge on monies in arrears. These decisions have limited the circumstances in which section 8 apply, a dangerous trend that impairs the purpose of the statutory protection.

83. The Ontario Court of Appeal held that a "bonus" of three months to be paid on default was not prohibited by section 8 because the borrower might provide notice and pay the arrears and interest in three months, although such a term might have the same effect as an interest increase upon default. Similarly, the British Columbia Court of Appeal also held that an interest increase drafted so as to apply to all monies owing, whether in arrears or not, was acceptable within the meaning of section 8. This despite the fact that the true effect of the clause was an increase in interest that applied only to money in default.<sup>63</sup>

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<sup>60</sup> *Reliant*, *supra* note 27 at para 37 [Appellants' Book of Authorities, Tab 15].

<sup>61</sup> Elder Law, Canadian Centre for, Study Paper on Predatory Lending Issues in Canada (February 28, 2008). BCLI Study Paper No. 3. Available at SSRN: <<http://ssrn.com/abstract=1421449>> at 10-11 [Appellants' Book of Authorities, Tab 21].

<sup>62</sup> *Langley Lo-Cost Builders Ltd. v 474835 B.C. Ltd.*, 2000 BCCA 365, 2000 CarswellBC 1229 at para 100 ("Langley") [Appellants' Book of Authorities, Tab 9].

<sup>63</sup> *Mastercraft Properties Ltd. v El Ef Investments Inc.*, 103 DLR (4<sup>th</sup>) 759, 1993 CarswellOnt 614 at paras 1, 4 (CA) [Appellants' Book of Authorities, Tab 11]; Waldron, 'Case Comment on Reliant', *supra* note 39 at para 23 [Appellants' Book of Authorities, Tab 25].

84. The strict interpretation of section 8 by the Majority in the Alberta Court of Appeal further restricts section 8 as the only interest clauses that would be prohibited by section 8 are those that explicitly take the form of a penalty increase in interest rate. In the result, contractual trickery is permitted, almost encouraged, despite being offensive to section 8.<sup>64</sup> This is the type of harsh consequences that courts ought to avoid.

85. In her commentary on *Reliant*, prominent *Interest Act* scholar Mary Anne Waldron acknowledged the struggle that courts have applying section 8 in a modern commercial context. She noted that there are issues with applying artificial means of interpretation to accommodate commercial needs. Waldron recognized that with the restrictions being placed on the section 8 protections, it is now possible to easily avoid the narrow situation still prohibited, yet produce the same effect. For lenders, this means that "only the ill-advised and unwary will suffer the negative effects of the statute." Her obvious conclusion is that there will be few unsophisticated borrowers actually protected by section 8 of the *Interest Act*.<sup>65</sup>

86. The protections afforded by the *Interest Act* apply to a broad range of individuals and businesses and are not distinguishable amongst these communities of borrowers. As such, the weakening of the protections affects all borrowers.<sup>66</sup> It would be an absurd result if a lender secured by a mortgage on residential property could invoke an interest escalation from 5% per annum to 59% per annum (i.e. any amount up to the criminal interest rate) for default, simply by drafting it as a discount, or as triggered one day before expiry of the mortgage term.

87. It is submitted that the decision of the Court of Appeal broadens the mechanisms by which section 8 can be evaded, weakens the protections provided by the *Interest Act* and ignores or rewrites a law intended for the protection of the public. These are the harsh and unintended consequences of a flawed approach to the interpretation of section 8.

## **E. Correct Application of Section 8 to First and Second Renewals**

### ***1) Past Approaches to Section 8***

88. Since its enactment in 1880, the Supreme Court of Canada has considered section 8 of the *Interest Act* on only a few occasions. Interpretation by the Supreme Court has been consistent

<sup>64</sup> Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 20 [**Appellants' Record, Part I, Tab 5**].

<sup>65</sup> Waldron, 'Case Comment on Reliant', *supra* note 39 at para 27 [**Appellants' Book of Authorities, Tab 25**].

<sup>66</sup> *Reliant*, *supra* note 27 at para 53 [**Appellants' Book of Authorities, Tab 15**].

with the purposive and contextual approach outlined above. More recently, however, courts across provincial jurisdictions have remarkably struggled with application of this established approach in a modern commercial context, and, as a result, have warped and eroded the protection provided by section 8.

89. Early cases applied the various sections of the *Interest Act* in situations falling clearly within the purview of the legislation. The Supreme Court of Canada's first comment on section 8 of the *Interest Act*, in *Coupland Acceptance Ltd. v Walsh*, where the appellant had charged an increased interest rate of 2% higher per month after maturity of the mortgage than it did prior to maturity. The Court found this violated section 8 of the *Interest Act*.<sup>67</sup>

90. The next major comment by the Supreme Court of Canada set out the purpose and intent of the section 8 and is consistent with its earlier interpretation. In *Immeubles Fournier Inc v Construction St-Hilaire Ltée*, the Court reviewed a mortgage provision charging a 15% "indemnity" in the event that the borrower goes bankrupt. The Majority of the Court held that the intention of section 8 was to "prohibit recovery of any form of additional payment" in the case of default, and was not limited to penalties in the form of increased interest. Accordingly, the 15% was a penalty that was prohibited by section 8.<sup>68</sup>

91. The Supreme Court of Canada again reiterated the purposive approach to section 8 and the focus on substance over form in *Tomell Investments Ltd. v East Marstock Lands Ltd.* In that case, the Court considered the constitutionality of section 8. It held on the purpose and design of section 8 of the *Interest Act*:

In my opinion, s. 8 of the Interest Act is valid federal legislation in respect of interest because, although it does not deal exclusively with interest in the strict sense of a charge accruing day by day, it is, insofar as it deals with other charges, a valid exercise of ancillary power designed to make effective the intention that the effective rate of interest over arrears of principal or interest should never be greater than the rate payable on principal money not in arrears. [Emphasis added]<sup>69</sup>

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<sup>67</sup> *Coupland Acceptance Ltd. v Walsh*, [1954] SCR 90 at 94, 1954 CanLII 8 [**Appellants' Book of Authorities, Tab 2**].

<sup>68</sup> *Immeubles*, *supra* note 40 at 11, 16 [**Appellants' Book of Authorities, Tab 7**].

<sup>69</sup> *Tomell Investments Ltd. v East Marstock Lands Ltd.* (1977), [1978] 1 SCR 974 at 987, 1977 CanLII 33 [**Appellants' Book of Authorities, Tab 19**].

92. Canadian courts across the provincial jurisdictions have interpreted and applied section 8 inconsistently, and have consistently failed to follow the law as expressed by the Supreme Court of Canada. There are at least three irreconcilable decisions from British Columbia, Ontario and Alberta.

93. The *Interest Act* is federal legislation and ought to apply consistently across provinces, but presently, the same clause could attract different treatment in each of these three jurisdictions. As noted by Justice Finch (now C.J.) of the British Columbia Court of Appeal, "[a]bout the only thing on which the courts seem to agree is the difficulty of construing the language of s. 8 in the context of the modern commercial world."<sup>70</sup> Upon reviewing these inconsistent approaches, this Honourable Court has the opportunity to set an approach consistent with the principles of statutory interpretation described above. The Majority of the Court of Appeal of Alberta in this appeal recognized the inconsistency in the law,<sup>71</sup> but its decision fails to clarify the task of applying section 8 to future mortgage provisions.

94. In Ontario, the courts have usually followed with the guidance of the Supreme Court of Canada in applying a contextual and purposive approach to interpretation of section 8. In *Re Weirdale Investments v Canadian Imperial Bank of Commerce* ("*Weirdale*"), it set an authority for the application of section 8 to interest terms constructed as discounts for prompt payment. In that decision, the Ontario High Court of Justice considered whether a provision that provided for the payment of interest of 10%, both before and after maturity, and before and after default, but waived said interest if the principal was paid on or before the due date, was void for contravening section 8 of the *Interest Act*.<sup>72</sup>

95. The Court in *Weirdale* interpreted section 8 in light of its history as an enactment of an equitable law. The Court concluded that Parliament had intended to prohibit both penal and non-penal devices, which included the interest discount at issue. This conclusion was reached by interpreting section 8 in line with its purpose. The Court concluded that application of section 8

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<sup>70</sup> *Reliant*, *supra* note 27 at para 69 [Appellants' Book of Authorities, Tab 15].

<sup>71</sup> Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 28 [Appellants' Record, Part I, Tab 5].

<sup>72</sup> *Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce et al (Re)*, 32 O.R. (2d) 183, 1981 CarswellOnt 1128 at para 1 (HCJ) [Appellants' Book of Authorities, Tab 20].

ought to be concerned with the effect of the interest clause in question, not simply a narrow analysis of its form.<sup>73</sup>

96. The most recent of Ontario that has considered section 8 is *P.A.R.C.E.L.*<sup>74</sup> The Court considered a promissory note and mortgage. The interest escalation clause at issue was in the promissory note, which was secured by the mortgage. After adopting the protective purpose of section 8 described in *Reliant*, the Court applied an expansive approach to its application. It found that the section 8 prohibition applied to terms found in both the mortgage and the promissory note. The interest escalation clause set out in the promissory note was not enforceable.<sup>75</sup> The Ontario Court of Appeal subsequently confirmed that section 8 cannot be avoided by creative drafting in the form of inclusion of a mortgage escalation clause in a promissory note as opposed to the mortgage itself.

97. British Columbia has seen some evolution over the years. The decision in *Weirdale* has been considered in its courts, and while not specifically overruling it, also not obviously applying it.<sup>76</sup> The British Columbia Court of Appeal in another interest "discount" case, *North West Life Assurance Co. of Canada v King's Mount Holdings Ltd.*, decided that an interest rate reduction which applied when a loan was not in default did not offend section 8.<sup>77</sup>

98. A number of decisions in British Columbia have adopted various approaches to applying section 8, including a discretionary "legitimate commercial purpose" test for assessment of interest terms that were *prima facie* contrary to section 8.<sup>78</sup>

99. The British Columbia Court of Appeal decision in *Reliant* did away with that test, instead selecting a contextual and purposive approach to applying section 8. In *Reliant*, the lender had advanced funds under a mortgage for a term of 13 months and 22 days. During the first 12 months and 22 days, interest was payable only at 14% per annum. One month prior to maturity,

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<sup>73</sup> *Ibid*, at para 25 [Appellants' Book of Authorities, Tab 20].

<sup>74</sup> *P.A.R.C.E.L.*, *supra* note 43 [Appellants' Book of Authorities, Tab 13].

<sup>75</sup> *P.A.R.C.E.L.*, *supra* note 43 at paras 52-53, 60-61 [Appellants' Book of Authorities, Tab 13].

<sup>76</sup> Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 37 [Appellants' Record, Part I, Tab 5], citing *Langley*, *supra* note 62 at para 93 [Appellants' Book of Authorities, Tab 9].

<sup>77</sup> Waldron, 'Case Comment on Reliant', *supra* note 39 at para 8, citing *North West Life Assurance Co. of Canada v King's Mount Holdings Ltd.* (1987), 15 BCLR (2d) 376, 5 ACS (3d) 236 (CA) [Appellants' Book of Authorities, Tab 25].

<sup>78</sup> *TD Trust v Guinness*, 12 BCLR (3d) 180, 1995 CarswellBC 564 (BCSC) at para 20 [Appellants' Book of Authorities, Tab 18].

the interest increased to 20% per annum. Foreclosure proceedings were commenced after the loan went into default, at which time the increase to a 20% interest rate was questioned.<sup>79</sup>

100. The Court of Appeal outlined the following principles for applying section 8, all of which clearly comply with the guidance of the Supreme Court of Canada:

- a. The purpose of section 8 is to protect borrowers against penalties and oppression;<sup>80</sup>
- b. A strict and narrow interpretation of section 8 is required, so long as that interpretation does not frustrate or impair the overall purpose of the legislation;<sup>81</sup>
- c. An additional charge on arrears is prohibited, whether expressed as such or simply having 'the effect' of increasing the charge in respect of arrears;<sup>82</sup>
- d. The court must determine the intention of the parties from the language of their agreement viewed against the objective circumstances in which the agreement was made and assess whether, based on these considerations, the interest clause runs contrary to section 8.<sup>83</sup>

101. While the principles in *Reliant* comply with the guidance of the Supreme Court, the result does not. While stating that it was applying the approach described, the British Columbia Court of Appeal appears to have ultimately reinstated the "legitimate commercial purpose" test in making its decision. It considered that the borrowers were experienced business people and were to be taken as having accepted that the increase in interest rate was in accord with a competitive marketplace. The interest provisions were therefore held not to be oppressive penalties within the meaning of section 8 and thus not barred by section 8.<sup>84</sup>

102. Despite outlining an objective and purposive approach to interpretation, the reasons in *Reliant* obfuscate the principles for future application. The British Columbia Court of Appeal's additional directions are based on a strict interpretation of the language in section 8. The Court stated that whether an interest increase is triggered by time rather than default is not

<sup>79</sup> *Reliant*, *supra* note 27 at paras 12-17 [Appellants' Book of Authorities, Tab 15].

<sup>80</sup> *Ibid*, at para 89 [Appellants' Book of Authorities, Tab 15].

<sup>81</sup> *Ibid*, at para 37 [Appellants' Book of Authorities, Tab 15].

<sup>82</sup> *Ibid*, at para 52 [Appellants' Book of Authorities, Tab 15].

<sup>83</sup> *Ibid*, at paras 76, 90 [Appellants' Book of Authorities, Tab 15].

<sup>84</sup> *Ibid*, at para 77, 90 [Appellants' Book of Authorities, Tab 15].

determinative as to whether it is prohibited by section 8. However, that an increase in interest applies to monies in arrears as well as those not in arrears is determinative and such a provision is not prohibited by section 8.<sup>85</sup> These reasons seem confused, alternately describing a purposive interpretation and a strict application.

103. There are other difficulties in applying *Reliant* to future cases. As identified by Waldron, while the interest clause was structured so as to apply to both monies in arrears and not in arrears, the reality is that when payments were missed, the due date was accelerated such that all money was, in fact, in arrears (similar to this case with respect to the Second Renewal). The increased interest rate therefore applied to monies in arrears and did not apply to any monies not in arrears.<sup>86</sup>

104. *Reliant's* purposive approach was recently adopted by the Ontario Court of Appeal in *P.A.R.C.E.L.*, though in a slightly different context.<sup>87</sup>

105. Prior to the Alberta Court of Appeal decision here, the jurisprudence in Alberta demonstrated two approaches to section 8: the decision of the Alberta Court of Appeal in *Dillingham*<sup>88</sup> and the decision of the Alberta Court of Queen's Bench in *Paragon Capital Corp v 396342 Alberta Ltd.* ("*Paragon*").<sup>89</sup>

106. The Alberta Court of Appeal decision in *Dillingham* considered the application of section 8 to a mortgage term specifying an increase in interest rate from nil during the term of the mortgage to 14% per annum after maturity and default.<sup>90</sup>

107. As noted by Professor Watson Hamilton, the decision in *Dillingham* is of limited usefulness. The Alberta Court of Appeal did not base its conclusion on the application of *Weirdale* or any other case considering similar circumstances, but instead concluded that the rate of interest prior to maturity could not be nil, but was merely unspecified. This required the Court to infer that there must have been a cost for borrowing and that there was not enough evidence to determine that cost. As such, the Court could not conclude that the provision had the effect of

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<sup>85</sup> *Ibid*, at paras 78-79 [**Appellants' Book of Authorities, Tab 15**].

<sup>86</sup> Waldron, 'Case Comment on Reliant', *supra* note 39 at para 23 [**Appellants' Book of Authorities, Tab 25**].

<sup>87</sup> *P.A.R.C.E.L.*, *supra* note 43 at para 51 [**Appellants' Book of Authorities, Tab 13**].

<sup>88</sup> *Dillingham*, *supra* note 25 [**Appellants' Book of Authorities, Tab 4**].

<sup>89</sup> *Paragon Capital Corp v 396342 Alberta Ltd.*, 2004 ABQB 25, 2004 CarswellAlta 165 ("*Paragon*") [**Appellants' Book of Authorities, Tab 14**].

<sup>90</sup> *Dillingham*, *supra* note 25 at para 2 [**Appellants' Book of Authorities, Tab 4**].

increasing the interest rate on arrears. This unique reasoning does not aid in extrapolating a uniform approach to future mortgage terms.<sup>91</sup>

108. Professor Waldron, in line with the Supreme Court decision, suggests a more useful conclusion to be drawn from *Dillingham*, being that the question is whether the rate on default can be shown to be penal in effect on the particular facts of the case. If that can be demonstrated, then section 8 should operate to prohibit the provision's enforcement. That approach should apply, whatever form of words is used and whether it imposes an increase or permits a rebate.<sup>92</sup>

109. The second approach seen in Alberta jurisprudence was in *Paragon*. In that case, the Alberta Court of Queen's Bench reviewed a mortgage provision that stated that interest would be charged at 2% per month, which rate would be reduced to 1.167% per month if the loan remained in good standing.<sup>93</sup>

110. The decision of the Alberta Court of Queen's Bench in *Paragon* follows the purposive approach to section 8 stated by the Supreme Court of Canada. It noted that there was a lack of agreement on section 8 but discerned the following principles from the case law:

- a. Whether a mortgage that contains a waiver of interest provision offends section 8 of the Act, each case must be decided on its own particular facts;
- b. In making this determination one should look to its substance more than the form;
- c. Enterprise should be free to negotiate such terms of interest as the parties consider appropriate to their transaction unless the terms are clearly within the exception set out in section 8 of the Act.<sup>94</sup>

111. The Alberta Court of Queen's Bench found that, based on this approach, the interest provision fell within the contemplation of section 8 of the *Interest Act*. The lender had "changed the form of a discount into a penalty in substance" by agreeing in the loan agreement to collect

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<sup>91</sup> Jonnette Watson Hamilton, "Perennial Problem of Section 8 of the Interest Act" (May 27, 2011), online: *ABlawg.ca* (blog) <<http://ablawg.ca/2011/05/27/perennial-problem-of-section-8-of-the-interest-act/>> at 4, 6 [Appellants' Book of Authorities, Tab 26]; *Dillingham*, *supra* note 25 at para 8 [Appellants' Book of Authorities, Tab 4].

<sup>92</sup> Waldron, *The Law of Interest*, *supra* note 39 at 90 [Appellants' Book of Authorities, Tab 24].

<sup>93</sup> *Paragon*, *supra* note 89 at para 4 [Appellants' Book of Authorities, Tab 14].

<sup>94</sup> *Ibid*, at para 31 [Appellants' Book of Authorities, Tab 14].

only the lower interest rate per month during the term of the loan. Therefore, such a clause was barred by section 8.<sup>95</sup>

112. The Alberta Court of Appeal decision in the present matter causes further confusion to the law. Its decision interpreted section 8 more strictly and narrowly than any previous decision, disregarding the "substance over form" and objective and purposive approaches seen in the decisions of the Supreme Court of Canada.

113. Decisions contrary to a strict and narrow interpretation and the recent cases arising out of British Columbia were all held not to be binding on the Court (i.e. *Paragon* and *Weirdale*) and were not followed. The decision in *Reliant* was not discussed in the Majority decision. Instead, the Majority found itself bound by *obiter dicta* from the anomalous Alberta Court of Appeal decision in *Dillingham*. Its decision can be simplified to the conclusion that section 8 only applies to those mortgage terms structured as penalties for default.<sup>96</sup>

114. The increasing confusion and inconsistency in the jurisprudence is perpetuated by the decision of the Alberta Court of Appeal in this appeal. This Honourable Court can correct the problems interpreting section 8 and remove it as an "irritant for courts, lawyers, lenders and borrowers who try and understand its effect, scope and modern day purpose."<sup>97</sup>

## 2) *Recommended Approach to Section 8*

115. A liberal and purposive approach to interpretation and application of section 8 accords with the Supreme Court's previous guidance and the principles of statutory interpretation set out above. A fair, consistent, and flexible approach is outlined below, in the three-part test for the application of section 8 stated by the Ontario Court of Appeal in *P.A.R.C.E.L.*, combined with a principled approach to whether any given mortgage clause has the prohibited effect.

116. The Ontario Court of Appeal in *P.A.R.C.E.L.* set out the three prerequisites to the application of section 8 in the real property context:

- (1) The covenant in question must impose a "fine", "penalty" or "rate of interest."
- (2) The covenant must have the prohibited effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

<sup>95</sup> *Ibid*, at para 40 [**Appellants' Book of Authorities, Tab 14**].

<sup>96</sup> Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 23 [**Appellants' Record, Part I, Tab 5**].

<sup>97</sup> ULCC Background Paper, *supra* note 39 at para 2 [**Appellants' Book of Authorities, Tab 23**].

(3) The arrears of principal or interest must be secured by mortgage on real property.<sup>98</sup>

117. In determining whether any given fine, penalty or rate of interest has the prohibited effect (part 2 of the test), the following principles drawn from prior case law and from the aforementioned principles of statutory interpretation ought to apply:

- a. Parties should be free to negotiate such terms of interest as the parties consider appropriate to their transaction unless the terms violate section 8 of the Act;
- b. An additional charge on arrears is prohibited, whether expressed as such or simply having 'the effect' of increasing the charge in respect of arrears;
- c. A fair, large and liberal application of section 8 is required when determining whether a provision has the prohibited effect;
- d. Each case must be decided on its own particular facts, looking to the substance of the provision more than the form;
- e. Application of section 8 to the provision must not frustrate or impair the overall purpose of the protective legislation, namely the protection of borrowers against penalties and oppressive lending practices; and
- f. The character and sophistication of the parties to the mortgage ought not be considered when determining whether section 8 prohibits the provision.

### 3) *The First Renewal Violates Section 8*

118. The Alberta Court of Appeal erred in finding that the First Renewal did not violate section 8 of the *Interest Act*. Based on the correct approach to section 8, the interest clause in the First Renewal is unenforceable. A fair and liberal interpretation, as is required, clearly demonstrates that the First Renewal violates section 8 of the *Interest Act*.

119. The interest clause in the First Renewal was written as an interest increase from Equitable's prime interest rate plus 3.125% per annum for the first six months to 25% per annum in the artificially-added seventh month of the renewal term.<sup>99</sup> This form of interest increase had the effect of charging the higher 25% per annum interest rate on monies in arrears. This

<sup>98</sup> *P.A.R.C.E.L.*, *supra* note 43 at paras 53-56 [**Appellants' Book of Authorities, Tab 13**].

<sup>99</sup> The Mortgage Amendment – Exhibit "F" to the Affidavit of Daniel Krayzel filed November 30, 2009 [**Appellants' Record, Part III, Volume II, Tab 7F**]

prohibited effect is drawn from the circumstances of the renewal negotiation and Equitable's addition of the penal seventh month.

120. During the negotiations that resulted in the First Renewal, it was agreed, first, that the extension of the mortgage term would be for an additional six months. Upon execution of the documentation, however, an additional month was added along with the interest rate escalation to 25%.<sup>100</sup> The seventh month is the exact type of abusive lending practice that section 8 is intended to address. It was artificially added to force renewal on Equitable's terms, or if the agreement was not renewed, escalate Equitable's claim to equity in the Property. The monies to which the increased interest applied were, in fact, in arrears prior to the First Renewal, and effectively in arrears once again at the end of the six month term.

121. Furthermore, the negotiation of the First Renewal occurred when the whole of the loan and interest charges under the original mortgage were in arrears. Lougheed was in a weak negotiating position, with Equitable dictating the terms of the renewal. This is precisely the type of situation where section 8 is intended to protect the vulnerable borrower from imposition of a punitive interest increase.

122. The necessary focus of the analysis on the substance of the clause over its form reveals that the intent of the interest increase was to act as a penalty for default and an increased charge on monies in arrears. Lougheed would pay the lower interest rate until it was in a position that it could not repay and was imminently in default. Whether the time frame for the interest increase is one hour, one day, or one month before the end of the mortgage term, the effect is a penalty for default. Equitable ought not to be permitted to creatively draft a renewal that evades the prohibition in section 8 but has the effect of charging an increased interest rate when the borrower defaults.

123. Interpretation of section 8 as prohibiting the interest clause in the First Renewal accords with the principle of freedom of contract set out in section 2 of the *Interest Act*. In this case, Equitable and Lougheed were free to negotiate whatever rate of interest, so long as it didn't violate section 8 or the *Criminal Code*. The parties had the opportunity to, and did, negotiate an increased level of base interest to account for the increased risk associated with the loan. This is

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<sup>100</sup> Affidavit of Neil Richardson sworn November 2, 2009 at para 13 [**Appellants' Record, Part III, Volume I, Tab 3**]

the freedom of contract to which section 2 speaks. The 25% per annum interest rate exacted as a penalty for default is the exception to the freedom of contract explicitly prohibited by section 8.

124. It is apparent from an examination of the circumstances and effect of the interest clause in the First Renewal that it is contrary to the purpose and intent of the legislation. This is the type of situation identified by Sullivan as one where the intention of Parliament and the purpose of the legislation ought to be accorded greater weight than a strict or technical interpretation of the legislation.<sup>101</sup> Section 8 is intended to protect borrowers against penalties and oppressive lending practices that effect an increased interest rate upon default in payments.

#### **4) *The Second Renewal Violates Section 8***

125. A fair, liberal and proper interpretation also leads to the conclusion that the Second Renewal violates section 8 of the *Interest Act*.

126. The interest clause in the Second Renewal was drafted as a "discount" on interest so long as Lougheed made all payments on the loan and repaid at the end of the additional 12 month term. The interest clause is drafted as a stated interest rate of 25% per annum, but the monthly payments required to be made were in an amount equal to the greater of 7.5% per annum of Equitable's prime interest rate plus 5.25% per annum. As with the First Renewal, this form of interest clause is not automatically caught by a strict reading of section 8.

127. However, the distinction between a "penalty" interest increase and a "discount" or "forbearance" structure is precisely what was intended to be eliminated when section 8 was originally legislated. It is contrary to the intent of Parliament and the purpose of the section in adopting a strict interpretation that would exclude such a clause from the prohibition. It has the same effect as a true penalty clause in that the higher interest rate become payable on default.

128. The Second Renewal must be read in the light of a purposive reading of section 8. It does not take the explicit form of a penalty interest rate charged upon default. However, the effect of the 25% per annum interest was an increase of the interest rate on monies in arrears over that on monies not in arrears, as is prohibited by section 8. So long as the mortgage was not in default, Lougheed was to make payments at a 7.5% per annum or prime plus 5.25% per annum interest rate. As soon as Lougheed went into default, the interest rate that Equitable would enforce

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<sup>101</sup> Sullivan, *Statutes, supra* note 31 at 15 [**Appellants' Book of Authorities, Tab 22**].

against Lougheed would escalate to 25%. As such, the interest charge on monies in arrears would be 25%, whereas on monies not in arrears, the interest cost was at the lower rate. This form of interest increase ought not avoid prohibition under section 8.

129. As with the First Renewal, the parties had an opportunity to negotiate a base rate that accounted for the increased level of risk associated with the loan. As such, the principle of freedom of contract set out in section 2 of the *Interest Act* is not violated by this interpretation of section 8. The 25% penalty interest rate falls squarely within the exception to the freedom of contract explicitly prohibited. As such, this interpretation fits the purpose and intent of both section 8 and section 2 of the *Interest Act*.

130. A penalty interest escalation clause disguised as a discount is contrary to the protective purpose and intent of section 8 of the *Interest Act*. This interest gimmick is prohibited by the *Interest Act* and is unenforceable.

**F. Conclusion – The 25% Interest Rate was a Penalty in both Renewals and therefore Unenforceable**

131. From its inception, section 8 of the *Interest Act* was intended as a broad prohibition against penalties that unfairly stripped defaulting borrowers of their equity. Section 8 was a correction of a previous state of the law that permitted creatively-drafted clauses that were disguised and not explicitly drafted as penalties. Under the legislation, it was the substance of the clause that was analyzed, not the form. Section 8 focused then, and still does, on the effect of the mortgage clause.

132. The statutory protection legislated by Parliament in 1880 remains in effect in substantially the same form today. Commerce and legal drafting have both become more sophisticated, but the purpose of section 8 remains the same. Borrowers who mortgage their land, whether commercial or residential, young or old, experienced or inexperienced, are in a vulnerable position. Without protection, lenders can impose rapacious interest clauses that strip an owner of their equity upon default.

133. Today's principles of statutory interpretation mandate that legislation be read in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. This approach to interpretation goes beyond a

strict reading of the words of the provision. It requires a fair and liberal reading that best effects the purpose of the provision.

134. A liberal and purposive reading of section 8 of the *Interest Act* requires a focus on the substance rather than the form of a mortgage clause in determining whether it violates the prohibition. Mortgage terms intended to creatively avoid the operation of section 8 by being structured as an increase shortly before imminent default or as a discount or forbearance rather than a stated penalty are offensive to the purpose and intent of the provision. The interest increase in the First Renewal and the Second Renewal are two such mortgage clauses. Interpretation of section 8 as strictly applying to only those clauses framed as penalties impairs the purpose of the section and violates the intention of Parliament. As such, the decision of the Court of Appeal should be overturned in favour of a fair and purposive interpretation of section 8 that would prohibit the punitive interest terms found in the First Renewal and Second Renewal.

#### **Part IV: Submissions Concerning Costs**

135. The Appellants seek costs throughout arising from the hearing of this matter at all levels of courts, including the Court of Queen's Bench of Alberta – Master, the Court of Queen's Bench of Alberta – Justice, the Court of Appeal of Alberta, and the Supreme Court of Canada.

#### **Part V: Orders Sought**

136. The Appellants request that this Honourable Court:

- a. allow the Appeal;
- b. declare the 25% per annum rates of interest set out in the First Renewal agreement and the Second Renewal agreement are both contrary to the *Interest Act* and therefore unenforceable;
- c. award costs of this appeal in accordance with the Supreme Court of Canada tariff and refer costs below to the Clerk of the Court in Alberta to tax the Master's, Queen's Bench and Court of Appeal decisions in accordance with the Rules of Court in that province; and
- d. such further and other relief as this Honourable Court may deem just or necessary.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this \_\_\_\_ day of September, 2015.**

**KRAYZEL CORPORATION**

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## Part VI: Table of Authorities

<u>Authority</u>	<u>Reference(s)</u>
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1. <i>Barrie Public Utilities v. Canadian Cable Television Assn.</i> , 2003 SCC 28, [2003] 1 SCR 476.	<a href="#">68</a>
2. <i>Coupland Acceptance Ltd. v Walsh</i> , [1954] SCR 90, 1954 CanLII 8.	<a href="#">89</a>
3. <i>Degelder Construction Co. v Dancorp Developments Ltd.</i> , [1998] 3 SCR 90, 1998 CanLII 765.	<a href="#">75</a>
4. <i>Dillingham Construction Ltd. v Patrician Land Corp.</i> , 65 AR 220, 1985 CarswellAlta 65 (CA).	<a href="#">36</a> , <a href="#">105</a> , <a href="#">106</a>
5. <i>Garland v Consumers' Gas Co.</i> , [1998] 3 SCR 112, 1998 CanLII 766.	<a href="#">74</a>
6. <i>Housen v. Nikolaisen</i> , 2003 SCC 33, [2002] 2 SCR 235.	<a href="#">46</a>
7. <i>Immeubles Fournier Inc. et al v Construction St-Hilaire Ltée</i> , [1975] 2 SCR 2, 1974 CanLII 155.	<a href="#">61</a> , <a href="#">90</a>
8. <i>John Doe v Ontario (Finance)</i> , 2014 SCC 36, [2014] 2 SCR 3.	<a href="#">49</a>
9. <i>Langley Lo-Cost Builders Ltd. v 474835 B.C. Ltd.</i> , 2000 BCCA 365, 2000 CarswellBC 1229.	<a href="#">81</a> , <a href="#">97</a>
10. <i>M &amp; D Farm Ltd. v Manitoba Agricultural Credit Corp.</i> , [1999] 2 SCR 961, 1999 CanLII 648.	<a href="#">55</a>
11. <i>Mastercraft Properties Ltd. v El Ef Investments Inc.</i> , 103 DLR (4 <sup>th</sup> ) 759, 1993 CarswellOnt 614 (CA).	<a href="#">83</a>
12. <i>Ontario v Canadian Pacific Ltd.</i> , [1995] 2 SCR 1031, 1995 CanLII 112.	<a href="#">78</a>
13. <i>P.A.R.C.E.L. Ltd. v Acquaviva</i> , 2015 ONCA 331, 2015 CarswellOnt 6733.	<a href="#">62</a> , <a href="#">79</a> , <a href="#">96</a> , <a href="#">104</a> , <a href="#">116</a>
14. <i>Paragon Capital Corp v 396342 Alberta Ltd.</i> , 2004 ABQB 25, 2004 CarswellAlta 165.	<a href="#">105</a> , <a href="#">109</a> , <a href="#">110</a> , <a href="#">111</a>

15. *Reliant Capital Ltd. v Silverdale Development Corp.*, 2006 BCCA 226, 2006 CarswellBC 1090. [38](#), [57](#), [58](#), [62](#), [79](#), [86](#), [93](#), [99](#), [100](#), [101](#), [102](#)
16. *Rizzo v Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837. [30](#), [49](#), [70](#), [78](#)
17. *Seidel v Telus Communications Inc.* 2011 SCC 15, [2011] 1 SCR 532. [71](#)
18. *TD Trust v Guinness*, 12 BCLR (3d) 180, 1995 CarswellBC 564 (BCSC). [98](#)
19. *Tomell Investments Ltd. v East Marstock Lands Ltd.* (1977), [1978] 1 SCR 974, 1977 CanLII 33. [91](#)
20. *Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce et al (Re)*, 32 OR (2d) 183, 1981 CarswellOnt 1128 (HCJ). [94](#), [95](#)

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26. Watson Hamilton, Jonnette, *ABlawg.ca* "Perennial Problem of Section 8 of the Interest Act" (May 27, 2011), online: *ABlawg.ca* <<http://ablawg.ca/2011/05/27/perennial-problem-of-section-8-of-the-interest-act/>>.

**Part VII: Legislation**

<b><u>Tab</u></b>	<b><u>Reference(s)</u></b>
A. <i>Criminal Code of Canada</i> , RSC 1985, c C-46.	<a href="#">64</a> , <a href="#">73</a>
B. <i>Federal Law-Civil Law Harmonization Act, No. 1</i> , SC 2001, c 4.	<a href="#">61</a>
C. <i>Interest Act</i> , RSC 1985, c I-15.	<a href="#">2</a> , <a href="#">47</a> ,
D. <i>Interpretation Act</i> , RSC 1985, c I-21.	<a href="#">30</a> , <a href="#">59</a> , <a href="#">67</a>

# Tab A

Criminal Code of Canada, RSC 1985, c C-46



CANADA

CONSOLIDATION

CODIFICATION

## Criminal Code

## Code criminel

R.S.C., 1985, c. C-46

L.R.C. (1985), ch. C-46

Current to August 30, 2015

À jour au 30 août 2015

Last amended on July 23, 2015

Dernière modification le 23 juillet 2015

Sequence of convictions only	(1.3) For the purposes of subsection (1.2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.	(1.3) Pour l'application du paragraphe (1.2), il est tenu compte de l'ordre des déclarations de culpabilité et non de l'ordre de perpétration des infractions, ni du fait qu'une infraction a été commise avant ou après une déclaration de culpabilité.	Précision relative aux condamnations antérieures
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Savings	(2) A threat to institute civil proceedings is not a threat for the purposes of this section. R.S., 1985, c. C-46, s. 146; R.S., 1985, c. 27 (1st Supp.), s. 46, 1995, c. 39, s. 150; 2008, c. 6, s. 33, 2009, c. 22, s. 15	(2) Une menace d'intenter des procédures civiles n'est pas une menace pour l'application du présent article. L.R. (1985), ch. C-46, art. 146; L.R. (1985), ch. 27 (1 <sup>er</sup> suppl.), art. 46; 1995, ch. 39, art. 150; 2008, ch. 6, art. 33; 2009, ch. 22, art. 15	Réserve
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## CRIMINAL INTEREST RATE

## TAUX D'INTÉRÊT CRIMINEL

Criminal interest rate	347. (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is	347. (1) Malgré toute autre loi fédérale, quiconque conclut une convention ou une entente pour percevoir des intérêts à un taux criminel ou perçoit, même partiellement, des intérêts à un taux criminel est coupable :	Taux d'intérêt criminel
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(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

(b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'une amende maximale de 25 000 \$ et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

Definitions	(2) In this section,	(2) Les définitions qui suivent s'appliquent au présent article.	Définitions
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"credit advanced" "capital prêtée"	"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;	« capital prêté » "credit advanced"	« capital prêté » "credit advanced"
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"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;	« dépôt de garantie » "required deposit balance"	« dépôt de garantie » "required deposit balance"
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"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;	« frais d'assurance » "insurance charge"	« frais d'assurance » "insurance charge"
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"interest" "intérêts"	"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar	« intérêt » "interest charge"	« intérêt » "interest charge"
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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 ab-

«frais pour découvert de compte» Les frais, d’un maximum de cinq dollars, payables lorsqu’un compte est à découvert ou lorsqu’il y a aggravation de ce découvert, et perçus soit par une caisse populaire ou *credit union* groupant uniquement ou principalement des personnes physiques, soit par un établissement recevant des fonds en dépôt, lesquels sont entièrement ou partiellement garantis par la Société d’assurance-dépôts du Canada ou par la Régie de l’assurance-dépôts du Québec.

«frais pour découvert de compte»  
“overdraft charge”

«intérêt» L’ensemble des frais de tous genres, y compris les agios, commissions, pénalités et indemnités, qui sont payés ou payables à qui que ce soit par l’emprunteur ou pour son compte, en contrepartie du capital prêté ou à prêter. La présente définition exclut un remboursement de capital prêté, les frais d’assurance, les taxes officielles, les frais pour découvert de compte, le dépôt de garantie et, dans le cas d’un prêt hypothécaire, les sommes destinées à l’acquittement de l’impôt foncier.

«intérêt»  
“interest”

«taux criminel» Tout taux d’intérêt annuel effectif, appliqué au capital prêté et calculé conformément aux règles et pratiques actuarielles généralement admises, qui dépasse soixante pour cent.

«taux criminel»  
“criminal rate”

«taxe officielle» La taxe perçue, en vertu d’une loi, par une administration pour valider les sûretés consenties dans une convention ou une entente de prêt.

«taxe officielle»  
“official fee”

(3) Quiconque reçoit paiement, total ou partiel, d’intérêts à un taux criminel est présumé connaître, jusqu’à preuve du contraire, l’objet du paiement et le caractère criminel de celui-ci.

Presumption

(4) Dans toute poursuite intentée en vertu du présent article, l’attestation du taux annuel effectif applicable à un capital prêté, fait foi jusqu’à preuve du contraire si elle est faite par un *Fellow* de l’Institut canadien des actuaires avec chiffres et éléments justificatifs à l’appui; il n’est pas nécessaire de prouver l’authenticité de

Preuve du taux annuel effectif

# Tab B

Federal Law-Civil Law Harmonization Act, No. 1,  
SC 2001, c 4

First Session, Thirty-seventh Parliament,  
49-50 Elizabeth II, 2001

Première session, trente-septième législature,  
49-50 Elizabeth II, 2001

**STATUTES OF CANADA 2001**

**LOIS DU CANADA (2001)**

**CHAPTER 4**

**CHAPITRE 4**

A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law

Loi n<sup>o</sup> 1 visant à harmoniser le droit fédéral avec le droit civil de la province de Québec et modifiant certaines lois pour que chaque version linguistique tienne compte du droit civil et de la common law

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**BILL S-4**

**ASSENTED TO 10th MAY, 2001**

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**PROJET DE LOIS-4**

**SANCTIONNÉ LE 10 MAI 2001**

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tion (1) has effect only so far as may be consistent with the due execution of the judgment:

R.S., c. 1:15

*Interest Act*

*Loi sur l'intérêt*

L.R., ch. 1:15

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

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

When per annum rate not stipulated

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

4. Sauf à l'égard des hypothèques sur immeubles ou biens réels, lorsque, aux termes d'un contrat écrit ou imprimé, scellé ou non, quelque intérêt est payable à un taux ou pourcentage par jour, semaine ou mois, ou à un taux ou pourcentage pour une période de moins d'un an, aucun intérêt supérieur au taux ou pourcentage de cinq pour cent par an n'est exigible, payable ou recouvrable sur une partie quelconque du principal, à moins que le contrat n'énonce expressément le taux d'intérêt ou pourcentage par an auquel équivaut cet autre taux ou pourcentage.

Lorsque le taux par an n'est pas indiqué

**92. Section 6 of the Act and the heading before it are replaced by the following:**

**92. L'article 6 de la même loi et l'intertitre le précédant sont remplacés par ce qui suit :**

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

INTÉRÊT SUR DENIERS GARANTIS PAR HYPOTHÈQUE SUR IMMEUBLES OU BIENS RÉELS

No interest recoverable in certain cases

6. Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage or hypothec contains a statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance.

6. Lorsqu'un principal ou un intérêt garanti par hypothèque sur immeubles ou biens réels est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, d'après tout système en vertu duquel les versements du principal et de l'intérêt sont confondus ou d'après tout plan ou système qui comprend une allocation d'intérêt sur des remboursements stipulés, aucun intérêt n'est exigible, payable ou recouvrable sur une partie quelconque du principal prêté, à moins que l'acte d'hypothèque ne fasse mention du principal et du taux de l'intérêt exigible à son égard, calculé annuellement ou semestriellement, mais non d'avance.

Il ne peut être recouvré d'intérêt dans certains cas

**93. Section 7 of the English version of the Act is replaced by the following:**

**93. L'article 7 de la version anglaise de la même loi est remplacé par ce qui suit :**

No rate recoverable beyond that so stated

7. Whenever the rate of interest shown in the statement mentioned in section 6 is less than the rate of interest that would be chargeable by virtue of any other provision, calcula-

7. Whenever the rate of interest shown in the statement mentioned in section 6 is less than the rate of interest that would be chargeable by virtue of any other provision, calcula-

No rate recoverable beyond that so stated

tion or stipulation in the mortgage or hypothec, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in the statement.

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

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

**95. Section 10 of the Act is replaced by the following:**

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

(2) Nothing in this section applies to any mortgage on real property or hypothec on immovables given by a joint stock company or other corporation, nor to any debenture issued by any such company or corporation, for the payment of which security has been given by way of mortgage on real property or hypothec on immovables.

No fine, etc., allowed on payments in arrears

When no further interest payable

When section not to apply

tion or stipulation in the mortgage or hypothec, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in the statement.

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

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

**95. L'article 10 de la même loi est remplacé par ce qui suit :**

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

(2) Le présent article n'a pas pour effet de s'appliquer à une hypothèque sur immeubles ou biens réels consentie par une compagnie par actions ou autre personne morale, non plus qu'aux débentures émises par une telle compagnie ou personne morale, dont le remboursement a été garanti au moyen d'hypothèques sur immeubles ou biens réels.

Pas d'amende sur les versements arriérés

Nul autre intérêt n'est payable

Quand l'article ne s'applique pas

# Tab C

Interest Act, RSC 1985, c I015



CANADA

CONSOLIDATION

CODIFICATION

## Interest Act

## Loi sur l'intérêt

R.S.C., 1985, c. I-15

L.R.C. (1985), ch. I-15

Current to August 30, 2015

À jour au 30 août 2015

Last amended on June 18, 2008

Dernière modification le 18 juin 2008

OFFICIAL STATUS  
OF CONSOLIDATIONS

CARACTÈRE OFFICIEL  
DES CODIFICATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Codifications comme élément de preuve

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

Incompatible --- lois

NOTE

NOTE

This consolidation is current to August 30, 2015. The last amendments came into force on June 18, 2008. Any amendments that were not in force as of August 30, 2015 are set out at the end of this document under the heading "Amendments Not in Force".

Cette codification est à jour au 30 août 2015. Les dernières modifications sont entrées en vigueur le 18 juin 2008. Toutes modifications qui n'étaient pas en vigueur au 30 août 2015 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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R.S.C., 1985, c. I-15

L.R.C., 1985, ch. I-15

An Act respecting interest

Loi concernant l'intérêt

## SHORT TITLE

## TITRE ABRÉGÉ

Short title

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

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

1. *Loi sur l'intérêt*.

S.R. ch. I-18, art. 1

Titre abrégé

## RATE OF INTEREST

## TAUX D'INTÉRÊT

No restriction  
except by statute

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

R.S. c. I-18, s. 2

2. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, une personne peut stipuler, allouer et exiger, dans tout contrat ou convention quelconque, le taux d'intérêt ou d'escompte qui est convenu.

S.R. ch. I-18, art. 2

Nulle restriction  
sauf les  
dispositions des  
loisInterest rate  
when none  
provided

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

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

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

S.R. ch. I-18, art. 3

Taux d'intérêt  
lorsque non fixéWhen per  
annum rate not  
stipulated

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

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

4. Sauf à l'égard des hypothèques sur immeubles ou biens réels, lorsque, aux termes d'un contrat écrit ou imprimé, scellé ou non, quelque intérêt est payable à un taux ou pourcentage par jour, semaine ou mois, ou à un taux ou pourcentage pour une période de moins d'un an, aucun intérêt supérieur au taux ou pourcentage de cinq pour cent par an n'est exigible, payable ou recouvrable sur une partie quelconque du principal, à moins que le contrat n'énonce expressément le taux d'intérêt ou pourcentage par an auquel équivaut cet autre taux ou pourcentage.

L.R. (1985), ch. I-15, art. 4, 2001, ch. 4, art. 91

Lorsque le taux  
par an n'est pas  
indiquéRecovery of  
sums paid  
otherwise

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

R.S. c. I-18, s. 5

5. En cas de paiement d'une somme à compte d'un intérêt non exigible, payable ou recouvrable en vertu de l'article 4, cette somme peut être recouvrée ou déduite de tout principal ou de tout intérêt à payer en vertu du contrat.

S.R. ch. I-18, art. 5

Recouvrement  
des sommes  
payées

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

No interest  
recoverable in  
certain cases

6. Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage or hypothec contains a statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance.

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

No rate  
recoverable  
beyond that so  
stated

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

R.S., 1985, c. I-15, s. 7, 2001, c. 4, s. 93(1)

No fine, etc.  
allowed on  
payments in  
arrears

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

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

R.S., 1985, c. I-15, s. 8, 2001, c. 4, s. 94

Interest on  
arrears

Overcharge may  
be recovered  
back

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

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

INTÉRÊT SUR DENIERS GARANTIS PAR  
HYPOTHÈQUE SUR IMMEUBLES OU  
BIENS RÉELS

Il ne peut être  
recouvré  
d'intérêt dans  
certains cas

6. Lorsqu'un principal ou un intérêt garanti par hypothèque sur immeubles ou biens réels est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, d'après tout système en vertu duquel les versements du principal et de l'intérêt sont confondus ou d'après tout plan ou système qui comprend une allocation d'intérêt sur des remboursements stipulés, aucun intérêt n'est exigible, payable ou recouvrable sur une partie quelconque du principal prêté, à moins que l'acte d'hypothèque ne fasse mention du principal et du taux de l'intérêt exigible à son égard, calculé annuellement ou semestriellement, mais non d'avance.

L.R. (1985), ch. I-15, art. 6, 2001, ch. 4, art. 92

7. Lorsque le taux d'intérêt mentionné en vertu de l'article 6 est moindre que celui qui serait exigible en vertu de quelque autre disposition, calcul ou stipulation de l'acte d'hypothèque, il n'est exigible, payable ou recouvrable sur le principal avancé aucun intérêt plus élevé que le taux ainsi mentionné.

L.R. (1985), ch. I-15, art. 7, 2001, ch. 4, art. 93(A)

L'intérêt  
recouvrable ne  
peut dépasser le  
taux ainsi  
mentionné

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

(2) Le présent article n'a pas pour effet de prohiber un contrat pour le paiement d'intérêt, sur des arrérages d'intérêt ou de principal, à un taux ne dépassant pas celui payable sur le principal non arriéré.

L.R. (1985), ch. I-15, art. 8, 2001, ch. 4, art. 94

Pas d'amende  
sur les  
versements  
arrérés

Intérêt sur les  
arrérages  
d'intérêt

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

S.R., ch. I-18, art. 9

Les surcharges  
peuvent être  
recouvrées

When no further  
interest payable

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

Exception

(2) Subsection (1) does not apply

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

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

Regulations

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

(a) prescribe entities; and

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

R.S., 1985, c. I-15, s. 10, 2001, c. 4, s. 95, 2008, c. 28, s. 155

**11. to 14.** [Repealed, 1992, c. 1, s. 146]

Nul autre intérêt  
n'est payable

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

Exception

(2) Le paragraphe (1) ne s'applique pas :

a) à l'hypothèque sur immeubles ou biens réels consentie par une compagnie par actions ou une personne morale, non plus qu'aux débiteures émises par elles, dont le remboursement a été garanti au moyen d'une telle hypothèque;

b) à l'hypothèque sur immeubles ou biens réels visée par règlement qui est consentie par une entité prévue par règlement, non plus qu'aux débiteures visées par règlement qui sont émises par elle, dont le remboursement a été garanti au moyen d'une telle hypothèque.

Règlements

(3) Pour l'application de l'alinéa (2)b), le gouverneur en conseil peut, par règlement :

a) prévoir des entités;

b) prévoir des catégories d'hypothèques consenties par ces entités et des catégories de débiteures émises par elles.

L.R. (1985), ch. I-15, art. 10, 2001, ch. 4, art. 95, 2008, ch. 28, art. 155

**11. à 14.** [Abrogés, 1992, ch. 1, art. 146]

## AMENDMENTS NOT IN FORCE

— 1996, c. 17, ss. 17, 18

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

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

When annual rate not stipulated

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

Regulations

— 1996, c. 17, ss. 17, 18

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

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

Interest recoverable in certain cases

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

Regulations

— 2001, c. 4, ss. 175, 176

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

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

R.S. c. 1-15

When annual rate not stipulated

## MODIFICATIONS NON EN VIGUEUR

— 1996, ch. 17, art. 17 et 18

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

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

Lorsque le taux annuel n'est pas indiqué

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

Règlements

— 1996, ch. 17, art. 17 et 18

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

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

Intérêt recouvrable dans certains cas

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

Règlements

— 2001, ch. 4, art. 175 et 176

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

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

L.R., ch. 1-15

Lorsque le taux annuel n'est pas indiqué

Coming into force	(2) Subsection (1) comes into force on the later of the coming into force of section 91 of this Act and section 17 of the <i>Agreement on Internal Trade Implementation Act</i> , chapter 17 of the Statutes of Canada, 1996.	(2) Le paragraphe (1) prend effet à l'entrée en vigueur de l'article 91 de la présente loi ou à celle de l'article 17 de la <i>Loi de mise en œuvre de l'Accord sur le commerce intérieur</i> , chapitre 17 des Lois du Canada (1996), la dernière en date étant à retenir.	Entrée en vigueur
	— 2001, c. 4, ss. 175, 176	— 2001, ch. 4, art. 175 et 176	
R.S., c. 1-15	176. (1) Subsection 6(1) of the <i>Interest Act</i> and the heading before it are replaced by the following:	176. (1) Le paragraphe 6(1) de la <i>Loi sur l'intérêt</i> et l'intertitre le précédant sont remplacés par ce qui suit :	I.R., ch. 1-15
	INTEREST ON MONEYS SECURED BY MORTGAGE ON REAL PROPERTY OR HYPOTHEC ON IMMOVABLES	INTÉRÊT SUR DENIERS GARANTIS PAR HYPOTHÈQUE SUR IMMEUBLES OU BIENS RÉELS	
Interest recoverable in certain cases	6. (1) Whenever any principal money or interest secured by mortgage on real property or hypothec on immovables is, by the mortgage or hypothec, made payable on a sinking fund plan, on any plan under which the payments of principal money and interest are blended, on any plan that involves an allowance of interest on stipulated payments or on any fund or plan described in the regulations, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced unless the mortgage or hypothec contains an express statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated in accordance with the regulations.	6. (1) Lorsqu'un principal ou un intérêt garanti par hypothèque sur immeubles ou biens réels est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, d'après tout système en vertu duquel les versements du principal et de l'intérêt sont confondus, d'après tout plan ou système qui comprend une allocation d'intérêt sur des remboursements stipulés, ou d'après un fonds ou un système prévu par règlement, aucun intérêt n'est exigible, payable ou recouvrable sur une partie quelconque du principal prêté, à moins que l'acte d'hypothèque ne fasse expressément mention du principal et du taux de l'intérêt exigible à son égard, calculé conformément aux règlements.	Intérêt recouvrable dans certains cas
Coming into force	(2) Subsection (1) comes into force on the later of the coming into force of section 92 of this Act and section 18 of the <i>Agreement on Internal Trade Implementation Act</i> , chapter 17 of the Statutes of Canada, 1996.	(2) Le paragraphe (1) prend effet à l'entrée en vigueur de l'article 92 de la présente loi ou à celle de l'article 18 de la <i>Loi de mise en œuvre de l'Accord sur le commerce intérieur</i> , chapitre 17 des Lois du Canada (1996), la dernière en date étant à retenir.	Entrée en vigueur

# Tab D

Interpretation Act, RSC 1985, c I-21



CANADA

CONSOLIDATION

CODIFICATION

# Interpretation Act

# Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

Current to August 30, 2015

À jour au 30 août 2015

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R.S.C., 1985, c. 1-21

L.R.C., 1985, ch. 1-21

An Act respecting the interpretation of statutes and regulations

Loi concernant l'interprétation des lois et des règlements

## SHORT TITLE

## TITRE ABRÉGÉ

Short title

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

R.S. c. 1-23, s. 1

1. *Loi d'interprétation*.

S.R., ch. 1-23, art. 1

Titre abrégé

## INTERPRETATION

## DÉFINITIONS ET INTERPRÉTATION

Definitions

2. (1) In this Act,

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

Définitions

"Act"  
« loi »

"Act" means an Act of Parliament;

« fonctionnaire public » Agent de l'adminis-

Définitions

"enact"  
Personne anglaise  
seulement

"enact" includes to issue, make or establish;

tration publique fédérale dont les pouvoirs ou obligations sont prévus par un texte.

« fonctionnaire public »  
"public officer""enactment"  
« loi »

"enactment" means an Act or regulation or any portion of an Act or regulation;

« loi » Loi fédérale.

« loi »  
"Act""public officer"  
« fonctionnaire public »

"public officer" includes any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment;

« règlement » Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

« règlement »  
"regulation""regulation"  
« règlement »

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité.

« texte » Tout ou partie d'une loi ou d'un règlement.

« texte »  
"enactment""repeal"  
Personne anglaise  
seulement

"repeal" includes revoke or cancel.

Expired and replaced enactments

(2) For the purposes of this Act, an enactment that has been replaced is repealed and an enactment that has expired, lapsed or otherwise

(2) Pour l'application de la présente loi, le remplacement d'un texte emporte son abroga-

Abrogation

ceased to have effect is deemed to have been repealed.

R.S., 1985, c. 1-21, s. 2, 1993, c. 34, s. 88, 1999, c. 31, s. 146, 2003, c. 22, s. 224(f);

#### APPLICATION

**Application** 3. (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

**Application to this Act** (2) The provisions of this Act apply to the interpretation of this Act.

**Rules of construction not excluded** (3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act.

R.S., c. 1-23, s. 3

#### ENACTING CLAUSE OF ACTS

**Enacting clause** 4. (1) The enacting clause of an Act may be in the following form:

“Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:”

**Order of clauses** (2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview or body of the Act shall follow in a concise and enunciative form.

R.S., c. 1-23, s. 4

#### OPERATION

##### ROYAL ASSENT

**Royal assent** 5. (1) The Clerk of the Parliaments shall endorse on every Act, immediately after its title, the day, month and year when the Act was assented to in Her Majesty's name and the endorsement shall be a part of the Act.

**Date of commencement** (2) If no date of commencement is provided for in an Act, the date of commencement of that Act is the date of assent to the Act.

**Commencement provision** (3) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date of assent to the Act, that provision is deemed to have come into force on the date of assent to the Act.

**Commencement when no date fixed** (4) Where an Act provides that certain provisions thereof are to come or are deemed to have come into force on a day other than the

tion; vaut aussi abrogation du texte sa cessation d'effet par caducité ou autrement.

L.R. (1985), ch. 1-21, art. 2, 1993, ch. 34, art. 88, 1999, ch. 31, art. 146, 2003, ch. 22, art. 224(A)

#### CHAMP D'APPLICATION

3. (1) Sauf indication contraire, la présente loi s'applique à tous les textes, indépendamment de leur date d'édiction.

(2) La présente loi s'applique à sa propre interprétation.

(3) Sauf incompatibilité avec la présente loi, toute règle d'interprétation utile peut s'appliquer à un texte.

S.R., ch. 1-23, art. 3

#### FORMULE D'ÉDICTION

4. (1) La formule d'édiction des lois peut être ainsi conçue :

« Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte : ».

(2) En cas de préambule, la formule d'édiction s'y rattache; viennent ensuite, en énoncés succincts, les articles du dispositif.

S.R., ch. 1-23, art. 4

#### EFFET

##### SANCTION ROYALE

5. (1) Le greffier des Parlements inscrit sur chaque loi, immédiatement après son titre, la date de sa sanction au nom de Sa Majesté. L'inscription fait partie de la loi.

(2) Sauf disposition contraire y figurant, la date d'entrée en vigueur d'une loi est celle de sa sanction.

(3) Entre en vigueur à la date de la sanction d'une loi la disposition de cette loi qui prévoit pour l'entrée en vigueur de celle-ci ou de telle de ses dispositions une date ultérieure à celle de la sanction.

(4) Lorsqu'une loi prévoit pour l'entrée en vigueur de certaines de ses dispositions une date antérieure ou postérieure à celle de la

Ensemble des textes

Présente loi

Toutes règles d'interprétation

Présentation

Disposition

Inscription de la date

Entrée en vigueur

Report de l'entrée en vigueur

Absence d'indication de date

in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

2001, c. 4, s. 8

Terminology

**8.2.** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

2001, c. 4, s. 8

#### PRIVATE ACTS

Provisions in private Acts

**9.** No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

R.S., c. I-23, s. 9

#### LAW ALWAYS SPEAKING

Law always speaking

**10.** The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10

#### IMPERATIVE AND PERMISSIVE CONSTRUCTION

"Shall" and "may"

**11.** The expression "shall" is to be construed as imperative and the expression "may" as permissive.

R.S., c. I-23, s. 28

#### ENACTMENTS REMEDIAL

Enactments deemed remedial

**12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal

au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

2001, ch. 4, art. 8

Terminologie

**8.2.** Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

2001, ch. 4, art. 8

#### LOIS D'INTÉRÊT PRIVÉ

Effets

**9.** Les lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue.

S.R., ch. I-23, art. 9

#### PERMANENCE DE LA RÈGLE DE DROIT

Principe général

**10.** La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10

#### OBLIGATION ET POUVOIRS

Expression des volontés

**11.** L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

S.R., ch. I-23, art. 28

#### SOLUTION DE DROIT

Principe et interprétation

**12.** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus

construction and interpretation as best ensures the attainment of its objects.

R.S., c. 1-23, s. 11

équitable et la plus large qui soit compatible avec la réalisation de son objet.

S.R., ch. 1-23, art. 11

#### PREAMBLES AND MARGINAL NOTES

#### PRÉAMBULES ET NOTES MARGINALES

Preamble

13. The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

R.S., c. 1-23, s. 12

13. Le préambule fait partie du texte et en constitue l'exposé des motifs.

S.R., ch. 1-23, art. 12

Préambule

Marginal notes and historical references

14. Marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only.

R.S., c. 1-23, s. 13

14. Les notes marginales ainsi que les mentions de textes antérieurs apparaissant à la fin des articles ou autres éléments du texte ne font pas partie de celui-ci, n'y figurant qu'à titre de repère ou d'information.

S.R., ch. 1-23, art. 13

Notes marginales

#### APPLICATION OF INTERPRETATION PROVISIONS

#### DISPOSITIONS INTERPRÉTATIVES

Application of definitions and interpretation rules

15. (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

15. (1) Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

Application

Interpretation sections subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(2) Les dispositions définitoires ou interprétatives d'un texte :

Restriction

(a) as being applicable only if a contrary intention does not appear; and

a) n'ont d'application qu'à défaut d'indication contraire;

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

b) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

S.R., ch. 1-23, art. 14

R.S., c. 1-23, s. 14

Words in regulations

16. Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

16. Les termes figurant dans les règlements d'application d'un texte ont le même sens que dans celui-ci.

Terminologie des règlements

R.S., c. 1-23, s. 15

S.R., ch. 1-23, art. 15

#### HER MAJESTY

#### SA MAJESTÉ

Her Majesty not bound or affected unless stated

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

Non-obligation, sauf indication contraire

R.S., c. 1-23, s. 16

S.R., ch. 1-23, art. 16

#### PROCLAMATIONS

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Proclamation

18. (1) Where an enactment authorizes the issue of a proclamation, the proclamation shall be understood to be a proclamation of the Governor in Council.

18. (1) Les proclamations dont la prise est autorisée par un texte émanant du gouverneur en conseil.

Auteur