

FILE NUMBER: \_\_\_\_\_

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

**BETWEEN:**

**Krayzel Corporation**

Applicant  
(Appellant/Subsequent Encumbrancer)

- and -

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

Applicants  
(Appellants/Defendants)

- and -

**The Equitable Trust Company**

Respondent  
(Respondent/Plaintiff)

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**APPLICATION FOR LEAVE TO APPEAL**  
KRAYZEL CORPORATION, THE LOUGHEED BLOCK INC.,  
NEIL JOHN RICHARDSON, HUGH DARYL RICHARDSON and  
HERITAGE PROPERTY CORPORATION (APPLICANTS)  
*Section 40 of the Supreme Court Act, R.S.C. 1985, c. S-26*

**VOLUME I**

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**MEMORANDUM OF ARGUMENT**

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**Part I: Statement of Facts****A. Overview**

1. In the field of personal and business financing, vulnerable borrowers are at particular risk of abuse when contracting with mortgage lenders. If not for statutory protections found in section 8 of the *Interest Act*, RSC 1985, c I-15 (the "*Interest Act*"), predatory mortgage lenders would have the ability to strip defaulting property owners of their equity through exorbitant penalties. In an economic environment of increasing mortgage debt, section 8 protects all types of mortgagors from abusive interest penalties, be they individual or corporate, young or old, inexperienced or sophisticated. These protections are becoming ever more important as mortgage lenders craft increasingly more sophisticated and complex terms. This case concerns creatively-drafted interest clauses in two consecutive mortgage renewals that capitalized on the weak negotiating position of the borrower and, during the inevitable foreclosure proceedings, appropriated any equity remaining in the subject property. Their effect was an increase in the amount owed by the Applicant mortgagor, Lougheed Block Inc. ("Lougheed") and thereby the Applicant guarantors, Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation, and the complete erosion of the remaining equity available for the subsequent encumbrancers, including the Applicant, Krayzel Corporation ("Krayzel") who held a second mortgage on the subject property. This case asks whether, based on the proper application of principles of statutory interpretation, mortgage lenders can, through the words they use, draft their way around the prohibition in section 8. Borrowers are at risk if section 8 is strictly construed to the point where the prohibited effect of such clauses is permitted through clever drafting.

*Interest Act*, RSC 1985, c I-15, s 8 [TAB 5T].

2. The Alberta Court of Appeal's Majority decision contains critical errors in interpreting section 8, with adverse impacts for mortgage lending across the country. The court below failed to apply long-standing principles of contextual and purposive statutory interpretation, instead

rendering the 130-year old protection impotent by restricting its application to almost no coverage. The decision below contradicts those arising from other provincial jurisdictions and exacerbates the inconsistency in this area of law. By considering this appeal, the Supreme Court of Canada has the opportunity to correct this error, establish a fair, large and liberal interpretation of section 8 as fits its purpose and bring uniformity to the multiplicity of approaches from Ontario, British Columbia, and Alberta.

3. The issues raised in this leave to appeal application have the public and national importance that befits consideration by the Supreme Court of Canada.

**B. The Equitable Mortgage**

4. The Applicant borrower, Lougheed, was the registered owner of a heritage office building and land located in downtown Calgary (the "Property").

Memorandum of Decision of Master Hanebury at para 2 [TAB 2A].

5. On November 8, 2006, Lougheed granted the Respondent lender, The Equitable Trust Company ("Equitable"), a mortgage and charge against the Property (the "Equitable Mortgage").

Memorandum of Decision of Master Hanebury at para 3 [TAB 2A].

6. The Equitable Mortgage was in the principal amount of \$27 million, with interest at Equitable's prime interest rate plus 2.875% per annum.

Memorandum of Decision of Master Hanebury at paras 3-4 [TAB 2A].

**C. The First Renewal**

7. 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 pay out the Equitable Mortgage.

Memorandum of Decision of Master Hanebury at para 5 [TAB 2A].

8. On August 27, 2008, Lougheed and Equitable entered into a letter agreement effective August 1, 2008, which renewed the Equitable Mortgage for a further seven months until March 1, 2009 (the "First Renewal").

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [TAB 2D].

9. The First Renewal was at an interest rate of Equitable's prime interest rate plus 3.125% per annum for the first six months, increasing to 25% per annum for the final month. The First Renewal also required Lougheed to pay a \$417,000 renewal fee and charged a \$10,000 default administration fee. 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.

...

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."

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [TAB 2D].

The First Renewal – Exhibit "F" to the Affidavit of Jennifer Shaw filed June 23, 2009 [TAB 4A].

**D. The Second Renewal**

10. On March 1, 2009, when the First Renewal matured, Lougheed was in default and struggling to obtain alternate financing. Equitable offered a further renewal for an additional 12 months. On April 28, 2009, Lougheed and Equitable executed an agreement effective February 1, 2009 (the "Second Renewal")

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45  
[TAB 2D].

11. The Second Renewal was 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 second renewal also required Lougheed to pay a \$556,000 renewal fee no later than June 30, 2009. The relevant provisions in the Second Renewal are as follows:

"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 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."

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [TAB 2D].

The Second Renewal – Exhibit "G" to the Affidavit of Jennifer Shaw filed June 23, 2009 [TAB 4B].

#### **E. Foreclosure and Judicial Sale**

12. Less than a month after execution of the Second Renewal, on May 20, 2009, Equitable gave Lougheed written notice of default and demanded payment of \$30,180,321.35, the total amount it claimed was owing based on a 25% per annum interest rate and including a \$10,000 default administration fee. Equitable brought foreclosure proceedings against the Property on June 2, 2009.

Memorandum of Decision of Master Hanebury at para 14 [TAB 2A].

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [TAB 2D].

13. As of June 7, 2010, Equitable calculated the amount of \$37,994,738.85 to be due and owing under the Equitable Mortgage, based upon interest accruing at the rate of 25% per annum after February 1, 2009 and including the default fees. In the event that the 25% per annum interest rate was found to breach section 8 of the *Interest Act*, Equitable calculated the amount of \$30,008,294.55 to be due and owing under the Equitable mortgage.

Affidavit of Ken Lai, sworn June 8, 2010 at Exhibits "A" and "B" [TAB 4C].

14. The Property was sold by judicial sale realizing sales proceeds of \$30,653,148.97. Equitable received \$29,147,618.37 in distributions from the proceeds. If the 25% per annum

interest rate was applied, the remaining \$1,505,529.60 would also be awarded to Equitable, leaving no value for subsequent encumbrancers, including the Applicant.

Order of Master Prowse dated July 6, 2010 [TAB 4D].

Memorandum of Decision of Master Hanebury at para 15 [TAB 2A].

**F. Master Hanebury Declares the Increase in Interest Unenforceable**

15. Lougheed, Krayzel and Equitable brought applications asking for a determination of the amount owing under the Equitable Mortgage. Lougheed and Krayzel sought a declaration that the 25% interest rate was contrary to section 8 of the *Interest Act* and Equitable asked the Court to affirm the 25% interest rate.

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45 [TAB 2D].

16. Master Hanebury correctly interpreted section 8 as speaking to fines, charges or penalties that have the effect of increasing interest on money in arrears over that not in arrears; the focus of the court's inquiry is on the substance of the transaction, not just its form. Interest rate increases provided for in the First Renewal and Second Renewal offended section 8 of the *Interest Act* and were unenforceable, as were default administration fees charged by Equitable.

Memorandum of Decision of Master Hanebury at paras 58, 73 and 82 [TAB 2A].

**G. The Honourable Justice Romaine Applies a Strict and Narrow Interpretation**

17. Equitable appealed the decision of Master Hanebury with respect to the interpretation of section 8 of the *Interest Act*.

Reasons for Decision of the Hon. Mme. Justice Romaine at para 1 [TAB 2B].

18. The Honourable Madam Justice Romaine of the Court of Queen's Bench of Alberta misinterpreted section 8 of the *Interest Act* as requiring a strict and narrow interpretation, contrary to the broad and remedial approach called for by the *Interpretation Act*, RSC 1985, c I-21 and the modern approach to statutory interpretation.

Reasons for Decision of the Hon. Mme. Justice Romaine at para 45 [TAB 2B].

*Interpretation Act*, RSC 1985, c I-21, s 12 [TAB 5U].

*Rizzo v Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21 [TAB 5K].

19. She 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 to enact freedom of contract with respect to interest rates. The second is the protection of borrowers in the context of mortgage lending, as seen in the prohibition enacted in section 8. Due to the physical construction of section 8 as an exception, Madam Justice Romaine applied a strict and narrow interpretation to section 8, but failed to consider the purpose of the *Interest Act* and beneficial nature of the section, which demand a fair and liberal interpretation. Madam Justice Romaine found that neither the First Renewal, nor the Second Renewal, breached the section.

Reasons for Decision of the Hon. Mme. Justice Romaine at paras 45, 65 and 81  
[TAB 2B].

#### **H. Majority of the Court of Appeal of Alberta Finds Itself Bound by *Dillingham***

20. A number of parties were heard by the Alberta Court of Appeal in a consolidated appeal.

Consent Consolidation Order of the Hon. Mme. Justice P.A. Rowbotham  
[TAB 2C].

21. The Court of Appeal was unanimous in finding that the First Renewal did not contain a provision in breach of section 8 of the *Interest Act*. The Alberta Court of Appeal found it dispositive 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.

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 1  
[TAB 2D].

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 45  
[TAB 2D].

22. 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*"). Despite being easily distinguishable on the facts, Madam Justice Hunt lamented that, absent an official application to reconsider the decision, she was bound by *Dillingham*, which, in her view, 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*.

*Dillingham Construction Ltd. v Patrician Land Corp.* (1985), 65 AR 220, 37 Alta LR (2d) 193 (CA) ("*Dillingham*") [TAB 5C].

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 23-24 [TAB 2D].

**I. The Honourable Justice Berger in Dissent Focuses on Substance, Not Form**

23. The Honourable Mr. Justice Berger agreed with the Majority that the First Renewal did not contravene section 8 of the *Interest Act*.

24. Contrary to the Majority decision, Mr. Justice Berger found that the Court of Appeal was not bound by the decision in *Dillingham*. *Dillingham* concerned very different mortgage terms from the case at hand and was, in his opinion, distinguishable on its facts. In that case, 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.

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at paras 70-72 [TAB 2D].

25. In his analysis of section 8, the Mr. Justice Berger focused on its purpose and intention of section 8, finding that:

[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.

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at para 48, citing *Reliant Capital Ltd. v Silverdale Development Corp.*, 2006 BCCA 226, [2006] 7 WWR 199 [TAB 2D].

26. Presumably based on the aforementioned modern principle of statutory interpretation and provisions of the *Interpretation Act*, Mr. 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. This was a violation of section 8.

Dissenting Reasons for Judgment of the Hon. Mr. Justice Berger at paras 49, 64 [TAB 2D].

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

27. This leave to appeal application raises the following issues of national and public importance:

**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. Courts Need Guidance, Given a Lack of National Consideration

##### 1) *Haphazard and Inconsistent Approach Across Jurisdictions*

28. Since its enactment in 1880, courts across jurisdictions have interpreted and applied section 8 inconsistently. As further described below, there are at least three irreconcilable approaches drawn from the jurisprudence arising out of British Columbia, Ontario and Alberta. The Majority in the Court of Appeal of Alberta in this case recognized the inconsistency in the law, but its decision ultimately does nothing to clarify the task of applying section 8 to future mortgage provisions. The *Interest Act* is paramount legislation with respect to mortgage interest rates and ought to apply consistently across provinces, but as the law stands today, the same clause could garner different treatment in each of these three jurisdictions. As noted by the Honourable Mister Justice Finch 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."

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 28 [TAB 2D].

*Reliant Capital Ltd. v Silverdale Development Corp.*, 2006 BCCA 226, [2006] 7 WWR 199 at para 69 ("*Reliant*") [TAB 5J].

29. In Ontario, the decision in *Re Weirdale Investments v Canadian Imperial Bank of Commerce* ("*Weirdale*") 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*.

*Re Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce et al* (1981), 32 O.R. (2d) 183, 121 DLR (3d) 150 (HCJ) at para 1 ("*Weirdale*") [TAB 5I].

30. 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 exercising an interpretation of section 8 that was in line with its purpose. The Court concluded

application of section 8 ought to be concerned with the effect of the interest clause in question, not simply a narrow analysis of its form.

*Weirdale*, *supra* at para 25 [TAB 5I].

31. As the Majority of the Alberta Court of Appeal acknowledged, the British Columbia approach to the Ontario decision in *Weirdale* is not clear. The decision in *Weirdale* has been considered by the courts, not specifically overruled but also not obviously applied.

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 37, citing *Langley Lo-Cost Builders Ltd. v 474835 B.C. Ltd.*, 2000 BCCA 365, 140 BCAC 182 at para 93 [TAB 2D].

32. The British Columbia Court of Appeal has considered a circumstance similar to *Weirdale* and found that an interest rate reduction that would apply only so long as the loan was not in default did not offend section 8.

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 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) ("Case Comment on *Reliant*") [TAB 5P].

33. A number of decisions in British Columbia have taken various other approaches to applying section 8, including developing a discretionary "legitimate commercial purpose" test for assessment of interest terms that were *prima facie* contrary to section 8.

*TD Trust v Guinness* (1995), 12 BCLR (3d) 180, 45 ACWS (3d) 187 (BCSC) at para 20 [TAB 5L].

34. The Court of Appeal decision in *Reliant Capital Ltd. v Silverdale Development Corp.* ("*Reliant*") did away with that test, however, instead electing 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, 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.

*Reliant*, *supra* at paras 6-17 [TAB 5J].

35. The British Columbia Court of Appeal in *Reliant* outlined the following principles for applying section 8:

- a. The purpose of section 8 is to protect borrowers against penalties and oppression;

*Reliant, supra* at para 89 [TAB 5J].

- 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;

*Reliant, supra* at para 37 [TAB 5J].

- 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;

*Reliant, supra* at para 52 [TAB 5J].

- 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.

*Reliant, supra* at paras 76, 90 [TAB 5J].

36. Seemingly applying the approach described, the British Columbia Court of Appeal found that the interest provisions were not oppressive penalties within the meaning of section 8. The Court 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. Therefore, this was not a circumstance that would be barred by section 8.

*Reliant, supra* at para 77, 90 [TAB 5J].

37. Despite outlining this objective and purposive approach, the decision in *Reliant* provided other remarks that obfuscate the principles for future application. Confusingly, the British Columbia Court of Appeal's additional comments seem alternatively decisive, without application of the purposive approach described, 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 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 that are not in arrears is determinative and such a provision is not prohibited by section 8.

*Reliant, supra* at paras 78-79 [TAB 5J].

38. There are other difficulties with applying *Reliant* in future cases. As identified by Waldron, while the interest clause was structured so as to apply to both monies in arrears and those 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. The increased interest rate therefore applied to monies in arrears and did not apply to any monies not in arrears. This causes further confusion as to whether an interest clause should be assessed based its operation in theory or in practice.

Case Comment on *Reliant*, *supra* at para 23 [TAB 5P].

39. While *Reliant* is the authority in British Columbia, it is not binding on the courts in Alberta, and was not even discussed in the Majority decision in the Alberta Court of Appeal below.

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt [TAB 2D].

40. Prior to the Alberta Court of Appeal decision in this case, the jurisprudence in Alberta demonstrated two approaches to section 8: The decision of the Alberta Court of Appeal in *Dillingham* and the decision of the Alberta Court of Queen's Bench in *Paragon Capital Corp v 396342 Alberta Ltd.* ("*Paragon*").

41. 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.

*Dillingham*, *supra* [TAB 5C].

42. 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 increasing the interest rate on arrears. This unique reasoning does not aid in extrapolating a uniform approach to future mortgage terms.

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 ("Perennial Problem of Section 8") [TAB 5R].

*Dillingham, supra* at para 8 [TAB 5C].

43. 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.

*Paragon Capital Corp v 396342 Alberta Ltd.*, 2004 ABQB 25, 350 AR 370 at para 4 ("*Paragon*") [TAB 5H].

44. The Alberta Court of Queen's Bench in *Paragon* noted that there was a lack of agreement in the case law on section 8 but discerned the following principles from the case law:

- a. As to whether a mortgage that contains a waiver of interest provision offends s. 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 s. 8 of the Act.

*Paragon, supra* at para 31 [TAB 5H].

45. 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 only the lower interest rate per month during the term of the loan. Therefore, such a clause was barred by section 8.

*Paragon, supra* at para 40 [TAB 5H].

46. The Alberta Court of Appeal decision in this matter causes even further confusion to the law. The decision of the Court of Appeal below interpreted section 8 more strictly and narrowly than any previous decision, disregarding the "substance over form" and objective and purposive approaches seen in recent jurisprudence. Decisions contrary to the strict and narrow interpretation applied by the Majority as well as cases arising out of British Columbia were all held not binding on the Court (i.e. *Paragon* and *Weirdale*). Furthermore, the decision in *Reliant* was not even discussed in the Majority decision. Instead, the Majority found itself bound by

*obiter dicta* from the anomalous Court of Appeal decision in *Dillingham*. Its decision can be distilled to the conclusion that section 8 only applies to those mortgage terms structured as penalties for default.

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 23 [TAB 2D].

47. The confusion and inconsistency in the jurisprudence is perpetuated by the decision of the Alberta Court of Appeal below. Should the law remain in its present unsettled state, British Columbia will have authority for an objective and purposive analysis of mortgage interest clauses. Ontario will take an approach concerned with substance over form and will apply section 8 to penal and non-penal terms. Finally, Alberta will take the strictest approach, interpreting section 8 to only prohibit mortgage terms that are structured as penalties applying only to arrears. The other provinces, bound by none of these, will be left to pick and choose the approach that they prefer. Until the Supreme Court of Canada provides a consistent approach for all jurisdictions, section 8 will remain “an irritant for courts, lawyers, lenders and borrowers who try and understand its effect, scope and modern day purpose.”

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 2 ("ULCC Background Paper") [TAB 5O].

## ***2) Section 8 has had Limited Consideration by the Supreme Court of Canada***

48. Since its inception in 1880, there have been few opportunities for consideration of section 8 of the *Interest Act* by the Supreme Court of Canada.

49. Early cases applied the various sections of the *Interest Act* in situations falling clearly within the purview of the legislation. For example, in *Coupland Acceptance Ltd. v Walsh*, 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 to be in violation of section 8 of the *Interest Act*.

*Coupland Acceptance Ltd. v Walsh*, [1954] SCR 90 at 94 [TAB 5B].

50. The next major comment by the Supreme Court of Canada on the application of section 8 was in *Construction St-Hilaire Ltée v Immeubles Fournier*. In this case, the Majority of the Court

reviewed a mortgage provision charging a 15% "indemnity" in the event that the borrower goes bankrupt. The Court found 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.

*Construction St-Hilaire Ltée v Immeubles Fournier Inc.*, [1975] 2 SCR 2, *supra* at 11 ("*St-Hilaire*") [TAB 5A].

51. Finally, the Supreme Court of Canada considered the constitutionality of section 8 in *Tomell Investments Ltd. v East Marstock Lands Ltd.*, where it commented on the broad 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]

*Tomell Investments Ltd. v East Marstock Lands Ltd.*, [1978] 1 SCR 974 at 987 [TAB 5M].

52. The Supreme Court of Canada considered section 347 of the *Criminal Code* regarding criminal interest rates in *Garland v Consumers' Gas Co.* While it did not comment on section 8 of the *Interest Act*, it indicated that the section of the *Criminal Code*, which was also aimed at protecting the public from abusive lending practices, was broadly worded such that "[i]t is the substance, and not merely the form, of a charge or expense which determines whether it is governed by s. 347."

*Garland v Consumers' Gas Co.*, [1998] 3 SCR 112 at para 28 [TAB 5D].

53. While there have been no further decisions of the Supreme Court of Canada considering section 8, the Court declined leave to appeal the decision in *Reliant*.

*JJM Construction Ltd. v. Reliant Capital Limited*, 2006 CanLII 39436 (SCC) [TAB 5E].

54. The case now at hand emphasizes the need for guidance on the application of section 8. The facts of this case concern mortgage interest mechanisms that were not discussed in *Reliant* and mandates an approach that is in conflict with those taken in other jurisdictions. Without Supreme Court of Canada guidance, inconsistency in provincial jurisprudence will be

perpetuated. With this appeal, the Supreme Court of Canada has the opportunity to consider multiple forms of mortgage interest clauses that courts have struggled with and bring consistency in approach. Accordingly, leave to appeal the decision of the Alberta Court of Appeal ought to be granted.

**3) *Parliamentary Attention has been Minimal***

55. Section 8 of the *Interest Act* has a long history in Canadian legislation, having been enacted in 1880 (43 Victoria, c 42). At that time, the section which was to become section 8 was in substantially the same form that it is in today.

*St-Hilaire, supra* at 21-22 [TAB 5A].

56. Since its enactment in 1880, there have been few substantive amendments to section 8. Most recently, in 2008, an amendment caused the provision to apply to both mortgages on real property (as it had since 1880) and hypothecs on immovables.

*Federal Law-Civil Law Harmonization Act, No. 1*, SC 2001, c 4, s 94 [TAB 5S].

57. Recommendations for amendment of the *Interest Act* were issued by the Uniform Law Conference of Canada Civil Law Section in August 2010, including recommendations with respect to section 8. Furthermore, other commentators have called for reforms of the *Interest Act* in order to deal with the evolving commercial reality and persistent uncertainty in interpretation.

Mary Anne Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 Can J Bus L 161 at 164 [TAB 5Q].

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 11-12 ("Predatory Lending") [TAB 5N].

58. Despite the recommendations and critiques of the *Interest Act*, Parliament has given no indication that the *Interest Act* is being reformed or replaced. As such, any interpretation of the provisions of the *Interest Act* continues to depend on principles developed in the courts.

**B. Critical Statutory Protections are at Risk**

**1) *The Purpose of Section 8 is Public Protection***

59. At the time of enactment, section 8 of the *Interest Act* served 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 British common law, such that borrowers would be protected from penalties in form and in substance.

ULCC Background Paper, *supra* at para 31 [TAB 5O].

Case Comment on Reliant, *supra* at para 3 [TAB 5P].

60. The courts today are generally in agreement that the purpose of section 8 today is still to protect property owners against abusive lending terms and practices.

Reasons for Decision of the Hon. Mme. Justice Romaine at para 37 [TAB 2B].

*Reliant*, *supra* at para 56 [TAB 5J].

61. The "all-or-nothing" nature of section 8, applying equally to residential and commercial borrowers, 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*."

Predatory Lending, *supra* at 10-11 [TAB 5N].

## **2) *Progressive Weakening of Section 8 Protections***

62. Over the past years, courts across Canada have struggled with applying section 8 to modern commercial arrangements. Jurisprudence leading up to the Alberta Court of Appeal's decision in this case evidences the difficulty of applying the purpose and intention of section 8 in conjunction with the principles of freedom of contract. As such, decisions have attempted to avoid the application 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.

*Langley Lo-Cost Builders Ltd. v 474835 B.C. Ltd.*, 2000 BCCA 365, [2000] WWR 46 at para 100 [TAB 5F].

63. Some courts have permitted creatively-drafted clauses that arguably have the effect of an additional charge on monies in arrears. In doing so, these decisions have limited the circumstances in which section 8 will apply. For example, the Ontario Court of Appeal found that an increase in interest triggered by the passage of time rather than default was not prohibited

by section 8, although such a term could arguably have the same effect as an interest increase upon default. Similarly, the British Columbia Court of Appeal found 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, despite the fact that the true effect of the clause was an increase in interest that applied only to money in default.

*Mastercraft Properties Ltd. v El Ef Investments Inc.* (1993), 14 OR (3d) 519, 103 DLR (4<sup>th</sup>) 759 (CA) at 6 [TAB 5G].

Case Comment on *Reliant*, *supra* at para 23 [TAB 5P].

64. The strict interpretation of section 8 by the Majority in the Alberta Court of Appeal below goes even further to restrict section 8. Under the Majority's approach, 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, suggesting that contractual trickery is now permitted, and even encouraged, despite the substance of such provisions being offensive to section 8.

Reasons for Judgment Reserved of the Hon. Mme. Justice Hunt at para 20 [TAB 2D].

65. In her commentary on the British Columbia case *Reliant Capital Ltd. v Silverdale Development Corporation*, prominent *Interest Act* scholar Mary Anne Waldron acknowledged the struggle that the courts have with 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." The flipside to Waldron's point is that there will be few unsophisticated borrowers actually protected by section 8 of the *Interest Act*.

Case Comment on *Reliant*, *supra* at para 27 [TAB 5P].

66. The majority of cases before the courts have dealt with commercial borrowers. However, 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.

*Reliant*, *supra* at para 55 [TAB 5J].

67. The decision of the Court of Appeal below broadens the mechanisms by which section 8 can be avoided, weakens the protections provided by the *Interest Act* and ignores or rewrites a law that remains in force for the protection of the public. As such, it is of national importance that the Supreme Court of Canada upholds the public protections afforded by section 8 and considers the appropriate application of the section for the modern marketplace.

**C. Conclusion**

68. It is submitted that an appeal of the decision of the Court below ought to be heard by the Supreme Court of Canada. The issues raised by this appeal have national and public importance. There is a significant risk that if the decision is left to stand, the protection instituted in section 8 of the *Interest Act* will be stripped of its meaning in Alberta. This will propagate uncertainty with respect to mortgage lending across the country and cause harm to mortgage markets. The case at hand offers the Supreme Court of Canada the opportunity to canvas the issues associated with section 8 and fashion a consistent approach that will address modern commercial realities.

**Part IV: Submissions on Costs**

69. The Applicants respectfully submit that costs ought to be awarded to the Applicants.

**Part V: Order Requested**

70. The Applicants respectfully submit that the leave to appeal be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of September, 2014.**

**KRAYZEL CORPORATION,  
THE LOUGHEED BLOCK INC.,  
NEIL JOHN RICHARDSON,  
HUGH DARYL RICHARDSON, and  
HERITAGE PROPERTY CORPORATION**

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**Counsel for the Applicants**  
G. Scott Watson  
**Parlee McLaws LLP**

**Part VI: Table of Authorities**

<b><u>Authority</u></b>	<b><u>Reference(s)</u></b>
<b><u>Jurisprudence</u></b>	
A. <i>Construction St-Hilaire Ltée v Immeubles Fournier Inc.</i> , [1975] 2 SCR 2.	<a href="#">50</a> , <a href="#">55</a>
B. <i>Coupland Acceptance Ltd. v Walsh</i> , [1954] SCR 90.	<a href="#">49</a>
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D. <i>Garland v Consumers' Gas Co.</i> , [1998] 3 SCR 112.	<a href="#">52</a>
E. <i>JJM Construction Ltd. v. Reliant Capital Limited</i> , 2006 CanLII 39436 (SCC).	<a href="#">53</a>
F. <i>Langley Lo-Cost Builders Ltd. v 474835 B.C. Ltd.</i> , 2000 BCCA 365, [2000] WWR 46.	<a href="#">62</a>
G. <i>Mastercraft Properties Ltd. v El Ef Investments Inc.</i> (1993), 14 OR (3d) 519, 103 DLR (4 <sup>th</sup> ) 759 (CA).	<a href="#">63</a>
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M. <i>Tomell Investments Ltd. v East Marstock Lands Ltd.</i> , [1978] 1 SCR 974.	<a href="#">51</a>
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N. Elder Law, Canadian Centre for, Study Paper on Predatory Lending Issues in Canada (February 28, 2008). BCLI Study Paper No. 3. Available at SSRN: < <a href="http://ssrn.com/abstract=1421449">http://ssrn.com/abstract=1421449</a> >.	<a href="#">57</a> , <a href="#">61</a>

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O. Telfer, Thomas G.W., " <i>Preliminary Background Paper on the Canada Interest Act</i> " (Paper delivered at the Uniform Law Conference of Canada, Proceedings of the Eighty-Ninth Annual Meeting, 2007), available online: < <a href="http://www.ulcc.ca/en/2007-charlottetown-pe/216-civil-section-documents/578-canada-interest-act-preliminary-background-paper-2007">http://www.ulcc.ca/en/2007-charlottetown-pe/216-civil-section-documents/578-canada-interest-act-preliminary-background-paper-2007</a> >.	47, 59
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Q. Waldron, Mary Anne, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997) 29 Can J Bus L 161.	57
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U. <i>Interpretation Act</i> , RSC 1985, c I-21.	18, 26

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Court File No.:

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

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BETWEEN:

**Krayzel Corporation**

Applicant

*(Appellant/Subsequent Encumbrancer)*

- and -

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

Applicants

*(Appellants/Defendants)*

- and -

**The Equitable Trust Company**

Respondent

*(Respondent/Plaintiff)*

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**APPLICATION FOR LEAVE TO APPEAL**

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