

CANADIAN FINANCIAL DIARIES

FINANCIAL RULES AND REGULATIONS RELEVANT TO CANADIAN LOW-INCOME HOUSEHOLDS

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WHO REGULATES CONSUMER FINANCIAL PRODUCTS IN CANADA?

FEDERAL			
REGULATOR	DESCRIPTION OF MANDATE	REGULATED ENTITIES	COVERAGE
Department of Finance	Appoints the Commissioner of the FCAC (see below). Recommends legislative changes to Parliament to protect the interests of consumers.		N/A
Office of the Superintendent of Financial Institutions (OSFI)	Supervises federally regulated financial institutions and pension plans to ensure they are financially sound and compliant with other statutory requirements, intervening as required. Creates rules and guidelines for federally regulated financial institutions. Provides approvals for certain financial transactions.	Banks (including foreign banks), insurance companies, federally incorporated or registered trust and loan companies, cooperative credit associations, pension plans and Fraternal Benefit Societies. ¹ I.e., all federally incorporated financial institutions and federally regulated employer-sponsored pension plans.	Pension Plans Insurance Mortgage underwriting
Financial Consumer Agency of Canada (FCAC)	Ensures that federally-regulated financial institutions comply with their statutory obligations to consumers. Provide information to consumers about their rights against financial institutions. More detail below.	FCAC regulates the same entities as OSFI with the exception of: foreign bank representative offices, fraternal benefit societies, or cooperative credit associations. FCAC also regulates payment card network operators.	Retail banking products (chequing/savings accounts, credit products, etc.) Visa MasterCard Interac Prepaid payment cards
Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)	Collects, analyzes and assesses information related to money laundering. All financial institutions are required to report information to FINTRAC in relation to certain banking transactions. Suspicious transactions must be reported.	Banks, financial dealers, money services businesses, life insurance companies and agents, government agencies that take deposits, accountants or accounting firms, real estate agents and brokers, casinos	Large cash transactions Electronic funds transfers Casino disbursements Suspicious transactions
Ombudsman	Provides dispute resolution	Participating banks and	Consumer and

¹ Fraternal benefit societies have a representative form of governance and are operated for fraternal, benevolent or religious purposes. They provide life and/or accident and/or sickness insurance to their members. Examples of Canadian fraternal benefit societies are: Toronto Police Widows and Orphans Fund and Teachers Life Insurance Society.

for Banking Services and Investments (OBSI)	services to customers of participating banks and investment firms	investment firms	small business customers
ADR Chambers Banking Ombudsman Office (ADRBO)	Privately-run dispute resolution service for customers of participating banks. Investigates customer complaints & provides non-binding recommendations. Regulated by the FCAC as an External Complaints Body	Bank of Nova Scotia Tangerine DirectCash Bank National Bank of Canada Royal Bank of Canada TD Bank Group	Retail bank consumers
Canada Deposit Insurance Corporation (CDIC)	Federal insurer of eligible deposits held at member financial institutions	Banks Federally regulated trust and loan companies Federally regulated credit unions	Eligible deposits held in Canadian dollars (chequing/savings, registered accounts, GICs/term deposits)
ONTARIO			
Ontario Ministry of Finance	Prepares and administers provincial budget. Creates economic, fiscal and taxation policy. Oversees the regulation of financial products in the province. ²	FSCO DICO FSRAO OSC	N/A
Financial Services Commission of Ontario (FSCO)	Protects the public interest and enhances public confidence by ensuring financial service providers comply with provincial legislation. (But see FSRAO below)	Insurance sector, pension plans, loan and trust companies, credit unions, caisses populaires, mortgage brokering and co-operative corporations	Mortgages Insurance Credit Unions/Caisses Populaires Provincial pension plans
Deposit Insurance Corporation of Ontario (DICO)	Prudential regulator and deposit insurer for the credit unions and caisses populaires in Ontario	Ontario credit unions and caisses populaires	Chequing/savings accounts Certified cheques/money orders Registered accounts (RSP, TFSA RESP, RDSP) GICs/term deposits
Financial	New independent regulator	Insurance companies	Mortgages

² A list of agencies and boards with which the Ministry works can be found here: <https://www.fin.gov.on.ca/en/about/agencies.html>

Services Regulatory Authority of Ontario (FSRAO)	which will supervise entities currently regulated by FSCO and DICO. Expected to launch June 2019. http://www.fsrao.ca/	Credit unions/caisses populaires Loan & trust companies Mortgage brokers Pension plan administrators	Pension plans Insurance (property/casualty, life/health) Accounts held at credit unions/caisses populaires
Ontario Securities Commission (OSC)	Protects investors by administering and enforcing the <i>Securities Act</i> and the <i>Commodity Futures Act</i> . Contributes to the health of Ontario's economy by creating rules to prevent misconduct and investigating alleged breaches. The OSC has the power to initiate enforcement proceedings.	Investment firms Individuals providing investment services (dealers, advisers, fund managers)	Investment products, including group RESPs
MANITOBA			
Financial Institutions Regulation Branch (FIRB)	Regulates financial institutions and cooperatives in Manitoba https://www.gov.mb.ca/finance/	Cooperatives Credit unions Insurance companies Trust & loan companies	Accounts/products /services held at regulated entities
Manitoba Securities Commission (MSC)	Regulates the securities industry to ensure consumers are protected and to promote fair capital markets. Includes an administrative branch that handles day-to-day activities (such as registrations) and a policy making group.	Investment firms Individuals providing investment services	Investment products Similar to Ontario, it works with industry SROs, which are national, to ensure compliance with provincial laws.
Public Utilities Board (PUB)	An independent, quasi-judicial administrative tribunal that oversees public utilities and designated monopolies. PUB sets rates for various public utilities	PUB sets rates for: Manitoba Hydro Manitoba Public Insurance (Crown auto insurance corporation) Natural Gas Water/Wastewater services Payday loans	Public utilities (gas, hydro, water/wastewater, etc.) Payday loans Automobile insurance

INDUSTRY ASSOCIATIONS	
Canadian Bankers Association	Financial Lobbying Group

Canadian Credit Union Association	Works on national regulatory and network compliance (focus on payments network compliance)
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Financial Consumer Agency of Canada

FCAC administers the consumer provisions in the federal financial institutions statutes. Under the current FCAC Supervision Framework³, once a compliance concern has been identified, an investigation and evaluation process is undertaken. If the investigation highlights a compliance concern, the FCAC's response will depend on factors such as: harm to consumers, risk of reoccurrence, controls in place, and the level of cooperation with FCAC.⁴ The FCAC will then issue a Notice to the company based on the level of severity of the breach. A "level 3" notice, the most severe, also results in a compliance report that outlines the facts, severity and recommendations for addressing the compliance issue.⁵ The financial entity is given 30 calendar days to respond to the facts. A level 3 notice may also result in a Notice of Violation. In addition to any level of Notice of Breach, the FCAC may require the financial entity to enter into an Action Plan or a Compliance Agreement to respond to the breach.

In the 2019 federal budget, the Government of Canada announced that the Minister of Finance would be appointing "a governance council" to "guide FCAC in its expanded mandate and promote the confidence of Canadians in our financial consumer protection system."⁶

INTERNATIONAL REGULATORS OF CONSUMER FINANCIAL PRODUCTS

United States

Consumer Financial Protection Bureau (CFPB)

CFPB administers federal laws aimed at protecting consumers of financial products and services. Its key functions are enforcement of consumer protection laws, and empowerment and education of consumers.⁷ The supervision branch of the CFPB conducts regular monitoring of financial institutions and may conduct investigations. It can bring a civil action against financial institutions either in federal court or in an administrative adjudication proceeding.⁸ Non-compliance may result in a penalty payable to the Civil Penalty Fund or a payment directly

³ Financial Consumer Agency of Canada, "Supervision Framework" (October 2018), online: <https://www.canada.ca/content/dam/fcac-acfc/documents/services/industry/supervision-framework.pdf>.

⁴ *Ibid* at 11-12.

⁵ *Ibid* at 12.

⁶ Budget 2019, Annex 4 at 330.

⁷ Consumer Financial Protection Bureau, "The Bureau", online: < <https://www.consumerfinance.gov/about-us/the-bureau/>>.

⁸ Consumer Financial Protection Bureau, "Enforcement", online: < <https://www.consumerfinance.gov/policy-compliance/enforcement/>>.

to the harmed consumer. The Civil Penalty Fund may be used to compensate consumers or create programs for consumer education and financial literacy.⁹ CFPB also exercises a rule making function in which it creates procedural guidelines for compliance and interprets federal statutory requirements.¹⁰

Federal Trade Commission – Bureau of Consumer Protection, Division of Financial Practices

The Division of Financial Practices of the FTC (the “Division”) works to protect consumers against unfair, deceptive or fraudulent practices.¹¹ It takes complaints from consumers and investigates companies and individuals offering financial products and services.¹² The Division commences legal action against parties who engaged in deceptive or fraudulent practices and seeks orders to refund consumers for amounts they may have paid or orders preventing companies or individuals from providing financial products and services.¹³

United Kingdom

Financial Conduct Authority (FCA)

The FCA is an independent conduct and prudential regulator of the financial markets in the United Kingdom. Its key functions are to protect consumers, protect the financial markets and promote competition.¹⁴ The FCA oversees banks, credit unions, financial advisors, securities and competition law.¹⁵ It is in charge of granting authorization to any person or firm who wants to conduct business in the UK financial markets. The FCA aims to protect consumers and the financial markets by creating rules, imposing penalties for non-compliance and/or removing or suspending a firm’s or individual’s authorization to conduct business.¹⁶ It may also bring criminal action against firms for financial crimes such as insider trading, or it may apply to the courts for injunctions and orders.¹⁷

⁹ Consumer Financial Protection Bureau, “Payments to harmed consumers”, online: <<https://www.consumerfinance.gov/about-us/payments-harmed-consumers/>>.

¹⁰ Consumer Financial Protection Bureau, “Rulemaking”, online: <<https://www.consumerfinance.gov/policy-compliance/rulemaking/>>.

¹¹ Federal Trade Commission, “Bureau of Consumer Protection”, online: < <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection>>.

¹² *Ibid.*

¹³ Federal Trade Commission, “About the Bureau of Consumer Protection”, online: < <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/about-bureau-consumer-protection>>.

¹⁴ Financial Conduct Authority, “About Us”, online: <<https://www.fca.org.uk/about/the-fca>>.

¹⁵ *Ibid.*

¹⁶ Financial Conduct Authority, “Protecting Consumers”, online <<https://www.fca.org.uk/about/protecting-consumers>>.

¹⁷ Financial Conduct Authority, “Enforcement”, online <<https://www.fca.org.uk/about/enforcement>>.

CURRENT REGULATORY LANDSCAPE: REGULATION OF FINANCIAL PRODUCTS

ACCESS TO BASIC BANKING SERVICES

Introduction

In 2003, the *Access to Basic Banking Services Regulations*¹⁸ (the “Regulations”) came into force under the *Bank Act*.¹⁹ The purpose of the Regulations is to assist low-income Canadians to access financial services. The Regulations reduced identification requirements needed to open a bank account and cash federal government cheques.²⁰ Despite the introduction of the Regulations, many low-income Canadians still do not have access to, or choose not to access, basic banking services.²¹

Legislative History

In 1996, as part of the regular review of the legislation provided for in the sunset provisions of the *Bank Act*,²² the Minister of Finance appointed the Task Force on the Future of the Canadian Financial Services Sector (the “MacKay Task Force”) to conduct a comprehensive study of the financial services sector.²³ The MacKay Task Force identified access to basic banking services for low-income consumers as a key issue.²⁴ In response, the major banks committed to reducing identification requirements to open an account and to cash federal government cheques. In 2003, the government enacted the Regulations pursuant to subsections 448.1(3) and 458.1(2) and section 459.4 of the *Bank Act*.²⁵

The Regulations fall under the Bank Act which applies to Schedule I banks (domestic Canadian banks such as BMO and RBC), and Schedule II banks (subsidiaries of foreign banks, such as Citibank and HSBC).²⁶ Federal credit unions are also subject to the Bank Act, and are supervised by the Office of the Superintendent of Financial Institutions (“OSFI”).²⁷ The Bank Act does not apply to provincial credit unions, which are provincially-regulated. Provincial legislation governing credit unions does not contain provisions about identification

¹⁸ *Access to Basic Banking Services Regulations*, SOR 2003-184 [*Regulations*].

¹⁹ *Bank Act*, SC 1991, c 46, ss 2, 13 [*Bank Act*].

²⁰ Canada, Department of Finance Canada, *Reforming Canada’s Financial Services Sector: A Framework for the Future* (Ottawa: Department of Finance Canada, 25 June 1999) at 5 [*Task Force Report*].

²¹ Poonam Puri and Andrew Nichol, “Developments in Financial Services Regulation: A Comparative Perspective” (2014), 55 Can Bus LJ 454 at 459.

²² *Bank Act*, *supra* note 18 at s 21.

²³ *Task Force Report*, *supra* note 19 at 5.

²⁴ *Ibid*, at 47.

²⁵ *Regulations*, *supra* note 17.

²⁶ *Bank Act*, *supra* note 18 at s 14.

²⁷ *Ibid*, s 2. *Federal credit union means a bank that, within the meaning of section 12.1, is organized and carries on business on a cooperative basis.

requirements for membership, since this is instead governed by the individual credit union's by-laws.

Opening a Retail Deposit Account

Section 448.1(1) of the *Bank Act* provides that a bank *shall* open an account in response to a request in person, subject to the regulations. The *Act* prohibits banks from requiring the customer to make a minimum deposit or to maintain a minimum balance.²⁸ Monthly or other fees attached to these accounts are not regulated in the *Act* or *Regulations*. Voluntary guidelines on providing a low- or no-fee bank account are discussed below.

An individual who wishes to open a retail deposit account at a bank must present two pieces of identification from Part A or B of the schedule, one of which must be from Part A. Identification from Part A includes a driver's license, Canadian passport, birth certificate, etc. whereas identification from Part B includes an employee identity card, a bank or credit card, or foreign passport. Alternatively, the Regulations provide individuals with the option of presenting one piece of identification from Part A and confirmation of identity by a client in good standing with the bank or an individual of good standing in the community where the bank is located.²⁹

A bank can refuse to open an account for an individual for any of the following reasons:

- there are reasonable grounds to expect that the account will be used for illegal or fraudulent purposes; the individual has a history of illegal or fraudulent activity in relation to financial services; there are reasonable grounds to believe that the individual made a material misrepresentation; there are reasonable grounds to believe that they must refuse to open the account to protect customers and employees from physical harm, harassment or abuse; or the individual has not provided adequate information to open an account.³⁰

Bankruptcy on its own, without evidence of fraud or illegal activity is not reasonable grounds to decline opening an account.³¹ If the bank refuses to open an account, it must provide a notice of refusal to the individual in writing and information on how the individual may contact the Financial Consumer Agency of Canada ("FCAC") to file a complaint or receive more information.³² A review of Canadian bank websites indicates that most banks have a general document about the Regulations and how customers may contact the FCAC.³³

Cashing of Certain Government of Canada Cheques and Other Instruments

²⁸ *Supra* note 18, s 448.1(2).

²⁹ *Regulations*, *supra* note 17 at ss 4(1)(a)(i)-(ii).

³⁰ *Ibid*, s 3(1)(a)-(e).

³¹ *Ibid*. s 3(2).

³² *Ibid*, s 5.

³³ See, eg, TD Canada Trust, "Access to Basic Banking Services", online: <https://www.tdcanadatrust.com/accounts/pdfs/basic_banking_services.pdf>.

If an individual is not a customer of a bank, they can still request that the bank cash a federal government cheque up to a maximum amount of \$1,500.³⁴ An individual who wishes to cash a cheque must present two pieces of identification from those in Part A or B of the schedule. Alternatively, an individual can present one piece of ID from Part A or B if it has the signature and photo of the individual, or the identity of the individual can be confirmed by a client in good standing with the bank or an individual of good standing in the community where the bank is located.³⁵

The bank can refuse to cash a cheque if the cheque has been altered or is counterfeit, the cheque is for more than \$1,500, has been endorsed or signed by a third-party, or the bank has reasonable grounds to believe that there has been illegal or fraudulent activity in relation to the cheque.³⁶ If the bank refuses to cash a cheque, they must provide written notice of refusal to cash the cheque and information on how the individual may contact the FCAC.³⁷

Holds on Cheques

The *Bank Act* also provides for the making of regulations regarding the maximum hold period for cheques deposited into a retail deposit account.³⁸ These regulations are found in the *Access to Funds Regulations*.³⁹ For cheques drawn on a branch located in Canada and issued in Canadian dollars,⁴⁰ the regulations stipulate a maximum hold period of four business days, not counting the day the cheque is deposited, for less than \$1,500 and seven business days for \$1,500 or more, if the cheque is deposited in person – the regulations provide for an additional business day for cheques deposited other than in person, such as to an automated banking machine (ABM).⁴¹ The bank must, however, make \$100 available immediately, if deposited in person, or one business day later, if deposited “in any other manner.”⁴² There are exceptions for circumstances when the bank “has reasonable grounds to believe that there is a material increased credit risk”,⁴³ when the account has been open for less than 90 days,⁴⁴ or when the cheque is more than six months’ old.⁴⁵ A bank that relies on the latter two exceptions must provide written notice of refusal, immediately, if deposited in person, and on request, if

³⁴ *Regulations, supra* note 17, s 7.

³⁵ *Ibid*, s 8.

³⁶ *Ibid*, s 6.

³⁷ *Ibid*, s 10.

³⁸ *Bank Act, supra* note 18, s 458.2.

³⁹ SOR/2012-24. This regulation also applies to federally-regulated credit unions and trust companies.

⁴⁰ *Ibid*, s 2.

⁴¹ *Ibid*, s 3.

⁴² *Ibid*, s 4.

⁴³ *Ibid*, s 5.

⁴⁴ *Ibid*, s 6(1)(b).

⁴⁵ *Ibid*, s 6(1)(d).

deposited in another manner.⁴⁶ The bank must disclose information about the maximum hold periods when customers open accounts and make this information publicly available in its branches.⁴⁷

Compliance with the Regulations

In 2005, FCAC conducted a mystery shopping exercise to monitor banks' compliance with the Regulations.⁴⁸ Approximately 100 trained consumers visited the branches of 17 Canadian banks in 13 different cities.⁴⁹ Each visit involved either opening a bank account or cashing a federal government cheque. The overall success rate was 84% for opening a bank account, and 91% for cashing a cheque.⁵⁰

Two key areas of concern were identified: the banks studied were not providing customers with written notices of refusal as per sections 5 and 10 of the Regulations, and there was still confusion surrounding the identification requirements.⁵¹ As mentioned previously, if the bank refuses to open an account for the customer, it must provide a written notice of refusal and information on how to contact the FCAC. The mystery shopping exercise found that only one in every 11 customers was given written notice of refusal.⁵² Further, customers that produced the necessary identification were refused service.⁵³ The shopping exercise revealed that branch staff often asked for photo identification or additional documents beyond the requirements of the regulations.⁵⁴ Following the exercise, FCAC stated that it was "working with banks to ensure these concerns are addressed."⁵⁵ While there is no specific information about what that involved, the 2006 FCAC compliance case management process suggests that a compliance officer may have been assigned to investigate, and letters of concern and notices of violation may have been sent.⁵⁶ The FCAC has not conducted a "mystery shopping exercise" since 2005 and there is a lack of information on current compliance.⁵⁷

⁴⁶ *Ibid*, s 6(2).

⁴⁷ *Ibid*, ss 7 and 8.

⁴⁸ Senate of Canada, *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 38th Parl, 1st Sess, Issue No 18 (27 October 2005) at 18:39 (Susan Murray) [*Senate Committee*].

⁴⁹ John Turley-Ewart, "The Poor Get Good Banking", *National Post* (9 December 2005), online: <<http://www.pressreader.com/canada/national-post-latest-edition/20051209/283231618478422>>. **Note:** a search re: demographic data and identities of the mystery shoppers did not yield any results.

⁵⁰ *Senate Committee*, *supra* note 47 at 18:39.

⁵¹ *Ibid* at 18:40.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ Financial Consumer Agency of Canada, "Annual Report 2005 – 2006" (22 September, 2006) at 44, online: <<http://publications.gc.ca/collections/Collection/FC1-2006E.pdf>>.

⁵⁷ Reuters, "Heft of Canada's bank oversight questioned after reports of customer account mis-selling reported", *Financial Post* (30 March 2017), online: <<http://business.financialpost.com/news/economy/heft-of-canadas-bank-oversight-questioned-after-reports-of-customer-account-mis-selling-reported>>.

2014 Low Cost Account Guidelines

Voluntary guidelines can also serve as a vehicle for improving access to banking for low income consumers. In Canada, the Harper government implemented the 2014 Low-Cost Guidelines to provide customers with low-cost or no-cost bank accounts with basic features.

Under the 2014 Low-Cost Guidelines, a customer with a low-cost or no-cost account qualifies for the following features:

- a minimum of 12 debit transactions per month (including at least two in-branch transactions) (**Note:** A review of the Big-Five Banks showed that 12 debit transactions was the maximum number of transactions offered for low-cost accounts);
- cheque writing privileges; and
- no extra charges for deposits, debit card, pre-authorized payment forms, monthly printed statements and online cheque image viewing (**Note:** A review of the Big-Five Banks indicates that with respect to other accounts, they do not charge for these services with the exception of TD, Scotiabank, and CIBC who charge \$2.25 for monthly printed statements).⁵⁸

The monthly fee set by the 2014 Low-Cost Guidelines is \$4.00 per month. Youth, students, Guaranteed Income Supplement (GIS) recipient seniors, and Registered Disability Savings Plan (RDSP) beneficiaries are eligible for an account with the same features as a low-cost account at no cost.⁵⁹ Banks are required to use clear and simple language to identify features and costs of a low-cost and no-cost account.⁶⁰ Also, banks must provide consumers with information in branch and online about how to access the Financial Consumer Agency of Canada's account selector tool to compare bank accounts.⁶¹

Misselling

The FCAC reviewed the sales practices of Canada's largest banks, in response to news stories alleging that banking products were being opened without customer consent. Employees from Canada's five largest banks reported pressure from their managers to sell, even when they felt the product was unnecessary for the customer.⁶² Other employees

⁵⁸ Department of Finance Canada, "2014 Low-Cost Account Guidelines" (27 May 2014), online: <<http://www.fin.gc.ca/activty/pubs/lca-cfm-eng.asp>> [*Low Cost Guidelines*].

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² CBC story <https://www.cbc.ca/news/business/banks-upselling-go-public-1.4023575>

reported opening products or increasing credit limits without customer consent in order to meet their increased sales goals.⁶³ The banks claimed the employees' experiences do not align with their policies and that they have processes in place to monitor sales goals and practices.⁶⁴

According to the FCAC, retail banks have becoming increasingly sales oriented which may result in sales interests being placed ahead of a customer's needs.⁶⁵ The banks' ability to compile data about their customers allows them to offer targeted products, resulting in a change of focus for front-line and call centre employees, who are now expected to identify, offer and sell products and services to customers or refer them to other departments within the bank.⁶⁶ According to the FCAC, the lack of transparency with respect to sales goals may make it difficult for customers to determine whose interests an employee is serving when a certain product is recommended over another.⁶⁷

The report found that retail banking's sales-driven culture may lead to mis-selling, defined as "the sale of financial products that are unsuitable for the consumer; sales that are made without taking into reasonable account of the consumer's financial goals, needs and circumstances and sales where consumers are provided with incomplete, unclear or misleading information."⁶⁸ The FCAC concluded that risks for mis-selling are present in the retail banking industry, but there is no widespread mis-selling and that "millions of transactions are conducted every day without incident."⁶⁹

The FCAC found that in comparison with other risk management frameworks, the banks' frameworks with respect to the management of sales practice risk were inadequate.⁷⁰ The banks' board of directors receive limited, high-level information regarding sales practice risk leaving them less likely to be aware of issues with sales practices.⁷¹ For instance, 90-95% of complaints are resolved at the first point of contact and are not reported or logged.⁷² Customer complaint reports only include complaints that have been elevated to higher levels, which may distort or conceal issues with employee sales practices.⁷³

In response, the FCAC identified three enhancements to its programs aimed at remedying mis-selling. The first enhancement is a new FCAC supervision framework which will ensure banks have policies to reduce mis-selling and potential breaches of market conduct

⁶³ CBC story <https://www.cbc.ca/news/business/banks-upselling-go-public-1.4023575>

⁶⁴ <https://www.documentcloud.org/documents/3517371-Banks-respond-to-Go-Public-stories.html>

⁶⁵ Financial Consumer Agency of Canada, "Domestic Bank Retail Sales Practices Review" (20 March 2018) at 5 [FCAC report].

⁶⁶ FCAC report at 6.

⁶⁷ *Ibid.*

⁶⁸ FCAC report at 1.

⁶⁹ *Ibid.*

⁷⁰ FCAC report at 18.

⁷¹ *Ibid.*

⁷² FCAC report at 21.

⁷³ *Ibid.*

obligations.⁷⁴ The second enhancement to the FCAC is increased resources aimed at supervision and enforcement.⁷⁵ Lastly, the FCAC plans to enhance its consumer education materials to better inform customers about their rights with respect to financial products and stress the importance of “asking their banks the right questions”.⁷⁶

⁷⁴ FCAC report at 24.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

PREPAID PAYMENT CARDS

Introduction: What are prepaid payment cards?

Prepaid payment cards can be split into two categories: “closed-loop” and “open-loop”. A closed-loop prepaid card can only be used at certain locations such as a gift card at a specific store, or a transit card for a single transportation system.⁷⁷ In contrast, open-loop prepaid cards look and function like traditional credit and debit cards but funds are preloaded onto the card.⁷⁸ As noted by one Ontario judge, these cards “are not credit cards. There is no extension of credit.”⁷⁹ Open-loop cards can be broken down further into single-load (once the card is spent it is discarded) and reloadable cards that can be topped up through direct deposit, online transfer, or by cash at a retail location.⁸⁰

Prepaid Payment Cards and Access to Banking

In 2015, the open-loop prepaid card market in Canada reached \$3.1 billion CAD loaded onto cards. It is expected that the Canadian market will follow the U.S. where open-loop prepaid cards are the fastest growing form of electronic payment.⁸¹ In 2014, the total load value in the U.S. was \$264 billion USD.⁸² Prepaid cards serve as a tool for an estimated 60 million unbanked citizens in the United States.⁸³ The cards offer more flexibility than traditional credit cards and can be accessed by a wider range of consumers. A customer does not require a credit check, strong credit history, or even a bank account to use an open-loop card.⁸⁴ In *Bernstein v Peoples Trust Company*, discussed below, the judge described open-loop, reloadable prepaid card users as “immigrants or people with poor credit history, who need a [credit card] for online shopping or booking hotel rooms” and noted that they “were commonly sold at payday loan companies like Money Mart”.⁸⁵ Advocates of open-loop cards suggest that preset limits on the cards can help prevent debt accumulation and encourage healthier budgeting and spending habits.⁸⁶ On the other hand, prepaid cards “have a higher cost structure than credit cards”.⁸⁷ These fee structures that may be difficult for the average consumer to understand. Canadian consumers raised their concerns to the government about

⁷⁷ Canadian Prepaid Providers Organization, “What is an Open Loop Prepaid Payment?”, online: <<https://www.cppo.ca/about-open-loop/what-is-an-open-loop-prepaid>> [CPPO].

⁷⁸ *Ibid.*

⁷⁹ *Bernstein v Peoples Trust Company*, 2019 ONSC 2867 at para 42 [*Bernstein* trial judgment].

⁸⁰ CPPO, *supra* note 77.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Federal Reserve Bank of St. Louis, “Cards, Cards and More Cards: The Evolution to Prepaid Cards”, (2011), online: <<https://www.stlouisfed.org/publications/inside-the-vault/fall-2011/cards-cards-and-more-cards-the-evolution-to-prepaid-cards>>.

⁸⁴ CPPO, *supra* note 77.

⁸⁵ *Bernstein* trial judgment, *supra* note 79 at paras 34 and 83.

⁸⁶ CPPO, *supra* note 77.

⁸⁷ *Bernstein* trial judgment, *supra* note 79 at para 57.

prepaid cards and the very complicated terms and fees associated with them. This led to the enactment of the federal *Prepaid Payments Products Regulations*.⁸⁸

Prepaid Payment Products Regulations

Legislative History

In Budget 2011, the Government of Canada promised to develop a consumer protection framework for customers using prepaid payment products.⁸⁹ Further, in the Economic Action Plan 2013, the federal government promised to develop a financial consumer code to better protect consumers of financial products and assist them in making responsible financial decisions.⁹⁰ As a result, on May 1, 2014, the *Prepaid Payment Products Regulations* (the “Regulations”) came into force.⁹¹ The purpose of the Regulations is to ensure that financial institutions providing prepaid products to customers treat them fairly.⁹² The Regulations are intended to give consumers full access to funds on their prepaid products without unnecessary and unknown fees, or expiry of funds.⁹³

The Regulations apply to prepaid payment products that are issued in Canada by a federally regulated financial institution (“FRFI”).⁹⁴ A prepaid payment product means a physical or electronic card that is or can be loaded with funds and that can be used by the card holder to make withdrawals or purchase goods or services.⁹⁵ The Regulations apply to FRFIs under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*.⁹⁶ The Regulations do not apply to prepaid products issued by provincially regulated institutions or retailers.⁹⁷

In light of the Regulations, prepaid cards are likely exempt from the Ontario *Consumer Protection Act*. The Regulations define prepaid payment products as “payment cards, physical or electronic, that is or can be loaded with funds and used by the cardholder to make withdrawals or purchase goods or services”.⁹⁸ The Regulations apply to “a company”, as defined in section 2 of the *Trust and Loan Companies Act*.⁹⁹

⁸⁸ Department of Finance Canada, “Frequently Asked Questions – Prepaid Payment Products Regulations”, (3 December 2013), online: <<https://www.fin.gc.ca/afc/faq/pppr-rsppp-eng.asp>> [*Department of Finance*].

⁸⁹ *Ibid.*

⁹⁰ Stephen Redican, “Final Prepaid Card Regulations and New Consumer Protection Code Announced”, *BLG*, online: <http://blg.com/en/News-And-Publications/Documents/Publication_3599_1033.pdf>.

⁹¹ *Prepaid Payment Products Regulations*, SOR 2013-209 [*Regulations*].

⁹² Department of Finance, *supra* note 84.

⁹³ *Ibid.*

⁹⁴ *Regulations*, *supra* note 87, s 2.

⁹⁵ *Ibid.*, s 1.

⁹⁶ *Ibid.*

⁹⁷ Financial Consumer Agency of Canada “Prepaid cards: rights and responsibilities”, (6 March 2017), online <<https://www.canada.ca/en/financial-consumer-agency/services/rights-responsibilities/rights-prepaid-products.html?wbdisable=true>>.

⁹⁸ *Regulations*, *supra* note 87, s 1.

⁹⁹ *Ibid.* at s 1(f).

Initial Disclosure

The Regulations contain requirements for initial disclosure, additional disclosure on issuance of the product, and prohibitions with respect to prepaid payment products. All disclosure must be made in language, and presented in a manner, that is clear, simple, and not misleading.¹⁰⁰ Before a prepaid payment product is issued, the issuing institution must provide certain information.¹⁰¹ This information must be provided in writing to any person applying to the institution and includes information such as: the name of the issuing institution; a toll-free number that the customer can use to inquire about the product's terms and conditions; restrictions, if any, imposed on the use of the product (e.g. that the product is not reloadable); all fees that may be imposed on the product holder; and a statement indicating an expiry date (if one applies).¹⁰² An expiry date is prohibited unless it is a promotional product.¹⁰³ A promotional product is a prepaid payment product that is purchased by an entity and distributed as part of a promotional, loyalty or award program.¹⁰⁴

Additional Disclosure

When the product is issued, the institution must disclose in writing the product's terms and conditions, a description of how the customer may verify the balance on the card, and the information listed in the Initial Disclosure requirements above, unless that information was disclosed immediately before issuing the product.¹⁰⁵ Further, certain information must be set out directly on the product, or if the product is electronic, must be disclosed at the product holder's request and includes: the name of the issuing institution; the date on which the product expires, if any; a toll-free number that can be used to make inquiries about the product; and a website where the information referred to in the Initial and Additional Disclosure requirements can be obtained.¹⁰⁶

Fees

The institution cannot impose a maintenance fee until at least 1 year after the product was activated unless it is a promotional product or a reloadable product and the customer has given express consent to the fee.¹⁰⁷ The consumer must also give express consent to any overdraft or interest fees charged on the product.¹⁰⁸ Further, the institution cannot increase or impose any new fees associated with the product unless the product holder has provided the institution with their name and mailing or e-mail address and the institution has disclosed the

¹⁰⁰ *Ibid*, s 3.

¹⁰¹ *Ibid*, s 4(1).

¹⁰² *Ibid*.

¹⁰³ *Ibid*, s 9.

¹⁰⁴ *Ibid*, s1.

¹⁰⁵ *Ibid*, s.6(1).

¹⁰⁶ *Ibid*, s 7.

¹⁰⁷ *Ibid*, s 10.

¹⁰⁸ *Ibid*, s 11.

fee by sending a notice 30 days before the effective date of the new fee or displaying a notice on the institution's website for at least 60 days before the effective date.¹⁰⁹

Compliance with the Regulations

The Regulations do not list any private right of action for violations, and do not specify any monetary penalties. The Financial Consumer Agency of Canada ("FCAC") is responsible for overseeing and enforcing compliance with the Regulations.¹¹⁰

Class Actions for Charging Illegal Fees

There are two ongoing class actions involving prepaid payment cards, one brought in Ontario and one in BC. Both allege that the providers of the cards charged fees in contravention of provincial consumer protection statutes.

Bernstein v Peoples Trust Company, 2017 ONSC 752

Facts

A class action was brought by Joyce Bernstein against Peoples Trust Company and Peoples Card Services LLP (collectively "Peoples Trust") on behalf of all consumers in Ontario who purchased or acquired a prepaid payment card sold or issued by Peoples Trust Company between November 29, 2011 and April 30, 2014 (the day before the federal regulations came into effect).¹¹¹ The suit alleged that Peoples Trust perpetrated an unfair practice under the *Ontario Consumer Protection Act, 2002* (the "CPA") and also breached the Gift Card Regulations in *O. Reg 17/05 (General)* by charging unauthorized and illegal fees from prepaid credit cards they sold.¹¹²

In September 2010, Bernstein received a gift of a Peoples Trust prepaid payment card that was branded a "Vanilla Prepaid Visa".¹¹³ The card had a face value of \$35 and stated that it was "valid thru 04/14".¹¹⁴ In September 2013, despite having never used the card, Ms. Bernstein learned the balance on her card was zero.¹¹⁵ Printed on the back of the gift in 5-point font was the service fee policy which stated that beginning the seventh month from the date of purchase, \$2.50 per month would be deducted from the balance of the card.¹¹⁶ The card also was subject to an activation fee, transaction fees, reload fee, "customer service/inquiry fee" and refund processing fee, among others.¹¹⁷

¹⁰⁹ *Ibid*, s 8.

¹¹⁰ Regulatory Impact Analysis Statement (2013) C Gaz II, 2615 (*Prepaid Payment Products Regulations*).

¹¹¹ *Bernstein v Peoples Trust Co, 2017 ONSC 752* at para 1 [*Bernstein* certification motion]. The trial judge expressed the view that both federal and provincial regulation will continue to apply to prepaid payment cards. *Bernstein* trial judgment, *ibid* at para 123.

¹¹² *Bernstein* certification motion, *ibid* at para 2.

¹¹³ *Ibid* at para 33.

¹¹⁴ *Ibid* at para 34.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

¹¹⁷ *Bernstein* trial judgment, *supra* note 79 at para 27.

Bernstein argued that the fees charged by Peoples Trust (activation fees, dormancy fees, insufficient funds, etc.) are contrary to the *CPA* and *O. Reg. 17/05*.¹¹⁸ Further, she pleaded that the cards that were subject to an expiry date violated s.25.3(1) of *O.Reg. 17/05* which states that “no supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement.”

Peoples Trust distributed single and multiple load cards that were sold by retailers and payday loan companies as a type of gift card.¹¹⁹ The single load cards were subject to an activation fee, which was added to the face value of the card and paid at the point of purchase.¹²⁰ A written cardholder agreement accompanied each card and the key terms of the agreement were printed on the cards.¹²¹ Payment of the activation fee confirmed acceptance of the terms and conditions governing use of the card.¹²² Peoples Trust argued that the primary purpose of the cards was to provide a cash replacement service, despite referring to and promoting the cards as “gift products” in their marketing materials.¹²³

Analysis

Before a class action can proceed to trial, it must be “certified” by a court as the most appropriate method for the claim to proceed. At the motion for certification, Peoples argued that the prepaid cards were a financial service product to which the *CPA* does not apply.¹²⁴ Specifically, s.2(2) of the *CPA* states that the *CPA* does not apply to financial products and services regulated under the *Loan and Trust Corporations Act (Ontario)*.¹²⁵ Peoples Trust was not specifically exempt by s.2(2) because it was incorporated under federal legislation and tried to argue that the exemption should be extended by analogy.¹²⁶ The court recognized that this was a difficult question of statutory interpretation and, at this stage in the litigation, did not engage in extensive analysis.¹²⁷ Ultimately, the court held that it was not plain and obvious that Peoples Trust qualified for the exemption under s.2(2) of the *CPA*¹²⁸ and therefore it was not plain and obvious that the plaintiffs’ claim would fail.

Alternatively, Peoples argued that if the *CPA* applied, the payments were not “future performance agreements” but rather cash replacement services.¹²⁹ Peoples contrasted the prepaid payment card to a gift card offered by a restaurant where the supply of dinner is the

¹¹⁸ *Bernstein* certification motion, *supra* note 111 at para 38.

¹¹⁹ *Ibid* at para 16.

¹²⁰ *Ibid* at para 20.

¹²¹ *Ibid* at paras 19-20.

¹²² *Ibid*.

¹²³ *Ibid* at paras 26-27.

¹²⁴ *Ibid* at para 54.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* at para 57.

¹²⁸ *Ibid*.

¹²⁹ *Ibid* at para 59.

future act to be performed by the restaurant.¹³⁰ Peoples argued that when the card is activated, it immediately provides access to the Visa or MasterCard payment network and Peoples had no future act to perform.¹³¹ However, the court rejected People's argument noting that it would be bizarre if the Legislature intended the CPA to protect a consumer who purchased a \$50 gift card for a restaurant but did not intend to protect a consumer that purchased a \$50 prepaid payment card with the idea of using it to pay for a meal at a restaurant in the future.¹³² Again, the court held that this argument was not enough at the preliminary certification stage to say that it was plain and obvious that the Peoples Trust prepaid payment cards were not subject to the CPA.¹³³

Ultimately, the court concluded that the plaintiff satisfied all five elements of the test for certification and certified the action as a class proceeding.¹³⁴

At trial, the court held that Peoples Trust single-load cards were subject to the CPA, but its reloadable cards were not on the basis that the latter are a financial product or service and therefore exempt from the CPA.¹³⁵ The trial judge held that access to a payment network was not determinative; it was the purpose of access to a payment network. For a reloadable card, the purpose of access is "banking"; for a single-load card, the purpose is "gifting".¹³⁶ As noted above, the judge agreed with Peoples Trust that purchasers of reloadable cards are seeking access to banking services, but noted that since deposits on the card are not insured and generate no interest, they are getting only "second-class" banking services.¹³⁷

The trial judge went on to hold that Peoples Trust single-load cards fell within the definition of "open loop gift card agreement" in O. Reg 17/05.¹³⁸ Consistent with the judge on the certification motion, the trial judge noted that Ms. Bernstein's experience of losing the value of the card was exactly what O. Reg 17/05 was intended to prohibit.¹³⁹ The judge also held that they fell within the definition of a "future performance agreement" since Peoples Trust promised ongoing access to the VISA or MasterCard payment network in return for purchasing the card.¹⁴⁰ The judge also dismissed Peoples Trust's argument that the regulations only applied when the card was actually given as a gift.¹⁴¹ The trial judge held that Peoples Trust violated O. Reg. 17/05 by imposing an expiry date on the card and seizing unused funds

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid* at para 62.

¹³³ *Ibid* at para 81.

¹³⁴ *Ibid* at para 126.

¹³⁵ *Bernstein* trial judgment at para 155.

¹³⁶ *Ibid* at para 159. The judge described a single-load card as "useless as a financial product." *Ibid* at para 161.

¹³⁷ *Ibid* at para 161.

¹³⁸ *Ibid* at 181.

¹³⁹ *Ibid* at 176.

¹⁴⁰ *Ibid* at 186.

¹⁴¹ *Ibid* at para 196.

left on the card on this date and by charging activation and dormancy fees above what is permitted by the regulations.¹⁴² The court also held that Peoples Trust engaged in an “unfair practice” under the *CPA* for failing to disclose fees associated with use of the card prior to purchase, other than the activation fee.¹⁴³ In addition to awarding damages for the illegal fees, the trial judge awarded punitive damages on the ground that Peoples Trust had intentionally violated the gift card regulations.¹⁴⁴

Jiang v Peoples Trust Company, 2018 BCSC 299

Facts

Ying Jiang purchased a general use prepaid card from a retailer in Burnaby, B.C. that was issued by Citizens Bank and branded with a VISA logo.¹⁴⁵ The card had a face value of \$25 and Jiang paid \$28.95 for it which included a \$3.95 activation fee.¹⁴⁶ The card was “good thru 11/2016”, non-refundable and had a monthly fee of \$2.50 that was applicable one month after the “good thru” date.¹⁴⁷ On this basis, the Citizens Bank card was different than the People’s Trust card, which started charging monthly fees beginning on the seventh month from the date of purchase.¹⁴⁸

Jiang brought an action on behalf of “all consumers who purchased, received or acquired one or more general use prepaid cards issued or sold by any of the defendants on or after November 1, 2018” and who reside in B.C.; entered into a cardholder agreement with “Vancity”, “Peoples” or either of them that contains a choice of law and jurisdiction clause in favour of BC law and courts; or opt-in to the proceeding.¹⁴⁹

In contrast to the *Bernstein* case, Jiang named multiple defendants in addition to Peoples Trust including Vancouver City Savings Credit Union, Citizens Bank of Canada, Amex Bank of Canada and All Trans Financial Services Credit Union Limited.¹⁵⁰ Jiang alleges that the general use prepaid cards infringe the *BC Business Practices and Consumer Protection Act* (the “*BPCPA*”).¹⁵¹ Specifically, Jiang seeks declarations that the defendants were in contravention of s.56.2 of the *BPCPA* which prohibits expiry dates on prepaid cards, and that the fees charged by the defendants were in contravention of s.56.3 of the *BPCPA*.¹⁵²

¹⁴² *Ibid* at paras 252, 254 and 256.

¹⁴³ *Ibid* at paras 261-66.

¹⁴⁴ *Ibid* at para 323.

¹⁴⁵ *Jiang v Peoples Trust Co* 2017 BCCA 119 at para 3, 94 BCLR (5th) 1 [*Jiang BCCA*]. Citizens Bank of Canada was renamed Vancity Community Investment Bank in April 2017. It is, and was at the time of the allegations made by the plaintiffs in *Jiang*, a wholly-owned subsidiary of Vancouver City Savings Credit Union.

¹⁴⁶ *Ibid* at para 4.

¹⁴⁷ *Ibid* at para 5.

¹⁴⁸ *Ibid* at para 35.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

¹⁵² *Ibid*.

Procedural Issues

The defendants raised two procedural arguments: one, that an alternative procedure provided for in the *BPCPA* was more appropriate than a class action,¹⁵³ and, two, that Jiang was an inappropriate representative plaintiff.¹⁵⁴ Both were rejected. Jiang was appointed as the representative plaintiff of both the B.C. resident sub-class and the non-resident sub-class.¹⁵⁵

On May 29, 2017, Joyce Bernstein was granted intervenor status.¹⁵⁶ Bernstein argued that the class definition in this case overlapped with half of the certified class members in *Bernstein*.¹⁵⁷ However, the B.C. Supreme Court held that there was no legal overlap.¹⁵⁸ The action in *Jiang* was brought on behalf of a sub-class of B.C. Residents and a non-resident sub-class for transactions from November 2008 to July 2016¹⁵⁹. The non-resident subclass includes persons who have B.C. choice of law and jurisdiction clauses in their agreements with Vancity or Peoples.¹⁶⁰ On the other hand, in *Bernstein*, the action was brought on behalf of a small subgroup of Ontario residents for transactions between November 2011 and April 2014.¹⁶¹ Further, the *Bernstein* action is against Peoples Trust whereas the action in *Jiang* includes additional defendants.¹⁶²

The B.C. Supreme Court agreed with the position of the plaintiff in *Jiang* that any overlap between class actions in multiple jurisdictions should not be resolved at the certification stage, rather, the time for electing one of the certified class actions is when either one has a final judgment on the merits or a settlement.¹⁶³ The Court held that individuals within the non-resident sub-class should be deemed to have opted-in to the proceeding by virtue of a choice of law and/or jurisdiction clause in favour of B.C. in their agreement with a defendant.¹⁶⁴

¹⁵³ *Jiang v Peoples Trust Company*, 2018 BCSC 299 at paras 4, 31-32. 2018 CarswellBC 442 (WL Can) [*Jiang BCSC*].

¹⁵⁴ *Ibid* at para 39-40 and 70.

¹⁵⁵ *Ibid* at para 70.

¹⁵⁶ *Ibid* at para 60.

¹⁵⁷ *Ibid* at para 63.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.

¹⁶³ *Ibid* at para 67.

¹⁶⁴ *Ibid* at para 69.

Tax Rebate Discounters

Introduction: What is Tax Rebate Discounting?

Tax rebate discounting is a practice where a firm or individual prepares a tax return for a client, and provides the client with an immediate discounted tax return.¹⁶⁵ In return for their services, the discounter retains a portion of the anticipated refund as a fee and pays the rest immediately to the client. The early 1970s saw a rise in the number of people relying on tax discounting services for their income tax refunds.¹⁶⁶ During these years, the discount rate that applied ranged anywhere from 40% to 90% and discounters also charged additional fees to prepare the returns.¹⁶⁷ If one took the discount rate and “turn-around” period that a discounter waited for a refund cheque, and expressed it as an annual interest rate, tax rebate discounters were charging interest rates of at least 200%.¹⁶⁸ Some rebaters charged in the 600-800% range and a rate of 1200% was reported.¹⁶⁹

The Tax Rebate Discounting Act

Legislative History

As a response to these abuses, provinces began to amend consumer protection legislation and pass statutes to address tax rebate discounting. These various provincial schemes were difficult to enforce, and tax discounters often found loopholes.¹⁷⁰ At the request of all provinces, the federal government enacted the *Tax Rebate Discounting Act* (the “Act”).¹⁷¹ The Act created an exemption to the Criminal Code, section 347 that allowed income-tax-preparation companies to charge what amounted to an interest rate beyond the criminal rate of interest.¹⁷² Initially, the legislation established a discounting rate of 15% of the refund, including all fees and charges, and imposed detailed disclosure requirements.¹⁷³

In 1985, the Act was amended and the amount that a discounter could charge for amounts over \$300 was reduced to 5%.¹⁷⁴ Tax discounters argued that the rate would put them out of business and argued that they were not engaged in money-lending, but entering buy-sell agreements with their clients.¹⁷⁵ However, this argument appeared to be unfounded. After the legislation was passed, the tax rebate discounting sector significantly grew from 7000

¹⁶⁵ Poonam Puri and Andrew Nichol, “Developments in Financial Services Regulation: A Comparative Perspective” (2014), 55 Can Bus LJ 454 at 459 [Puri and Nichol].

¹⁶⁶ Martha Milczynski, “Tax Rebate Discounting in Canada – The Case for Abolition” (1987) 2 Osgoode JLS 74.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, at 75.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Puri and Nichol, *supra* note 151.

¹⁷² Jerry Buckland, *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada* (Toronto: University of Toronto Press, 2012) at 48.

¹⁷³ Puri and Nichol, *supra* note 151.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

transactions in 1979 to 61,500 in 1981, and 385,000 in 1984.¹⁷⁶ This is also the time when two large players, H&R Block and BenTax, entered the industry.¹⁷⁷

The purpose of the Act is to protect the rights and interests of individuals who use discounting services to get their income tax refunds.¹⁷⁸ In Quebec, discount refunds of provincial income tax are illegal. In Manitoba, the *Manitoba Income Tax Act* outlines regulations governing discounting and it is administered by the Manitoba Department of Finance.¹⁷⁹

Requirements Under the Act

Under the Act, a person acquires a right to a “refund of tax where that person, as between himself and another person, acquires a right to a refund of tax or to an amount equal to the amount of a refund of tax”.¹⁸⁰ Once a discounter such as H&R Block has “acquired the client’s right to a refund of tax, the Minister of National Revenue may pay the amount of the refund to the discounter.”¹⁸¹

When a discounter acquires a right to a client’s refund, they must follow the fee guidelines established by the Act. The fee guidelines are structured so as to ensure that clients receive a minimum amount of “consideration” in return for transferring to the discounter the right to receive the tax refund. The effect of these provisions is to ensure that clients of tax discounters receive at least 85% of their expected refund when the refund is \$300 or less and 95% when it is more than \$300.¹⁸² This structure includes any fees or charges that a discounter, or any person not acting at arm’s length with the discounter, charges for preparing the client’s return or any other service related to the discounting transaction.¹⁸³ The Act made it an offence to pay a lower percentage to a client in exchange for a right to their refund, subject to a maximum \$25,000 fine.¹⁸⁴

The Act also contains several provisions for discounters that relate to disclosure, notice, and record maintenance requirements. The discounter must provide the client with a statement describing the discounting transaction and if the client requests, a true copy of the client’s income return filed with the government, and any related information return.¹⁸⁵ In addition, the discounter must provide the client with any notice of assessment the discounter receives in relation to the client’s return of income, and notice of the actual amount of tax

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Canada Revenue Agency, “Guide for Discounters 2016”, online: <<https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/E/pub/tg/t4163/t4163-16e.pdf>>.

¹⁷⁹ *Ibid.*, at 5.

¹⁸⁰ *Tax Rebate Discounting Act*, RSC 1985, c T-3, s 2(2) [*Tax Rebate Discounting Act*].

¹⁸¹ *Ibid.*, s 2.1(1).

¹⁸² *Ibid.*, s 2(1).

¹⁸³ *Ibid.*, s 3(2).

¹⁸⁴ *Ibid.*, ss 3(1) and 7.

¹⁸⁵ *Ibid.*, s 4(1)(b).

refund received by the discounter.¹⁸⁶ Again, failure to abide by these conditions constitutes an offence and the discounter is liable on summary conviction to a fine not exceeding \$25,000.00.

Compliance

Canada Revenue Agency conducts compliance programs to ensure that tax discounters meet their responsibilities under the Act and that individuals who use these services are protected.¹⁸⁷ All persons, firms, organizations and financial institutions wanting to provide discounting services to clients must apply to obtain a discounter code.¹⁸⁸ If the CRA has reasonable grounds to believe that a discounter has not complied with provisions of the Act or any conditions listed in the CRA Guide for Discounters, they may suspend or cancel the discounter's code.¹⁸⁹ In addition, if the discounter does not pay fines and restitution to victims or does not fulfill the probation terms ordered by a court for previous convictions under the Act, their discounter code will also be suspended or cancelled.¹⁹⁰

Convictions Under the Act

In February 2007, Michael Channer of MBC Accounting Services was found guilty of 16 offences under the Act.¹⁹¹ While preparing and discounting clients' personal income tax returns for 2003, Channer failed to pay some clients the full amount of refund to which they were entitled, did not pay some clients their refund at the time required, and failed to provide some clients with their notice of assessment.¹⁹² Channer was fined \$8,000.¹⁹³

More recently, Rosaire Michaud operated a tax discounting business in New Brunswick and was charged with 126 counts under s. 6.1 of the Act and 148 counts under s.239(1.1)(a) of the *Income Tax Act*.¹⁹⁴ Michaud prepared tax returns on behalf of 148 clients, leading to the clients obtaining unentitled refunds from which Michaud would get paid for his services.¹⁹⁵ Michaud prepared a tax return based on false information provided by the client and then would issue the client a cheque.¹⁹⁶ The client would then meet up with an orchestrator of the

¹⁸⁶ *Ibid*, s 5.

¹⁸⁷ Canada Revenue Agency, "Discounter information for individuals", online: <<https://www.canada.ca/en/revenue-agency/services/e-services/e-services-individuals/efile-individuals/discounter-information-individuals.html#q1>>. **Note:** a search for more information about these compliance programs did not yield any results.

¹⁸⁸ *Guide for Discounters*, *supra* note 164.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*.

¹⁹¹ Canada Revenue Agency, "Canada Revenue Agency: Tax Discounter Fined \$8,000 for Failing to Provide Clients with Tax Refunds", (9 February 2007), online: <<http://www.marketwired.com/press-release/canada-revenue-agency-tax-discounter-fined-8000-failing-provide-clients-with-tax-refunds-634950.htm>>. **Note:** I was unable to find this judgment on West Law and Lexis Nexis.

¹⁹² *Ibid*.

¹⁹³ *Ibid*.

¹⁹⁴ *R v Michaud*, 2012 NBCA 77, 397 NBR (2d) 219 at para 1.

¹⁹⁵ *Ibid*, at para 3.

¹⁹⁶ *Ibid*.

scheme and give them a portion of the funds.¹⁹⁷ There was no evidence Michaud was involved in orchestrating the tax fraud scheme.¹⁹⁸ The trial judge convicted Michaud of four out of 126 counts under the Act, and 134 out of 148 counts under the *Income Tax Act*. Michaud was sentenced to a conditional sentence of two years less a day and fines of \$391,504.49 and \$2,000.00.¹⁹⁹ On appeal, Michaud's convictions under the *Income Tax Act* were overturned, but those under the Act upheld.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, at para 4.

¹⁹⁹ *Ibid.*, at para 1.

PAYDAY LOANS

Introduction

A payday loan is a short-term loan that is usually repaid by the borrower's next paycheque.²⁰⁰ The *Criminal Code* defines payday loans as “an advancement of money in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card”.²⁰¹ Unlike traditional loans, interest does not compound over the term of the loan, rather, lenders charge a fee based on how much is borrowed. At the end of the term, which is usually the borrowers next pay period, the principal amount of the loan and fee are due in full. Payday loans were designed to cover cash shortfalls in between a borrower's paydays.

Because payday loans are for a short-term, a credit history check is usually not required. Lenders generally require proof of regular income, a bank account, and a permanent address.²⁰² To compensate for the short-term nature of these loans and the lack of a credit history check, lenders charge high interest rates and fees. In Ontario, a lender cannot charge more than \$15 per \$100 borrowed. This represents an annual interest rate of 390% for a loan of \$100.²⁰³ In Manitoba, lenders cannot charge more than \$17 per \$100 borrowed, which represents an annual interest rate of 442%.

The fees charged by payday lenders have made payday loans an expensive borrowing tool. When the borrower is unable to repay a payday loan on time, lenders charged additional fees to extend the term of the loan or granted a new payday loan to payout the outstanding loan (a “rollover”). Provincial payday loan legislation has attempted to protect consumers from becoming overwhelmed by debts owed to payday lenders by limiting the amount of interest and fees lenders may charge. In some provinces, rollovers and extensions are either not permitted or the fees a lender may charge for an extension are limited. As a result of these more stringent regulations, some payday lenders have moved to installment loans, discussed in a separate section.

Payday Loan Users

²⁰⁰ Financial Consumer Agency of Canada, *Payday Loans* (Ottawa: Financial Consumer Agency of Canada, 2018), online: Government of Canada <<https://www.canada.ca/en/financial-consumer-agency/services/loans/payday-loans.html>> [FCAC 1].

²⁰¹ *Criminal Code*, RSC 1985, c C-46, s 347.1(1) [*Criminal Code*].

²⁰² FCAC 1, *supra* note 186.

²⁰³ The annual rate was calculated by dividing the fee charged (\$15) by the amount borrowed, multiplied by the number of payments this would represent over a year. [$\$15/\$100 \times 26 \times 100 = 390$]

A 2017 survey by the Canadian Payments Association identified that 49% of Ontarians and 53% of Manitobans live paycheque to paycheque.²⁰⁴ Payday loans are particularly attractive to lower-income Canadians because of their relatively lax qualification criteria and quick access to funds. Payday loan users report declining income and employment, poor credit history and a lack of suitable loan products at banks as factors influencing their decision to obtain a payday loan.²⁰⁵ Banks may offer products that do not align with the borrowers needs (i.e. minimum borrowing amounts much larger than what the borrower requires) or the timeframe of obtaining the loan is lengthy.²⁰⁶ Poor credit history prevented some borrowers from obtaining loans from a bank.²⁰⁷ Borrowers reported that payday lenders usually offer products that align with their borrowing needs, particularly in terms of speed and convenience (location, operating hours and processing times).²⁰⁸ Customer service was another influencing factor, with some borrowers reporting that banks provided poorer customer service than payday lenders.²⁰⁹ Other borrowers reported that their friends' and families' positive experiences with payday loans influenced their decision.²¹⁰ However, payday loans are not only used by those living on a low income, as higher-income Canadians have also reported accessing them.²¹¹

In a 2016 study by the FCAC, payday loan users reported that they used payday loans to cover unexpected, necessary expenses such as car repairs and expected, necessary expenses such as utility bills.²¹² More than half of the respondents reported taking out a loan of \$500 or less.²¹³ Thirty-seven per cent of respondents reported using a payday loan between two to five times in the last three years, while 23% reported using a payday loan six or more times in the same time period. Although payday loans were designed to be repaid with the borrower's next paycheque, one-third of borrowers reported repaying their loans from other sources, such as savings accounts, taking out new payday loans or borrowing from friends or family.

²⁰⁴ The Canadian Payroll Association, *Manitoba National Payroll Week 'Living Pay Cheque to Pay Cheque News Release'* (Winnipeg: Canadian Payroll Association, 2017), online: <https://www.payroll.ca/PDF/News/2017/NPW/Manitoba_FINAL_EN.aspx>. See also *Ontario National Payroll Week 'Living Pay Cheque to Pay Cheque News Release'* (Toronto: Canadian Payroll Association, 2017), online <https://www.payroll.ca/PDF/News/2017/NPW/Ontario_FINAL_EN.aspx>.

²⁰⁵ Jerry Buckland, Chris Robinson & Brenda Spotton Visano, *Payday Lending in Canada in a Global Context: A Mature Industry with Chronic Challenges* (Palgrave Macmillan, 2018) at p 68 [Buckland].

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at p 69.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid* at p 69–70.

²¹¹ Financial Consumer Agency of Canada, *Payday Loans: Market Trends* (Ottawa: Financial Consumer Agency of Canada, 2016) at p 2 [FCAC].

²¹² *Ibid.*

²¹³ *Ibid* at p 6.

Savings and budgeting were issues among borrowers. Less than a quarter of respondents had at least \$1,500 saved and 47% of the respondents reported having no cash savings at all.²¹⁴ When asked how they would fund an unexpected purchase of \$500, 16% of payday loan users reported they would not be able to make this purchase at all, 50% would need to access a payday loan, credit card, line of credit or borrow from a friend. Only 24% of users reported that they would make this purchase from their savings or emergency fund.²¹⁵ The FCAC found that even if consumers have savings, they often turn to high-interest credit if they have identified a particular use for their savings, demonstrating the need to educate consumers on the value of building and using a “rainy day” fund.²¹⁶ When it came to budgeting, payday loan users were more likely to have a budget, but they were less likely to successfully stay within it.²¹⁷

The FCAC found that payday users were uninformed of the costs associated with payday loans, especially in comparison to other borrowing alternatives.²¹⁸ Most respondents were unaware that payday loans carried a higher cost of borrowing than alternatives such as a credit card.²¹⁹ Borrowers who reported higher levels of financial literacy took out fewer payday loans and were more successful in maintaining their budgets.²²⁰ Payday loan consumers did not consistently seek out financial advice, even when they felt it was necessary, with 27% of the respondents reporting that they never sought out financial advice, even when it was needed.²²¹ The FCAC found that borrowers who sought financial advice increased their likelihood of saving and financial planning, which it believes to be a key factor in reducing payday loan use.²²²

Legislative History

The Money-Lenders Act and the Small Loans Act (federal legislation)

Small, short-term loans were governed by the *Money-Lenders Act (MLA)* from the turn of the twentieth century to 1939. The *MLA* limited interest on loans under \$500 to 12% per annum.²²³ Although the *MLA* granted courts the power to re-open transactions when the interest charged, including fees, exceeded 12% per annum, the lack of a statutory definition of interest²²⁴ meant that lenders were able to evade the interest cap by adding additional charges and fees, which courts interpreted as not constituting interest.²²⁵

²¹⁴ *Ibid* at p 10.

²¹⁵ *Ibid*.

²¹⁶ *Ibid*.

²¹⁷ *Ibid* at p 11.

²¹⁸ *Ibid* at p 5.

²¹⁹ *Ibid* at p 1, 5.

²²⁰ *Ibid* at p 12.

²²¹ *Ibid*.

²²² *Ibid*.

²²³ *MLA*, s 6.

²²⁴ *MLA*, s 7.

²²⁵ Mary Waldron, “A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past?” (2011) 50 CBLJ 300 at 303 [*Waldron*].

The *MLA* was repealed in 1939 and replaced by the *Small Loans Act (SLA)*. The *SLA*, attempted to resolve the issue of lenders evading the interest ceiling by defining the cost of the loan as “the whole cost of the loan to the borrower, whether the same is called interest, or is claimed as a discount, deduction from an advance, commission, brokerage, fines, penalties or charges for inquiries, defaults or renewals or otherwise”.²²⁶ The *SLA* applied to loans under \$1,500 (increased from \$500 in 1956) and set the maximum cost of the loan to 1% per month (12% per annum).²²⁷ The *SLA* used a tiered approach to set the maximum cost for loans²²⁸:

- (a) 24% per annum for loans of up to \$300;
- (b) 12% per annum for loans exceeding \$300 but under \$1000;
- (c) 18% per annum for loans exceeding \$1000

For loans defined as “long-term” – more than 20 months on a loan up to \$500 or more than 30 months on a loan greater than \$500 – the maximum cost of a loan could not exceed 12% per annum.²²⁹

Although the *SLA* was generally regarded as successful, it still left a possibility for evasion.²³⁰ Lenders could offer only loans greater than \$1,500, where the *SLA* would not apply. Additionally, credit unions (who were more likely than banks to lend small amounts) lobbied to increase the \$1,500 loan amount, as the low rate ceiling severely impacted their bottom line. By 1970, multi-purpose credit cards were introduced, which were not subject to the *SLA*.²³¹ The *SLA* was repealed in 1981.²³²

Criminal Code Criminal Interest Rate Provision

The criminal interest rate provision was added into s.347 (then s.305.1) of the *Criminal Code* in 1981. This provision makes it a criminal offence to receive a payment of interest or to enter into an agreement to receive a payment of interest that exceeds 60% per annum.²³³ The drafters of the provision contemplated larger, longer term loans as opposed to small, short-

²²⁶ *Small Loans Act*, RSC 1970, c S-11, s 2(a) [*SLA*].

²²⁷ *Ibid*, s 5(1).

²²⁸ *Ibid*, s 3(2)(a-c).

²²⁹ *Ibid*, s 3(3).

²³⁰ *Waldron*, *supra* note 211 at 305.

²³¹ *Ibid* at 307.

²³² In a 2004 editorial, Prof. Jacob Ziegel noted that the *SLA* had functioned well and called the repeal “ill-advised”. Jacob Ziegel, “Time to clarify Canada’s lending law” *Globe and Mail* (20 April 2004), online: <https://www.theglobeandmail.com/opinion/time-to-clarify-canadas-lending-law/article1136034/>.

²³³ *Criminal Code*, *supra* note 187 at s 347(1).

term loans.²³⁴ Although intended to combat loansharking, the provision has been used primarily in civil litigation.²³⁵

Lenders began offering payday loans in Canada in the mid-1990s.²³⁶ By the early 2000s, the industry began to grow rapidly.²³⁷ By the mid-2000s, payday lenders became defendants in several class action lawsuits, in which the plaintiffs invoked s.347.²³⁸ Payday lenders were accused of offending s.347 as their loans often carried interest rates over 60% when all additional fees were considered.²³⁹ These class actions mostly settled.²⁴⁰

Parliament, responding to pressure from the payday loan industry and the pending class action lawsuits, passed Bill C-26.²⁴¹ Bill C-26 amended s.347 of the Criminal Code to exempt payday lenders from the provision, if the province they operated in enacted legislation regulating payday loans. Payday lenders are exempt from s.347 if all of the following are met:²⁴²

- (a) the loan is \$1,500 or less and the term of the loan is 62 days or less;
- (b) the lender is licensed or authorized by provincial law to enter a loan agreement;
- (c) the province is designated under subsection (3)

Provinces must request to be designated.²⁴³ In order to be designated, a province must have legislation in place to protect payday loan borrowers, which imposes limits on the total cost of payday loans.²⁴⁴

Provincial Legislation

Provinces who have enacted payday loan legislation are exempt from s.347 of the *Criminal Code*. Currently Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan have enacted payday loan legislation.

²³⁴ Pierre Paquette, 1st Sess, 39th Parl.

²³⁵ Jacob S Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986) 11:2 Can Community LJ 233 at p 234.

²³⁶ Canadian Consumer Finance Association, "About the Industry", online: <<https://canadiancfa.com/about-the-industry/>>.

²³⁷ Buckland, *supra* note 191 at p 4.

²³⁸ Nathan Irving, "Bill 14: The Consumer Protection Amendment Act (Payday Loans)", 34 Man LJ 159 at p 159, 162 [Irving]. See also *MacKinnon v National Money Mart Co.*, 2004 BCCA 473, [2004] BCJ No 1961; *Bodnar v Cash Store Inc.*, 2005 BCSC 1228, [2005] BCJ No 1904; *Smith v National Money Mart Co.*, [2005] OJ No 2660, 8 BLR (4th).

²³⁹ *Ibid* at p 161-162.

²⁴⁰ *Ibid*.

²⁴¹ Parliamentary Information and Research Service, *Bill C-26, An Act to Amend the Criminal Code (Criminal Interest Rate)* (Legislative Summary LS-541E) (Ottawa: Library of Parliament, 2006, revised 2007) at 2, online: <<https://lop.parl.ca/content/lop/LegislativeSummaries/39/1/c26-e.pdf>>.

²⁴² *Criminal Code*, *supra* note 187, s 347.1(2)(a-c).

²⁴³ *Ibid*, s 347(3).

²⁴⁴ *Ibid*.

Newfound and Labrador is the last province other than Quebec – discussed at the end of this chapter, below – to enact payday loan legislation, but it has yet to come into force.²⁴⁵

While provincial legislation varies, there are several similarities. All designated provinces prohibit tied-selling, whereby a lender provides a payday loan on the condition that the borrower purchase another product, service or insurance, using any form of security for a payday loan and wage assignment, which involves taking funds directly from the borrower's paycheque as well as impose disclosure requirements on loan agreements and posters in physical locations. As per section 347.1 of the *Criminal Code*, designated provinces must limit the total cost of borrowing of payday loans. A chart comparing these cost of borrowing provisions and the other regulations discussed below is included in **Appendix 1**.

Pre-authorized debit payments and non-sufficient funds (NSF) fees

Most lenders accept pre-authorized debits from a bank account as repayment for loans. Some provinces have regulated this repayment method in their legislation, as a response to borrower complains about repeated attempts or incorrect amounts being debited from their bank accounts. Repeated attempts or incorrect debits may result in borrowers being charged non-sufficient funds (NSF) fees from their bank.

In Manitoba, lenders may only process a pre-authorized debit once.²⁴⁶ Subsequent attempts are only permitted if the borrower is not charged a fee from their financial institution and the lender does not charge the borrower any fee to re-process the debit.²⁴⁷ Lenders who fail to comply with the pre-authorized debit rules may be subject to an administrative penalty.²⁴⁸ If the borrower repays the loan by cheque or pre-authorized debit and it is dishonoured, the lender may charge a fee of \$20.

In Ontario, lenders are not permitted to re-process a pre-authorized debit more than once if the borrower would incur any fees.²⁴⁹ If a lender re-processes a pre-authorized debit more than once and the borrower is charged any fees, the borrower is entitled to a refund from the lender and is only liable to repay the principal of the loan.²⁵⁰ Ontario allows lenders to collect "reasonable charges" that reflect the cost the lender incurs due to a dishonoured payment.²⁵¹

Repeat Borrowing, Rollovers and Extensions

²⁴⁵ *An Act to Amend the Consumer Protection and Business Practices Act*, 2016 c 46.

²⁴⁶ MB Reg, 99/2007, s 15.7(1) [*MB Payday Regs*].

²⁴⁷ *Ibid* at s 15.7(2).

²⁴⁸ See Compliance and Enforcement – Manitoba for administrative penalty figures.

²⁴⁹ Ont Reg, 98/09, s 31(1) [*ON Payday Regs*].

²⁵⁰ *Ibid* at s 31(4-5).

²⁵¹ *Payday Loans Act, 2008*, SO 2008, c 9, s 33(1)(b) [*PLA*].

Prior to provincial payday loan legislation, lenders allowed borrowers to rollover outstanding loans into a new payday loan if they could not pay by the due date. Borrowers, especially those with a lower or fixed income, who become financially dependent on payday loans may fall into a “debt trap” and face pressure to borrow again to repay their outstanding loans.²⁵² Most provinces now prohibit rollovers as well as concurrent loans, requiring lenders to wait a certain period after an outstanding loan is repaid before advancing a new loan.

Manitoba allows replacement loans, which are defined as “a payday loan arranged or provided by a payday lender as part of a series of transactions or events that results in the borrower’s debt under another payday loan previously arranged or provided by that payday lender being repaid in whole or in part”.²⁵³ Replacement loans are defined as being larger than the outstanding loan.²⁵⁴ The total fee a lender may charge for a replacement loan is limited to 5% of the principal amount of the replacement loan.²⁵⁵ If the borrower is unable to pay their loan and does not require additional funds, lenders may extend or renew their payday loan and the total charge for an extension or renewal cannot exceed 5% of the principal amount of the loan.²⁵⁶ If the borrower fully repays their loan and requests another within 7 days, the maximum fee the lender can charge is 5% of the principal amount of the new loan.²⁵⁷

Ontario prohibits rollovers and concurrent loans. Lenders must wait a minimum of seven days from the date the borrower repays the loan in full before advancing a new payday loan.²⁵⁸ If a lender or broker contravenes this waiting period, the borrower is only liable for the principal amount of the loan.²⁵⁹ An extended repayment plan is required when a borrower takes out 3 or more payday loans from the same lender within in a 63-day period.²⁶⁰ The lender must spread payments equally over at least 3 of the borrower’s pay periods if they are paid semi-monthly, biweekly or more frequently.²⁶¹ If the borrower is paid less frequently than semi-monthly or biweekly, then the lender must spread payments equally over at least 2 of the borrower’s pay periods.²⁶² The payments must be less than 35% of the total loan, if the borrower is paid semi-monthly or biweekly or 50% of the total loan if the borrower is paid less frequently than semi-monthly or biweekly.²⁶³

Prohibited Practices

²⁵² *Buckland*, *supra* note 191 at p 11.

²⁵³ *The Consumer Protection Act*, CCSM c c200, s 137 [*MB CPA*].

²⁵⁴ *MB Payday Regs*, *supra* note 232, s 2.1.

²⁵⁵ *Ibid*, s 13.1(2).

²⁵⁶ *Ibid*, s 13.1(3)(a).

²⁵⁷ *Ibid*, s 13.1(3)(b).

²⁵⁸ *PLA*, *supra* note 237, s 35(1)(a).

²⁵⁹ *Ibid*, s 35(5).

²⁶⁰ *ON Payday Regs*, *supra* note 235, s 25.1(2).

²⁶¹ *Ibid*, s 25.1(2)(a).

²⁶² *Ibid*, s 25.1(2)(b)

²⁶³ *Ibid*, s 25.4(a-b)

Designated provinces have also prohibited lenders from engaging in certain practices when arranging, providing or collecting payday loans. In Manitoba, payday lenders are prohibited from communicating with the borrower, any of their family members, friends, acquaintances or business contacts in a manner that constitutes harassment.²⁶⁴ Harassment is defined as using “threatening, profane, intimidating or coercive language or using undue, excessive or unreasonable pressure.”²⁶⁵ Lenders are limited to contacting the borrower or any of their family, friends or acquaintances 6 times in a 7-day period or 3 times in a 7-day period by any one method of communication that is not regular mail.²⁶⁶ Lender’s must comply with a borrower’s request not to contact their employer if they make reasonable arrangements to discuss the loan with the lender at an alternate location and make good on such arrangements by discussing the loan with the lender at that location.²⁶⁷

Ontario prohibits lenders from contacting any of the borrower’s family members, friends, neighbours, acquaintances or employer with respect to an outstanding loan.²⁶⁸ A borrower’s employer may be contacted with respect to a payday loan if the borrower consents or if the sole purpose of the contact is to verify and confirm employment information.²⁶⁹

Masked Products and Anti-Avoidance

Lenders have introduced alternative lending products marketed as lines of credits or instalment loans in an attempt to evade payday loan legislation. The *PLA* has an “anti-avoidance” provision in section 4, which states that when determining whether the *PLA* applies, a court shall determine the real substance of the transaction (or person, entity, or agreement) and disregard its outward form. Section 54(1) of the Ontario *Payday Loans Act* allows the Director to apply to the Superior Court of Justice for an order directing a company to comply with the *Act* if it is not currently doing so.

Manitoba enacted High-Cost Credit Product legislation that deems any line of credit or loan that exceeds an annual interest rate of 32% as a high-cost credit product.²⁷⁰ Credit cards, margin loans, mortgages, payday loans and credit products offered by banks and credit unions are excluded from the legislation.²⁷¹ The High-Cost Credit Product legislation requires anyone who arranges, provides or offers high-cost credit products to be licenced.²⁷² The legislation requires lenders to disclose certain information to the borrower, including that the product is a high-cost credit product, the borrower’s rights, the total cost of credit in a dollar amount and

²⁶⁴ *MB Payday Regs*, *supra* note 232, s 18.3(1)(a).

²⁶⁵ *Ibid*, s 18.3(2)(a-b).

²⁶⁶ *Ibid*, s 18.3(1)(c)(i-ii).

²⁶⁷ *Ibid*, s 18.3(4)(a-c).

²⁶⁸ *ON Payday Regs*, *supra* note 235, s 26(1-2).

²⁶⁹ *Ibid*, s 26(3)(b).

²⁷⁰ *MB CPA*, *supra* note 239, s 237.

²⁷¹ *Ibid*, ss 237(d-f), s 238(2). *See also*, MB Reg 7/2016, s 4(2).

²⁷² *MB CPA*, *supra* note 239, s 241(1).

any fees associated with the product.²⁷³ This legislation would likely capture products that attempt to evade payday loan legislation. A chart summarizing and comparing high-cost credit regulations in place or proposed in four provinces is found in **Appendix 2**. Instalment loans, which payday lenders have introduced, possibly to avoid payday loan regulation, is discussed in the next chapter.

In *Ontario (Ministry of Consumer and Business Services Act, Director) v Cash Store Financial Services Inc.*, the defendant broker, previously licensed under the *Payday Loans Act*, chose not to renew their licence because it found new amendments to the *Act* too onerous.²⁷⁴ It introduced a lending product called a “basic line of credit” (BLOC) from which it received a 21% fee on a borrower’s initial draw; the third-party lender earned interest at 59.9% per annum.²⁷⁵ The borrower had to pay 50% of the outstanding balance each payment and according to the defendant, most customers chose a repayment frequency that matched their pay schedule.²⁷⁶ The BLOC was marketed to the same consumers who previously used the defendant’s payday loans.²⁷⁷ The Director of the Ministry of Consumer and Business Services applied for an order that the BLOC was regulated by the *Payday Loans Act*.

The defendant argued that because its product was a line of credit, which is excluded in the definition of a payday loan, the *Act* did not apply. Further, it argued payday loans were single transactions, as they involve one advance of money in exchange for one pre-authorized debit, cheque or future payment, whereas its line of credit product involves multiple advances and repayments.²⁷⁸ According to the defendant, its BLOC worked like any other line of credit: borrowers had a credit limit they could draw against, interest was charged only on the amount drawn and could be repaid at any time.²⁷⁹ Borrowers could redraw, as long as they had paid down the existing draw by 50% and passed another credit check.²⁸⁰

The court held this was comparable to a series of payday loans, and the fact the customer did not have to re-apply on subsequent draws made “little substantive difference.”²⁸¹ The court found the “essence of any loan application is the credit check”, which would be completed whether a borrower was redrawing from the BLOC or obtaining a new payday loan.²⁸² The court found it would be highly unlikely for a borrower to accumulate multiple

²⁷³ *Ibid*, s 249(1)-(2).

²⁷⁴ *Ontario (Ministry of Consumer and Business Services Act, Director) v. Cash Store Financial Services Inc.*, 2014 ONSC 980 at para 6, [2014] OJ No 706.

²⁷⁵ *Ibid* at para 11.

²⁷⁶ *Ibid*.

²⁷⁷ *Ibid* at para 15.

²⁷⁸ *Ibid* at para 34.

²⁷⁹ *Ibid* at para 37.

²⁸⁰ *Ibid* at para 40.

²⁸¹ *Ibid* at para 41.

²⁸² *Ibid*.

draws without repaying existing draws first and passing credit checks due to the high interest rate charged.²⁸³ The reality of the situation was that repayment would be necessary before the borrower could redraw from the BLOC.²⁸⁴ In essence, a borrower could take 26 payday loans out in one year, repaying them biweekly and passing a credit check each time, or draw from the BLOC 26 times, repaying each draw biweekly and passing a credit check each time.²⁸⁵ The court held the BLOC was a payday loan, declaring that it was regulated under the *PLA* and the defendant was prohibited from brokering BLOCs without a licence under the *PLA*.

Zoning

Municipalities have begun to use by-laws to limit the number of payday lenders. A recurring theme in Ontario's legislative debates was the need to protect the vulnerable, who would be most likely to access payday loans. Ontario Bill 59, *Putting Consumers First Act*, amended the *Payday Loans Act, 2008*, allowing municipalities to enact zoning by-laws to limit the number and location of payday lenders.²⁸⁶ The amendments came into effect on January 1st, 2018.

The City of Toronto has adopted interim regulations to limit the number of payday lending stores while it conducts a review of the industry.²⁸⁷ The regulations create a new business licence for payday lenders. In order to receive a licence, applicants must already be licensed under the *Payday Loans Act, 2008*.²⁸⁸ If the applicant is not licensed with the province or received a license after May 1st, 2018, they are not eligible for the municipal business licence.²⁸⁹ This prevents any new payday lenders from operating in Toronto until its full review of payday lending is complete.

Hamilton has similar regulations.²⁹⁰ Under Hamilton's by-law, every payday lender must have a business licence issued by the city and a licence from the province.²⁹¹ Hamilton also restricts the number of payday lenders in the city to 15 in total with no more than 1 lender in each ward.²⁹² Existing lenders are "grandfathered" provided that the location continues to be operated as a payday loan business, maintains their business licence and complies with other

²⁸³ *Ibid* at para 43.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid* at para 44.

²⁸⁶ *PLA, supra* note 237, s 24(3).

²⁸⁷ City of Toronto By-Law 526-2018. Proposed completion date of the industry review is the second quarter of 2019.

²⁸⁸ City of Toronto By-Law 526-2018, c 545-538 A.

²⁸⁹ *Ibid* at B.

²⁹⁰ City of Hamilton By-Law 18-042.

²⁹¹ *Ibid* at ss 2–3(a).

²⁹² *Ibid* at s 6(a-b).

provisions of the by-law.²⁹³ The by-law requires lenders to provide any person who expresses interest in a loan with credit counselling information.²⁹⁴

Compliance and Enforcement

Ontario

The *Payday Loans Act* gives the Registrar of the Ministry of Government and Consumer Services (or a person delegated by the Registrar) the power to inspect a payday loan business for the purpose of ensuring compliance with payday loan laws, dealing with complaints from consumers or determining whether the lender remains entitled to a licence.²⁹⁵ Inspectors aim to stop violations before they occur.²⁹⁶ Inspectors have the power to access and remove any money, pre-authorized debit or data storage/processing device relevant to the inspection, subject to the lender's right to have the item returned within a reasonable time.²⁹⁷ This power extends to unlicensed lenders, if the inspector has reasonable grounds to believe that unlicensed lending is occurring.²⁹⁸ Inspectors are not permitted to use force to enter or inspect a lender.²⁹⁹

The Act allows the Director of the Ministry of Government and Consumer Services to appoint investigators, who investigate whether a lender has committed an offence under the *PLA*. Matters may be referred to an investigator when there is concern a lender has violated the *PLA*. Investigators may apply for search warrants and investigate licensed or unlicensed lenders.³⁰⁰ Investigators have the power to use any investigative technique as well as use police officers and any force necessary to execute the search warrant.³⁰¹ Based on an investigator's investigation, the Director may charge lenders with an offence under the *PLA*.

Failing to comply or contravening (including any attempts to contravene) any section of the *PLA* is an offence and offenders may be subject to a fine of \$50,000 and/or imprisonment of up to 2 years less a day if the offender is an individual.³⁰² If the offender is not an individual, the fine increases to a maximum of \$250,000.³⁰³ In addition to fines, a court may order the lender to pay compensation or make restitution to borrowers.³⁰⁴ The *PLA* allows the Minister of Government and Consumer Services to impose administrative penalties of up to \$10,000 to

²⁹³ *Ibid* at ss 5, 8.

²⁹⁴ *Ibid* at s 12.

²⁹⁵ *PLA*, *supra* note 237, s 47(1).

²⁹⁶ Government of Ontario, "Consumer complaints and enforcement", online: <<https://www.ontario.ca/page/consumer-complaints-and-enforcement#section-2>>.

²⁹⁷ *Ibid*, s 47(2).

²⁹⁸ *Ibid*, s 47.1(1).

²⁹⁹ *Ibid*, s 47(5).

³⁰⁰ *Ibid*, s 48(1) – s 49(1).

³⁰¹ *Ibid*, s 49(8).

³⁰² *Ibid*, s 55(1), (3)(a).

³⁰³ *Ibid*, s 55(3)(b).

³⁰⁴ *Ibid*, s 56.

promote compliance with the requirements under the *PLA* and its *Regulations*.³⁰⁵ Administrative penalties are imposed on the basis of absolute liability, meaning that an administrative penalty may be imposed even if a lender took all reasonable steps to prevent contravention of the *PLA* or was “honestly and reasonably mistaken about facts that, if true, would have rendered the contravention innocent.”³⁰⁶

The Ministry of Government and Consumer Services also publishes a list of lenders who have been levied administrative penalties, charged with an offence under the *Payday Loans Act* or have not responded to consumer complaints received by the Ministry.³⁰⁷ A lender could stay on this list for up to 27 months, but may be removed if the complaint is resolved or if found not guilty of the offence charged.³⁰⁸ The service lists the name, address and contact information of the lender as well as what enforcement action was taken against the lender. The most frequent infractions are incomplete or missing disclosure information and mandatory statements on lending documents, failure to display a licence and failure to have a visible poster outlining the maximum cost per \$100 borrowed.

Manitoba

Manitoba’s *CPA* authorizes the Director of the Consumer Protection Office to name inspectors, who have the power to inspect payday lenders.³⁰⁹ Inspectors may carry out any “inspection, examination, audit or test reasonably required” to determine whether lenders are complying with the *Act* and *Regulations*.³¹⁰ Inspectors generally do not need warrants to carry out an investigation, unless the premises is a private residence.³¹¹ An inspector will require a warrant if they have been refused entry or if there is reasonable grounds to believe that the inspector will be refused entry.³¹² Payday lenders must keep records of all payday loans they offer, arrange or provide and provide these records to an inspector upon request.³¹³

Lenders who contravene or fail to comply with the *CPA* are guilty of an offence and liable to a fine of up to \$300,000 or three times the amount the defendant obtained from the offence (whichever is greater) and/or imprisonment of up to three years.³¹⁴ Courts may order restitution on the application of the Minister of Justice and Attorney General or a person affected by the offence.³¹⁵

³⁰⁵ *Ibid*, s 59(1-3).

³⁰⁶ *Ibid*, s 59(6)(a-b).

³⁰⁷ The Consumer Beware List can be accessed online at <https://www.ontario.ca/page/search-consumer-beware-list>.

³⁰⁸ <https://www.ontario.ca/faq/how-can-i-get-information-about-business-removed-consumer-beware-list>

³⁰⁹ *MB CPA*, *supra* note 239, s 135.2(1).

³¹⁰ *Ibid*, s 135.2(1)(a).

³¹¹ *Ibid*, s 135.2(3).

³¹² *Ibid*, s 135.4(1)(a-b)(i-ii).

³¹³ *Ibid*, s 135.1(2), s 157.

³¹⁴ *Ibid*, s 136.1(1)(a-b).

³¹⁵ *Ibid*, s 136.1(2).

The Director of the Consumer Protection Office (or a person to whom they delegate authority) is authorized under the *Payday Loans Regulations* and *CPA* to levy administrative penalties.³¹⁶ The *Regulations* list 34 instances when administrative penalties may be imposed. Some of these instances include:³¹⁷

1. Arranging, providing or offering a payday loan without a licence
2. Charging a cost of borrowing that exceeds the maximum (\$17 per \$100 borrowed)
3. Providing a loan for more than 30% of a borrower's net income
4. Engaging in tied selling
5. Not providing a borrower with a printable copy of the agreement for online payday loans

The *Regulations* provide for a tiered administrative penalty structure, ranging from \$1,000 to \$20,000, depending on how many times the lender has previously contravened the *Act* or *Regulations* and whether the lender is a corporation or individual. For individuals, the first contravention incurs a \$1,000 penalty, the second, \$2,000 and the third and up, \$5,000.³¹⁸ For corporations, the first contravention incurs a \$5,000 penalty, the second, \$10,000 and third and up, \$20,000.³¹⁹

The Consumer Protection Office publishes a list of recent enforcement actions, including administrative penalties and prosecutions.³²⁰ This list includes the name of the business, its owner, the section infringed and the amount of the penalty.

Financial Literacy and Education Funds

Both Manitoba and Ontario have established financial literacy and education funds. The Manitoba fund is known as the Manitoba Borrowers' Financial Literacy Fund. Each year, licenced payday lenders must pay a \$500 levy in addition to licence renewal fees.³²¹ The purpose of the fund is to support "programs and activities designed to improve the financial literacy of the borrowers and potential borrowers of high-cost credit products and payday loans."³²² In 2014, \$10,000 was paid to the Legal Help Centre, a registered charity that offers legal information to low-income Manitobans.³²³ The funds were intended to assist the Legal Help Centre to provide consumer protection focused information sessions, specifically on

³¹⁶ *Ibid*, s 136(1). See also, *MB Payday Regs supra* note 232, s 19.

³¹⁷ *MB Payday Regs, ibid*, s 19(1)-(1.1).

³¹⁸ *Ibid*, s 19(2).

³¹⁹ *Ibid*, s 19(2.1).

³²⁰ The Recent Enforcement Actions list is accessible at http://www.gov.mb.ca/justice/cp/cpo/info/admin_pen.html.

³²¹ *MB Regs*, 8/2016, s 1(a-b).

³²² *MB CPA, supra* note 239, s 257.

³²³ Public Utilities Board, 2013 p 3.

signing contracts and managing finances.³²⁴ In 2017, the Fund granted \$3,050 to the Manitoba Financial Literacy Forum, a collective of government agencies, private businesses, not-for-profit organizations, volunteer groups and individuals.³²⁵ The funds were used to create a financial literacy calendar, which provides consumers financial literacy information and budgeting tips.³²⁶ The Minister of Justice is responsible for managing the fund.³²⁷

The Ontario fund is known as the Ontario Payday Lending Education Fund. The purpose of the fund is to promote the education of borrowers of their rights and of lenders of their obligations.³²⁸ This includes training, advertising, publications and other similar initiatives.³²⁹ The fund is composed of lenders' licencing fees and is managed by a not-for-profit corporation. The not-for-profit corporation reports to the Minister of Government and Consumer Services.

The FCAC plans to increase consumer awareness of the costs and alternatives to payday loans through consumer education. By focusing on educating borrowers on the cost of credit, emergency savings plans and seeking financial advice, the FCAC aims to help Canadians make more financially sound borrowing decisions. The FCAC stated it will work with provinces to contribute to a "pan-Canadian" approach to informing consumers about the cost of credit and available alternatives to payday loans.³³⁰

Quebec

Quebec does not legislate payday loans. The payday lending industry is extremely limited in Quebec because of interest rate restrictions. Quebec's *Consumer Protection Act* requires merchants who enter money lending contracts to obtain a licence from the President of the Office de la protection du consommateur.³³¹ Banks, caisses populaires and trust and savings companies are exempt from the licencing requirements.³³² The President can refuse to issue a licence if "in his opinion, there are reasonable grounds to believe that the permit must be refused to ensure, in the public interest, that the business activities contemplated in this chapter will be performed with honesty and competence".³³³ Licences have only been issued to lenders who charge interest rates that do not exceed 35%.³³⁴

³²⁴ *Ibid.*

³²⁵ Manitoba Justice Annual Report, <http://manitobafinancialliteracy.com/about-the-forum/>

³²⁶ *Ibid.*

³²⁷ *MB CPA, supra* note 239, s 258(4).

³²⁸ *PLA, supra* note 237 s 67(a).

³²⁹ *Ibid.* The authors were unable to locate any public reports on how these funds are being spent.

³³⁰ *FCAC, supra* note 197 at p 15.

³³¹ *Consumer Protection Act*, CQLR, c P-40.1, s 321 [*QC CPA*].

³³² *QC Regs* c P-40.1 r.3, s 18(a-c) [*QC Regs*].

³³³ *QC CPA, supra* note 317, s 325(b).

³³⁴ Janet Lo, "A Criminal Rate of Interest: Updating Garland for Consumers", *Public Interest Advocacy Centre* (Ottawa: 2011) online: <https://www.piac.ca/wp-content/uploads/2014/11/GarlandUpdate_FINAL.pdf> at p 34 [*PIAC*].

The CPA also allows consumers to request a contract be nullified or their obligations under the contract reduced if the consumer is being exploited or the obligations of the consumer are excessive, harsh or unconscionable.³³⁵ This provision has been used by courts to rule that money lending contracts with interest rates above 35% are unconscionable.³³⁶ At this interest rate, it would cost a borrower \$1.35 per \$100 borrowed, which is nearly 167% lower than the \$15 per \$100 borrowed price cap in Ontario, Alberta and New Brunswick.³³⁷

These provisions prevent payday lenders from operating profitably in the province.³³⁸ However, this has not prevented online lenders from offering loans in Quebec.

Online Payday Lenders

Increased regulation of the payday loan industry has made online options attractive to lenders, while the convenience, flexibility and quick funding options have made online payday loan services attractive to borrowers. The online market allows Canadian borrowers to connect with non-Canadian lenders, which introduces new compliance and enforcement risks.

“Lead generators” pose as payday loan companies, but actually take a prospective borrower’s information and sell it to lenders who provide the funds for the loan.³³⁹ Lead generators may expose borrowers to international lenders who are unlicensed and effectively unregulated.³⁴⁰ Enforcing Canadian laws against a lender located in a different country likely would prove difficult. Lead generators pose a privacy risk to borrowers as well. Borrowers may inadvertently expose themselves to identity fraud or unauthorized charges on their bank account because they need to provide their personal and bank account information in order to apply for a loan.³⁴¹

Consumers may not be aware of their rights with respect to payday loans and potentially pay charges that are against the legislated maximums or otherwise violate Canadian legislation. Provincial legislation across Canada requires physical lenders to have certain disclosure posters, use standard form loan agreements and have financial education information available to borrowers, which may assist consumers to make a sound borrowing decision. For example, a study by the Consumers Council of Canada (CCC) found one online

³³⁵ QC CPA, *supra* note 317, s 8.

³³⁶ PIAC, *supra* note 320 at p 34.

³³⁷ The cost was calculated by multiplying \$100 by the interest rate (35%) and dividing by 26, assuming a 14-day loan term [$\$100 \times 35\% / 26 = \1.35].

³³⁸ Stephanie Ben-Ishai and Saul Schwartz, “Payday Lending in Canada: 10 Years Later”, 2016 Annual Review of Insolvency Law 25 at XX.

³³⁹ Consumers Council of Canada, “Consumer Experience in Online Payday Loans” (2015), online: <https://www.consumerscouncil.com/site/consumers_council_of_canada/assets/pdf/ccc_online_payday_loans_w eb.pdf> at p 22-23 [CCC].

³⁴⁰ *Ibid* at p 5.

³⁴¹ *Ibid*.

payday lender was violating the prohibition on tied-selling by automatically including “loan protection”, which the borrower had to physically uncheck during the application process.³⁴²

The CCC audited 134 online payday lenders and found 94 of these lenders were unlicensed.³⁴³ Of the 94 unlicensed lenders, 30 were Canadian-based, 22 were from the United States and 42 lenders did not disclose the location of their headquarters.³⁴⁴ Further research into the ownership of the website domain found 12 websites were hosted in international locations, namely Germany, Russia, Brazil and Estonia.³⁴⁵ At the time of the CCC study, only 2 lenders were licenced to offer payday loans online in Manitoba, but the study encountered 10 unlicensed lenders.³⁴⁶ In Ontario, the study found 16 online lenders although only 9 lenders were licenced to offer online loans. The study also found 8 of the 11 online lenders in Nova Scotia were unlicensed.³⁴⁷

The CCC’s audits reviewed each lender’s compliance with provincial fee disclosure requirements, finding 38 out of 40 licenced lenders were compliant whereas only 19 out of 94 unlicensed lenders were compliant.³⁴⁸ Licenced and unlicensed lenders were both generally non-compliant with provincial legislation requiring borrowers to be informed of their right to cancel. Some lenders inaccurately reported the timeframe in which the borrower could cancel the agreement and some did not advise customers of this right before they entered the agreement.³⁴⁹ Only 48% of licenced lenders and 22% of unlicensed were compliant with provincial cancellation requirements.³⁵⁰ Of the 134 lenders audited, 72 lenders did not disclose fees for dishonored payments (NSF fees) on their website, 51 lenders were within provincial requirements and 11 were outside of provincial requirements. Aside from Saskatchewan, where providing credit counselling information is a requirement for licensing, only 17 lenders provided any information about credit counselling.³⁵¹

Legislative Response

Ontario and Manitoba have addressed online payday lending in their payday loan legislation. Both provinces prohibit anyone from offering, arranging or providing a payday loan unless the party has a licence. Ontario law differentiates between loan brokers and lenders, prohibiting any broker or lender from dealing with an unlicensed broker or lender.³⁵² If an

³⁴² *Ibid* at p 33.

³⁴³ *Ibid* at p 66.

³⁴⁴ *Ibid*.

³⁴⁵ *Ibid* at p 89.

³⁴⁶ *Ibid* at p 67.

³⁴⁷ *Ibid*.

³⁴⁸ *Ibid* at p 74.

³⁴⁹ *Ibid*.

³⁵⁰ *Ibid*.

³⁵¹ *Ibid*.

³⁵² *PLA, supra* note 237, s 6(1)-(2).

unlicensed lender enters into an agreement with a borrower in Ontario, the borrower is only liable for the principal of the loan and not the cost of borrowing.³⁵³ Manitoba law interprets any broker that assists a borrower to obtain a payday loan to be the lender arranging the loan.³⁵⁴

Manitoba's regulations require online lender's website to be designed in the following manner **before** an agreement is entered to provide an online payday loan:

- (a) the borrower must understand what action or actions will result in acceptance of the agreement;
- (b) the agreement must be accessible to the borrower in a way that allows them to acknowledge and accept the terms of the agreement; and
- (c) the prospective borrower must be able to print the agreement.

Other regulations require online lenders to ensure that borrowers have consented to entering the agreement and that funds are transferred to the borrower's bank account on the same day. Online lenders are required to display their name as shown on their licence and the licence's expiry date near the top of the first page a borrower encounters.³⁵⁵

In Ontario, payday loan regulations require lenders to provide the information on their licence as soon as the borrower enters their website.³⁵⁶ Lenders and loan brokers must make information regarding the maximum cost allowable per \$100 borrowed, the individual borrower's cost per \$100 borrowed, and total cost of borrowing \$500 (as an example) before discussing anything about payday loans with the borrower.³⁵⁷ Other regulations require lenders to make borrowers aware of educational materials about the payday lending industry and financial planning and offer educational materials immediately upon the borrower's request.³⁵⁸ Ontario also requires the lender to make a printable loan agreement available prior to the borrower entering the agreement.³⁵⁹

Quebec

Due to Quebec's interest rate cap, virtually no payday lenders operate storefronts in the province. However, several companies offer online payday loans or "cash advances". The premise of these products is the same as payday loans: the borrower can borrow anywhere from \$300 - \$1500 (more in some cases) and is expected to pay the loan back on their next payday.

³⁵³ *Ibid*, s 6(3).

³⁵⁴ *MB CPA*, *supra* note 239, s 138.1.

³⁵⁵ *MB Payday Regs*, *supra* note 232, s 9.1(3).

³⁵⁶ *ON Payday Regs*, *supra* note 235, s 4(5).

³⁵⁷ *Ibid*, s 14(5).

³⁵⁸ *Ibid*, s 5.

³⁵⁹ *Ibid*, s 18(4-5).

The CCC found 14 websites that offered payday loans to Quebec residents. Three of these websites were Canadian-based, four were based in the United States and seven did not disclose the location of their head office.³⁶⁰ Although Quebec does not have payday loan legislation, the study reviewed whether the online lenders were compliant with interest rate legislation. Nine of these lenders did not disclose fees for loans that were not paid on-time and the other five lenders disclosed interest charges exceeding 35% per annum.³⁶¹

³⁶⁰ CCC, *supra* note 325 at p 66.

³⁶¹ *Ibid*, at p 75.

INSTALMENT LOANS

Introduction

Instalment loans are one of the fastest growing credit products in Canada.³⁶² Instalment loans are similar to payday loans, but are larger and have longer repayment periods.³⁶³ Lenders offer instalment loans ranging from \$500 up to \$15,000, with repayment periods ranging from six months to five years.³⁶⁴ Instalment loans have a fixed number of payments and each payment consists of an amount applied to the principal of the loan and interest.³⁶⁵ These loans may be attractive to borrowers because the advertised cost is usually lower than a payday loan and carry fixed payments over a longer period of time.³⁶⁶

However, these loans may carry fees that are very close to the criminal rate of interest. In one case, the agreement expressed the annual percentage rate as 46.96%, but when calculated by an actuary, the annual percentage rate was 57.12%.³⁶⁷ Because the regulations between the products differs, there is concern lenders may opt to provide instalment loans only, potentially evading payday loan legislation. Manitoba, Quebec and Alberta have responded to this concern by introducing high-cost credit product legislation that would capture instalment loans; British Columbia has proposed regulations. A chart summarizing and comparing these regulations is found in **Appendix 2**. In the rest of Canada, the criminal rate of interest is the primary regulation instalment loan lenders face.

Legislative History

Because the dollar amount of an instalment loan may vary, there has not been legislation that captures all instalment loans. Small, short-term loans were governed by the *Money-Lenders Act (MLA)* from the turn of the twentieth century to 1939. The *MLA* limited interest on loans under \$500 to 12% per annum.³⁶⁸ Although the *MLA* granted courts the power to re-open transactions when the interest charged, including fees, exceeded 12% per annum, the lack of a statutory definition of interest³⁶⁹ meant that lenders were able to evade the interest cap by adding additional charges and fees, which courts interpreted as not constituting interest.³⁷⁰

³⁶² Aaron Saltzman, "Instalment Loans the New High-Interest Danger for Consumers", *CBC*, (27 February 2015), online:<<http://www.cbc.ca/news/business/instalment-loans-the-new-high-interest-danger-for-consumers-1.2971067>> [CBC].

³⁶³ Government of British Columbia, "Instalment Loans", online: <<https://www2.gov.bc.ca/gov/content/family-social-supports/borrowing-money/expensive-loans/instalment-loans>> [BC].

³⁶⁴ Google search – reviewed Mogo, easyFinancial, Fairstone Canada, LendingMate, Cash4You, Money Mart, Cashco, MagicalCredit, UrgentMoney

³⁶⁵ *BC*, *supra* note 349.

³⁶⁶ *Ibid*.

³⁶⁷ *CBC*, *supra* note 348.

³⁶⁸ *Money Lenders Act*, RSO 1937, c 243, s 6.

³⁶⁹ *Ibid*, s 7.

³⁷⁰ Mary Waldron, "A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past?" (2011) 50 *CBLJ* 300 at 303 [Waldron].

The *MLA* was repealed and replaced by the *Small Loans Act* in 1939. The *SLA* attempted to resolve the issue of lenders evading the interest ceiling by defining the cost of the loan as “the whole cost of the loan to the borrower, whether the same is called interest, or is claimed as a discount, deduction from an advance, commission, brokerage, fines, penalties or charges for inquiries, defaults or renewals or otherwise”.³⁷¹ The *SLA* applied to loans under \$1,500 (increased from \$500 in 1956) and set the maximum cost of the loan to 1% per month (12% per annum).³⁷² The *SLA* used a tiered approach to set the maximum cost for loans.³⁷³

Evasion was still an issue with the *SLA* because lenders could choose to only offer loans of more than \$1,500. Credit unions, who were more likely than banks to lend small amounts, lobbied to increase the \$1,500 loan amount because the low interest rate ceiling severely impacted their bottom line.

The federal government enacted section 347 of the Criminal Code which criminalized agreements that carried an interest rate exceeding 60% in order to combat loansharking.³⁷⁴ Police forces in major cities requested the provision as there was a “direct connection between drugs, prostitution and other organized crimes” and loansharking.³⁷⁵ Section 347 has primarily been used in civil litigation – although there has been some criminal action.

In most jurisdictions, section 347 is the primary regulation instalment loan lenders face. Many lenders maintain compliance with section 347 by offering loans just under the criminal interest rate.³⁷⁶ According to one CEO of an instalment loan lender, these higher rates are necessary to account for the high-risk nature of these loans.³⁷⁷ The criminal rate of interest is discussed in a separate chapter, below.

Provincial Regulation

Instalment loans are often marketed to the same individuals as payday loans – consumers with poor credit history.³⁷⁸ Payday loans are regulated in eight provinces and these regulations require lenders to be licenced, create a ceiling on fees that a lender may charge and prohibit certain practices, such as charging non-sufficient funds fees or contacting employers with respect to outstanding loans. Because legislation particular to instalment loans does not exist in most jurisdictions, lenders must only comply with the criminal rate of interest and any relevant provincial legislation, often found within a province’s *Consumer Protection Act*.

³⁷¹ *Small Loans Act*, RSC 1970, c S-11, s 2(a) [*SLA*].

³⁷² *Ibid*, s 5(1).

³⁷³ See Payday Loans, Legislative History.

³⁷⁴ Jacob S Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986) 11:2 Can Community LJ 233 at p 234.

³⁷⁵ *R v Chomski* (1986), 1 WCB (2d) 40 at para 6, 1986 CarswellOnt2411 (Ont Prov Ct).

³⁷⁶ *CBC*, *supra* note 348.

³⁷⁷ *Ibid*.

³⁷⁸ *Ibid*.

Ontario

Ontario does not regulate instalment loans. Part VII of the *Consumer Protection Act* governs consumer credit agreements, which requires lenders to disclose certain information to borrowers, such as: the outstanding principal balance at the beginning of the agreement, the total advances made to the borrower including nature, timing and amount (if there are multiple advances), the length of the agreement, the cost of borrowing, the amortization period, the interest rate, prepayment rights, and the amount of any payments among other things.³⁷⁹ Part VII allows buyers to pay the full balance owing under a credit agreement at any time without penalty.³⁸⁰ Lenders are limited to collecting “reasonable charges” with respect to legal costs in collecting or attempting to collect a debt, costs incurred due to a dishonored payment or costs to register or protect a security interest.³⁸¹

Instalment loan lenders are not required to be licenced. Unlike payday loans which are limited to 50% of a borrower’s income, there is no maximum lending amount for an instalment loan. Lenders are not barred from making concurrent instalment loans, whereas concurrent payday loans are prohibited.³⁸² Payday loan regulations prevent rollovers, which is obtaining a new loan to pay an existing one, whereas instalment loans are not subject to such regulations. One borrower claimed after she received her initial loan, she was contacted by the lender who offered her more money.³⁸³ A former employee of this lender corroborated this account, claiming that sales representatives receive a commission and often call customer offering additional loans.³⁸⁴

Manitoba

Manitoba has enacted High-Cost Credit Product legislation which would likely capture an instalment loan. Manitoba’s legislature recognized that an issue with legislating payday loans was that lenders have found ways to circumvent the legislation.³⁸⁵ The legislation defines “high-cost credit products” broadly, including any loan or line of credit that carries an interest rate exceeding 32% annually.³⁸⁶ High-cost credit products also include loans for under \$5000 with terms that include an interest rate of up to 32%, a term of 2 years or less and the payment of a high-cost credit fee.³⁸⁷ A high-cost credit fee includes, but is not limited to, brokerage fees,

³⁷⁹ O Reg 17/05, s 63(1).

³⁸⁰ *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, s 76(1) [CPA].

³⁸¹ *Ibid*, s 75(a)(b)(c).

³⁸² *Payday Loans Act, 2008*, SO 2008, c 9, s 35(1)(a).

³⁸³ *CBC*, *supra* note 348.

³⁸⁴ *Ibid*.

³⁸⁵ Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 40th Parl, 3rd Sess, No 66 (22 May 2014) (Jon Gerrard).

³⁸⁶ Man Reg 7/2016, s 2(1) [MB Regs].

³⁸⁷ *Ibid*, s 2(2).

credit assessment/approval fees, administrative/processing fees, default charges and fees for exceeding the credit limit.³⁸⁸

Similar terms exist for lines of credits, which some lenders have offered instead of payday loans because of increased regulation.³⁸⁹ A line of credit with a credit limit of up to \$5000 that requires the borrower to pay a high-cost credit fee, obtain authorization before accessing the funds, repay amounts owing on a schedule that corresponds with their payday of at least 10% of the principal amount or advance within a 30 day period is considered a high-cost credit product.³⁹⁰ Credit cards, margin loans, mortgages, payday loans and credit products offered by banks and credit unions are excluded from the legislation.³⁹¹

The High-Cost Credit Product legislation requires anyone who arranges, provides or offers high-cost credit products to be licenced.³⁹² The legislation requires lenders to disclose to the borrower that the product is a high-cost credit product, their rights under the agreement, the total cost of credit in a dollar amount and any fees associated with the product.³⁹³ Lenders are only permitted to reprocess pre-authorized debits more than once if the borrower is not charged a fee.³⁹⁴ Borrowers may also cancel a high-cost credit agreement within 48 hours.³⁹⁵ In addition to licencing fees, lenders are required to pay an annual levy of \$500 to the Manitoba Borrowers' Financial Literacy Fund, which "funds programs and activities that improve the financial literacy of borrowers and potential borrowers of high-cost credit products and payday loans".³⁹⁶

Alberta & Quebec

Quebec and Alberta have passed bills that will introduce regulations similar to Manitoba's High-Cost Credit Product legislation. Alberta's regime defines any credit agreement that provides for an interest rate of 32% or more as a high-cost credit product.³⁹⁷ High-cost credit lenders will need to be licenced; however, credit unions and financial institutions regulated under the federal *Bank Act* are exempt.³⁹⁸ The Alberta regime also prohibits several practices, including contacting a borrower's employer to collect an outstanding amount, using wage assignments to collect an outstanding amount and reporting a debt to a collection agency

³⁸⁸ *The Consumer Protection Act*, CCSM c c200, s 251(3) [MB CPA].

³⁸⁹ See *Ontario (Ministry of Consumer and Business Services Act, Director) v Cash Store Financial Services Inc.*, 2014 ONSC 980, [2014] OJ No 706.

³⁹⁰ *MB Regs*, supra note 372, s 3(2).

³⁹¹ *MB CPA* supra note 374, ss 237(d-f), s 238(2). See also *MB Regs* *ibid*, s 4(2).

³⁹² *MB CPA*, *ibid*, s 241(1).

³⁹³ *Ibid*, s 249(1)-(2).

³⁹⁴ *MB Regs*, supra note 372, s 17.

³⁹⁵ *MB CPA*, supra note 374, s 252(1). The 48-hour time period excludes Sundays and holidays.

³⁹⁶ *Ibid*, s 258(1).

³⁹⁷ Bill 31, *A Better Deal for Consumers and Business Act*, 3rd Sess, 29th Leg, Alberta, 2017, s 1(12) (assented to 15 December 2017) SA 2017 c 18 (See s 124.01).

³⁹⁸ Alta Reg 132/2018, s 13(e).

if the borrower has notified the lender that the debt is in dispute and wants to take the matter to court.³⁹⁹ Alberta's high-cost credit product regime came into force on January 1, 2019.

Quebec's regime uses a floating rate to determine whether an agreement is a high-cost agreement. Any credit product that carries an interest rate 22 percentage points above the Bank Rate of the Bank of Canada is a high-cost credit product.⁴⁰⁰ As of August 2018, the Bank Rate was 1.75%, meaning a credit product with an interest rate of 23.75% would be considered a high-cost credit product. Before entering any credit agreement, lenders are required to assess the borrower's capacity to repay.⁴⁰¹ Lenders regulated under the federal *Bank Act*, *Insurance Companies Act*, *Cooperative Credit Associations Act*, *Trust and Loan Companies Act* and the provincial *Act respecting insurance*, *Act respecting financial services cooperatives* and the *Act respecting trust companies and savings companies* are all deemed to have complied with this requirement.⁴⁰²

Lenders must take into account the borrower's monthly gross income, total monthly housing disbursements, monthly credit expenses and the borrower's credit report.⁴⁰³ The borrower's expenses are then calculated as a percentage of their monthly income (the debt ratio). The lender must provide the borrower with a document that outlines how the debt ratio was calculated and what the borrower's debt ratio is.⁴⁰⁴ If a lender fails to complete this assessment, they lose the right to claim credit charges and must refund all charges already paid by the borrower.⁴⁰⁵ If a borrower enters a high-cost credit contract and their debt ratio exceeds 45%, the borrower is presumed to have an obligation that is excessive, harsh or unconscionable.⁴⁰⁶ Under section 8 of the Quebec *Consumer Protection Act*, a consumer may demand that a contract be nullified or their obligations reduced if their obligation is excessive, harsh or unconscionable.⁴⁰⁷ Quebec's high-cost credit product legislation comes into force on August 1, 2019.

³⁹⁹ *Ibid*, s 24 (i)(l)(o).

⁴⁰⁰ CQLR, c P-40.1, r 3, s 61.0.3 [QC Regs].

⁴⁰¹ Bill 134, *An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs*, 1st Sess, 41st Leg, Quebec, 2017, s 19 (assented to 15 November 2017) SQ 2017 c 24 (See s 103.2) [QC CPA].

⁴⁰² *Ibid*, see s 103.2.

⁴⁰³ QC Regs, *supra* note 386, s 61.0.1 (a)(b)(c)(d).

⁴⁰⁴ *Ibid*, s 61.0.5.

⁴⁰⁵ QC CPA, *supra* note 387, see s 103.3.

⁴⁰⁶ *Ibid*, see s 103.5.

⁴⁰⁷ *Consumer Protection Act*, SQ, P-40.1, s 8.

REMEDIES/DEFENCES FOR BORROWERS

UNCONSCIONABLE TRANSACTIONS RELIEF ACT

Introduction

Several provinces have legislation titled the Unconscionable Transactions Relief Act (*UTRA*).⁴⁰⁸ The aim of this legislation is to provide relief to a borrower when they have been taken advantage of by a lender.⁴⁰⁹ The *UTRA* allows a court to reopen a transaction and relieve a borrower from further payments, order repayment to the borrower, revise any part of the contract or set aside the contract when “the cost of the loan is excessive and the transaction is harsh or unconscionable”.⁴¹⁰ A transaction is unconscionable when the transaction is made absent informed consent, or in a circumstance where there is inequality in the bargaining power of the parties.⁴¹¹ Courts may exercise this power in a lawsuit by the creditor to recover money lent, or in an application by the debtor for relief, even if the loan is not due for repayment.⁴¹² A court also may exercise its powers under the *UTRA* in any proceeding where money lent is due or will be due, if the amount owing is at issue.⁴¹³

The *UTRA* covers any transaction that involves the repayment of money or money lending, regardless of its actual form.⁴¹⁴ Under the *UTRA*, the cost of the loan covers interest, premiums, dues, bonuses, commissions and brokerage fees.⁴¹⁵ The terms “creditor” and “debtor” are broadly defined and includes any creditor who is assigned a debt, and any person who guaranteed a debt.⁴¹⁶

Legislative History

The roots of the *UTRA* were borrowed from the United Kingdom’s *Money Lenders Act*. The Ontario *Money Lenders Act (MLA)* granted courts the same power to reopen, relieve and revise contracts as the *UTRA*.⁴¹⁷ The *MLA* did not apply to pawnbrokers, certain corporations, solicitors investing money for clients and those who incidentally lent money in the course of operating their business. The *MLA* required a money-lending business to be registered.⁴¹⁸ The Act imposed a fine of up to \$200 for a first time offender, and subsequent offenders were liable

⁴⁰⁸ In a 2004 editorial, Jacob Ziegel recommended that the federal government pass similar legislation. Ziegel, *supra* note 218.

⁴⁰⁹ *Trans Canada Credit v Ramsay* (1980), 27 NFLD & PEIR 144 at para 27, 74 APR 144.

⁴¹⁰ *Unconscionable Transactions Relief Act*, RSO 1990, c U.2, s 2(a-d) [*UTRA*].

⁴¹¹ *Ontario (Attorney General) v Barfried Enterprises*, [1963] SCR 570 at para 12, 42 DLR (2d) 137.

⁴¹² *UTRA*, *supra* note 396 at s 3(a-b).

⁴¹³ *Ibid*, s 3(c).

⁴¹⁴ *Ibid*, s 1.

⁴¹⁵ *Ibid*.

⁴¹⁶ *Ibid*.

⁴¹⁷ *Money Lenders Act*, RSO 1937, c 243, s 3.

⁴¹⁸ *Ibid* s 7.

to imprisonment for up to 6 months.⁴¹⁹ An action against an unregistered money-lender could only be commenced with the consent of the Crown Attorney.⁴²⁰ In 1946, the *MLA* was repealed and replaced with the *UTRA*.⁴²¹ Notably, the sections regarding registration of money lenders were absent from the *UTRA* enacted in 1946.

The consumer credit industry became profitable and began to grow by 1939.⁴²² Banks were generally not interested in making consumer loans, which left consumers to seek loans from money lenders and loan sharks.⁴²³ Parliament enacted the *Small Loans Act*, which allowed small loan companies to be incorporated and provide loans of up to \$500.⁴²⁴ The *Small Loans Act* required lenders to be licensed if the cost of the loan exceeded 12% per annum.⁴²⁵ The \$500 threshold was increased to \$1,500 in 1956.⁴²⁶ Efforts to increase this amount failed and the *Small Loans Act* was later repealed in 1980.⁴²⁷

There was some question whether provincial *UTRAs* infringed on federal jurisdiction over interest. The Supreme Court held that this legislation was constitutional and did not fall under the federal interest head of power, nor did it conflict with the *Interest Act*.⁴²⁸ The Supreme Court held that the *UTRA* dealt with rights under a contract, which falls under the provincial government.⁴²⁹

Applying for relief

In order for a debtor to request relief under the *UTRA*, they must demonstrate: a) the cost of the loan is excessive, and b) the transaction is harsh and unconscionable.⁴³⁰ To determine whether these requirements have been met, a court will consider the risk with respect to the money lent, and all of the circumstances in which the transaction took place.⁴³¹

A) *The cost of the loan is excessive*

A debtor could demonstrate that the cost of the loan is excessive by demonstrating the cost of the loan constitutes a criminal interest rate under section 347 of the *Criminal Code*.⁴³² A

⁴¹⁹ *Ibid* s 11 (1).

⁴²⁰ *Ibid* s 11 (2).

⁴²¹ Revised Statutes of Ontario, 1950, Schedule A [Acts and parts of Acts repealed by the Revised Statutes of Ontario]. <http://digitalcommons.osgoode.yorku.ca/rso/vol1950/iss5/25/> at p 150.

⁴²² Micheline Gleixner, "Reconsidering Legislative Competence over Consumer Credit" (2016) 7 Annual Review of Insolvency Law [article starting page #] at 36.

⁴²³ *Ibid*.

⁴²⁴ *Ibid* at p 36-37.

⁴²⁵ *Ibid* at p 37.

⁴²⁶ *Ibid* at 37.

⁴²⁷ *Ibid*.

⁴²⁸ *Ibid* at 38-39.

⁴²⁹ *Ibid*.

⁴³⁰ *Ekstein v Jones*, [2005] OJ No 3497 at para 45, 2005 CanLII 29491 (Sup Ct J).

⁴³¹ *Ibid* at para 46.

⁴³² *Ibid* at para 48.

criminal interest rate is an effective annual interest rate that exceeds 60% per annum.⁴³³ A debtor also may demonstrate the cost of the loan is excessive by showing they could have obtained the loan elsewhere at a lower rate.⁴³⁴

If the loan was high-risk, a court may not find a high interest rate to be excessive. The following factors establish an “obvious and substantial risk” to the lender and may justify a higher cost of the loan:⁴³⁵

- (a) The borrower was unknown to the lender
- (b) The borrower solicited the loan
- (c) The loan was for a short period only
- (d) There was urgency on the part of the borrower to obtain the funds
- (e) The lender had to borrow to finance the loan

B) The transaction is harsh and unconscionable

A debtor could demonstrate the transaction was harsh and unconscionable by showing that the terms were unfair, or there was inequality in the parties’ bargaining power, and one party had an undue advantage because of it.⁴³⁶ Whether a transaction is fair or unfair will depend on the circumstances – what may be fair in one case may be unfair in another.⁴³⁷ Courts have considered the respective experience of the parties in determining whether a particular transaction is fair.⁴³⁸ A transaction may be unfair if the borrower urgently needed to borrow and the lender took advantage of that urgent need.⁴³⁹ Establishing the following factors would indicate the transaction was fair and reasonable:⁴⁴⁰

- (a) the lender’s honesty, frankness and full disclosure in terms the borrower could understand
- (b) the loan’s risk – a higher risk may justify a higher interest rate or security requirements
- (c) the loan was reasonably consistent with prevailing market rates for a similar loan

Inequality of bargaining power means that the “weaker party’s ability to bargain is impaired to the extent he or she is not a free agent and is not equal to protecting her or

⁴³³ *Criminal Code*, RSC 1985, c C-46, s 347(1)-(2).

⁴³⁴ *Ibid* at para 52.

⁴³⁵ *Ibid* at para 51.

⁴³⁶ *Ibid* at para 57.

⁴³⁷ *Morehouse v Income Investments*, [1966] 1 OR 229 at para 9, 53 DLR (2d) 106 (Cty Ct).

⁴³⁸ *Ibid* at para 12.

⁴³⁹ *Ibid*.

⁴⁴⁰ *Ibid* at paras 11, 13, 14.

himself".⁴⁴¹ Courts have considered the following factors as demonstrating an inequality of bargaining power:⁴⁴²

- (a) distress, recklessness, want of care, intoxication
- (b) ignorance,
- (c) lack of independent legal advice, infirmity, a party's bargaining power is grievously impaired by reason of his own needs and desires⁴⁴³
- (d) lack of skill in borrowing money

Arbitration/Mediation Clauses

Many contracts contain clauses that call for arbitration or mediation in the event of a dispute before any legal proceedings are commenced. Courts have exercised their powers under the *UTRA* in spite of arbitration/mediation clauses. Both the Ontario and Manitoba *UTRAs* give courts discretion to exercise their powers "in spite of any provision or agreement to the contrary".

In *Briones v National Money Mart*, the defendant payday lender sought to enforce an arbitration clause. The plaintiff relied on the Manitoba *Consumer Protection Act*, the criminal rate of interest and the *UTRA*. Under the *UTRA*, she claimed that the cost of each payday loan was harsh and excessive. The court accepted this argument and interpreted s.3(b) of the *UTRA* to mean that to the extent the mediation/arbitration clause was contrary to the *UTRA*, it did not apply.⁴⁴⁴ The plaintiff had the right to apply for relief under the *UTRA*, despite the mediation/arbitration clause that she had signed.⁴⁴⁵ This interpretation is consistent with other jurisdictions, such as Alberta, whose *UTRA* is identically worded. In *Young v Dollar Financial Group*, the judge ruled "neither an arbitration nor a mediation clause can preclude or prevent a debtor from accessing the Court".⁴⁴⁶ *Young* was affirmed by the Alberta Court of Appeal and leave to appeal to the Supreme Court of Canada was refused.

Remedies under the Act

Ontario

The *UTRA* gives courts a wide range of power to deal with unconscionable transactions. This power ranges from revising the interest rate to relieving the debtor from any further payments. Frequently, courts have revised transactions to make these transactions fairer.

In *Loans Till Payday v Brereton*, the court revised a payday loan's interest rate to align it with market rates. Although the action was brought after the amendments to the *Criminal Code*

⁴⁴¹ *Ibid* at para 58.

⁴⁴² *Ibid* at para 59.

⁴⁴³ See *Lloyd's Bank v Bundy*, [1974] QB 326 at p 339, [1974] 3 All ER 757 (CA).

⁴⁴⁴ *Briones v National Money Mart Co*, 2013 MBQB 168 at para 36, 295 Man R (2d) 101 [*Briones*].

⁴⁴⁵ *Ibid* at para 39.

⁴⁴⁶ *Young v Dollar Financial Group*, 2012 ABQB 601 at para 47, [2012] AJ No 1055 [*Young*].

that exempted payday lenders from the criminal interest rate provision, Ontario's payday loan legislation had not fully come into force.⁴⁴⁷ Brereton received a payday loan for \$450 and agreed to pay \$562.50 a week later, which he failed to do.⁴⁴⁸ The agreement stipulated several charges if Brereton defaulted: a \$500 fee if the loan was sent to collections or if legal action was commenced against him, a \$450 locate fee if any mail sent to him was returned and a 59% interest rate on any amounts owing after the loan was due.⁴⁴⁹ Loans Till Payday sought \$1,114.32 from Brereton.⁴⁵⁰

Loans Till Payday obtained default judgment but was only awarded \$450, pre- and post-judgment interest at 18% and court costs of \$185.⁴⁵¹ This award was upheld on appeal. Loans Till Payday had not complied with the provisions of Ontario's *Payday Loans Act, 2008* that were in force.⁴⁵² They had charged Brereton more than they were allowed to and failed to disclose the annualized interest rate, which was 1,303%.⁴⁵³

The court inferred that from the very nature of payday loans, there was inequality in the parties' bargaining power.⁴⁵⁴ The court found that people who seek payday loans are often in difficult financial situations and would otherwise not agree to pay the interest rates these loans carry.⁴⁵⁵

Manitoba

Manitoba also has unconscionable transactions relief legislation, and it is nearly identical to Ontario's. In Manitoba's *UTRA*, a court has discretion to award costs to the creditor when the court considers the debtor's action frivolous or vexatious.⁴⁵⁶ The two acts also differ with respect to the rights of a party who is assigned a debt. In Manitoba's *UTRA*, an assignee is deemed to have notice of all the circumstances regarding the loan, if the right to recover was assigned or transferred before or within 2 years after the money is lent.⁴⁵⁷ If the debtor acknowledges to a lawyer the amount received, the cost of the loan and disbursement of the loan, the assignee will not be deemed to have notice of the loan's particulars.⁴⁵⁸

In *Quick Auto Lease Inc. v Nordin*, the court used s.2 of the *UTRA* to relieve the defendant borrower from any further payments. The plaintiff dealership claimed they leased a

⁴⁴⁷ *Loans Till Payday v Brereton*, 2010 ONSC 6610 at para 14, [2010] OJ No 5176.

⁴⁴⁸ *Ibid* at para 4.

⁴⁴⁹ *Ibid* at para 5.

⁴⁵⁰ *Ibid* at para 6.

⁴⁵¹ *Ibid* at para 7.

⁴⁵² *Ibid* at para 22.

⁴⁵³ *Ibid* at para 44.

⁴⁵⁴ *Ibid* at para 48.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ *Unconscionable Transactions Relief Act*, RSM 1987, c U20, s 5(2) [*Man UTRA*].

⁴⁵⁷ *Ibid* at s 6 (1).

⁴⁵⁸ *Ibid* at ss. 6 (1) a-c, s.6 (2).

vehicle to the defendant, but the defendant believed she purchased the vehicle. The defendant was charged for the residual value of the car, a lease termination fee, service charges for NSF payments and late payments amounting to over \$2000.⁴⁵⁹

The court ruled that the essence of the transaction was a sale and not a lease.⁴⁶⁰ The borrower was charged 25% interest when the post-judgment interest rate of the court was 1%. The court found this to be evidence that the interest rate was excessive in the circumstances, even though most borrowers would have paid more than a 1% interest rate.⁴⁶¹ The judge also considered the NSF/late payment fees and an \$859 lease documentation fee in coming to the conclusion that the cost of the loan was excessive.⁴⁶²

In this case, the court found certain non-financial clauses in the contract provided further evidence as to why the contract should not be enforced.⁴⁶³ One clause threatened the defendant with criminal theft charges if she failed to relinquish possession of the vehicle on expiry of the lease.⁴⁶⁴ This clause was questionable, as the judge found that the customer still had a right to possession of the vehicle, even though the lease had expired. The other clause waived any rights the defendant had under the *Consumer Protection Act*.⁴⁶⁵ The plaintiff also told the defendant her vehicle was equipped with an immobilizer and it would be used to prevent her from driving the vehicle unless she paid the arrears.⁴⁶⁶ The defendant testified that she had previously called the plaintiff, but was never advised of any arrears.⁴⁶⁷ The judge found this to be an “unsettling” way to deal with a customer and further evidence that the contract should not be enforced.

Class Action Proceedings

The *UTRA* has been invoked in class action litigation. In a class action against payday lender Cash Store Inc, prior to the enactment of the *Criminal Code* exemption and provincial payday loan legislation, the plaintiff claimed that the broker’s fee charged by the defendant money lender breached the *UTRA*, the *Consumer Protection Act* and the criminal rate of interest in s.347 of the *Criminal Code*.⁴⁶⁸ The broker’s fee was charged at the time the loan was granted and at each rollover (an extension of the original loan by granting a new payday

⁴⁵⁹ *Quick Auto Lease Inc v Nordin*, 2013 MBQB 275 at para 21, 298 Man R (2d) 251 [*Nordin*].

⁴⁶⁰ *Ibid* at paras 17-22.

⁴⁶¹ *Ibid* at para 25.

⁴⁶² *Ibid* at paras 26-27.

⁴⁶³ *Ibid* at para 33.

⁴⁶⁴ *Ibid* at para 29-31.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ *Ibid* at para 28.

⁴⁶⁷ *Ibid*.

⁴⁶⁸ *McCutcheon v Cash Store Inc* (2006), 80 OR (3d) 644 at para 1, [2006] OJ No 1860 (Sup Ct J).

loan).⁴⁶⁹ This resulted in annual interest rates of up to 1,170%.⁴⁷⁰ The class action was certified by the court and was later settled.⁴⁷¹

In Manitoba, a similar class action lawsuit was filed in 2013. The plaintiff borrower had used the defendant lender's payday loan service 99 times and sometimes used the defendant's cheque cashing service to repay the loan.⁴⁷² The plaintiff sought a declaration that the cheque cashing service was interest, which meant the interest on the payday loan exceeded the criminal rate of interest.⁴⁷³ The plaintiff invoked s. 2 of UTRA to claim repayment of all cheque-cashing service fees paid.⁴⁷⁴ The loan agreement had a mediation and arbitration clause, which the defendant sought to enforce.⁴⁷⁵ The court dismissed the defendant's motion to enforce the mediation/arbitration clause.⁴⁷⁶ This decision was upheld by the Manitoba Court of Appeal, and a further appeal to the Supreme Court of Canada was refused.⁴⁷⁷

⁴⁶⁹ *Ibid* at para 10.

⁴⁷⁰ *Ibid*.

⁴⁷¹ Michael Robb & Emilie Maxwell, "National Class Actions to be considered at the National Level: The Supreme Court of Canada grants leave to appeal in Meeking v Cash Store Inc" (2014), online at <https://www.siskinds.com/national-class-actions-to-be-considered-at-the-national-level-the-supreme-court-of-canada-grants-leave-to-appeal-in-meeking-v-cash-store-inc/>.

⁴⁷² *Briones*, *supra* note 430 at para 5.

⁴⁷³ *Ibid* at para 2.

⁴⁷⁴ *Ibid*.

⁴⁷⁵ *Ibid* at para 3.

⁴⁷⁶ *Ibid* at para 50.

⁴⁷⁷ *Briones v National Money Mart*, 2014 MBCA 57, 373 DLR (4th) 460, leave to appeal to SCC refused, 2014 SCCA No. 355.

CRIMINAL RATE OF INTEREST

Introduction

This chapter describes the criminal interest rate – how the provision works, the remedies available and its use in criminal and civil actions, particularly in regards to payday loans. Although it is criminal legislation, it generally has not been used to impose criminal sanctions on lenders: we found only one case in which a pawnbroker was criminally charged. It is frequently used in civil actions, however, and it has been used in many class actions against payday lenders.

Legislative History

Small Loans Act

The federal government has the authority to create legislation regarding interest. In 1939, the *Small Loans Act* was enacted to regulate a growing consumer credit industry. The preamble to the *Small Loans Act (SLA)* describes how usury laws were rendered ineffective by the practices of money lenders.⁴⁷⁸ Money lenders often charged broker fees, discounts, commissions, and penalties that were not considered interest. These charges were actually compensation for the use of money loaned or for accepting risk.⁴⁷⁹ Because these charges were not considered interest, they did not raise the nominal annual interest rate of the contract.⁴⁸⁰ The *SLA* remedied this issue by defining the cost of the loan as “the whole cost of the of the loan to the borrower whether the cost is called interest”.⁴⁸¹ Additional charges, such as broker fees, discounts, commissions and penalties were included in this definition.⁴⁸²

The *SLA* governed loans under \$1,500 and applied to any person lending money except for banks and pawnbrokers.⁴⁸³ Lenders were required to be licensed, except if cost of the loan did not exceed 1% per month (12% per annum).⁴⁸⁴ Otherwise, the *SLA* set the maximum cost for loans as follows:⁴⁸⁵

- (a) 24% per annum for loans of up to \$300;
- (b) 12% per annum for loans exceeding \$300 but under \$1000;
- (c) 18% per annum for loans exceeding \$1000

⁴⁷⁸ *Small Loans Act*, RSC 1970, c S-11, preamble [SLA].

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid* at s 2.

⁴⁸² *Ibid.*

⁴⁸³ *Ibid* at s 2.

⁴⁸⁴ *Ibid* at s 5(1).

⁴⁸⁵ *Ibid* at s 3(2), (a-c).

For loans defined as “long-term” – more than 20 months on a loan up to \$500 or more than 30 months on a loan greater than \$500 – the maximum cost of a loan could not exceed 12% per annum.⁴⁸⁶

The *SLA*’s effectiveness was questioned because it only applied to loans of up to \$1,500, which by 1980, was a small amount.⁴⁸⁷ This created the possibility for lenders to easily circumvent the *SLA*.⁴⁸⁸

The *SLA* also adversely affected credit unions, who offered smaller consumer loans more readily than banks (who were exempted from the *SLA*).⁴⁸⁹ Credit unions lobbied for the *SLA*’s repeal, and the federal government acknowledged that an appeal would provide “long overdue relief” to credit unions.⁴⁹⁰ Previous attempts to increase the \$1,500 ceiling in the *SLA* failed, with MPs and the Minister of Finance noting that the ceiling did not allow credit unions to compete in the small loans market because it was no longer profitable.⁴⁹¹ Another concern was that credit unions would stop providing loans of \$1,500 or less, forcing borrowers to borrow more than they actually needed.⁴⁹² With the increase in the number and type of lenders offering loans, it was thought that a more competitive marketplace would protect borrowers.⁴⁹³ After the *SLA*’s repeal the federal government enacted the criminal interest rate provision into s.347 (then s.305.1) of the Criminal Code.

Criminal Code Criminal Interest Rate Provision

The intent of the criminal interest rate provision was to combat loansharking.⁴⁹⁴ Loansharking was rampant in major cities such as Montreal, whose police force requested the provision to fight loansharking.⁴⁹⁵ This sentiment was echoed in Ontario courts in *R v Chomski*. The judge summarized debates before the Senate Committee on Banking, Trade and Commerce, noting that police forces in major cities requested the provision because there was a “direct connection between...organized crimes” and loansharking.⁴⁹⁶ Affected borrowers were often working class and precariously employed.⁴⁹⁷ The provision sought to impose harsher

⁴⁸⁶ *Ibid* at s 3(3).

⁴⁸⁷ Jacob S Ziegel, “Comments on Legislation and Judicial Decisions” (1981), 59:1 Can Bus Rev 188 at p 189.

⁴⁸⁸ *Ibid*.

⁴⁸⁹ *Ibid* at p 189-190.

⁴⁹⁰ Charles Mayer, 32nd Parl., 1st Sess., Vol. 1 at p 155-156, 738.

⁴⁹¹ Gordon Taylor, 32nd Parl., 1st Sess., Vol 1 at p 1066.

⁴⁹² Don Blenkarn, 32nd Parl., 1st Sess., Vol 2 at p 2170.

⁴⁹³ Stephen Antle, “A Practical Guide to Section 347 of the Criminal Code – Criminal Rates of Interest” (1994) 23 Can Bus LJ 323 at 324.

⁴⁹⁴ Jacob S Ziegel, “The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost” (1986) 11:2 Can Community LJ 233 at p 234.

⁴⁹⁵ *Ibid* at p 192.

⁴⁹⁶ *R v Chomski* (1986), 1 WCB (2d) 40 at para 6, 1986 CarswellOnt2411 (Ont Prov Ct).

⁴⁹⁷ *Ibid*.

consequences for loansharking and to encourage courts to offer substantial fines or prison sentences.⁴⁹⁸

Section 347 covered both commercial and consumer loans using broad language. This provision makes it a crime to enter into an agreement or arrangement to receive interest at a criminal rate, which is defined as *exceeding* 60% per annum. However, drafters of the provision contemplated larger, longer term loans as opposed to small, short-term loans.⁴⁹⁹ These smaller, shorter-term loans, often known as payday loans, caught the attention of Parliament.⁵⁰⁰ Payday lenders were accused of offending s.347 as their loans often carried interest rates over 60% when all additional fees were considered.⁵⁰¹ Payday lenders argued that the fees charged were not interest.⁵⁰² Payday lenders became defendants in several class action lawsuits, which invoked s.347.⁵⁰³

Parliament responded by passing Bill C-26 which amended s.347 to exempt payday lenders from the provision if the province had enacted legislation regulating payday lenders. This delegated the power to legislate payday lenders to the provinces.

Payday lenders were exempt from s.347, if all of the following were met:⁵⁰⁴

- (a) the loan is \$1,500 or less and the term of the loan is 62 days or less;
- (b) the lender is licensed or authorized by provincial law to enter a loan agreement;
- (c) the province is designated under subsection (3)

Provinces must request to be designated.⁵⁰⁵ In order to be designated, a province must have legislation in place to protect payday loan borrowers, which imposes limits on the total cost of payday loans.⁵⁰⁶

Requirements Under the Provision

S.347 (1) of the Criminal Code makes it a crime to receive or enter an agreement or arrangement to receive an interest payment that *exceeds* 60% per annum.⁵⁰⁷ Interest under s.347 is defined broadly and includes any charge or expense payable on credit advanced.⁵⁰⁸ Interest does not include insurance charges, official fees, overdraft charges or required deposit

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Pierre Paquette, 1st Sess, 39th Parl.

⁵⁰⁰ Nathan Irving, "Bill 14: The Consumer Protection Amendment Act (Payday Loans)", 34 Man LJ 159 at p 159-160.

⁵⁰¹ *Ibid* at p 161-162.

⁵⁰² *Ibid* at p 161.

⁵⁰³ *Ibid* at p 159.

⁵⁰⁴ *Criminal Code*, RSC 1985, c C-46, s 347.1(2)(a-c) [*Criminal Code*].

⁵⁰⁵ *Ibid* at s 347(3).

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid* at s 347(1).

⁵⁰⁸ *Ibid* at s 347(2).

balances.⁵⁰⁹ The provision describes these charges as follows:⁵¹⁰

- (a) insurance charges are the cost of insuring the risk assumed by the lender (provided they do not exceed the amount advanced);
- (b) official fees are fees payable to any governmental authority to properly register security used for the purpose of granting credit;
- (c) overdraft charges are charges from a credit union or caisse populaire for creating or increasing an overdraft balance that do not exceed \$5

There are two offences under s.347(1). These offences are not mutually exclusive and violating either of them is sufficient to violate s.347.⁵¹¹ The first offence (the “*agreeing offence*”) is entering an agreement to receive interest at a criminal rate.⁵¹² Courts have interpreted this offence narrowly by looking at the requirements of the contract.⁵¹³ If the contract requires interest to be paid at a criminal rate, the contract is illegal. For example, a contract requiring interest of 61% per annum is illegal. A contract that *requires* payment of interest over a period that will give rise to an annual interest rate that exceeds the criminal rate is also illegal.⁵¹⁴ For example, a loan of \$100 payable at 10% interest per month for a term of one year is illegal because it *requires* interest to be paid at an effective annual rate of 120%.

The second offence (the “*receiving offence*”) is receiving an interest payment or partial interest payment at a criminal rate.⁵¹⁵ For this offence, there is a presumption that parties who receive full or partial payments of interest at criminal rates have knowledge that the payment was made at a criminal rate, if there is no evidence to the contrary.⁵¹⁶ This offence is interpreted broadly, regardless of the interest rate in the contract.⁵¹⁷ Liability under the “*receiving offence*” may be subject to a “wait and see” approach.⁵¹⁸ If the repayment period and total interest paid are unknown, it is not possible to calculate the effective annual interest. Therefore, liability under the “*receiving offence*” may be unknown and one may need to “wait and see” until the actual amount of interest and repayment period are known.

An agreement that has an interest rate lower than the criminal rate may eventually become illegal. This may occur when the repayment period is not defined in the contract. Lenders who make contracts with ambiguous terms bear the risk of violating s.347 if the loan

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Degelder Construction Co v Dancorp Developments Ltd*, [1998] 3 SCR 90 at para 31, [1998] SCJ No 75 [*Degelder*].

⁵¹² *Ibid* at para 28.

⁵¹³ *Ibid* at para 34.

⁵¹⁴ *Ibid* at para 29.

⁵¹⁵ *Ibid* at para 28.

⁵¹⁶ *Criminal Code*, *supra* note 490 at s 347(3).

⁵¹⁷ *Degelder*, *supra* note 497 at paras 29-30.

⁵¹⁸ *Ibid* at para 30.

reaches a point where the interest received exceeds the criminal rate.⁵¹⁹ The relevant period is the repayment period and not the term set out in the contract.⁵²⁰ For example, an agreement to loan \$100 at 10% interest per month for an undefined period becomes illegal after the sixth month.

If the loan reaches a criminal rate of interest due to a voluntary act of the borrower, s.347 is not violated.⁵²¹ A voluntary act is described as “an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement”.⁵²²

The criminal rate of interest does not apply to persons other than banks if the loan is \$1,500 or less, the lender is licensed to enter into loan agreements and the province where transaction occurs is designated by the federal government. Provinces may be designated if they have payday loan legislation that protects borrowers and limits the total cost of such loans.⁵²³

Criminal Convictions under the Provision

Any criminal proceedings under s.347 must be approved by the Attorney General of Canada.⁵²⁴ Section 347 carries a punishment of up to 6 months’ imprisonment and/or a \$25,000 fine on summary conviction.⁵²⁵ If guilty of an indictable offence, s.347 carries a punishment of up to 5 years’ imprisonment.⁵²⁶

In *R v Duzan*, a pawnbroker was charged and convicted under s.347. The pawnbroker appealed, questioning whether criminal liability should be imposed when the interest paid was solely determined by the pledger’s repayments.⁵²⁷ The court decided the pawnbroker must bear responsibility for the offending interest charges because it designed the agreement.⁵²⁸ The

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid* at paras 30, 34.

⁵²¹ *Ibid* at para 34.

⁵²² *Ibid.*

⁵²³ Non-payday loans for less than \$1500 would involve banks, credit unions or private lenders. Section 347.1 of the *Criminal Code* only carves an exemption for licensed payday lenders, so s.347 would be applicable to anyone else. In Ontario, non-payday loans for less than \$1500 may be regulated under Part VII (Credit Agreements) of the *Consumer Protection Act* (CPA). It likely only applies to private lenders as s.2(2) of the CPA exempts banks, credit unions, and loan and trust companies. In Manitoba, non-payday loans may be regulated by Part XXV (High-Cost Credit Agreements) and Part II (Credit Agreements and Leases) of the *Consumer Protection Act*. Similar to Ontario, Manitoba’s CPA exempts banks, credit unions and prescribed persons.

⁵²⁴ *Criminal Code*, *supra* note 490 at s 347(7). The requirement of the Attorney General’s consent makes it impossible for business dealings between experienced borrowers and lenders to lead to jail time. See Scott Sangster, “Interest Rates: Disclosing the Cost of Borrowing” (1991) 16:2 LNow 8 at p 8.

⁵²⁵ *Ibid* at s 347(1)(a).

⁵²⁶ *Ibid* at s 347(1)(b).

⁵²⁷ *R v Duzan* (1993), 105 Sask R 295 at para 11, 1993 CanLII (CA).

⁵²⁸ *Ibid* at para 24.

court dismissed the pawnbroker's appeal, noting that the pawnbroker could have designed the arrangement so it would not violate s.347.⁵²⁹

In *R v Saikaley*, the accused made several private loans to individuals at varying amounts and interest rates.⁵³⁰ He was charged with 16 counts of charging a criminal rate of interest along with 2 counts of extortion and other drug trafficking offences.⁵³¹ Ultimately, he was convicted on the extortion and drug trafficking offences, but a new trial was ordered for the counts of charging a criminal rate of interest. The Crown characterized the accused as a loan-shark, preying on those who could not afford to repay the money borrowed by charging exorbitant interest rates.⁵³² Because the loans were not repaid, the defence argued the effective annual rate was impossible to calculate.⁵³³ The defence also raised a mistake of fact defence, arguing the accused did not know how the monthly interest payments could lead to an illegal interest rate.⁵³⁴

The judge rejected the defence's mistake of fact defence, but accepted their arguments regarding the unpaid loans.⁵³⁵ Relying on *Degelder*, a civil case, which held liability for *receiving* interest at a criminal rate may rest on a 'wait and see' approach, the judge dismissed six charges of *receiving* interest payments at a criminal rate.⁵³⁶ Because of a lack of evidence regarding repayment terms, the judge found that calculating the effective rate of interest would be impossible.⁵³⁷ The judge found the accused guilty of five counts of *agreeing* to receive interest payments at a criminal rate.⁵³⁸

On appeal, a new trial was ordered because the trial judge erred in applying the presumption of knowledge in s.347(3) to the charges of *agreeing* to receive interest payments at a criminal rate.⁵³⁹ The wording of s.347(3) states the presumption of knowledge is applicable to those who *receive* interest payments at a criminal rate. The appeal court did not decide whether the presumption could potentially apply to "*agreeing* offences".⁵⁴⁰

Use in Civil Actions

The criminal rate of interest has been the subject of several civil actions. A borrower may use the criminal rate of interest to demonstrate that the cost of a loan is excessive when

⁵²⁹ *Ibid* at paras 24, 27.

⁵³⁰ *R v Saikaley*, 2013 ONSC 1854 at para 16, [2013] OJ No 1572.

⁵³¹ *Ibid* at para 254.

⁵³² *Ibid* at para 270.

⁵³³ *Ibid* at para 272.

⁵³⁴ *Ibid* at para 273.

⁵³⁵ *Ibid* at para 276-277.

⁵³⁶ *Ibid* at para 276.

⁵³⁷ *Ibid*.

⁵³⁸ *Ibid* at paras 288, 293, 303, 307, 313.

⁵³⁹ *R v Saikaley*, 2017 ONCA 374 at paras 89, 115, 135 OR (3d) 641.

⁵⁴⁰ *Ibid* at para 90.

applying for relief under the *Unconscionable Transactions Relief Act* (UTRA).⁵⁴¹ Payday lenders have been harshly scrutinized for charging criminal rates of interest by the courts. Prior to the enactment of provincial payday loan legislation and the *Criminal Code* exemption, the criminal rate of interest was used to demonstrate that the cost of the loan was excessive.

In Ontario, courts have reduced the interest rates payday lenders may recover if the interest rate charged exceeds the criminal rate. This has been achieved through the *UTRA*, which gives the courts the power to revise any part of a contract when the cost of the loan is excessive and the transaction is harsh and unconscionable⁵⁴². Payday loans have frequently exceeded the criminal rate of interest when all fees and charges are considered as they may be considered interest for the purposes of the provision.

In 2011, Cash Shop, a payday loan lender, brought action against several borrowers for unpaid payday loans. The court released 8 identical judgements denying Cash Shop's request to recover principal, interest, a \$350 collection fee and pre- and post- judgment interest at 59% per annum. The court awarded Cash Shop the principal amount, \$200 court costs and pre- and post-judgment interest at 18% per annum in each case. All of the borrowers signed a standard form and each was found to exceed the criminal rate of interest (an "agreeing offence"). In one case, a one-week payday loan of \$700 carried a \$120 interest charge, which was equivalent to an annualized rate of 1,042.85%.⁵⁴³ All the borrowers were relieved under the *UTRA*, with the court inferring there was inequality of bargaining power from the very nature of the loan.⁵⁴⁴ The court noted payday loan borrowers are often in difficult financial situations and would otherwise not agree to pay such high interest rates.⁵⁴⁵

Remedies

In s.347, there are no explicit remedies for borrowers who were charged an illegal interest rate. The Supreme Court of Canada ruled there is a "spectrum of remedies available to judges to deal with contracts that violate s.347".⁵⁴⁶ This may include voiding the entire contract or severing the parts of the contract that violate s.347 or reducing interest rates to comply with s.347.⁵⁴⁷

⁵⁴¹ *Ekstein v Jones*, [2005] OJ No 3497 at para 48, CanLII 29491 (Ont Sup Ct J).

⁵⁴² *Unconscionable Transactions Relief Act*, RSO 1990, c U.2 at s 2(d) [*UTRA*].

⁵⁴³ *Cash Shop 51 v Riviera*, 2011 CarswellOnt 16123 at para 5 (Sup Ct J).

⁵⁴⁴ *Ibid* at para 4.

⁵⁴⁵ *Ibid*.

⁵⁴⁶ *Transport North American Express Inc. v New Solutions Financial Corp.* 2004 SCC 7 at para 6, [2004] 1 SCR 249.

⁵⁴⁷ *Ibid* at para 40.

The court took a flexible approach to dealing with statutory illegality and identified four considerations when deciding whether a contract should be voided for illegality in its entirety or partially enforced.⁵⁴⁸ These considerations are:⁵⁴⁹

- (a) whether the purpose or policy of s.347 would be subverted by severance;
- (b) whether the parties entered into the agreement for an illegal purpose or with an evil intention;
- (c) the relative bargaining position of the parties and their conduct in reaching the agreement;
- (d) the potential for the debtor to enjoy an unjustified windfall

Because the purpose of s.347 is to prevent loan-sharking, the Court ruled that lower courts must exercise caution when dealing with contracts that do not involve loan sharking.⁵⁵⁰ However, the Court recognized the importance of context; for example, a contract between sophisticated parties may result in illegal interest rates being read down to conform with s.347.⁵⁵¹ Although the decision does not explicitly mention consumer loans, a judge would likely reduce an illegal interest rate on a consumer loan to an interest rate that reflects market conditions at the time of the loan. A judge also would have the discretion to relieve the borrower from the debt obligation completely, if needed to denounce a serious violation of s.347.⁵⁵²

The previous test, the “blue-pencil” test, was found to be problematic. The “blue-pencil” tests the appropriateness of severance by determining whether an illegal contract can become legal by drawing a line through the illegal portions.⁵⁵³ The problem with the “blue-pencil” test was that it created a new agreement for the parties and its results could be arbitrary, depending on how the contract was drafted.⁵⁵⁴ The original intentions of the parties forming the contract is paramount. The preferred method of severance is a contextual approach that would remedy the illegality, but remain as close as possible to the original intentions of the parties.⁵⁵⁵

⁵⁴⁸ *Ibid* at para 41.

⁵⁴⁹ *Ibid* at para 42.

⁵⁵⁰ *Ibid* at para 43.

⁵⁵¹ *Ibid* at para 39.

⁵⁵² *Ibid* at para 31.

⁵⁵³ *Ibid* at para 27.

⁵⁵⁴ *Ibid* at paras 30, 33.

⁵⁵⁵ *Ibid* at para 32.

POSSIBLE SOLUTIONS/EMERGING ISSUES

OPEN BANKING

Introduction: What Is Open Banking?

Open banking is a framework under which consumers have the right to share their banking information with other financial service providers.⁵⁵⁶ Under the current framework, banks have complete control over consumer information, and cannot disclose information except with consumer consent or under limited circumstances (e.g. if required by regulators).⁵⁵⁷ Canadian financial institutions currently also restrict consumers from giving their bank account information to others. This is driven by concerns of fraud and misuse of customer information.⁵⁵⁸ However, under an open banking framework, customers are given the power to decide who can view their banking information and can share their banking information instantly with other financial institutions and non-banks.⁵⁵⁹ Third-party platform developers such as Amazon, Google, Apple, and financial technology companies are eager to enter the banking sphere.⁵⁶⁰

Benefits of Open Banking

Open banking has the potential to disrupt the financial services sector and increase competition. Fintech companies have a large interest in gaining access to customers' banking information so that they may offer competitive pricing or other services to customers. Banks and third parties can use the financial data that customers share with them and develop new apps and platforms.

Open banking requires information sharing that is made possible by an Application Programming Interface (API). An API is a software intermediary that allows two applications to talk to each other and provide access to open data, and secure shared access to private data.⁵⁶¹ For example, an API is how online travel services such as Expedia and Kayak aggregate information from multiple airline databases for consumers. The API gathers information from the airline about seats, baggage options, etc., and then takes the airline's response and delivers

⁵⁵⁶ Kashif Zaman, "Open banking and cyber risk – balancing customer interests", *Osler* (21 September 2017) online: <<https://www.osler.com/en/blogs/risk/september-2017/open-banking-and-cyber-risk-balancing-customer-i>> [Osler].

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Paul Waldie, "Britain to be first in line to shake up financial services with 'open banking'", *The Globe and Mail* (8 January 2018), online <<https://www.theglobeandmail.com/report-on-business/international-business/european-business/britain-prepares-to-shake-up-financial-services-with-launch-of-worlds-first-open-banking-standard/article37520850>> [Waldie].

⁵⁶⁰ *Ibid.*

⁵⁶¹ MuleSoft, "What is an API? (Application Programming Interface)", online <<https://www.mulesoft.com/resources/api/what-is-an-api>>.

it back to the online travel service, and then to the consumer.⁵⁶² In a similar fashion, banks and third-party developers can use APIs to create apps that host a wide variety of services such as managing multiple bank accounts, finding loans, and handling accounting.⁵⁶³

According to a survey conducted by Accenture, all but one of 100 payments executives at large global banks said their bank plans to make major investments in open banking initiatives by 2020.⁵⁶⁴ Traditional banks face the threat of new entrants (e.g. fintech companies) and over half of all bank executives surveyed believe that they will be forced to implement open banking initiatives to compete.⁵⁶⁵ In addition, consumer expectations are also changing and 41% of consumers in North America said they are comfortable giving online bank account credentials to a third party.⁵⁶⁶

Potential Risks

Recent data breaches at companies such as Uber and Equifax indicate that the benefits of open banking must be weighed against the threat of data breaches and cybersecurity issues. The likelihood of a data breach increases the more places that data is stored in or made available through.⁵⁶⁷ Under an open banking initiative, there would be a high degree of interconnectedness amongst banks and third-party companies, and a successful cyber attack against one institution or provider could spread widely within the entire financial system.⁵⁶⁸ The Government of Canada intends to work with Public Safety Canada to determine what regulatory changes are needed for cyber security and make Canada a leader in the promotion of safe and secure services.⁵⁶⁹

Current Initiatives

Europe

Under the U.K.'s Open Banking Standard and Europe's Revised Payments Services Directive (PSD2), as of January 13, 2018, banks must grant third-party providers access to a customer's online account or payment services.

⁵⁶² *Ibid.*

⁵⁶³ *Waldie, supra* note 546.

⁵⁶⁴ Accenture, "Accenture Research: Most Large Global Banks Planning Major Investments in Open Banking", (16 October 2017), online: <<https://newsroom.accenture.com/news/accenture-research-most-large-global-banks-planning-major-investments-in-open-banking.htm>>.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Accenture Strategy, "Open for Business", (2017), online: <https://www.accenture.com/t20170629T215524Z__w_/ca-en/_acnmedia/PDF-56/Accenture-Strategy-Digital-Open-Banking-POV.pdf#zoom=50>.

⁵⁶⁷ *Osler, supra* note 542.

⁵⁶⁸ Armina Ligaya, The Canadian Press "'Open banking' holds promise but cybersecurity fears loom for Canadian banks", *CBC* (30 November 2017), online: <<http://www.cbc.ca/news/business/open-banking-financial-technology-1.4426379>>.

⁵⁶⁹ *Osler, supra* note 542.

Britain became the first in the world to launch an “open banking” initiative, changing how banks operate and offering new opportunities for non-banks to enter the financial services market.⁵⁷⁰ The UK government investigated the supply of retail banking services and concluded that there was a need to improve competition and choice, and this resulted in the ‘Open Banking’ initiative.⁵⁷¹ The nine largest UK retail banks and building societies, including Barclays, HSBC, and Santander, are legally required to allow certain customer information to be shared securely online with other regulated companies, and other banks and building societies can voluntarily do the same.⁵⁷² The information sharing is done through APIs and Open Banking is standardizing the APIs that banks and building societies use so that all company apps and websites can communicate using a common approach.⁵⁷³ To protect customer information, data is encrypted, and only companies regulated by the Financial Conduct Authority, a financial regulatory body that operates independently of the UK Government, can use it. In May 2018, the UK will enact the EU’s General Data Protection Regulation (GDPR) that includes fines of up to €20 million, or 4% of the company’s turnover, for companies that do not have proper data protection measures.⁵⁷⁴

The PSD2 is administered by the European Commission to regulate payment services and providers throughout the European Union.⁵⁷⁵ The purpose of the PSD2 is to better protect consumers, promote the development and use of online and mobile payments and make cross-border European payment services more secure.⁵⁷⁶ Under the PSD2, there is an Access to Account (XS2A) rule that mandates banks or other account-holding payment service providers to facilitate secure access to customer information via APIs.⁵⁷⁷ The PSD2 is estimated to increase operating costs for banks as they must implement heightened security and launch APIs to share customer information. In addition, as non-banks such as Amazon and Apple begin to enter the financial services sector, banks will face increased competition.

Canada

Currently, the Department of Finance is engaging in a consultation process that includes a review of statutory language. The Department is seeking views on whether to clarify and modernize the type of information and technology activities that federally regulated financial institutions are allowed to undertake in-house. Further, the Department intends, as part of its broader federal financial regulation review, to examine the merits of open banking including a

⁵⁷⁰ *Waldie, supra* note 546.

⁵⁷¹ Open Banking Ltd., “Background to Open Banking”, (2018), online: <<https://www.openbanking.org.uk/background-to-open-banking/>>.

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ European Commission, “European Parliament adopts European Commission proposal to create safer and more innovative European payments”, (8 October 2015), online: <http://europa.eu/rapid/press-release_IP-15-5792_en.htm?locale=en>.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ Accenture Consulting, “PSD2: How Can Banks Seize the Opportunities?”, online: <<https://www.accenture.com/ca-en/insight-psd2-opportunities-banks>>.

look into how other jurisdictions are implementing open banking and the potential benefits and risks for Canadians.⁵⁷⁸

Open Banking and Financial Inclusion

Open banking can promote financial inclusion and enable traditionally underserved customers to access financial services that were not previously available.⁵⁷⁹ The innovative technologies created under the open banking regime can widen access to financial products such as credit, debt advice and financial advice.⁵⁸⁰ For example, credit providers can share limited data on “thin file” consumers to advance financial inclusion and pool together limited information.⁵⁸¹ Traditional credit scoring has been criticized for the narrow set of data it uses, and having a wider variety of information could result in a more transparent and accurate credit scores.⁵⁸² European banking services provider, “figo”, aggregates financial sources from thousands of banks and financial institutions.⁵⁸³ The company’s platform enables third parties to access data from more than 55 million online banking accounts and financial sources such as processed data of the bank accounts, credit cards, deposits, and Paypal accounts.⁵⁸⁴ With figo, the credit applicant can securely share his or her banking data with the credit provider who can then conduct a digital account check and get an overview of the consumer’s salary, income and structure of expenses.⁵⁸⁵ Open banking can result in services such as figo that enable people who were previously excluded to access suitable credit products.

Further, open banking can provide consumers with improved insights on how to manage their money. As identified by Prosper Canada, innovative new technology can help achieve a more inclusive financial marketplace through methods such as: designing accounts to make it easier for consumers to avoid penalties and extra fees, enabling consumers to set predefined spending limits, and sending real-time messages when consumers make sub-optimal financial choices.⁵⁸⁶ Open banking has resulted in the rise of Personal Financial Management (PMF)

⁵⁷⁸ Department of Finance Canada, “Potential Policy Measures to Support a Strong and Growing Economy: Positioning Canada’s Financial Sector for the Future”, (11 August 2017), online: <<https://www.fin.gc.ca/activty/consult/pssge-psefc-eng.pdf>>.

⁵⁷⁹ Faith Reynolds, “Open Banking A Consumer Perspective”, *Barclays*, (January 2017), online: <<https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Research/Open%20Banking%20A%20Consumer%20Perspective%20Faith%20Reynolds%20January%202017.pdf>> [*Barclays*].

⁵⁸⁰ *Ibid.*

⁵⁸¹ Laura Brodsky & Liz Oakes, “Data sharing and open banking”, *McKinsey & Company*, (September, 2017), online: <<https://www.mckinsey.com/industries/financial-services/our-insights/data-sharing-and-open-banking>>.

⁵⁸² *Barclays*, *supra* note 579 at 12.

⁵⁸³ figo, “About figo” (2018), online: <<https://www.figo.io/en/about-figo/>>.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Florian Schwabl, “How banking data contributes to financial inclusion with regard to credit provision” (21 December, 2017), *figo*, online: <<https://www.figo.io/en/blog/how-banking-data-contributes-to-financial-inclusion-with-regard-to-credit-provision/>>.

⁵⁸⁶ Prosper Canada, “A chance to make banking better” (31 May, 2016), online: <<http://prospercanada.org/News-Media/News/A-chance-to-make-banking-better.aspx>>.

platforms that use APIs to aggregate all of a consumer's accounts in one place.⁵⁸⁷ Compiling all of this data may be difficult for a consumer, especially a low-income one, to do on their own and PMF's can help simplify financial information and allow the consumer to gain insight on their spending behaviour.⁵⁸⁸

Consumer experts have concerns that the same tools that can increase financial inclusion have the power to create obstacles that undermine its potential.⁵⁸⁹ There are concerns that open banking can lead to both digital exclusion and financial exclusion, especially amongst low-income individuals.⁵⁹⁰ Traditionally excluded consumers such as low-income individuals, the elderly, those in rural areas and in the North, may not have access to, or the confidence to use, the technology that many of these new platforms require.⁵⁹¹ As a result, these consumers may be excluded and unable to reap the benefits of the various financial tools and services that open banking can produce. In addition, there is concern that simply giving an individual the "tools" to manage his or her money is not the same as giving them the "behaviours" that will enable them to be financially capable.⁵⁹²

⁵⁸⁷ *Barclays, supra* note 579 at 11.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*, at 27.

⁵⁹⁰ *Ibid.*, at 23.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*, at 24.

Appendix 1 - Payday Loans Provincial Chart

Province ¹	Max. Cost (per \$100 borrowed)	Max. Loan Amount and Term	Charges on Default	NSF fees and Pre-Authorized Debits (PAD)	Right of rescission	Rollovers, Extensions and Concurrent Loans	Remedies for lender breaches
Ontario <i>Payday Loans Act, 2008</i>	\$15	50% of the borrower's net income ² . Max term of 62 days	N/A	"Reasonable" charges. Lender may not re-process a PAD if the borrower would incur <i>any</i> charges. If the lender re-processes a PAD and the borrower is charged, the borrower is not liable for the cost of borrowing and may recover any charges already paid from the lender.	Yes – two business days	Extended Payment Plan: opt to pay loan back in equal instalments over multiple pay periods if 3 loans advanced within a 63-day period without any service fees for doing so Rollovers: prohibited	Yes – borrower entitled to refund for any illegal payments (within one year of making the payment). If lender does not refund, buyer is allowed to recover in the Superior Court of Justice. Borrowers are only liable for the principal amount of the loan when dealing with an unlicensed lender.
Manitoba <i>The Consumer Protection Amendment Act (Payday</i>	\$17	30% of the borrower's net income ³ . Max term of 62 days	Yes – 2.5% of the amount in default per month (cannot be compounded and may only be charged once in 30	\$20. A PAD can only be processed once. A lender may process a PAD a second time if the borrower is not charged a fee by the	Yes – within 2 business days	Extensions: lenders may only charge 5% of the principal amount to extend a loan. Replacements: if a borrower is receiving a	Yes – borrower entitled to refund of <i>all</i> charges if cost of loan exceeds prescribed amount.

¹ Ontario, Manitoba, Alberta, British Columbia, Saskatchewan, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island are all designated under section 347.1(3) of the Criminal Code. This means the criminal rate of interest does not apply to payday loans within these provinces. Quebec is not designated.

² Net income is calculated by reviewing the borrower's net income for the most recent calendar month, excluding any amounts received from any loans or other forms of credit.

³ Net income is calculated by reviewing the borrower's income from all sources in the most recent calendar month **minus** any compulsory or voluntary deductions.

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<p><i>Loans) 2006, The Consumer Protection Amendment Act (Payday Loans), 2009, The Payday Loans Regulation (Regulation 99/2007); The Payday Loans Regulation, amendment (Regulation 3/2009); The Payday Loans Regulation, amendment (Regulation 50/2010)</i></p>			<p>days. The fee cannot be charged if the borrower is receiving a replacement loan)</p>	<p>lender or their financial institution to re-process it.</p>		<p>replacement loan, the total cost of credit cannot exceed 5% of the principal amount of the replacement loan.</p> <p>If a borrower requests another loan within 7 days of repaying a previous loan, the total cost of credit cannot exceed 5% of the principal amount of the new loan.</p>	
<p>Alberta <i>Payday Loans Regulation (part of the</i></p>	<p>\$15</p>	<p>Minimum term of 42 days</p>	<p>Yes – 2.5% per month (cannot be compounded)</p>	<p>Max \$25 NSF fee. Lenders are prohibited from reprocessing a PAD unless the second</p>	<p>Yes – within 2 business days</p>	<p>Rollovers are prohibited.</p>	<p>Yes – any breach by the lender bars collection of <i>any</i> fees</p>

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<i>Consumer Protection Act</i>				attempt is for the same amount (excluding the NSF fee) and is attempted within 30 days since the lender received notification of the dishonoured payment OR with the borrower's consent.			
British Columbia <i>Payday Loans Regulation (part of the Business Practices and Consumer Protection Act)</i>	\$15	50% of the borrower's net income Max term of 62 days	Yes – 30% per annum on the principal amount	Max \$20	Yes – within 2 business days	Concurrent and rollover loans are prohibited. Payment Plan: If the borrower is receiving their third loan in 2 months, they have the option of repaying the loan in 3 bi-weekly payments.	Yes – borrowers entitled to refunds of any payments exceeding the maximum cost of the loan. A lender is barred from collecting <i>any</i> fees if it contravenes the legislation such as using the borrower's personal information to market other products, providing a payday loan on the condition the borrower purchases or uses other products and services, requesting or requiring the borrower to repay either the principal or cost of borrowing before the loan is due.

Appendix 1 - Payday Loans Provincial Chart

Province ¹	Max. Cost (per \$100 borrowed)	Max. Loan Amount and Term	Charges on Default	NSF fees and Pre-Authorized Debits (PAD)	Right of rescission	Rollovers, Extensions and Concurrent Loans	Remedies for lender breaches
Saskatchewan <i>The Payday Loans Act</i>	\$17	50% of the borrower's net income	Yes – 30% per annum on the principal amount	Max \$25. Charged once, regardless of actual number of NSF payments.	Yes – by end of the next business day	Concurrent and rollover loans are prohibited. Extensions are permitted provided the lender does not charge any fees or interest for doing so.	Yes – borrower entitled to recover all fees charged if lender charges in excess of permitted fees or fees not permitted under the legislation
New Brunswick <i>Cost of Credit Disclosure and Payday Loans Act</i>	\$15	30% of the borrower's net income	Yes – interest of 2.5% per month on the outstanding amount (cannot be compounded and only charged once in a 30-day period).	Max \$20 for each NSF payment. A lender may only reprocess a PAD once if it does not charge a fee to the borrower and only attempts to reprocess the same amount within 30 days after the first attempt was dishonoured.	Yes – within 2 business days	No – concurrent and rollover loans are prohibited. An extension may be permitted if the borrower is not charged any additional fee aside from the allowed interest.	Yes – borrower entitled to refund of all fees if lender charges more than permitted under the legislation
Nova Scotia <i>Consumer Protection Act and Payday Lenders Regulations</i>	\$22	N/A		Yes – Max \$40 per loan	Yes – by the end of the next business day	The borrower and lender may negotiate a renewal or extension. Rollovers and concurrent loans are prohibited.	Yes – borrower entitled to refund of all fees if lender charges any fees before the loan is due or grants a rollover or discounts the loan

Appendix 1 - Payday Loans Provincial Chart

Province ¹	Max. Cost (per \$100 borrowed)	Max. Loan Amount and Term	Charges on Default	NSF fees and Pre-Authorized Debits (PAD)	Right of rescission	Rollovers, Extensions and Concurrent Loans	Remedies for lender breaches
Prince Edward Island <i>Payday Loans Act and Payday Loans Act Regulations</i>	\$25	N/A	Yes – “Reasonable” charges	“Reasonable charges” (charges that reflect the cost the lender incurs due to a dishonoured payment). Lenders may not reprocess a PAD if it would result in the borrower paying a fee.	Yes – within 2 days (if the lender is closed, by the end of the next business day the lender is open)	<p>Concurrent loans are prohibited.</p> <p>A lender may not enter into a new agreement with a borrower unless 7 days have elapsed since the borrower’s last loan was paid in full.</p> <p>Rollovers and extensions are prohibited.</p>	Yes – a borrower will not be liable for fees if the lender breaches payday loan legislation, including: using personal information to market other products, providing a payday loan on the condition the borrower purchases or uses other products and services, requesting or accepting a wage assignment as part of a payday loan agreement or requiring the borrower to repay either the principal or cost of borrowing before the loan is due.
Newfoundland and Labrador <i>Payday Loans Regulations (under the Consumer Protection and Business Practices Act) and Payday Loans Licensing</i>	\$21	50% of the borrower’s net income	Yes – Interest rate of 2.5% (cannot be compounded)	\$20 fee for each dishonoured PAD.	Yes – within 2 business days	<p>Rollovers and concurrent loans are prohibited.</p> <p>An extension is prohibited if the lender imposes any additional charges aside from the allowed interest rate.</p>	Yes – borrower is not liable for any amounts exceeding the principal amount if the lender: charges a cost over \$21 per \$100 lent, charges any prohibited fees, grants a rollover loan or if the lender engages in a prohibited practice such as stating or implying a payday loan will improve the borrower’s credit rating or requiring the borrower to accept other services in order to receive a payday loan (tied

Appendix 1 - Payday Loans Provincial Chart

Province ¹	Max. Cost (per \$100 borrowed)	Max. Loan Amount and Term	Charges on Default	NSF fees and Pre- Authorized Debits (PAD)	Right of rescission	Rollovers, Extensions and Concurrent Loans	Remedies for lender breaches
<i>Regulations (under the Consumer Protection and Business Practices Act)</i>							selling).

Appendix 2 - Provincial High-Cost Credit Product Chart

Province	Type of Products Covered	Interest Rate	Licensing Requirement	Pre-Authorized Debits (PAD)	Cancellation	Prohibited Practices	Remedies for the borrower
Manitoba <i>The Consumer Protection Act (High-Cost Credit Products)</i>	Any loan or line of credit, excluding credit cards, margin loans, mortgages, payday loans and credit products offered by banks and credit unions	Greater than 32% (annually) Certain loans and lines of credit are considered high-cost credit products even if the interest rate is under 32% ¹	Yes – anyone who arranges, offers or provides high-cost products must be licensed	Lender may only repeatedly process a PAD if the borrower is not charged any fees or penalties. No maximum fee is set for dishonored payments.	Borrower may cancel within 48 hours (excluding Sundays and holidays). A borrower may cancel at any time if they were not notified of their right to cancel or if the lender’s notice to the borrower was inadequate (not in compliance with the legislation).	Processing unauthorized PADs Stating a high-cost credit product will improve a borrower’s credit rating if that statement is inaccurate Offering an incentive to enter a high-cost credit agreement Assisting unlicensed lenders to offer, arrange or provide high-cost credit products	
Alberta <i>The High-</i>	Any credit agreement excluding payday	32% or greater (inclusive of all mandatory fees)	Yes – anyone who offers, arranges or enters into a high-	Lender may only repeatedly process a PAD if it is the same	Borrower may cancel any continuing <i>optional</i> service on 30	Contacting 3 rd parties with respect to the loan or outstanding	The borrower may request a refund for any cancelled

¹ In Manitoba, loans that are under \$5000 for a term of 2 years or less and require payment of a high-cost credit fee are considered high-cost credit products. A high-cost credit fee includes brokerage fees, credit assessment/approval fees, administrative/processing fees, advance or draw fees, fees to access the funds or set up the account, cash card fees, default charges and fees for exceeding the credit limit. High-cost credit fees do not include fees or penalties for dishonored payments. The fee can be any amount.

A line of credit with a credit limit up to \$5000 that requires: **(a)** authorization before accessing funds, **(b)** payment of a high-cost credit fee, **(c)** repayments that correspond with the borrower’s payday of at least 10% of the principal amount or advance within a 30-day period is considered a high-cost credit product.

Appendix 2 - Provincial High-Cost Credit Product Chart

<p><i>Cost Credit Regulation (part of the Consumer Protection Act)</i></p>	<p>loans</p>		<p>cost credit agreement must be licensed²</p>	<p>amount as the first debt (along with a fee) and processed within 30 days after lender receives notice of a dishonored payment OR with the borrower’s consent</p>	<p>days’ notice or shorter if the agreement explicitly states the cancellation period</p>	<p>amount³ Charging more than the prescribed amount for dishonored PADs Contacting any person in a manner that constitutes harassment (using threatening, profane, intimidating or coercive language, using undue or excessive or unreasonable pressure and using telephone, e-mail or other methods of contact (excluding traditional mail) to call or send messages excessively.)</p>	<p>optional services if they were charged for such services after cancellation</p>
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² The following businesses are exempted from Alberta’s licensing requirement: public utilities with respect to sale of services, life insurance companies with respect to a loan to the insured secured against the policy’s cash surrender value, municipalities or Metis settlements with respect to payment of taxes, financial institutions regulated under the Bank Act or relevant provincial and federal student loan legislation, credit unions and ATB Financial.

³ In Alberta, a lender may contact 3rd parties to obtain the borrower’s residential address, personal or work telephone number for the purposes of collecting or attempting to collect an outstanding payment. If the lender is initiating or initiated legal proceedings, they may contact the borrower’s employer for the purposes of collecting or attempting to collect an outstanding payment. Otherwise, a lender is not permitted to contact the borrower’s employer to collect an outstanding payment. A borrower cannot be contacted at work with respect to the loan if they have specifically requested so and made reasonable arrangements to discuss the loan and adheres to those arrangements.

Appendix 2 - Provincial High-Cost Credit Product Chart

<p>Quebec⁴</p> <p><i>An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs (Bill 134) – an amendment to the Québec Consumer Protection Act</i></p>	<p>Any credit contract</p>	<p>The borrower’s debt ratio may not exceed 45%⁵</p> <p>Floating Interest Rate: Bank of Canada Bank Rate + 22 percentage points⁶</p>	<p>Yes – any merchant that enters into a high-cost credit contract must be licenced</p>		<p>Borrower may cancel within 10 days after each party (lender and borrower) receives a copy of the credit agreement</p>	<p>Advancing credit without completing an assessment of the borrower’s capacity to repay (banks, trust & loan companies and credit unions that are in compliance with federal or Quebec statutes and regulations are deemed to have complied with the assessment requirement).</p> <p>Failing to disclose interest rates</p>	<p>Any borrower with a debt ratio exceeding 45% that enters into a credit contract is presumed to have an obligation that is harsh, excessive, or unconscionable and may demand the contract be nullified</p> <p>In addition, the lender loses the right to any charges under the credit agreement and must refund any charges the borrower has already paid.</p>
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⁴ Quebec’s high-cost credit product legislation comes into force on August 1, 2019.

⁵ The lender is required to assess the borrower’s capacity to repay before entering the contract and provide the borrower with a copy of the assessment. The assessment involves computing the percentage of the borrower’s income that goes towards expenses (the debt ratio).

⁶ As of May 2019, the Bank of Canada Bank Rate was 1.5%, meaning a credit contract carrying an interest rate of 23.5% would be considered a high-cost credit product in Quebec.

Appendix 2 - Provincial High-Cost Credit Product Chart

<p>British Columbia⁷</p> <p><i>Business Practices and Consumer Protection Amendment Act, 2019 (Bill 7) – a proposed amendment to the Business Practices and Consumer Protection Act</i></p>	<p>Any credit product excluding payday loans, mortgages and other prescribed products⁸</p>	<p>A lender may not charge an interest rate that exceeds the prescribed rate⁹</p>	<p>Yes</p>	<p>A lender may only process a pre-authorized debit once A lender may not charge any other additional fees unless prescribed by legislation</p>	<p>Borrower may cancel within 1 day of entering the agreement (provided the lender is open)</p>	<p>Lender may not advertise that a high-cost credit product will improve a borrower’s credit rating if it will not do so</p> <p>Offering any incentive to enter a high-cost credit agreement</p> <p>Accepting a wage assignment.</p>	<p>Borrower may cancel if they are not notified of their right to cancel upon entering the agreement</p> <p>Borrower may cancel if the lender fails to provide an agreement that conforms to the legislation.</p> <p>Borrower may cancel if the lender contravenes any provision of the high-cost credit product legislation.</p> <p>If the borrower is charged any prohibited fee or a prohibited interest rate, the borrower is not liable for any amount aside from</p>
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⁷ British Columbia’s high-cost credit product legislation is not currently law. It has passed a first reading in B.C.’s legislative assembly.

⁸ The proposed legislation will also cover renewals, extensions or amendments of high-cost credit agreements. The legislation excludes products offered by savings institutions and prescribed classes of high-cost credit grantors (likely entities regulated by federal or provincial legislation)

⁹ B.C. has not currently published an interest rate that would trigger the high-cost credit product legislation. If B.C. does not publish a prescribed interest rate, then the federal criminal interest rate applies (an interest rate exceeding 60% per annum).

Appendix 2 - Provincial High-Cost Credit Product Chart

							the principal amount of the advance.
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