A Criminal Rate of Interest:
Updating Garland for Consumers

Written By: Janet Lo
Research By: Diana Oliveira and Michael Zahalan
Public Interest Advocacy Centre
1204 – ONE Nicholas St
Ottawa, Ontario
K1N 7B7

Published January 2011

The Public Interest Advocacy Centre
(PIAC)
Suite 1204
ONE Nicholas Street
Ottawa, Ontario
K1N 7B7

Canadian Cataloguing and Publication Data

Updating Garland for Consumers
ISBN
X-XXXXXX-XX-X

Acknowledgment

The Public Interest Advocacy Centre received funding from Industry Canada's Contributions Program for Non-profit Consumer and Voluntary Organisations. The views expressed in the report are not necessarily those of Industry Canada or the Government of Canada.

EXECUTIVE SUMMARY

Millions of consumers subscribe to utilities and telecommunications services on a monthly billing schedule. If consumers miss a payment due date, the service likely charges late payment interest and may apply a late payment penalty fee or charge a processing fee for accounts that have late payments. Beginning with the notable case of *Garland v. Consumers' Gas* before the Supreme Court of Canada in 1998, courts determined that the definition of "interest" is broad and a late payment penalty could be construed as an "interest" charge on an advancement of credit because a deferral of payment constitutes an advancement of payment under s. 347. It has been over ten years since the Supreme Court's decision in *Garland*. Since that decision, there have been more attempts to apply a broad interpretation of "interest" to charges arising from late payment penalty charges.

Non-sufficient fund fees may fall within the definition of "interest" for the purposes of s. 347 where there is no disclosure in the lending agreement that the NSF charge is a reasonable pre-estimate of costs that might be incurred by the lender as a result of a dishonoured cheque, or where there is no mention of a NSF fee. Where such disclosure is made, NSF fees will likely not fall within the definition of "interest" for the purpose of s. 347. Courts have also found processing fees that are sufficiently connected to the loan that is a charge payable or paid for the advancing of credit can constitute "interest". Insurance is not usually considered to be a form of interest, however if it is a mandatory condition of a standard form contract to secure an advance of credit, then it will be considered "interest" under s. 347 as it is an added cost of borrowing. Courts have applied s. 347 to interest charged in loan agreements between individuals and pawn shops. In a positive decision for consumers, *De Wolf v. Bell ExpressVu*, Justice Perell at the Ontario Superior Court of Justice found that an administrative fee on late accounts set out in Bell's standard form contract constituted "interest" under s. 347. However, the decision was overturned by the Ontario Court of Appeal on the basis that the fee was unrelated to the advancing of credit. Instead, the administration fee was a legitimate pre-estimate of the costs incurred by Bell ExpressVu when accounts remain outstanding and were thus recovery for a disbursement. Leave to appeal to the Supreme Court of Canada was denied.

One notable legal development since *Garland* is the use of class action lawsuits to enforce s. 347 of the *Criminal Code*. In many cases, these class action lawsuits target the payday lending industry. In cases where consumers are disputing charges related to late payments, the amount of the claim is too low to justify an individual taking on a utility giant or payday loan company. Class action claims have suffered delay in courts while addressing arguments such as the application of mandatory arbitration clauses and limitation periods. Courts have been unwilling to allow mandatory arbitration clauses to prevent class proceedings under s. 347.

While class actions for late payment penalties and violations of s 347 certainly increase access to justice for consumers, class actions are limited in being able to provide direct remedies to the affected consumers. One of the most obvious benefits of the class action is the public awareness of late payment practices that arguably violate s. 347. However, class proceedings are lengthy and may leave the affected consumer without any remedy for several years. When legal questions are settled and if the class action is certified, then parties usually come to a settlement. Settlements unfortunately do not make a pronouncement on the legality of the defendant's behaviour and may take the class action out of the public realm as the terms of settlement may be confidential, decreasing negative publicity directed to the defendant. Settlements may also produce poor remedies for consumers. For example, some settlements for class proceedings against payday lenders have provided vouchers for redemption of payday lending services. These vouchers have the effect of perpetuating payday loan use and inducing customers to continue using their services. There are also practical difficulties with identifying customers who paid excessive late penalties and there have been observations that there is little uptake by eligible plaintiffs. Finally, there has been a trend of passing the cost of class action settlements back to customers. Enbridge has successfully applied to the Ontario Energy Board to recoup the costs of the $22 million settlement for *Garland v. Consumers Gas Co.* by increasing rates for its residential customers. Toronto Hydro and other municipal utilities in Ontario have similarly applied to the Ontario Energy Board to recover $17 million from ratepayers following a settlement of a class action relating to late fees. In effect, this move means that all consumers will ultimately pay the price for the late payment penalty practices of the utility industry.

Section 347 of the *Criminal Code* has undergone legislative reform to address concerns with the payday lending industry. Provinces wanted the ability to regulate payday loans and in 2007, s. 347 was amended to exempt payday lenders from criminal sanctions in provinces that license payday lenders and have implemented legislative measures designed to protect consumers and limit the overall cost of the loans. The resulting provincial regulation has been disappointing, with several of the provincial rates permitting excessive fees that translate to annual interest rates of 500% to 800%. The 60% ceiling imposed by s. 347 of the *Criminal Code* is less than adequate and the provincial regulations have not provided much better protection for consumers.

Other jurisdictions are also examining whether they need to specifically regulate the payday lending industry. In the United States, the regulation of payday lending is largely implemented at the state level. Only in sixteen states have there been an express interest rate cap for payday lending. The United States Congress passed a law that The United States Congress passed a law that caps lending to military personnel at a maximum of 36% APR, however there has not been federal legislation that caps interest rates for payday lending. The United Kingdom has also recognized the deep-seated nature of problems related to payday lending but has not recommended a cap on interest rates levied by high-cost credit providers. In recent years, Australia has transferred regulatory responsibility for consumer credit from the

states and territories to the Commonwealth Government. Australia is currently consulting for its National Consumer Credit Protection Reform Package, which will examine whether a national interest rate cap should be implemented. If an interest rate cap is implemented, this will directly impact the payday lending industry in Australia.

Compared to PIAC's 1998 survey of industry practices for charging late payment penalties, few telecommunications and utilities companies continue to charge administrative or processing fees for late payment penalties. All services providers continue to charge interest rates on late payments and most charge a fee for payments that bounce due to non-sufficient funds. Most providers specifically state in standard form contracts that they charge a fee for NSF bounces, likely to avoid the capture of their NSF fee into the definition of "interest". Recent class actions challenge how late payment penalties are charged when the customer pays bills on time but there is a delay in receiving the payment. The newest class action challenges Bell Canada's increase in the late payment interest rate.

While *Garland* was a positive step for consumers, it was recognized that its gains would never provide consumers with sufficient credit protection. Together with disappointing result in *De Wolf*, the provincial regulation of payday lenders that has allowed higher interest rates than the criminal usury rates and the problems with relying on class actions for consumer recourse, it seems that consumers have even fewer protections from exploitative credit arrangements today.

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1. INTRODUCTION

Millions of consumers subscribe to utilities and telecommunications services on a monthly billing schedule. If consumers miss a payment due date, the service likely charges late payment interest and may apply a late payment penalty fee or charge a processing fee for accounts that have late payments. Beginning with the notable case of *Garland v. Consumers' Gas* before the Supreme Court of Canada in 1998, courts determined that the definition of "interest" is broad.[1] It has been over ten years since the Supreme Court's decision in *Garland*. Since that decision, there have been more attempts to apply a broad interpretation of "interest" to charges arising from late payments, which have been the subject of class actions under s. 347.

Section 347 of the *Criminal Code* has also been used in class actions against payday lenders across the country. Scrutiny of the payday lending industry has resulted in Parliamentary scrutiny of s. 347 to facilitate provincial regulation of payday lending practices. The payday lending industry has also attracted regulatory attention in other jurisdictions around the world.

Conclusions of PIAC's 1998 Garland Report

The 1998 Supreme Court of Canada case of *Garland v. Consumers' Gas* was an unexpected case on the criminal rate of interest but brought about an important opportunity to revisit the need to provide safeguards for vulnerable consumers. The decision illustrated how consumers who possess little bargaining power may be protected from exorbitant usurious penalties and charges for late payment. Such punitive transaction costs often catapult the customer into further default.

PIAC's 2000 "A Garland for Consumers" report discussed how the industry practice of charging late fees has implications for consumers and especially how these practices impact consumer debt.[2] Rising debt threatens consumers' access to commodities that are vital to the maintenance of their standard of living.

PIAC's report noted that s. 347 of the *Criminal Code* was rarely used and the minimal consumer protections embodied in *Garland* would not be beneficial if consumers were left unaware of the usury provisions. Usury provisions are particularly confusing for consumers as violations are difficult to identify and calculate. Ex post facto application is not good enough for consumers. As well, the 60% ceiling imposed by s. 347 of the *Criminal Code* is less than adequate in protecting consumers from exploitative credit arrangements.

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[1] *Garland v. Consumers Gas Co.*, [1998] 3 S.C.R. 112.

[2] Public Interest Advocacy Centre, "A Garland For Consumers: Will the Garland Case Provide Safeguards for Vulnerable Consumers?" (2000), online: http://www.piac.ca/consumers/a_garland_for_consumers_will_the_garland_case_provide_safeguards_for_vulnerable_consumers/.

PIAC's report recommended that to address the issue of proxy debt spiral, consumers must be offered rates and prices that are affordable for public utilities. Second, with the use of *Garland*, ancillary fees must be minimized and exorbitant fees abolished. Third, utilities must offer consumers payment options and repayment plans that afford the consumer flexibility. Fourth, the abolition of late payment penalties must in no way accelerate shut off as universal service remains vital. Finally, any policy designed to minimize proxy debt must also come to terms with the current shift to deregulated energy and telecommunications markets.

While the *Garland* case marked an important first step for consumers with the Supreme Court explicitly recognizing that consumers must be shielded from exploitative credit transactions and excessive ancillary charges, it alone cannot provide consumers with sufficient protection. Section 347 of the *Criminal Code* must be integrated with other consumer protection measures.

Report Methodology

In this report, PIAC reviews case law developments since the 1998 *Garland* case discussing the criminal rate of interest provision of the *Criminal Code*. What is notable is how courts have determined what does and what does not constitute "interest" under s. 347. Special attention is devoted to the class action mechanism as an attempted mechanism for consumer recourse, which has been used to enforce s. 347 with several class actions targeting the payday lenders. Commentary with respect to its efficacy is provided.

Since *Garland*, Parliament has also scrutinized s. 347 in order to facilitate provincial regulation of payday lenders. Canadian federal and provincial legislation to address payday lending is reviewed with a criticism of provincial legislative approaches for the regulation of payday lending. PIAC also reviewed how other countries regulate and enforce interest rate caps, examining practices in the United States, United Kingdom and Australia.

Finally, PIAC explores the industry practice of penalizing consumers for late payments of their monthly bills by surveying industry to gather specific information about how companies charge consumers if the consumer is late to pay their monthly bill and the total resulting cost to the consumer. This industry survey contacted customer service representatives of utilities, telecommunications services and credit card providers and reviewed standard form consumer contracts to better understand industry practices for handling late payments by consumers.

2. SECTION 347 CASELAW

Section 347 until Garland case

An in-depth analysis of the history and construction of s. 347 and interpretation through case law up to the Supreme Court of Canada decision in *Garland v. Consumers' Gas Co.* was reviewed in PIAC's report, "A Garland for Consumers: Will the Garland Case Provide Safeguards for Vulnerable Consumers?".

Section 347 of the *Criminal Code* was passed in 1980 with a bill that repealed the *Small Loans Act* and amended the *Criminal Code* to criminalize excessive interest rates for the first time in Canada. The criminalizing of interest rates above 60% surpassed the safeguards found in existing provincial legislation at the time designed to protect consumers.

The construction of s. 347 creates two distinct offences: (1) it is an offence to enter into an agreement or arrangement to receive interest at a criminal rate; and (2) it is an offence to actually receive interest at a criminal rate. A criminal interest rate is defined as an interest rate that exceeds 60% on the credit advanced. "Interest" is defined broadly as any fee, fine, penalty, commission or similar chare or expense and composed of the aggregate of these expenditures. The section defines "credit advanced" in a broad fashion, as advanced credit is not limited to money but may intimate the value of goods, services or benefits.

The most basic principle evolving from case law surrounding s. 347 is that courts should focus on the transaction's substance as opposed to its form. This is relevant in determining both whether there is an "agreement or arrangement" and whether the expense in question is to be characterized as "interest". Courts commented that the definition of "interest" includes fees and charges of every kind, however described or disguised and "courts cannot permit the erosion of the protection of the public from usurious charges that Parliament manifestly intended to provide".[3] When calculating interest, the effective interest rate may be calculated on the basis of a specific contractual term or may be calculated based on the time between the advancement of credit and the actual repayment.

The 1998 Supreme Court of Canada *Garland v. Consumers' Gas Co.* decision focused on the interpretation and application of s. 347 of the *Criminal Code*, specifically whether the Late Payment Penalty, depending on when it was paid, could be said to constitute "interest" at a criminal rate. The Supreme Court of Canada found that the Late Payment Penalty could be construed as an "interest" charge on an advancement of credit because a deferral of payment constitutes an advancement of credit under s. 347. The court found that the interest charged was part of an arrangement that existed between Consumers Gas and its customers in accordance

[3] *William E. Thomson and Associates v. Carpenter* (1989), 69 O.R. (2d) 550 (Ont. C.A.).

with the terms of that arrangement imposed by Consumers Gas. The charge was also meant to compensate Consumers' Gas for the cost of payments deferred, which is a hallmark of a credit agreement. Thus, the Supreme Court of Canada held that s. 347 applied to the Late Payment Penalty and remitted the action to the Ontario Court General Division for proceedings in accordance with the *Class Proceedings Act*.[4]

Post-Script to Garland

Garland had paid approximately $75 in Late Payment Penalty charges between 1983 and 1995. Following the Supreme Court of Canada's decision in 1998, Garland commenced a class action seeking restitution for unjust enrichment of Late Payment Penalty charges in violation of s. 347 of the *Criminal Code*. The parties brought cross-motions for summary judgment and the motions judge granted Consumers Gas Co.'s motion for summary judgment, finding that the action was a collateral attack on the Ontario Energy Board's orders. The Ontario Court of Appeal disagreed but dismissed Garland's appeal on the grounds that his unjust enrichment claim could not be made out. Garland once again appealed to the Supreme Court of Canada. In 2004, the Supreme Court of Canada ordered Consumers Gas to reimburse millions of dollars of the late payment penalties to customers who paid a criminal rate of interest.[5] The Supreme Court judgment further develops the law of unjust enrichment and class actions, in holding that a transfer of money constitutes enrichment and further clarification of the third prong of the three-prong test for unjust enrichment.

Following the 2004 lawsuit to the Supreme Court of Canada, Consumers Gas (now Enbridge) agreed to pay $22 million to settle the lawsuit. Enbridge then asked the Ontario Energy Board to allow it to impose a special charge on its customers to recover the $22 million payment as well as illegal costs and interest charges. The Ontario Energy Board ruled, allowing Enbridge's request in February 2008, finding all costs including the settlement, legal fees and interest recoverable from ratepayers.[6] As a result, Enbridge residential customers would face an additional total charge of $13.50 spread over the next five years. In April 2008, Garland petitioned the Ontario Cabinet to review the Energy Board's decision.[7]

The following section is not intended to be a comprehensive historical look at s. 347 of the Criminal Code. This section serves as an update to key case law discussing components of s. 347 of the *Criminal Code* since the *Garland* decision. Many of these cases assist by clarifying the definition of what does and does not constitute "interest".

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[4] *Class Proceedings Act*, 1992, S.O. 1992, c. 6.
[5] *Garland v. Consumers Gas Co.*, [2004] S.C.J. No 21.
[6] Ontario Energy Board Decision EB-2007-0731 (4 February 2008), online: http://www.oeb.gov.on.ca/documents/cases/EB-2007-0731/Decision_Enbridge_CASDA_20080204.pdf.
[7] Canwest News Service, "Enbridge wants customers to pay for class action lawsuit" (4 May 2008).

Section 347 Case Law Update Since Garland

Clarifications to what can constitute "interest"

Non-Sufficient Fund (NSF) Fees

Non-sufficient fund (NSF) fees are charged when a cheque has been drawn on an account but the account in question has insufficient funds to clear that cheque. The Alberta Provincial Court in the 2008 decision of *EasyFinancial Services Ltd. v. Rivard* held that NSF fees may be considered interest within the meaning of "interest" in section 347. [8]

While NSF fees are not connected to the initial extension of credit and the fee can been avoided by the borrower simply paying on time, the Alberta Provincial Court found that it is still nonetheless a part of the cost of borrowing.[9] The question in this case was whether the personal loan agreement in the amount of $2,500 was enforceable against Rivard. The agreement stated that the fixed annual rate of interest was 59.9 per cent with the total interest payments of $57.50 per month for insurance under a loan protection plan. The loan protection plan made it clear that the cost of the loan insurance was $2.20 per $100. Rivard was charged an additional $50 fee for a previously dishonoured payment, a NSF fee. The court commented about NSF fees: "Although the NSF fee was payable upon a cheque being dishonoured and "not in connection with the initial extension of credit" it was nevertheless part of the cost of borrowing. Even though NSF fees could have been avoided by the borrower simply upon paying in time, which was demonstrated in *Garland*, this would not prevent the fee from being determined to be interest."[10] However, there was no disclosure in the documents that there was a possibility of additional fees or penalties for dishonoured payments. EasyFinancial was awarded $1,056 and it was found that the transaction interest rate exceeded the criminal interest rate and EasyFinancial failed to properly disclose the transaction to Rivard.

By contrast, the Manitoba Court of Queen's Bench in 2009 in *Keystone Finance Inc. v. Phillipot* found that fees associated with NSF fees were not interest for the purposes of s. 347 of the *Criminal Code*. [11] The facts of *Keystone* are as follows: Keystone was in the business of providing longer-term loans (approximately 24 months) to persons in financial difficulty or bankruptcy who could not obtain credit through usual lenders. Mr. Phillipot borrowed $1000. He was charged a $99 brokerage fee and the contract stated that he would be charged a $40 NSF fee every time a cheque was dishonoured. A breakdown associated with the charge was offered as justification for the fee. Nine of the nine cheques that Mr. Phillipot gave Keystone were dishonoured

[8] *EasyFinancial Services Ltd. v. Rivard*., [2008] A.J. No. 1407 at para. 13, 100 Alta. L.R. (4th) 368., appealed and order varied in [2009] A.J. No. 600 (see paras. 27-35 for discussion of NSF as interest).
[9] *Easy Financial Services* at para. 13.
[10] *Easy Financial Services* at para. 13.
[11] *Keystone Finance Inc. v. Phillipot,* [2006] M.J. No. 477 at para. 23, 210 Man. R. (2d) 118.

and each time, Keystone added $40 to the amount already owing. The court held that charges, expenses or penalties associated with non-sufficient funds are not for purpose of advancing credit under an agreement or arrangement. Thus, the NSF fees were not interest for the purposes of section 347. Rather, these charges "arise as a result of attempts to obtain the monthly payments when due, an attempt made after the credit is advanced."[12] However, the court found the $40 charge associated with the NSF fee unreasonable and accordingly reduced the fee to $15. In *Affordable Payday Loans v. Harrison*, the court issued a similar finding that NSF fees were not interest for the purposes of s. 347 resulted.[13]

Distinguishing *Rivard* and *Keystone* turns on whether there was disclosure to the borrower about the NSF fee in the agreement. In finding that NSF fees are not interest as per s. 347 of the *Criminal Code* in *Keystone*, the Manitoba Court of Queen's Bench found that the agreement specified that the NSF fee was a "reasonable pre-estimate of costs that might be incurred by the lender as a result of a dishonoured cheque."[14] The lender, Keystone Finance, explained the costs associated with NSF cheques by providing a breakdown of the fees in the agreement.[15] By contrast, there was no mention made of NSF fees in the agreement contemplated in *EasyFinancial* nor was there any breakdown of the costs that might have been associated with a dishonoured payment.

Processing Fees

The British Columbia Court of Appeal decision in 2007 in *Kilroy v. A OK Payday Loans Inc.,* dealt with short-term loans of small amounts from three businesses in British Columbia.[16] These "payday loans" were for amounts generally between $100 and $500 and advanced under standard form loan agreements. The term of the loan was for 15 days or until the borrower's next payday, which ever came first. Interest was charged for a two-week period at 21 per cent *per annum*, together with a processing fee of 19 per cent or more of the principal sum advanced ("the processing fees"). In order to obtain a loan, each borrower was required to provide A OK with a signed cheque for the total amount of the sum advanced, the interest charged, and the processing fees. A OK held the cheque as security and used it to obtain repayment if the borrower did not exercise an option to repay the loan by other means, such as cash payment or a debit transaction. If the borrower failed to repay the loan and the cheque was not honoured, the standard agreement required the borrower to pay a further fee of $75 that it called the "late fee". The court in this case found that when a processing fee is "sufficiently connected to the loans to be a charge payable or paid for the advancing of credit", it can constitute "interest" as per section 347 of the *Criminal Code*. *Kilroy* reinforces the Supreme Court of Canada's decision in *Garland*

[12] *Keystone Finance* at para. 23 (emphasis added).
[13] [2002] A.J. No. 824 (Alta. Prov. Ct. J.).
[14] *EasyFinancial* at para. 34.
[15] *Keystone Finance* at para. 15.
[16] *Kilroy v. A OK Payday Loans Inc.*, [2006] B.C.J. No. 1885 [B.C. Sup. Ct.].

that fees associated with late payment penalties can be interest.[17] However, the applicability is narrowed by the recent decision in *De Wolf v. Bell ExpressVu*, which is discussed later in this report.

Insurance

Insurance is not usually considered to be interest, however if it is mandatory, for example, part of a standard form contract as a mandatory condition to securing an advance of credit as required by some mortgages, then it will be considered interest. If insurance was optional, then the portion retained by the creditor would be commission for the sale of insurance coverage, which is separate and apart from the loan and thus part of the cost of borrowing. However, if the insurance is mandatory then it is considered an added cost of borrowing.[18] This was held by the court in *EasyFinancial*:

> The appearance of these clauses in the standard forms the borrowers must sign prior to taking out a loan indicates that the insurance is not an option. Nowhere on the standard form does it indicate that the borrower can opt out of the insurance. Further, the Plaintiffs representative during the assessment admitted in his evidence than one-half of the $57.50 per month insurance paid by the borrower is deducted "off the top" and retained by the Plaintiff. Therefore, over the period of 12 months, the Plaintiff would receive an additional $345.00 (50% of $690.00) under the characterization of an insurance premium. If the insurance were optional and not mandatory, it could have been argued that the portion retained by the Plaintiff was commission for selling the client the insurance overage, that is, separate and apart from the loan. If this argument was to be accepted it would not be part of the cost of borrowing. However, given the mandatory nature of this insurance (i.e. "I ... hereby make application to enroll in the LPP ..."), I conclude that this extra fee is an added cost of borrowing. Although the Plaintiff has made it clear in the documentation to call it an insurance premium, in my view, this is simply to attempt to avoid the characterization of the cost of insurance or a portion thereof as "interest" under the definition of interest set out in section 347(2) of the *Code*. After all, arguably only half of that insurance premium is actually applied to the cost of actual insurance, the other half being retained by the Plaintiff as an added fee.[19]

Agreements made by pawn shops

In one case, s. 347 of the *Criminal Code* was used to challenge a loan agreement made between an individual and a pawn shop. In 2009, the Alberta Provincial Court in *Collington v. A1-Pawn Ltd* found a pawn shop agreement to be unenforceable and void as a result of interest being charged at a criminal rate of interest.[20] In this case, Collington borrowed $3,500 and gave A1-Pawn Ltd valuable possessions as security. When her loan matured one month later, she had to pay $4,550 to recover her items.

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[17] *Kilroy v. A OK Payday Loans Inc.*, [2007] B.C.J. No. 820 at para. 20.
[18] *EasyFinancial* at para. 16.
[19] *EasyFinancial* at para. 16.
[20] *Collington v. A1-Pawn Ltd.*, [2004] A.J. No. 1354 (Alta. Prov. Ct.).

Over a six-month period, Collington paid $9,926 only to have some of her items were returned, with her most valuable item held by the pawn shop as the owner claimed more money was owed. Collington was an unsophisticated consumer and English was her second language. In addition, she desperately needed money because her husband was ill and she had fallen behind in mortgage payments and was in danger of losing her home. Thus, she was in no position to negotiate with A1 Pawn Ltd. and the terms of the agreement were dictated to her. The agreement was found by the court to be unenforceable and void as a result of interest being charged at a criminal rate of 30 per cent interest for a 30-day period, which amounts to a 360 per cent annual interest rate.

What is not interest

Administration Fees: De Wolf v. Bell ExpressVu

The facts of this case are as follows: De Wolf was a subscriber to the satellite television services offered by Bell ExpressVu. De Wolf claimed that Bell ExpressVu's administrative fee of $25.00 on late accounts after 60 days amounted to an illegal interest charge under s. 347 of the *Criminal Code*. Bell ExpressVu argued that the fee is "lawful liquid damages," a genuine pre-estimate of costs incurred to recover its customer's delinquent accounts. De Wolf launched a class action seeking to recover the impugned charge and punitive damages. The proceeding was certified as a class proceeding in 2008.

The issue in the case was whether the administrative fee set out in Bell's standard form contract constituted "interest" under section 347 of the *Criminal Code*. Justice Perell of the Ontario Superior Court stated that the court must examine the substance, not merely the form, of the payment relationship in answering the question of whether a charge is incurred by customers to receive credit.[21] Justice Perell found that the agreement between Bell ExpressVu and its customers must in substance be for advancing the monetary value of goods or services and the charge imposed as the price for the deferral of payment is the interest. Notably, Justice Perell drew a parallel between Bell ExpressVu's administrative fee and the processing fee in *Kilroy v. A OK Payday Loans Inc.* imposed by A OK Payday Loans for the late payment of a payday loan. In *Kilroy*, the processing fee was only imposed in the event of default and calculated by reference to the costs incurred by the lender as a result of the borrower's default.

The court held that the administration fee constituted interest in contravention of s. 347 and awarded summary judgment in favour of De Wolf. The Ontario Superior Court of Justice decision was a positive decision for consumers with significant guidance taken from *Garland v. Consumers Gas Co*, allowing administrative fees charged on late accounts to be included in the definition of "interest" for s. 347. Justice Perell refused to accept Bell ExpressVu's argument that their administration

[21] *De Wolf v. Bell ExpressVu Inc.*, [2008] 298 D.L.R. (4th) 526 (Ont. Sup. Ct. J.) at para. 33.

fee levied 35 days after the due date of a bill was for liquidated damages or payment to offset Bell ExpressVu's costs when a subscriber's account remains unpaid.

Bell ExpressVu appealed the order dismissing their motion for summary judgment and appealing Justice Perell's order for summary judgment declaring the administrative fee to be interest for the purpose of s. 347 of the *Criminal Code*. The Ontario Court of Appeal in September 2009 held that the administration fee charged by Bell ExpressVu was not interest for purposes of s. 347, allowing the appeal and dismissing the action.[22] The Court of Appeal found that the fee was unrelated to the advancing of credit.

The court held that the charges were determined to be recovery for a disbursement rather than a cost or penalty for the advancing of credit.[23] The Ontario Court of Appeal did not similarly see the parallel between the administrative fee charged in *De Wolf* and the late payment penalty and processing fee in *Kilroy*.[24] The court distinguishes *Kilroy* because the late fee penalty in that case was tied to the advancement of credit and not merely the recovery of a disbursement.

The court characterized the administration fee as a "legitimate pre-estimate of the costs incurred by the appellants when accounts remain outstanding for more than 60 days", more properly characterized as a recovery of a disbursement than as a cost or penalty for the advancing of credit.[25] The distinction that this court made from *Garland* focused the relationship from which the agreement was created. Agreements between institutions whose business it is to lend money, fees and extra charges are connected to that lending of money and advancement of credit whereas agreements between service providers and a consumer may be, but will not necessarily be, connected to the advancing of credit.[26] The Ontario Court of Appeal also cautioned against using the perception of subscribers to determine whether a fee or charge is considered an advancement of credit.[27]

De Wolf filed an application for leave to appeal the decision of the Ontario Court of Appeal for Ontario to the Supreme Court of Canada in November 2009. On March 25, 2010, the Supreme Court of Canada denied the application for leave to appeal and the action was complete. This result is disappointing for consumers.

Discount for early payments

In *Scarlett v. Fortis BC*, the British Columbia Supreme Court in 2007 set an interesting precedent regarding what is not interest. In this case, an electricity company discounted their customers' bills by 10 per cent if the customer paid before the due

[22] *De Wolf v. Bell ExpressVu Inc.,* [2009] O.J. No. 3707, 311 D.L.R. (4th) 68 (Ont. C.A.).
[23] *De Wolf v. Bell ExpressVu* (Ont. C.A.) at para. 43.
[24] *De Wolf v. Bell ExpressVu* (Ont. C.A.) at para. 41.
[25] *De Wolf v. Bell ExpressVu* (Ont. C.A.) at para. 43.
[26] *De Wolf v. Bell ExpressVu* (Ont. C.A.) at paras. 39 to 40.
[27] *De Wolf v. Bell ExpressVu* (Ont. C.A.) at para. 52.

date of the monthly bill. One of their customers brought an action arguing that Fortis BC was charging customers an extra 10 per cent every month , which exceeded the criminal rate of interest. The court found that the 10 per cent discount was applied to payments before the due date and since credit can only arise after payment is due, the discount cannot be associated with an advance of credit and therefore does not constitute "interest".[28]

> Since the defendant only allowed the discount on payments made before the due date, and since credit can arise only after payment is due, it follows that the discount cannot be associated with an advance of credit. Section 347 of the *Code* is concerned only with interest charged on an advance of credit. If the discount in issue here cannot be interest within the meaning of that section, then the giving of it cannot engage the *Code*'s sanction against criminal interest.[29]

Remedies

In the case of *Transport North American Express Inc. v. New Solutions Financial Corp.*, the Supreme Court of Canada in 2004 stated that the traditional rule that contracts in violation of statutory enactments are void *ab initio* is not the approach that courts should necessarily take in cases of statutory illegality involving s. 347. Judicial discretion should be employed and the following remedies are available flowing from a violation of s. 347 of the *Criminal Code*:

> A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the Code. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitive loan-sharking arrangements and contracts that have a criminal object should be declared void ab initio. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. The agreement in this case is an example of such a contract. In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved.[30]

Factors affecting remedies

The factors in deciding what remedy applies are:

> (i) whether the purpose or the policy of s. 347 would be subverted by severance; (ii) whether the parties entered into the agreement for an

[28] *Scarlett v. FortisBC Inc.*, [2007] B.C.J. No. 54 at para. 16.
[29] *Scarlett v. FortisBC* at para. 16.
[30] *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249 at para. 6.

> illegal purpose or with an evil intention; (iii) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (iv) whether the debtor would be given an unjustified windfall.[31]

Some cases have expanded on considerations of the factors affecting remedies. For example, the court may inquire as to whether or not the contract was negotiated by equals.[32] Part of the inquiry may examine how sophisticated the parties are, whether one of the parties is acting out of desperation or unrepresented by counsel.[33] As well, the court may consider whether the creditor has been convicted of similar infractions in the past.[34] An additional factor affecting remedies is whether the loan agreement is deceptive in the sense that it fails to disclose the amounts actually advanced as well as an accurate breakdown of the fees and interest.[35]

[31] *Whitrow v. Hamilton*. 2010 SKCA 7, at para. 16 – this test was originally cited in *William E. Thomson Associates Inc. v. Carpenter* (1989), 61 D.L.R. (4th) 1.
[32] *Eha v. Genge*, [2006] B.C.J. No. 1882 at para. 4, 60 B.C.L.R. (4th) 183.
[33] *Collington v. A1-Pawn Ltd*., 2004 A.J. No. 1354, at para. 4.
[34] *Kotello v. Dimerman*, [2006] M.J. No. 308 at para. 23.
[35] *Stop n' Cash 1450 v. Box*, [2005] O.J. No. 1233 at para. 23.

3. CLASS ACTIONS AS A MECHANISM TO ENFORCE CRIMINAL INTEREST RATE PROVISIONS

A major legal development since PIAC's 1998 "Garland for Consumers" report is the use of class action lawsuits to enforce s. 347 of the *Criminal Code*.[36] In many cases, these class action lawsuits target the payday lending industry. The amounts sought for recovery are too low to justify an individual taking on a utility giant or a payday loan company.

Mandatory arbitration clauses as a barrier to class action?

The conflict between legislation dealing with arbitration and legislation dealing with class action proceedings has been a topic of dispute in both British Columbia and Ontario and impacted two s. 347 class actions against Money Mart. Some contracts for loans from payday lenders include clauses regarding mandatory arbitration in the event of a dispute. In response to this, courts have determined in two cases that arbitration is not allowed in disputes related to criminal rates of interest as these payday lenders never seek arbitration when enforcing their own rights and having the arbitration clause has the effect of defeating their customers' potential class action proceedings. These cases are discussed below.

MacKinnon v. National Money Mart Company et al.

In 2003, the *MacKinnon v. National Money Mart Co.* class action filed in British Columbia sought restitution of fees paid to all payday lenders making loans in British Columbia.[37] The plaintiff alleged that the loans were made with an effective annual

[36] In British Columbia, see for example, *Bodnar v. The Cash Store Inc.* (2005), B.C.J. No. 1904 (Sup. Ct. J.). See also *Parsons v. Coast Capital Savings Credit Union* (2006), BCSC 552; appealed [2007] B.C.J. No 859 (C.A.). See also *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, [2006] B.C.J. No. 1639 (Sup. Ct.); also [2008] B.C.J. No. 971 (S.C.). See also *Kilroy v. A OK Payday Loans Inc.*, [2006] B.C.J. No. 1885; appealed (2007) 278 D.L.R. (4th) 198 (B.C. C.A.). See also *Smith v. Vancouver City Credit Union*, [2007] B.C.J. No. 1200; appealed [2008] B.C.J. No. 1299; leave to appeal dismissed by the Supreme Court of Canada on July 10, 2008. See also *Bartolome v. Mr. Payday Easy Loans Inc.*, [2008] B.C.J. No. 167 (Sup. Ct.). In Ontario, see for example, *Markson v. MBNA Canada Bank*, [2005] O.J. 4625 (Sup. Ct. J.); appealed (2007) 85 O.R. (3d) 321 (C.A.). See also *McCutcheon v. Cash Store Inc.*, [2006] O.J. No. 1860 (Sup. Ct. J.). See also *Smith v. National Money Mart Company*, [2006] O.J. No. 4269 (C.A.); also *Smith v. National Money Mart Company*, [2007] O.J. No. 46 (Ont. Sup. Ct. J.); also *Smith Estate v. National Money Mart Company*, [2008] O.J. No. 2248 (Ont. Sup. Ct. J.). There are fewer class actions in other provincial jurisdictions, but for some examples, see *CAPS International v. Kotello* (2002), 6 W.W.R. 307 (Man. Q.B.); *Ayrton v. PRL Financial (Alta) Ltd.* (2006), AB CA 88; *EasyFinancial Services Ltd. v. Rivard*, [2008] A.J. No. 1407 (Alta. Prov. Ct.).

[37] This class action was Kurt MacKinnon v. National Money Mart Company, Canadian Cheque Cashing Corporation, Payday Loans Ltd., Pay Credit (B.C.) Ltd., Stop N' Cash 1000 Inc., Instaloans Financial Solution Centres (Kelowna) Ltd., Instaloans Financial Solution Centres

interest rate of greater than 60% and therefore illegal under s. 347 of the *Criminal Code*. The action also sought damages for breach of British Columbia's *Unconscionable Transactions Act* and punitive damages. By some estimates, the cost of this class action could cost payday lenders in British Columbia up to $250 million.

The loan agreements in question contained arbitration clauses. Money Mart argued for a stay of the class action several times on the basis that the arbitration clause prevented the class proceeding. The British Columbia Court of Appeal found that the reasoning in the cases of *Dell* and *Rogers* required a court to defer to the parties' choice of arbitration, even though their dispute has been or may be certified pursuant to the *Class Proceedings Act*.[38] However, the court of appeal stopped short of referring the dispute to arbitration because it found that issue estoppel precluded the court from giving effect to the change in law at such a late point in the case. The court of appeal also found that there would be no obvious injustice in denying the Money Mart defendants the benefit of a change in the law because of the long and tortuous course of litigation and the fact that part of the action would continue in the courts regardless.

The British Columbia Supreme Court approved a settlement of the class action against Money Mart and its parent company, Dollar Financial Group, Inc., on July 19, 2010. Settlement class members are defined as residents in British Columbia at any time after January 29, 2003 who, in the period January 29, 1997 to July 11, 2009 obtained an Eligible Fast Cash Transaction and were a Money Mart customer who in the period July 12, 2009 to October 31, 2009 obtained for the first time in British Columbia an Eligible Fast Cash Transaction. The terms of the settlement entitle class members to submit a claim to receive a refund of up to 100% of the cheque cashing fees they paid, subject to reductions for legal expenses and repayment of any unpaid loans. Refunds will be paid 50% in cash and 50% as a Deferred Cash Payment and Services Voucher that is redeemable for cash in 3 years from issuance. The Deferred

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(Vernon) Ltd., Instaloans Financial Solution Centres (B.C.) Ltd., Sorensen's Loans 'Til Payday Inc., Cash Factory Loans Inc., 594506 B.C. Ltd., Kleincorp Mgmt. Inc., Check Station Inc., Ca$hier Inc., Nationwide Payday Loan Advance Ltd., The Little Loan Shoppe Ltd., Cash Advantage Services Ltd., John Doe No. 1 dba Cash Exchange, Moneypot Financial Services Inc., 555538 B.C. Ltd., Mr. Payday Easy Loans Inc., The Yellow Cash Center Inc., Clinton Tynes dba Cash Quick Services, Cash Now Financial Services Inc., John Doe No. 2 dba Premier Cash Advance, Money Sense Check Services Inc. and Cash Corp. (Court file #S030572) Vancouver, British Columbia, Supreme Court of Justice (January 29, 2003). See also *MacKinnon v. National Money Mart Co.,* (2004), 50 B.L.R. (3d) 291 (B.C.C.A.). The action was certified in 2007 (2007 SCSC 348). In the years between 2004 and 2010, the defendants "took a hard-line defense" by seeking to stay the actions, applying to strike the Plaintiffs' claims, appealing to the Court of Appeal multiple times, appealing to the Supreme Court of Canada ([2004] S.C.C.A. No. 512, appeal dismissed), and opposing motions for consolidation and continuance of the Plaintiffs' actions.

[38] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 and *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921.

Cash Payment and Services Voucher can also be used immediately for services at a Money Mart store. To fund the settlement, Money Mart will establish a Settlement Fund of $24.5 million in cash and preloaded credits.[39]

Smith Estate v. National Money Mart Co.

In *Smith Estate v. National Money Mart Co.*, the class action was commenced in 2003 seeking to require National Money Mart to pay damages equal to charges on payday loans or fast cash advances on the basis that the charges breached s. 347 of the *Criminal Code*.[40] The contracts contained an arbitration clause, which, if upheld, would have denied the plaintiff the opportunity to bring a class action against the company. Money Mart defended the action, asserting that its business model operated within the rules and counterclaimed seeking the repayment of debts owed to it by its customers. Prior to the class certification motion, Money Mart brought a motion for a stay of proceedings and to have the claims referred to arbitration. The motion was denied and on appeal, the court declined to rule on whether previous Supreme Court decisions of *Dell* and *Rogers* had changed the law in Ontario or whether ss. 7 and 8 of the *Consumer Protection Act, 2002* had retroactive effect.[41] The court instead based its decision on the doctrine of issue estoppel. The court held that whether or not an arbitration clause is to be enforced should be considered as part of the preferable procedure analysis on a motion for class certification. The court exercised its discretion and rejected Money Mart's appeal, noting that the matter had advanced to the point of trial after years of motions and several appeals including two applications for leave to appeal to the Supreme Court of Canada: "a stay would defeat the claims subject to arbitration clauses, not on the merits but for reasons of practicality."[42]

The class action was certified in 2007 and the trial began in April 2009. A settlement agreement was negotiated in June 2009 and it was valued at over $120 million with

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[39] For full terms of the settlement, please see: http://complexlitigation.ca/class_actions/money_mart/.

[40] The *Smith v. National Money Mart* case began in 2003, but was not certified as a class action until 2007, with settlement finally approved in 2010. As summarized by Perell, J. in *Smith Estate v. National Money Mart Company*, 2010 ONSC 1334 at para. 11, in the years between 2003 and 2010, "there were two motions to stay the action, a certification motion [37 C.P.C. (6th) 171], a decertification motion, and a motion for summary judgment. There was one leave application to the Divisional Court [[2007] O.J. No. 2160], four appeals to the Court of Appeal [2009 ONCA 455; 2008 ONCA 746; 80 O.R. (3d) 81; 258 D.L.R. (4th) 453], and three leave applications to the Supreme Court of Canada [[2006] S.C.C.A. No. 267; [2005] S.C.C.A. No. 528]. There were 39 orders, 12 endorsements, and 4 judgments. Eventually, the action was called to trial…and there were 17 days of trial [2009 ONCA 455]." Final settlement was approved in 2010 (2010 ONSC 1334).

[41] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 and *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921. Sections 7 and 8 of the Ontario *Consumer Protection Act*, 2002 permit consumers to participate in a clause action even if the contract contains an arbitration clause.

[42] *Smith Estate* at para. 50 (Ont. C.A., 2008).

components of cash to class members, class counsel fees, release of debts owed by class members, transferable transaction credits to class members, payment to the Class Proceedings Fund, and administrative costs.[43] The settlement class was defined as all persons who between August 19, 1997 and December 31, 2009, received a payday loan or fast cash advance from a Money Mart store in Ontario or franchisee which was repaid by a first party personal cheque delivered on the day the loan was obtained, provided that the cheque was honoured by the bank. The court approved the settlement agreement in March 2010 with the debt and transaction credits to be available immediately and the cash credits to be available after July 15, 2011.

Limitation Period and Class Actions

Smith v. Vancouver City Savings Credit Union

In *Smith v. Vancouver City Savings Credit Union*, Smith alleged that the credit union charged overdraft fees incurred in 1996 in contravention of s. 347.[44] From 1983 onward, VanCity Savings Credit Union charged overdraft fees to its members at various times for overdraft loans extended to honour cheques drawn on accounts containing insufficient funds. Smith paid three overdraft charges of $10 each. In the class action, Smith alleged that those fees were charged unlawfully on the basis that they constituted interest at a criminal rate and that the credit union was unjustly enriched. Smith claimed an accounting, restitution and damages. She sought repayment on the basis of constructive trust. The action was commenced in 2004 and seeks to recover monies VanCity has collected in excess of the maximum amount permitted under s. 347.

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[43] For details of the settlement benefits, see: http://moneymartclassaction.com/faq.php:

> The settlement has a value of approximately $120 million, made up of the following components: (a) $13 million in cash (less the 10% levy to the Class Proceedings Fund) to be distributed to class members; (b) $14.5 million to pay class counsels' fees, disbursements and taxes. Class Counsel have appealed this component of the settlement. A copy of the notice of appeal may be viewed here; (c) the release of all debts owed by settlement class members to Money Mart on April 30, 2009 that were still outstanding on December 31, 2009. The value of these debts is $56,252,076; (d) $30 million in transferable transaction credits allocated on a pro rata basis to each settlement class member who does not have a debt to Money Mart which is released under the settlement. These transaction credits can be used for certain Money Mart products in all corporate and franchise stores in Canada, except stores located in the Province of Quebec, or they may be transferred or sold to other individuals; (d) payment of the $3,000,000 levy of the Class Proceedings Fund on the transaction credits; and (e) payment of administrative costs estimated to be $2,000,000.

[44] *Smith v. Vancouver City Savings Credit Union*, [2007] B.C.J. No. 1200 (B.C.S.C.); appealed [2008] B.C.J. No. 1299 (B.C.C.A.); class action certified [2010] B.C.J. No. 152 (B.C.S.C.).

The credit union sought dismissal of Smith's claim as barred by the six-year limitation period. Smith claimed that VanCity holds the disputed overdraft charges in a constructive trust for the benefit of the plaintiff and the class members. The limitation period for a constructive trust would be ten years under the *Limitation Act*. The British Columbia Supreme Court found that the ten-year limitation period applied as it was too early in the proceedings to tell whether a remedial constructive trust was an appropriate remedy. The court dismissed VanCity's application. VanCity appealed this decision but the British Columbia Court of Appeal found that the trial judge was correct.

On January 29, 2010, the British Columbia Supreme Court certified the class action. The class was defined as all persons resident in British Columbia who are or were members of VanCity and who received, prior to February 5, 1997, an overdraft loan from VanCity honouring a cheque or other instrument drawn by the member when there were insufficient funds standing to the credit of the member's account and paid an overdraft charge in excess of $5.

Commentary on Consumer Class Actions as a Mechanism for Consumer Recourse

Class actions are governed under provincial jurisdiction and each province and territory has their own legislation pertaining to class actions. For example, the province of Ontario has the *Class Proceedings Act*.[45] The Supreme Court of Canada has held that class proceedings are intended to further three goals: judicial economy, access to justice and behaviour modification.[46] These goals are intended to inform judicial decision-making and when contemplating the certification of a class action, judges should conduct their inquiry through the lens of these three goals. Certification of a class action can transform individually non-viable claims into collectively viable claims because class actions are a means by which rights that go otherwise unasserted on an individual level can be asserted in the aggregate.

This section examines how effective the class action mechanism is for the enforcement of s. 347 of the *Criminal Code* to achieve these three goals, especially for consumer access to justice.

Advantages of Class Actions

> Consider the following scenario: a bank unlawfully deducts one half cent from the accounts of 1.5 million customers each month for 15 years. Customers complain, but the bank refuses to return the funds. Over time, customers might lose a few dollars each, but the loss to each individual is so minimal as to be almost meaningless. Nevertheless, the bank unlawfully profits to the tune of more than $1 million. Although the loss suffered by each customer is tiny, their rights have been infringed. They have a right to recover that money

[45] *Class Proceedings Act*, 1992, S.O. 1992, c. 6.
[46] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 27-29.

> from the bank. No sane individual or rational economic actor, however, would take on the expense of a lawsuit to recover their missing pennies. The economic cost, the opportunity cost, and the sheer difficulty of recovering such a small amount from an institutional defendant conspire to prevent recovery. Only a class action offers plaintiffs the opportunity and the means to recover their money and deprive the bank of its unlawful gain.[47]

The above example demonstrates that there is strength in numbers - that without class action litigation it would be very difficult, even illogical, to pursue an action for an insignificant amount. Without class actions, the opportunity to "have one's day in court" would fail to make good economic sense. Thus, one of the largest advantages of class actions is that class actions grant consumers some access to justice and the possibility of pursuing lawsuits that would otherwise be inefficient or unaffordable for individuals to pursue on their own.

Successful class actions, in turn, attempt to place consumers and corporations at the same level by forcing corporations to disgorge the profits that they made at the expense of their customers.[48] Class actions that relate to s. 347 of the *Criminal Code* seek to bring justice to consumers who have been charged illegal rates of interest. Consumers can often be taken advantage of with charges of exorbitant interest, which may be masked as fees, leaving them at the mercy of these businesses. Class actions serve as a mechanism to remedy this problem by attempting to level the playing field.

Disgorging profits is advantageous for consumers not only because they receive what is rightfully owed to them, but also because it puts other businesses on notice that if they act in a similar manner they too may suffer repercussions.[49] This achieves one of the three goals of class actions: behaviour modification. Disgorging profits also brings awareness to the issue. For example, s. 347 class actions bring to the attention of other similar customers that they have rights that also may have been infringed leading them to either join an existing class action or to start their own class action lawsuit.

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[47] Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47 Alta. L. Rev. 185 at 188.

[48] David A. Crerar, "The Restitutionary Class Action: Canadian Class Proceedings Legislation for the restitution of Unlawfully Demanded Payments , Ultra Vires Taxes and Other Unjust Enrichments" (1998) 56 U. T. Fac. L. Rev. 47 at 71. "Disgorgement" is defined as the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion in B.A. Garner, *Black's Law Dictionary*, 9th ed. (St. Paul: West, 2009).

[49] Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47 Alta. L. Rev. 185 at 205.

Class actions also help consumers overcome non-economic, psychological barriers to litigation.[50] Mathew Good describes the ability of class actions to minimize, and in some instances eliminate, psychological barriers:

> Proceeding as a class can iron out demographic and cultural differences and weaknesses; counsel can tailor their communications to the characteristics of their client, and a wider class means an averaging out of differences. Negative perceptions of the legal system can be mediated by the double intermediaries of counsel and the class representative. Psychological barriers can be overcome by careful selection of a class representative mentally prepared to face the ordeal of litigation.[51]

Psychological barriers are especially relevant to s. 347 class actions. Section 347 class actions, especially those targeting payday lenders, may involve class members who are not highly educated and who often live paycheque to paycheque.

However, it is important to realize that although class actions may prove to be economically efficient and increase access to justice for those who in traditional circumstances would not be able to seek judicial relief, class actions have their imperfections and do not always provide justice for consumers.

Disadvantages of Class Actions

There are financial challenges associated with launching a class action.[52] The representative plaintiff is entrusted with finding the financing to advertise and launch the suit.[53] The Rules of Civil Procedure in Ontario require class representatives to concern themselves with the possibility of cost awards should they lose the action. The unsuccessful party may be liable for the successful party's costs despite the reality that many plaintiffs do not have access to such funds and the defendants in class action litigation are already well financed. Thus, the potential of having to pay the winners costs acts as a significant deterrent to some contemplating pursuing an action.[54]

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[50] Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47 Alta. L. Rev. 185 at 192.
[51] Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47 Alta. L. Rev. 185 at 199.
[52] David A. Crerar, "The Restitutionary Class Action: Canadian Class Proceedings Legislation for the restitution of Unlawfully Demanded Payments , Ultra Vires Taxes and Other Unjust Enrichments" (1998) 56 U. T. Fac. L. Rev. 47 at 82.
[53] David A. Crerar, "The Restitutionary Class Action: Canadian Class Proceedings Legislation for the restitution of Unlawfully Demanded Payments , Ultra Vires Taxes and Other Unjust Enrichments" (1998) 56 U. T. Fac. L. Rev. 47 at 82.
[54] It should be noted that in Ontario, the Class Proceeding Fund, if applied to and the application is successful, offers the class disbursements if they are unsuccessful. In Quebec, legal fees are paid out of the fund on.

Class proceeding legislation begins with a claim that is brought on behalf of a defined class of two or more members against the defendant(s). In most provinces, shortly after the action is commenced, the plaintiff is required to make an application to certify the action as a class proceeding. Until the court certifies the action, the representative plaintiff cannot proceed on behalf of the class. Certification is hard to achieve, which adds to delay (addressed below). If and when certification is achieved, many class actions usually settle out of court.[55] A settlement can result in a class settling for less than they might have received if they had proceeded to court with the claim and won, even though proceeding to court can be a risky endeavour. Settling out of court also has the effect of minimizing behaviour modification. A settlement may take the class action out of the public realm and behind closed doors as the terms of the settlements are often confidential thus decreasing the often negative publicity directed towards the defendant and similarly decreasing awareness to the issue of consumer exploitation in class actions such as those that relate of s. 347.[56] Class actions that settle out of court may be a product of the fact that class action counsel fees are high. The risk and length associated with class actions creates a situation in which class members attempt to minimize counsel costs associated with proceeding to court with the claim.[57]

A major problem with class actions is delay. For example, in the case involving National Money Mart described above, a notice of action was issued in August 2003, the case proceeded to court in April 2009 and the case settled out of court and settlement was approved March 3, 2010.[58] Another example involving Cash Money Cheque Cashing Inc, the statement of claim was filed in October of 2003 and the case settlement was approved June 2009.[59] These cases took almost seven years to reach a settlement. Cases that proceed to court often take longer. It can take a long time for consumers to find justice.

When cases finally settle or a decision is handed down, often the remedies are less than ideal. For example, in the case involving Instaloans (now known as Cash Store Financial) in British Columbia, the class members settled for a maximum $14 million to

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[55] Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke J. Comp. & Int'l L. 269 at 279-280.
[56] John C. Kleefeld, "Class Action as Alternative Dispute Resolution" (2001) 39 Osgoode Hall L.J. 817 at 827.
[57] Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke J. Comp. & Int'l L. 269 at 273. Although contingency fees (where counsel agrees to take on the litigation and recover fees and disbursements only in the event of success) are available to fund class action litigation, they are a risk that some lawyers may not be willing to take. Class members in Ontario and Quebec also have access to a class proceeding fund to help fund their action but in Ontario the fund only funds disbursements whereas in Quebec the fund pays legal fees as well as disbursements.
[58] *Kenneth Smith, Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, et al. v. National Money Mart Co. et al.* (2009), 92 O.R. (3d) 641 (Ont. C.A.).
[59] *Mortillaro v. Cash Money Cheque Cashing Inc.*, [2009] O.J. No. 2904 (Ont. Sup. Ct. J.).

be issued in cash as well as vouchers[60]. The vouchers are to be redeemed for services at Cash Store Financial. The vouchers are non-transferable and may be used to pay either future or existing service fees on payday loans. These vouchers can be redeemed for cash but only during the six-month period that begins three years after the vouchers are issued. These vouchers have the effect of perpetuating payday loan use. This remedy is another way of payday lending companies inducing customers to continue to use their services. This settlement and others like benefit payday lenders as use of these vouchers will generate more business for them and the defendant has an opportunity to "reconquer" clients that they potentially had lost.[61] Payday lending creates a vicious cycle and these remedies from class action settlements perpetuate that.

Class actions will not solve the big picture problem for consumers

Class actions are presently the only mechanism that increases access to justice for individual consumers as individual actions through the court system are not feasible. However, class actions are far from an effective path of recourse for consumers and disappointingly, settlements through the allowance of vouchers only seem to further legitimize the payday lending industry and do not help consumers successfully fight out of debt spirals.

As well, there are practical difficulties with identifying customers who paid excessive late penalties. Where money is set aside for individual plaintiffs and eligible plaintiffs need to apply for the funds, there seems to be little uptake. While some critics suggest that this means there is not a great social need for these actions, these claims are largely speculative and may be related to the lack of awareness of the settlements or to the amount of paperwork that needs to be completed for a paltry sum.[62] The *Garland* class action as well as the class actions against Union Gas and Toronto Hydro demonstrated the difficulty of identifying customers who paid excessive late penalties. Settlement funds in these cases were paid to charities administering low-income energy assistance programs.

Passing the cost of class action settlements back to customers appears to be the trend, led by the post-script of the *Garland* case where the Enbridge successfully applied to the Ontario Energy Board to recoup the costs of the $22 million settlement from its residential customers. The Ontario Energy Board states that late payment penalties and interest rates currently approved by the Board are compliant with all laws and judicial decisions: "[b]y encouraging prompt payment of utility bills, late payment penalties reduce a utility's cost to provide service by reducing the utility's revenue requirement for the purpose of setting delivery rates. This lowers delivery

[60] *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* (2009), 309 D.L.R. (4th) 236 (B.C.C.A.).
[61] Lawyers Weekly, "Class action conundrum: A growing chorus of concerned lawyers say that class action lawsuits rarely lead to big payouts for consumers" (19 April 2010).
[62] Lawyers Weekly, "Class action conundrum: A growing chorus of concerned lawyers say that class action lawsuits rarely lead to big payouts for consumers" (19 April 2010).

rates for all customers."[63]

In January 2010, Toronto Hydro and other municipal electrical utilities in Ontario reached a tentative $17 million settlement for a late fees class action. Toronto Hydro sought recovery of "all costs" for its estimated $7.75 million share of the settlement. On July 22, 2010, the Superior Court of Ontario approved the class action settlement and the utilities asked the Ontario Energy Board to determine if the province's hydro utilities can recover $17 million from ratepayers following the settlement.[64] In effect, this move means that all consumers will ultimately pay the price for the late payment penalty practices of the utility industry.

[63] Ontario Energy Board, Late Payment Penalties, online: http://www.oeb.gov.on.ca/OEB/Consumers/Electricity/Your+Electricity+Bill/Late+Payment+Penalties.

[64] Toronto Star, "Electricity customers face another hit" (16 November 2010). See also The Nugget, "Utilities on hook for court settlement" (11 November 2010).

4. PARLIAMENTARY AND PROVINCIAL REGULATION OF THE CRIMINAL RATE OF INTEREST AND THE PAYDAY LENDING INDUSTRY

Canadians borrow an estimated $2 billion per year through payday loans. PIAC has commented extensively on the payday lending industry and its impact on low-income and vulnerable consumers with a view to regulation of the industry in past. The scope of the following section narrowly focuses on legislative changes to s. 347 of the *Criminal Code* and a review of the resulting provincial regulation of payday lenders.

Legislative Changes to s. 347 of the Criminal Code to Address the Payday Lending Industry

Section 347 of the *Criminal Code* posed a stumbling block to regulating payday loans, as provincial governments would not seek to regulate an area defined by the federal *Criminal Code* as illegal. As well, some provinces are reticent to raise the issue of regulation of interest rates, which is a thorny constitutional question.

In November 2004, Senator Plamondon introduced Bill S-19 seeking to amend s. 347 of the *Criminal Code* to introduce new provisions aimed at curbing payday lenders, pawn brokers and others lending to financially vulnerable Canadians. Bill S-19 would have lowered the criminal rate of interest from 60% per annum to the Bank of Canada overnight rate plus 35% per annum.[65] The Bill also called for the definition of "interest" in s. 347(2) to be amended to include insurance charges, thus eliminating what some see as a deficiency in the current legislation that is being used by some payday lenders operating under the insurance model.

Bill C-26, *An Act to Amend the Criminal Code (criminal interest rate)*, was introduced in the House of Commons on October 6, 2006.[66] The Bill proposed to amend s. 347 of the *Criminal Code* by adding s. 347.1 which would exempt payday lenders from criminal sanctions in order to facilitate provincial regulation of the industry. The exemption applies to the payday loan companies licensed by any province that has legislative measures in place designed to protect consumers and limit the overall cost of the loans. The Bill received Royal Assent on May 3, 2007.

PIAC in a previous paper warned that the removal of the criminal interest rate provision for payday loans must be paired with extensive provincial regulation that

[65] Bill S-19, *An Act to Amend the Criminal Code (criminal interest rate)*, 1st Sess., 38th Parl., 2004 (introduced 4 November 2004, died on the Order Paper).
[66] Bill C-26, *An Act to Amend the Criminal Code (criminal interest rate)*, 1st Sess., 39th Parl., 2006 (assented to 26 April 2007).

contemplates further and complete regulation of the payday loans industry.[67] Since the passage of Bill C-26, there have been a number of provincial legislative proposals put forward to regulate payday lenders. These regulatory proposals focus on the disclosures payday lenders are required to make to consumers in advertisements and contractual terms and caps on the interest rate they are allowed to charge.

Provincial Regulation of Payday Lending

British Columbia

Since November 1, 2009, the Payday Loans Regulation has been in force in British Columbia that cap the maximum charges for short-term loans to 23% (including interests and fees).[68] The borrower can cancel the loan by the end of the following day of signing the agreement without paying any charge, only 1 loan per borrower at a time and to restrict the ability for lenders to access the borrower's bank or employer. In addition, lenders are prohibited from lending more than 50 percent of a borrower's take-home pay or requiring repayment before the borrower's next payday. All lenders will be required to register and are regulated under the Business Practices and Consumer Protection Authority (also known as Consumer Protection BC).[69]

Alberta

Beginning March 1, 2010, in Alberta, the *Payday Loans Regulation* of the *Fair Trading Act* regulates payday lenders in Alberta.[70] The regulation defines a payday loan as a loan of $1,500 or less with a term of less than 62 days. The *Payday Loans Regulation* stipulates that the maximum fee a payday lender can charge is $23 per $100, which includes all mandatory fees and charges, related to the loan. The Regulation gives borrowers a two-day "cooling off period" after the loan is signed, during which the borrower can cancel the loan and return the money without paying additional fees. Payday lenders cannot charge more than $25 on a dishonoured cheque or pre-authorized debit. All payday lenders are required to have a Payday Loan license issued by Service Alberta.

Saskatchewan

Saskatchewan approved the Payday Loans Regulations on June 8, 2010.[71] The Regulations allow payday lenders to charge a maximum of 23% of the amount of the

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[67] Public Interest Advocacy Centre, "Pragmatic Solutions to Payday Lending: Regulating Fringe Lending and 'Alternative' Banking" (November 2003) at p. 47.
[68] *Payday Loans Regulation* B.C. Reg. 57/2009 under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2.
[69] Government of British Columbia, "Media release: Government moves to regulate payday lenders" (2 March 2009), online: http://www2.news.gov.bc.ca/news_releases_2005-2009/2009PSSG0022-000255.htm.
[70] *Payday Loans Regulation*, Alberta Regulation 157/2009 under the *Fair Trading Act*, R.S.A. 2000, c. F-2.
[71] See media release: "Saskatchewan Moves Toward Full Regulation of Payday Loan Industry" (8 June 2010), online: http://www.gov.sk.ca/news?newsId=857cb061-131d-4df0-

loan as the total cost of borrowing. The Regulations also prohibit the charge of additional fees beyond the allowed interest rate and lending more than 50% of the borrower's net pay during the term of the loan.

Manitoba

In Manitoba, rules and regulations for payday lenders were proclaimed on July 20, 2010 to take effect on October 18, 2010. Under the Payday Loans Regulation, the maximum rate that can be charged for a payday loan is $17 per $100 and the maximum amount of a loan can only be 30% of the borrower's next net pay.[72] There are also additional regulations surrounding the disclosure of terms and conditions in loan agreements and all fees are to be included in the cost of credit whether or not they are optional.

Ontario

Starting April 1, 2009, the Government of Ontario enacted the *Payday Loans Act, 2008*.[73] This legislation requires payday lenders to be licensed and prohibits certain industry practices such as "rollover" loans. Payday loan borrowers are given a two-day "cooling off period" to cancel a loan with no reason without incurring a penalty. As well, the legislation sets a maximum total cost of borrowing cap for payday loan agreements in Ontario of $21 per $100 borrowed as recommended by Ontario's Maximum Total Cost of Borrowing Advisory Board.[74]

Nova Scotia

Effective August 1, 2009, Nova Scotia approved maximum fees are capped at $31 per $100 loan, resulting in an annual percentage rate (APR) of interest of more than 800%.[75] Payday loan borrowers have 24 hours after taking a loan to change their mind without penalty. The regulations also require payday lenders to post a sign the cost of borrowing, total to repay and annual percentage rate for a $300 loan over a 14-day term.

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b211-44b30d8aff4f. See also Saskatchewan Payday Loans Fact Sheet: http://www.gov.sk.ca/adx/aspx/adxGetMedia.aspx?mediaId=1159&PN=Shared.

[72] *Payday Loans Regulation* 50/2010 amendment to 99/2007 under the *Consumer Protection Act*, C.C.S.M. c. C200.

[73] *Payday Loans Act*, 2008, S.O. 2008, c. 9.

[74] PIAC submitted comments with the National Anti-Poverty Organization (NAPO) to the Consultation to the Maximum Total Cost of Borrowing Advisory Board on the Maximum Total Cost of Borrowing on Payday Loans on May 31, 2008. PIAC/NAPO submitted that the maximum payday loan rate for Ontario borrowers basing a payday loan upon employment income to be up to $10 origination fee plus up to 60% EAR interest plus up to 5% of the principal amount of the loan. For those persons basing it upon social assistance benefits, the rate should be a $5 flat origination fee plus 3% of the loan principal. When 30% of regular employment income or social assistance benefit is exceeded by the total payday loan, the excess should be charged only at the rate of 3% of principal for those relying upon employment income and 1% of principal for those relying upon social assistance benefits.

[75], *Payday Lenders Regulations* under Section 18U of the *Consumer Protection Act*, R.S.N.S. 1989, c. 92, O.I.C. 2009-324.

Prince Edward Island

In April 2009, Prince Edward Island introduced the *Payday Loans Act*.[76] The Act received Royal Assent on May 15, 2009, however has not been proclaimed pending development of regulations. Prince Edward Island's legislative model would set a maximum interest rate through regulations, require the lender to fully disclose all costs of the loan and allow the borrower a two-day "cooling off period" to cancel the loan without any penalty.

Provincial Regulation of Payday Loans Is Not Protecting Consumers

The results of provincial regulation have been disappointing for consumers.

Ontario and British Columbia permit total fees of well over $60 for a typical $300 loan to be repaid in 14 days. The fees are nearly 15 times what a credit card would charge for a cash advance over the same period of time. In Nova Scotia, the maximum fees of $93 per two-week $300 loan results in an annual percentage rate (APR) of interest of more than 800%, making it the second-highest rate in North America of the jurisdictions that regulate the fees that can be charged, with British Columbia and Ontario close behind. Notably, the allowable fees in Ontario are greater than the previous Money Mart charges that were at the center of a class action lawsuit against the company.

The lowest cost of borrowing currently allowed by provinces, which regulate payday loan companies, is $17 per $100 borrowed with a maximum loan amount of 30% of a person's paycheque in Manitoba. Paying $17 per $100 borrowed on a 12-day loan, for example, would represent an annual interest rate of 517%. However, the Canadian Payday Loan Association criticized Manitoba's payday lending regulations, claiming that these regulations were not in the best interests of consumers because it was out of step with other provinces' set total cost of borrowing rates. The Canadian Payday Loan Association and 310-LOAN claimed that this would result in payday lenders facing very high costs jeopardizing the future of the industry in Manitoba.[77]

The provincial regulation for payday lending does not provide low-income consumers with consumer protection but merely results in decriminalization of usury, particularly as low-income and vulnerable consumers get trapped in a spiral of easy loans from payday lenders that they are unable to repay.

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[76] *Payday Loans Act*, S.P.E.I. 2009, c. 83.

[77] CBC News, "Proposed Manitoba payday loan rules slammed" (24 April 2010), online: http://www.cbc.ca/canada/manitoba/story/2010/04/24/mb-payday-loan-rules.html. 310-LOAN claimed that this rate could not sustain a payday lending business that relies upon payday loans alone for operating profits, see Personal Money Store, "Manitoba's Judgment of Payday Loans Ignores Reason, Commerce", online: http://personalmoneystore.com/moneyblog/2009/11/16/payday-loans-manitoba/.

Only in Quebec has there been legislation that has prevented the payday loan industry from growing in the province. Under Quebec's *La loi sur la protection du Quebec*, a lender must have a license to operate in Quebec.[78] The agency can refuse to issue a license if "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."[79] The Quebec legislation caps annualized interest rates at 35% and Quebec court decisions have used s. 8 of *La loi sur la protection du consommateur* to rule that credit contracts with interest rates higher than approximately 35% are unconscionable. Section 8 provides that "[t]he consumer may demand the nullity of a contract or a reduction in his obligations… where the obligation of the consumer is excessive, harsh or unconscionable." Quebec courts have used this section to reduce interest and similar charges.[80] To comply with court rulings, the agency have determined that a license may be issued only if the lender demonstrates that he is not claiming credit charges over the rate of 35%. This requirement is not provided by regulation.

Newfoundland and Labrador has decided to refrain from provincial regulation of payday loan companies, choosing instead to uphold the 60% per annum maximum interest rate set out in s. 347 of the *Criminal Code*. The Minister of Government Services for Newfoundland and Labrador, the Honourable Kevin O'Brien said:

> As a government, we could not in good conscience implement regulations that potentially could result in annual interest rates equating to nearly 550 per cent being charged to consumers in our province. By putting in place provincial regulations for payday loan companies that permit annual interest charges above 60 per cent, we would not be protecting consumers' best interests. We do not want individuals being gouged or putting themselves more in debt and having a hard time catching up because of high interest rates for these types of short-term loans. We have reviewed the terms and conditions relating to maximum interest rates outlined in the *Criminal Code of Canada*, as well as regulations of other provinces and territories for payday lenders, and have decided that payday loan companies in this province will continue to be subject to section 347 of the Criminal Code of Canada.[81]

Harvey Strosberg, lead plaintiff counsel in the Money Mart lawsuit, suggested Ontario moved too quickly. Strosberg commented that "the government made a fundamental

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[78] *Loi sur la protection du consommateur*, R.S.Q. c. P-40.1. Banks and credit unions are exempted from this requirement.
[79] *Ibid.* at s. 325.
[80] C. Masse, *Loi sur la protection du consommateur analyses et commentaires* (Cowansville: Les Editions Yvon Blais, 1999) at pp. 142-146.
[81] Government of Newfoundland and Labrador, "Provincial Government Will Not Regulate Payday Loan Companies" (16 June 2010), online: http://www.releases.gov.nl.ca/releases/2010/gs/0616n11.htm.

policy error in deciding the issue before this trial is over and all the evidence is in about the ways these companies really work."[82]

In provinces where the payday lenders are regulated and thus exempted from the *Criminal Code* interest rate laws, new class actions are unlikely to commence against payday lenders.

It is instructive to briefly examine the ways in which other jurisdictions have attempted to regulate payday lending practices and provide consumer protection in this area.

[82] National Post, "Canada lagging on payday loan regulations – U.S. crackdown hasn't crossed over the border" (18 May 2009).

5. INTERNATIONAL REGULATION OF CRIMINAL RATES OF INTEREST AND PAYDAY LENDING

United States

As outlined in PIAC's 1998 "A Garland for Consumers" report, United States states have an extensive amount of control over the establishment of usury rate. To a great extent, state governments determine whether the charging of interest beyond a certain rate will be prohibited and if so, what the ceiling rate will be.

Payday lending has undergone extraordinary growth in the United States. In the early 1990s, there were less than 200 payday lending stores across America. By 2007, there were 25,000 stores and it is estimated that the payday lending industry generates approximately $5.5 billion annually in loan fees.[83]

Since 2004, there has been a significant winding back of high-cost payday lending in the United States. Most states have their own usury laws that do not allow the lender to sue to recover debt where an illegal interest rate is charged. In some states, such as New York, such loans are void *ab initio*. On July 1, 2010, Arizona became the sixteenth American state to expressly cap interest in payday lending. The American experience of payday lending tends to indicate reform is only effective when the legislative intent is not to modify the practice, but to strictly limit cost through the implementation of a comprehensive interest rate cap.[84] However, payday lending is still authorized in a vast majority of American states.

The requirement to achieve payday lending reform on a state-by-state basis has made reform difficult. The varying outcomes across different states have created a patch-work quilt of regulation. There have been indications that payday lending regulation in the United States may be moving into the federal politics. In a January 2008 Wall Street Journal opinion piece, co-authors Governor of California Arnold Schwarzenegger and former United States President Bill Clinton criticize payday loans and calls for a nationwide reduction in the use of fringe credit, particularly payday loans.[85] Indeed, there have been several unsuccessful attempts by various members of Congress to introduce legislation to regulate payday lending and protect American consumers from these high-interest loans.

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[83] Consumer Law Action Centre, "Payday Loans: Helping hand or quicksand? Examining the growth of high-cost short term lending in Australia, 2002-2010" (2010), online: http://www.consumeraction.org.au/downloads/PayDayLendingReport-FINAL.pdf..

[84] Consumer Law Action Centre, "Payday Loans: Helping hand or quicksand? Examining the growth of high-cost short term lending in Australia, 2002-2010" (2010), online: http://www.consumeraction.org.au/downloads/PayDayLendingReport-FINAL.pdf..

[85] Wall Street Journal, "Beyond Payday Loans" (24 January 2008), online: http://online.wsj.com/article/SB120113610711211855.html.

This is not to intimate that the federal government does not currently have any tools to protect consumers from unjust credit practices.

The Federal Deposit Insurance Corporation allows its member banks to participate in payday lending but in March 2005 issued guidelines intended to discourage long-term debt cycles by transitioning to a longer term loan after six payday loan renewals.[86] The guidelines address significant risks of payday lending, procedures, safety issues and compliance issues. Advocacy groups responded that this was a positive step but its full impact was uncertain.[87] According to the Center for Responsible Lending, at least two nationally chartered banks are offering their own version of payday loans, with high fees and short-term balloon payments similar to those that cause the typical payday borrower to be trapped in long-term debt.[88] The Office of the Comptroller of the Currency (OCC) is responsible for regulating these banks but so far has not stopped the practice.

The United States Congress passed a law effective October 1, 2007 that caps lending to military personnel at a maximum of 36% APR.[89] The Defense Department called payday lending practices "predatory" and military officers cited concerns that payday lending ruined low-paid enlisted men and women's finances, jeopardizing their security clearances and interfering with deployment schedules to Iraq. Congress has not yet expanded reforms to address the payday lending industry across the country.

The *Community Reinvestment Act* enacted by Congress mandated financial institutions to "serve the convenience and needs of the communities in which they are chartered to do business."[90] Federal examiners evaluate a bank's community reinvestment efforts through three tests in lending, investments and service, which are published for the public to review. The *Community Reinvestment Act* seeks to balance a bank's benefits and burdens: banks that profit from community deposits should be encouraged to extend credit to those same communities. In 2008, the United States House Committee on Financial Services held a hearing on the *Community Reinvestment Act*'s impact on the provision of loans, investments and services to under-served communities. A FDIC official testified that the FDIC was contemplating offering incentives for banks to offer low-cost alternatives to payday

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[86] Federal Deposit Insurance Corporation, "Guidelines for Payday Lending" issued February 2005, online: http://www.fdic.gov/news/news/financial/2005/fil1405a.html.

[87] Center for Responsible Lending response to FDIC guidelines, online: http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/pa-FDIC_Revised_Payday_Guidelines-0305.pdf. Consumers Union response, online: http://www.consumersunion.org/pub/2005/04/002144print.html.

[88] Center for Responsible Lending, "Mainstream Banks Making Payday Loans" (24 February 2010), online: http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Mainstream-banks-making-payday-loans.html.

[89] The John Warner National Defense Authorization Act – Talent Amendment, H.R. 5122.

[90] *Community Reinvestment Act*, Pub.L. 95-128, Title VIII of the *Housing and Community Development Act of 1977*, 91 Stat. 1147, 12 U.S.C. S 2901. See Emily Berkman, "Microloans as a Community Reinvestment Act Compliance Strategy" (2006) N.Y.U.J.L. & Bus. 329.

loans and the FDIC began a two-year pilot project with 31 banks in 2007.[91] The pilot resulted in the making of 34,000 small-dollar loans worth $40.2 million and ran until December 2009. The FDIC evaluation reported the pilot as a success and that loans were a viable commercial product to low-income households with default risks similar to other types of unsecured credit. FDIC claimed that the pilot demonstrated that small sum credit products can be used to build and retain long-term banking relationships with people on low incomes and that there are also advantages in offering small loans alongside simple savings products and financial education.[92]

A Safe, Affordable, and Feasible Template for Small-Dollar Loans

Product Element	Parameters
Amount	$2,500 or less
Term	90 days or more
Annual Percentage Rate (APR)	36 percent or less
Fees	Low or none; origination and other upfront fees plus interest charged equate to APR of 36 percent or less
Underwriting	Streamlined with proof of identity, address, and income, and a credit report to determine loan amount and repayment ability; loan decision within 24 hours
Optional Features	Mandatory savings and financial education

Figure 1: FDIC Pilot Study Template of Elements for Safe, Affordable and Feasible Small-Dollar Loans

One notable development in the United States is the introduction of the *Credit CARD Act of 2009*, effective February 22, 2010.[93] This legislation marks comprehensive credit card reform that aims to establish a fair and transparent practices relating to the extension of credit to consumers. The Act gives consumers protection against arbitrary several credit card practices. Notably, consumers are protected against interest rate increases and prevents credit card companies from charging interest on debt that is paid on time during a grace period, thereby ending the "double-cycle billing" practice. Credit card companies are also prevented from charging over-limit fees.

[91] Testimony of Robert W. Mooney, Deputy Director, Division of Supervision and Consumer Protection, FDIC before the United States House Committee on Financial Services, 15 April 2008.
[92] Federal Deposit Insurance Corporation, Press Release: "FDIC's Small-Dollar Loan Pilot Shows Banks Can Offer Alternatives to High-Cost, Short-Term Credit; Results in Safe, Affordable and Feasible Template for Small-Dollar Loans" (24 June 2010), online: http://www.fdic.gov/news/news/press/2010/pr10140.html.
[93] *Credit Card Accountability Responsibility and Disclosure Act of 2009*, Public Law 111-24, 123 Stat. 1743 through 123 Stat. 1766.

United Kingdom

Payday lending estimates in the United Kingdom estimated the market to be worth over £1.2 billion per year.[94] There is currently no specific payday lending regulation in the UK and no interest rate cap on payday loans, however payday lending is regulated by the general consumer credit legislation. The *Consumer Credit Act 1974* requires lenders to obtain a consumer credit license from the Office of Fair Trading (OFT). Before issuing a license, the OFT determines whether the lender is "fit" based on a number of factors, including the lender's practices.

The *Consumer Credit Act 2006* introduced an explicit requirement for the Office of Fair Trading to consider irresponsible lending as a factor in determining the overall fitness of a lender to hold a consumer credit licence.[95] Guidance on irresponsible lending was issued to the credit industry in March 2010. The guidance requires lenders to clearly state the total costs associated with obtaining a loan and to include the APR in any advertisement. The guidance also requires lenders to lend responsibly and to assess the borrower's capacity to repay a loan in a 'sustainable' manner, which includes the ability of the borrower to repay the loan without having to take out an additional loan.

As well, there have been a small number of adjudications by the Advertising Standards Authority (ASA) with regard to payday lending:

> In April 2008, the ASA upheld a complaint against the payday lender, the Money Shop for using advertising which suggested that the use of high rate, short-term credit was suitable to fund aspirational, non-essential purchases such as a party, a shopping trip or a holiday. The ASA ruled that this was likely to be seen as encouraging care-free, impulsive and frivolous spending on credit and concluded that the advertisement could encourage consumers to spend borrowed money irresponsibly. In October 2009, the ASA upheld a complaint against the online payday lender Quickquid, for failing to include the APR of 2,000% in its TV advert. The ASA ruled that the APR had to be disclosed as the advert emphasized the speed of the loan process and that this constituted an incentive for people to take up their offer. In July 2010, the ASA upheld a complaint against online payday lender Wonga.com Ltd for portraying the act of taking out a loan in an overly whimsical fashion, including using laughter when the suggestion was made that a bank may offer a better alternative. The failure to give greater prominence to the APR than other information presented in the ad concerning the cost of borrowing also caused it to breach the *Consumer Credit (Advertisements) Regulations 2004*.[96]

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[94] Consumer Focus research quoted in Centre for Responsible Lending, "Regulating Payday Lending: Are we being ambitious enough, are we asking the right questions?" (September 2010), online: http://www.responsible-credit.org.uk/uimages/File/Payday%20lending%20regulation.pdf.

[95] *Consumer Credit Act 2006*, S. 25 (2B).

[96] Centre for Responsible Credit, "Payday lending in the UK: a review of the debate and policy options" (October 2010), online: http://www.responsible-

In 2009, the OFT launched a review of high cost consumer credit.[97] To establish whether high-cost credit is working well for consumers, the review focused on the following four areas:

- The level of competition in the market, including the impact of the economic downturn on competition and whether suppliers compete vigorously to deliver benefits for consumers.
- The business models of lenders within the sector.
- The behaviour and decisions made by consumers when purchasing credit.
- Whether consumers get the information they need to make good decisions.

The results of the review were released in June 2010. The review found that in some respects, the high cost consumer credit market was working reasonably well but there were some concerns about the market. The OFT concluded that there was no need to cap the interest rates levied by high-cost credit providers. The OFT was concerned about the relatively low level of ability and effectiveness of consumers in driving competition between providers, given their low levels of financial capability. As well, sources of additional supply such as mainstream financial providers seem to be limited. Due to this, competition on price is not effective and prices are high.

The OFT claimed that the deep-seated nature of these problems illustrated the limited possibilities for the OFT to make significant improvements to the high cost credit markets through this review. With that in mind, the OFT made recommendations but recognized that these recommendations would only bring marginal improvements. The OFT recommended that the government help consumers make informed decisions on high-cost credit by ensuring that financial literacy programs cover high-cost credit products and mainstream financial products. The government should also work with industry groups to provide information to consumers on high-cost credit loans through price comparison websites. The OFT also recommended mechanisms to increase consumers' ability to build up a documented credit history when using high-cost credit. Another recommendation suggested that the OFT collect essential information on the high-cost sector and improve tools for monitoring this sector. Finally, the OFT recommended best practices among high-cost credit lenders, including a code covering complaints processes, policies on rollovers of loans, guidance on misleading advertisements of loans, and proper brand identification for consumers.[98]

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credit.org.uk/uimages/File/payday%20lending%20the%20UK%20october%202010%20final.pdf.

[97] Office of Fair Trading UK, "Review of high cost consumer credit", online: http://www.oft.gov.uk/OFTwork/credit/review-high-cost-consumer-credit/.

[98] Office of Fair Trading Report, "Review of high-cost credit: Final Report" (June 2010), online: http://www.oft.gov.uk/shared_oft/reports/consumer_credit/High-cost-credit-review/OFT1232.pdf.

Australia

Since 2002, the number of high-cost short-term lenders has increased almost tenfold in Australia. Australian consumer groups have expressed concerns that Australia will experience the same problems seen in the United States where there are more payday lending storefronts than McDonalds and Starbucks combined. Consumer Action estimates that approximately $204 million in principal is currently loaned out for high-cost short-term loans in Australia every year to around 379,000 customers across approximately 674,000 loans.[99]

Australia's state and territory governments have traditionally regulated high-cost short term lending as part of their general regulatory responsibility for consumer credit. These approaches have resulted in a "patchwork" of regulation for the industry, with some territories implementing a 48% interest rate cap, others relying on the extent of regulation in the Uniform Consumer Credit Code (UCCC) of 1996. Since 2001, the short-term loan provisions of the UCCC have applied to any loan of 62 days or less, for $50 or more, where the annual interest rate exceeds 24% or the fees charged for the loan exceed 5%.[100]

Over the course of the last two years, Australia's financial regulation system has undergone significantly modification in the area of consumer protection. In July 2008, the Council of Australian Governments signalled a new approach by transferring regulatory responsibility for consumer credit from the states and territories to the Commonwealth Government. This set in place conditions for a single national consumer credit law.

Phase One of the National Consumer Credit Protection Reform Package was introduced to Australian Parliament in June 2009. Phase One focussed on writing the UCCC into national law with some amendments but did not intend to focus on payday lending. Phase One created a new Australian Securities and Investments Commission (ASIC)-administered national licensing regime for credit providers and implementing mandatory responsible lending practices and other consumer protection measures.[101] For consumers, this means that personal loans, credit cards, consumer leases, overdrafts and line of credit accounts, among other products and services, will be regulated under the Commonwealth, which in turn will be administered by ASIC.

Phase Two of the Reform Package will include an examination of state approaches to interest rate caps and the federal government will need to decide for or against the implementation of a national interest rate cap which will determine the immediate

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[99] Consumer Law Action Centre, "Payday Loans: Helping hand or quicksand? Examining the growth of high-cost short term lending in Australia, 2002-2010" (2010), online: http://www.consumeraction.org.au/downloads/PayDayLendingReport-FINAL.pdf.

[100] Consumer Law Action Centre, "Payday Loans: Helping hand or quicksand? Examining the growth of high-cost short term lending in Australia, 2002-2010" (2010), online: http://www.consumeraction.org.au/downloads/PayDayLendingReport-FINAL.pdf.

[101] These laws were passed as the *National Consumer Protection Act 2009*.

future of the payday lending industry. In the interim, state-based protections will remain where they are in place. Consultation on Phase Two began in July 2010.

6. INDUSTRY PRACTICES FOR CHARGING LATE PAYMENT PENALTIES IN CANADA

In PIAC's 1998 "A Garland for Consumers" report, late penalty policies of some companies within a variety of industries were reviewed. In this update report, PIAC surveyed industry practices for charging late payment penalties in Canada.[102] To accomplish this, PIAC contacted customer service representatives to inquire into the company's policies for late payment penalties. PIAC noted the interest rate charged on late payments, whether the company levied a penalty fee or an administrative or processing fee for late payments. As well, PIAC examined these companies' Terms of Use and standard form contracts where available for further information.

Telecommunications Companies

Bell Canada and Bell Aliant

Bell Canada is Canada's largest telecommunications company, providing consumers with telephone, wireless communications, high-speed internet, digital television and voice over IP services. Bell Aliant is a regional communications provider, serving consumers in six provinces.

At the time of PIAC's survey, Bell Canada and Bell Aliant charged 2% interest on late payments for unregulated telephone and internet services. However, Bell applies a late payment charge to unpaid balances 30 days after the billing date. The regulated part of a customer's bill is subject to a lower fee of 1.25% per month or 16.07% per annum.

On March 25, 2010, Bell gave notice to its customers that it would increase the late payment fee to 3% for unregulated services effective June 1, 2010. This results in an interest rate of 42.58% per annum. This increase has attracted much attention and in November 2010, a Quebec law firm filed a class action on behalf of plaintiff Louis Aka-Trudel against Bell Canada asking the company to reduce its interest rates on late bill payments.[103] The suit, filed with the Quebec Superior Court, also claims $100 per member of the group for moral damages and $200 for punitive damages. The firm will argue that the interest rates qualify as excessive and will seek to have the class action suit certified by the court within the next 12 to 18 months.

Bell Canada's late fees have been the subject of two class actions in Ontario and Quebec surrounding the timing of how Bell Canada charges late fees in practice. In

[102] The industry survey was conducted in November 2009 to February 2010.
[103] The Wire Report, "New class action suit challenges Bell's interest rate hike on unpaid bills" (5 November 2010).

April 2010, a Quebec class action against Bell Canada was settled.[104] The class action was filed on behalf of Bell Canada and Bell Mobility clients who had paid late payment charges on payments made in full before the payment deadline through a financial institution within the payment delay indicated on their bill. The settlement affects Bell Canada and Bell Mobility clients who paid their bill through their financial institutions between June 21, 2003 and August 9, 2009. In September 2010, a settlement was achieved for a similar class action in Ontario against Bell Canada filed on behalf of anyone in Ontario who has been charged late fees after having made a payment within the grace period indicated on their home or wireless phone bill. The claim related to charges received since March 26, 2008. Bell agreed to credit all existing customers who paid late fees between March 26, 2008 and August 9, 2009.[105] Bell also changed its policy so that customers who pay in full through a bank before or on the expiry date of the grace period will not be penalized through fees.

Rogers Communications Inc.

Rogers Communications Inc. is engaged in three primary lines of business. Rogers Wireless is Canada's largest wireless voice and data communications service provider. Rogers Cable offers cable television, high-speed internet access and telephony products for residential and business customers. Rogers Media provides broadcasting, specialty, print and online media with businesses in radio and television broadcasting, televised shopping, magazine and trade journal publication and sports entertainment.

Rogers charges 2% (26.82% per annum) interest late payment charge on any unpaid balance, compounded monthly from the balance until it is paid in full. Where a customer's cheque bounces for non-sufficient funds, Rogers will charge a $25 penalty. The interest fee and penalty for NSF applies for home phone, wireless and cable services. Rogers also may charge $25 if there are "administration and/or account processing activities" that have occurred due to non-payment. If the customer is disconnected, the reconnection fee to restate service following late payments is $25.00.

TELUS Communications Company

TELUS Communications Company is the largest telecommunications company in western Canada, providing wireline and wireless telecommunications services including data, internet protocol, voice, video and entertainment services.

TELUS charges 2% interest per month (26.82% per annum) on late payments. In the standard form contract, TELUS states that they charge a penalty fee for late payments

[104] Notice of Proposed Settlement of a Class Action between Annie Boulerice and Julien Gregoire v. Bell Canada and Bell Mobility (29 April 2010), online: http://www.bga-law.com/bell-late-fees/qc/.

[105] Notice of Proposed Settlement of a Class Action between Suzanne Brazeau and Bell Canada and Bell Mobility, online: http://www.bga-law.com/bell-late-fees/ont/AvisSurSiteWebAnglais-Ontario.pdf.

but the penalty fee is not specified. TELUS will also charge an administration fee for any payments not honoured by a financial institution or credit card company.

Primus Canada

Primus Canada was founded in 1997 and serves more than one million customers telecommunications services including long distance and local phone service, voice over IP, wireless services, and internet services.

Primus Canada charges a 1.5% compounded monthly interest rate on late payments when payment has not been received 30 days after the date of the statement of account for service. Primus charges an unspecified administrative fee for NSF bouncebacks.

Shaw Communications

Shaw Communications offers consumers broadband cable television, high-speed internet, home phone, satellite Direct-to-Home services and programming content through Shaw Media. Shaw serves 3.4 million customers through extensive fibre networks.

Shaw charges customers 2% per month (26.8% per annum) late payment interest charge calculated on the outstanding amount. If the account remains unpaid for 60 days, Shaw applies a $20 processing fee for services related to downgrading or terminate the customer's services. As well, Shaw charges a $25 fee for cheques that are returned due to non-sufficient funds

The Energy Industry

Enbridge Inc.

Enbridge delivers energy and owns Canada's largest natural gas distribution company. Enbridge provides distribution services in Ontario, Quebec, New Brunswick and New York State.

Enbridge charges 1.5% per month for late payments (19.56% per annum) for all unpaid balances, which is compounded monthly until the account is satisfied. The charge is applied to the account on the seventeenth day following the date the bill is due. As well, Enbridge charges $25 for payment bouncebacks where there is a non-sufficient fund.

Union Gas

Union Gas is a Canadian natural gas storage, transmission and distribution company based in Ontario. The distribution business serves 1.3 million residential, commercial and industrial customers in more than 400 communities across northern, southwestern and eastern Ontario.

Union Gas charges a 1.5% per month (19.56% per annum) late payment charge on the unpaid balance, which is compounded monthly until the account is satisfied. The charge is applied to the account on the seventeenth day following the day the bill is due. As well, where a payment cannot be processed due to insufficient funds, Union Gas will apply a $16.00 NSF charge.

Ontario Hydro

Ontario Hydro delivers electricity to individuals and businesses in Ontario. In 2009, Ontario Hydro earned $470 million in net income.

Ontario Hydro applies a late payment charge of 1.5% per month (19.56% per annum) on an unpaid balance, compounded monthly until the balance is paid in full. The charge is applied if payment is not received within 21 days of the billing date. For payments with insufficient funds, Ontario Hydro charges a $25 fee for NSF.

Hydro-Quebec

Hydro-Quebec generates, transmits and distributes energy in Quebec and its sole shareholder is the Quebec government. Hydro-Quebec posted a net income of $2,047 million for the first nine months of 2010, compared to $2,060 million in 2009.

Hydro-Quebec applies administration fees for late payments that are calculated at a rate of 1.2% per month (14.4% per annum) from the billing date. As well, Hydro-Quebec charges $10 for insufficient funds.

Credit and Charge Card Issuers

Generally, credit card issues do not charge late fees if the monthly minimum repayment is not made. Rather, the credit card user continues to pay interest on the arrears. Similar to the observations of the 1998 PIAC report, a consumer who fails to make timely payments of at least the minimum amount required will not be eligible for such bonuses as "preferred customer" interest rates which offer the potential for real consumer savings. As well, if a consumer misses making monthly credit card payments by the due date, their credit card issuer may increase the interest rate on his or her credit card, normally by between 2% and 6%. The increase can be temporary or permanent, depending on the issuer.[106] Federally-regulated financial institutions must notify the consumer in advance of an interest rate increase and in some cases they must also provide a reason for the increase.

As noted earlier, the United States has recently seen credit card regulation reform, protecting consumers against arbitrary interest rate increases by requiring 45-day notice to consumers before hiking interest rates and prevents retroactive increases. As well the United States *Credit CARD Act of 2009* prevents credit card companies

[106] Financial Consumer Agency of Canada, "Understanding Credit Card Fees" (June 2010), online: http://www.fcac-acfc.gc.ca/eng/publications/PaymentOptions/CCFees/CCFees-eng.pdf.

from charging over-the-limit fees. Such over-the-limit fees are still allowable for Canadian credit cards.

In May 2009, Canada's Minister of Finance announced new credit card regulations under the *Bank Act*, effective September 1, 2010.[107] These regulations included a minimum 21-day interest-free grace period on new purchases and requirements to make billing practices more clear for consumers. For example, application forms and credit contracts will need to clearly summarize the credit card features such as interest rates and fees. As well, credit card bills must specify the implications of only paying the minimum amount in terms of how long it would take the consumer to repay the balance if only the minimum payment is made each month. The regulations did not introduce an interest rate cap on credit cards, with Minister Flaherty claiming that consumers have choices and need to shop around to find lower interest rates for credit cards.[108]

A charge card is an alternative payment to cash and unlike credit cards, charge cards do not keep their billing cycle from one cycle to the next. Rather, the amount used on the charge card must be repaid in the full amount by the due date, otherwise the customer will face late fees or delinquency fees. For example, the American Express charge cards have an annual penalty interest rate of 30% per annum for late payments calculated from the statement date.

Summary

It seems that in comparison to the industry survey conducted in 1998 by PIAC, few utility telecommunications and energy companies continue to charge administrative or processing fees for late payment penalties in addition to interest on late payments. Most companies charge a fee for payments that bounce due to non-sufficient funds, with fees ranging from $10 to $25. Most providers specifically state in standard form contracts that they charge a fee for NSF bounces, likely to avoid the capture of their NSF fee into the definition of "interest".

[107] See *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations* pursuant to the *Bank Act*, R.S.C. 1991, c. 46. See also the *Cost of Borrowing Regulations.*

[108] Financial Post, "Ottawa introduces new credit card regulations" (21 May 2009).

7. CONCLUSION

In PIAC's original Garland report, PIAC noted that the *Garland* decision in 1998 was viewed as an important step forward for consumers with the Supreme Court of Canada recognizing that consumers must be shielded from exploitative credit transactions and excessive ancillary charges such as late payments. However, the recent case of *De Wolf v. Bell ExpressVu* led to a disappointing result for consumers as the court did not extend s. 347 and the logic of *Garland* to an administration fee charged in the event of late payments, finding it not to be "interest".

Since *Garland*, several class actions have been filed to enforce s. 347 of the *Criminal Code*. Many of these class action lawsuits target the payday lending industry. While these actions provide consumers with some form of recourse, they are lengthy and costly. Furthermore these class actions have provided controversial remedies for consumers where settlement has been reached, resulting in judicial legitimization of the industry and in some cases approval of settlements that only further the consumer down the path of spiral debt with vouchers. The provision of vouchers benefit the industry and the defendant emerges from litigation with an opportunity to "reconquer" clients that they had potentially lost. Most recently, the Ontario energy regulator approved Enbridge's application to recoup the costs of the $22 million settlement for late payment penalties from its ratepayers, minimizing the efficacy of the class action mechanism for s. 347 cases.

Section 347 has also undergone legislative reform to address concerns with the payday lending industry. Provinces wanted the ability to regulate payday loans and in 2007, s. 347 of the *Criminal Code* was amended to exempt payday lenders from criminal sanctions in provinces that license payday lenders and have implemented legislative measures designed to protect consumers and limit the overall cost of the loans. The resulting provincial regulation has been disappointing, with several of the provincial rates permitting excessive fees that translate to annual interest rates of 500% to 800%. As noted in PIAC's "A Garland for Consumers" report, the 60% ceiling imposed by s. 347 of the *Criminal Code* is less than adequate, thus the provincial regulations have not provided adequate consumer protection.

Other jurisdictions have also attempted to regulate payday lending. In the United States, the regulation of payday lending is largely implemented at the state level. Only in sixteen states has there been an express interest rate cap for payday lending. The United States Congress passed a law that caps lending to military personnel at a maximum of 36% APR, however there has not been federal legislation that caps interest rates for payday lending. The United Kingdom has also recognized the deep-seated nature of problems related to payday lending but has not recommended a cap on interest rates levied by high-cost credit providers. In recent years, Australia has transferred regulatory responsibility for consumer credit from the states and territories to the Commonwealth Government. Australia is currently consulting for its National

Consumer Credit Protection Reform Package, which will examine whether a national interest rate cap should be implemented. If an interest rate cap is implemented, this will directly impact the payday lending industry in Australia.

Compared to PIAC's 1998 survey of industry practices, it appears that few telecommunications and utilities companies continue to charge administrative or processing fees for late payment penalties. All service providers continue to charge interest rates on late payments and most charge a fee for payments that bounce due to non-sufficient funds. Most providers specifically state in standard form contracts that they charge a fee for NSF bounces, likely to avoid the capture of their NSF fee into the definition of "interest". There have been some issues with the timing of these late fees in practice.

While *Garland* was a positive step for consumers, it was recognized that its gains would never provide consumers with sufficient credit protection. Together with disappointing result in *De Wolf*, the provincial regulation of payday lenders that has allowed higher interest rates than the criminal usury rates and the problems with relying on class actions for consumer recourse, it seems that consumers have even fewer protections from exploitative credit arrangements today.

APPENDIX A

Section 347 of the Criminal Code

Criminal interest rate
347. (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
(*a*) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
(*b*) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

Definitions
(2) In this section,

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

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

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

"interest"
« *intérêt* »
"interest" means the aggregate of all charges and expenses, whether

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

“official fee”
« *taxe officielle* »
“official fee” means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

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

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

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

Proof of effective annual rate
(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated

the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

Notice

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

Cross-examination with leave

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

Consent required for proceedings

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

Application

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

R.S., 1985, c. C-46, s. 347; 1992, c. 1, s. 60(F); 2007, c. 9, s. 1.

Section 347.1 of the Criminal Code

The following provisions were added to the *Criminal Code* in Bill C-26 in 2007.

Definitions

347.1 (1) The following definitions apply in subsection (2).

“interest”
« *intérêts* »
“interest” has the same meaning as in subsection 347(2).

“payday loan”
« *prêt sur salaire* »
“payday loan” means 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.

Non-application

(2) Section 347 and section 2 of the *Interest Act* do not apply to a person, other than a financial institution within the meaning of paragraphs (*a*) to (*d*) of the definition “financial institution” in section 2 of the *Bank Act*, in respect of a payday loan agreement entered into by the person to receive interest, or in respect of interest received by that person under the agreement, if

(*a*) the amount of money advanced under the agreement is $1,500 or less and the term of the agreement is 62 days or less;

(*b*) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and

(*c*) the province is designated under subsection (3).

Designation of province

(3) The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.

Revocation

(4) The Governor in Council shall, by order, revoke the designation made under subsection (3) if requested to do so by the lieutenant governor in council of the province or if the legislative measures described in that subsection are no longer in force in that province.

2007, c. 9, s. 2.