A Garland For Consumers: Will The Garland Case Provide Safeguards For Vulnerable Consumers?

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Introduction

A Garland For Consumers?

In October of 1998, the Supreme Court of Canada found that the Late Payment Penalties (LPP) charged by Consumers' Gas may constitute a criminal interest rate contrary to section 347 of the *Criminal Code*. The decision, in *Garland v. Consumers' Gas*, was unexpected insofar as the LPP had been continuously approved by the Ontario Energy Board since its adoption in 1975. It also brings in its wake, however, an important opportunity to revisit the need to provide safeguards for vulnerable consumers.

The decision is an illustration of how consumers, who possess little bargaining power, may be protected from exorbitant usurious penalties and charges for late payment. After all, such punitive transaction costs often catapult the customer into further default. As many consumers simply cannot pay, rising debt threatens their access to commodities which are vital to the maintenance of their standard of living.

Further, the conclusion that the Garland case may have only a limited impact on consumer credit protection, raises a host of ancillary issues concerning the billing practices of utilities. This discussion, therefore, goes beyond the examination of the legal decision and its policy implications. It also attempts to recognize the need for the creation of consumer credit protections, implemented within a comprehensive framework.

Chapter One will assess the scope of section 347 of the *Criminal Code* by describing the legislative history surrounding its adoption, and the actual construction of the section. Canadian case law will also be detailed, with a particular emphasis on the Supreme Court's reasoning with respect to the LPP in *Garland*. Chapter Two will briefly compare and contrast the Canadian experience with how consumers in the United States and the United Kingdom are protected from usurious charges. Chapter Three will focus on the policy implications of *Garland*, from a consumer standpoint. In turn, Chapter Four will look at industrial implications by examining the policies of specific companies in a variety of industries. In conclusion, the study will recommend actions which may be taken to further protect consumers from exploitive credit arrangements. Although *Garland* is clearly a step in the right direction, its application is not a sufficient response to the needs of consumers.

Chapter One

Section 347: Criminalizing Excessive Interest Rates

Section 347 of the *Criminal Code*[1], (formerly section 305.1), was brought about by Bill C-44[2], passed by both the House of Commons and the Canadian Senate in 1980. The Bill, which repealed the *Small Loans Act* and amended the *Criminal Code*, served to criminalize excessive interest rates for the first time in Canada. Thus, the initiative went far beyond the mandatory disclosure provisions within the *Canada Interest Act* and the *Bank Act*. Similarly, the criminalizing of interest rates above 60% surpassed the safeguards found in existing provincial legislation designed to protect consumers.

The *Small Loans Act*, passed in 1936, was intended to protect consumers who wished to procure personal loans below $1 500 from exorbitant interest rates and additional loan costs. At the time, such protections were particularly important as there were very few financial institutions capable of furnishing such loans; the abuse of market power was greatly feared. The price ceiling, however, ensured that the protections created by the *Small Loans Act* quickly became irrelevant to consumers. In addition, as the number of Canadian financial institutions competent to loan to small consumers increased, the fear of monopoly power envisioned by the Act also waned.

Thus, by the 1970s, the *Small Loans Act* had become outdated, and was in need of reform. At a minimum, alternative protections needed to be established to ensure that loan sharking activities were adequately dealt with.

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[1] See Appendix A for the full text of section 347.

[2] *An Act to Amend the Small Loans Act and to Provide For Its Repeal and to Amend the Criminal Code.* S.C. 1980-81-82-83, c. 43.

Most commentators have found the legislative history surrounding Bill C-44 to be ambiguous.[3] The Bill received multiparty support; it was passed unanimously without debate by the House of Commons. Although it was referred to the Senate Committee on Banking, Trade, and Commerce, there was little discussion concerning the substance of the bill before it was ultimately passed by the Senate without amendment.[4]

In submissions before the Senate Committee, the then Minister of Consumer and Corporate Affairs issued an undertaking that further review of the section would be performed after enactment, so that amendments could be adopted if warranted. To this point, however, no such

[3] Compare, for example, the commentary of Stephen Antle in "A Practical Guide to Section 347 of the Criminal Code" (Canadian Business Law Journal 23, 1994, p. 323)., with that of Jacob Ziegel in 'The Usury Provisions of the Criminal Code", (Canadian Business Law Journal, 11, 1986, p. 233) and the commentary of Blair, J.A. in *William E. Thomson and Asscoiates v. Carpenter (1989), 69 O.R. (2d) 545.*

[4] There was even little discussion concerning the dubious constitutionality of the criminal section given 92(13) of the BNA Act which gives provinces exclusive jurisdiction over property and civil rights. Courts have, however, subsequently affirmed the constitutionality of s. 347 in *Horvat v. Artell Developments Ltd.*, [1993] 2 S.C.R. 443. A constitutional challenge based on s. 7 and 11(d) of the Canadian Charter of Rights and Freedoms has similarly been rejected by the courts.

review has taken place.[5] Leaving the text of the section itself aside, it remains unclear whether Parliament intended section 347 to shield consumers from loan sharking activities or whether more comprehensive protections were envisioned.

Thus, to a large extent, the statutory construction of the section must speak for itself. It has been noted that the offences created by the section, as well as the definitions it provides for key terms, go far beyond the 'cost of loan' concept embodied by the *Small Loans Act*. Despite the lack of awareness of the provision immediately following its adoption, the section has the potential to impact upon a vast variety of daily commercial and consumer transactions. Beyond its criminal implications, the rule of contractual illegality ensures that the section will profoundly affect civil law relations.

The Construction of Section 347

Section 347 creates two distinct offences. Section 347(1)(a) makes it an offence to enter into an agreement or arrangement to receive interest at a criminal rate, whereas 347(1)(b) makes it an offence to actually receive interest at a criminal rate. The relationship between the two offences has caused a great deal of controversy, especially given the ambiguous nature of Parliamentary intent. Courts have been forced to flesh out the exact differences between the two offences. Of particular importance has been the question of what period of time should be used to measure whether or not an interest rate is criminal. Yet, leaving aside this dispute, it is clear that the offences are separate and distinct, as they have different actus reus requirements.

Section 347(3) sets out a refutable presumption that receipt of a criminal interest rate imputes knowledge that the rate was indeed criminal. The section also establishes penalties, standards of proof and procedural notice requirements for the offences.

[5] See the analysis of J. Ziegel in 'The Usury Provisions of the Criminal Code", p. 244.

It is when looking at 347(2), however, that one may assess the potential impact of the provision. 347(2) sets out exhaustive definitions of key terms and thus determines the scope of the offences. The definitions contained in 347(2) illustrate that the offences have the potential to be applied to a wide variety of commercial and consumer transactions.

As discussed, a 'criminal' interest rate is defined as an interest rate that exceeds 60% on the credit advanced. This statement, however, begs the question as to how to define both 'interest' and 'credit advanced'. Significantly, the section defines 'interest' in an extremely broad fashion. An 'interest' may be any fee, fine, penalty, commission or similar charge or expense. The 'interest' is composed of the aggregate of these expenditures. Thus, the provision goes beyond defining interest in terms of form, in favour of focusing on both substantive and transaction costs incurred by the borrower. The section does enumerate six statutory exceptions to the composition of 'interest': repayments of principal, insurance charges, official fees, overdraft charges, required deposit balances and mortgage property taxes. These exceptions, however, further buttress the position that the provision was meant to deal with a broad variety of transactions; for the offences to be applicable, charges simply cannot fall within the enumerated exceptions, which are narrowly defined.

For the offences found in section 347 to become applicable, interest must be paid or payable for the 'advancement of credit' under an arrangement of agreement. Congruent with the position taken with respect to the definition of 'interest', the section defines 'credit advanced' in a broad fashion. Advanced credit is not limited to money, but may intimate the value of goods, services or benefits.[6] Thus, the application of the section is not limited to the traditional monetary loan.

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[6] The argument was made in *Garland v. Consumers' Gas* [(1995) 22 O.R. (3d), 451] that for s. 347 to be applicable, the 'credit advanced' must include money, and not simply the monetary value of goods, services or benefits. The reasoning was that the article 'the' was placed before money, whereas 'any' was placed before goods, services or benefits. Justice Winkler rejected this strict grammatical interpretation in favour of a more modern principle of statutory interpretation. He focused on the word 'aggregate' to reach the conclusion that 'credit advanced' may connote money and/<u>or</u> the monetary value of goods, services and benefits.

All transactions involving a deferral of payment have the potential to trigger application of the section 347 offences.

Thus, the definitions which are incorporated into the section seem to intimate an intention to create a flexible tool with which to protect consumers from a variety of usurious charges. The construction of the section has the potential to apply to a great deal more than loan sharking activities. Yet, the extent to which the section will become applicable will be in large part determined by evolving judicial interpretation.

Section 347 Case Law

Immediately following its adoption, section 347 attracted little attention. Courts, however, have slowly been given the opportunity to flesh out the basic principles concerning how the provisions are to be interpreted. The most basic principle which has been established in this respect, is that courts should focus on the transaction's substance as opposed to its form. This is relevant in both determining if there is an 'agreement or arrangement', and if the expense in question is to be characterized as an 'interest'. Courts are to concentrate on the costs incurred by the borrower, writ large. Such an approach is based on the belief that the construction of the section signifies a parliamentary intent for purposive action. For example, in *William E. Thomson Associates Inc. v. Carpenter*, Justice Blair of the Ontario Court of Appeal justified characterizing a facility fee as an interest, writing:

> *The definition of "interest" includes fees and charges of every kind, however they may be described or disguised. Courts cannot permit any erosion of the protection of the public from usurious charges which Parliament manifestly intended to provide.*[7]

[7] *William E. Thomson and Asscoiates v. Carpenter (*1989), 69 O.R. (2d) 550. [emphasis added]

Indeed, this quotation has often provided the rationale for subsequent courts' broad interpretation of the concept of 'interest'. By surveying the case law, Stephen Antle has compiled a list of the fees and charges which various courts across Canada have deemed to be an 'interest' under section 347.[8] The list includes:

- commitment fees
- initial fees
- loan fees
- loan advance fees
- facility fees
- finance charges
- bonuses
- legal fees
- extension fees
- capitalized interest
- bonus interest
- compensation for interest lost on money advanced on short notice
- lender's costs
- an increase in the outstanding balance of the purchase price if the borrower does not pay the original balance within a set time
- amounts the borrower is to pay in addition to repaying principal, (for example where the lender advanced $150 000 US and the borrower agreed to repay $232 000 US, plus interest and other charges, over 90 days)
- the borrowers estimated share of profit on resale of property, which the borrower agreed to pay to the lender in addition to repaying the amount advanced

[8] Stephen Antle in "A Practical Guide to Section 347 of the Criminal Code", p. 328-29.

In addition to this broad definition of interest, the scope of section 347 has not been narrowed by mitigating applicability based on either the intentions, or the relative bargaining positions of the parties in question. The borrower, independent of his or her sophistication, cannot legally accept to pay an interest rate exceeding 60%, even if a disclaimer is included in the contract. The only time that such factors will be deemed relevant is when courts are deciding whether or not to sever the criminal interest rate from the contract. Although courts will not rewrite the contract itself, it is possible for them to sever the offending provision. The decision to do so is undertaken on a case by case basis. Four factors are considered in this process: the consistency of severance with the objectives and purposes of section 347, the intentions of the parties, the relative bargaining positions and sophistication of the parties, and the existence of unjust enrichment.[9]

The second major issue with respect to judicial interpretation of section 347 is how the two offences established by the provision are to relate to one another. Of particular importance is the determination of what time period should be used in calculating whether the interest rate paid is, or is not, criminal. There are two main options. First, the effective interest rate could be calculated on the basis of the document itself; it would be determined by a specific contractual term. Alternatively, the effective interest rate may be calculated based on the time between the advancement of credit and the <u>actual repayment.</u>

The British Columbia Court of Appeal had the opportunity to comment on this issue in *Nelson et.al. v. C.T.C. Mortgage.*[10] Justice Seaton, writing for the majority of the court, found that the effective interest rate should be determined by assessing the contract itself. The method of calculating the interest rate based on the time between advancement and repayment was rejected

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9 See the analysis of criminal interest rate severance by J. Ziegel in 'The Usury Provisions of the Criminal Code", p. 244. Zeigel feels that section 347 is both dangerously unwieldily and unnecessary. He advises lawyers to place charges in individual sections and to incorporate disclaimers into contracts to promote severability if a criminal interest rate is found.

10 *Nelson et.al. v. C.T.C. Mortgage.* (1984), 16 D.L.R. (4th), 139, affirmed by the Supreme Court [1986] 1 S.C.R. 749.

so as to avoid absurd results. For example, credit advancements, particularly mortgages, often give the borrower the right to prepayment. Thus, in many instances, if the borrower chooses to avail himself of this option, he will in effect criminalize the interest rate. The voluntary and unilateral act of the borrower will serve to turn a formally legal agreement or arrangement into an illegal one. Justice Seaton also noted that the acceptance of the second option would result in there being two different “criminal interest rates”, one for 347(1)(a) and one for 347(1)(b).

Thus, in *Nelson*, it was found that the agreement or arrangement in question must require the payment of a criminal interest rate. As the Supreme Court of Canada affirmed *Nelson* in substance, the second principle of judicial interpretation of section 347 has historically stated that courts must look at the agreement at the time of its creation. This stance illustrates that courts have been shy to accept the consequences of the plain meaning of 347(1)(b). Indeed, the majority decision of the British Columbia Court of Appeal in *Nelson* to a large extent muted the distinction between the two offences created by section 347. Justice Hutcheson, dissented from the *Nelson* decision, arguing that 347(1)(b) was not to be as narrowly construed as 347(1)(a), stating that for the former:

> *The question is: did the mortgagee receive a payment at a criminal rate? That question is to be answered by an analysis of what has been received in fact and a calculation based upon the period that has elapsed since the money was advanced.*[11]

The argument of Justice Hutcheson was considered, and partially accepted, in *Degelder Construction Co. v. Dancorp Developments Ltd.*, [12] a decision which was released by the Supreme Court in tandem with *Garland v. Consumers’ Gas Co.* Justice Major, writing for a

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[11] *Nelson et.al. v. C.T.C. Mortgage.* (1984), 16 D.L.R. (4^{th}), 151.

[12] *Degelder Construction Co. v. Dancorp Developments Ltd.* [1998] 3 S.C.R.

unanimous court, argues that the *Nelson* ratio has been substantially overdrawn and a new framework must be articulated to guide the interpretation of section 347.

The Supreme Court insists that the *Nelson* decision should not be viewed as implying that an interest rate cannot become criminal through the course of a credit advancement. Rather, Nelson should be cited solely to indicate that, in most instances, an interest rate cannot become criminal because of the voluntary act of the borrower. For example, the *Nelson* majority had cited demand mortgages as a possible exception to the conclusions they articulated. A demand mortgage may provide for immediate repayment by the borrower dependent on a trigger, such as a declaration of bankruptcy. If the hypothetical bankruptcy occurred shortly after the advancement of credit, it is very likely that the repayment would involve an interest rate exceeding 60%. The court was unsure as to whether the criminal rate should be enforceable in such a scenario. Thus the Supreme Court argues in *Dancorp*, that the *Nelson* decision should be applied in a more flexible fashion.

Similarly, the Supreme Court states that the fact that the definition of a 'criminal interest rate' may differ between 347(1)(a) and 347(1)(b) should not be characterized as an absurd result. The section, after all, creates two offences which are both distinct and complementary. 347(1)(a) is to be narrowly construed. The question to be asked is: what rate of interest does the agreement or arrangement require? 347(1)(b), on the other hand, is intended to supplement the former test by being interpreted in a broad fashion. The question to be asked is: at what rate of interest has payment actually been received? Thus, 347(1)(b) necessitates a 'wait and see' attitude which will ensure that criminal interest rates which are neither anticipated nor required under an agreement or arrangement will still be disallowed.

The way in which Canadian courts have interpreted the definition of 'interest' and accepted a broad approach to 347(1)(b) illustrates that the criminal interest rate section holds great promise to impact upon a variety of everyday commercial and consumer transactions. *Garland v. Consumers' Gas Co.*, decided by the Supreme Court of Canada in 1998, is an illustration of just how powerful section 347 has the potential to be.

Garland v. Consumers' Gas Co.: The LPP and Section 347

In 1995, Gordon Garland commenced a class action against Consumers' Gas Company.[13] He alleged that the Late Payment Penalties (LPP) charged by the Company were contrary to section 347. Thus, Garland sought the restitution of $112 million alleged to have been paid by customers of Consumers' Gas since section 347 officially came into force in 1981.

The establishment of the LPP predated section 347. It was adopted following a series of rate hearings by the Ontario Energy Board in 1975. Under section 19(1) of the *Ontario Energy Board Act* (as it was then constituted), the OEB was charged with setting reasonable rates for the natural gas consumed in Ontario. Further, no utility was permitted to sell natural gas without obtaining the authority to do so from the OEB. In determining the rate base, the OEB needed to ensure that reasonable allowances were made such that utilities had sufficient working capital. Part of the process of setting rates, therefore, focused on the ability to forecast when consumers would pay their bills. The greater the amount of accounts receivable the utilities were forced to carry, the greater their need for working capital. The logic was that if consumers were given the incentive to pay their bills on time, the revenue requirement would be lessened and the rates kept down.

[13] The motion was brought under the *Class Proceedings Act*, 1992, S.O. 1992, c.6.

The LPP was thus instituted, and remains a means of promoting consumers to promptly pay their bills.[14] If residential consumers do not pay the balance due within 16 days of the mailing date, they will incur a charge consisting of 5% of the outstanding amount. The LPP is a fixed penalty which does not compound if it goes unpaid. The LPP was chosen over an interest charged on a daily basis, as the latter method was not viewed as providing an adequate incentive for prompt payment. Every rate order issued following the 1975 establishment of the LPP implicitly approved the mechanism, and it was reviewed and reapproved in 1988.[15] The LPP clause is found in Consumers' rate schedules for residential consumers, and as of 1989, it is also contained in the Consumers' Handbook of Rates and Distribution Services. The operation of the LPP is clearly stated in the billing material provided to consumers.[16]

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[14] The LPP was instituted by the OEB in E.B.R.O. 302-II (Sept 4, 1975).

[15] The LPP was reviewed reapproved in E.B.R.O. 452 (December 21, 1988).

[16] For the text of these clauses see Appendix B. For sample billing material see Appendix C.

The Ontario Court (General Division) accepted that for those consumers who paid their outstanding balance shortly after it was due, the LPP represented a high rate of interest (This is assuming, of course, that it is defined as an 'interest' under section 347.) Unless customers waited approximately 37 days to pay the LPP, they were being charged in excess of a 60% penalty. Evidence was also offered to illustrate that indeed, most consumers paid their bills shortly after receiving the LPP, and therefore paid a criminal interest rate. 65.7% of consumers paid on or before the dues date, *27.9% paid within 10 days after the due date,* and only 6.4% waited for more than 10 days after the due date to pay their outstanding balance.[17] Thus, the actuarial evidence clearly showed that the LPP charge, in many instances, exceeded 60%. It was less than clear, however, whether this constituted a usurious charge under section 347. Given the construction of the section and the preceding case law, the trial court was faced with four basic issues of applicability:

- was the LPP an 'interest' within the meaning of section 347(2)?
- was the relationship between Consumers' Gas and its customers characterized by an 'advancement of credit'?
- was the interest paid for the advancement of credit based on an 'agreement or arrangement'?
- was the application of section 347 precluded by *Nelson* which stated that there can be no violation of the section where a payment of interest at a criminal rate arises from the voluntary act of the debtor?

[17] *Garland v. Consumers' Gas* (1995) 22 O.R. (3d), 457.

The Ontario Court, General Division gave summary judgement in favour of Consumers' Gas.[18] The case was disposed of on the basis of *Nelson*. The Court rejected the argument that the existence of the LPP created two payment options; the company had not implicitly agreed to the deferral of payment through the use of an incentive. Thus, the 'trigger' of the LPP resulted from the unilateral and voluntary act of the debtor. Under the *Nelson* rule, therefore, section 347 could not apply. Although this was enough to dispose of the case, the Court, in *obiter dicta*, also rejected the notion that the LPP constituted an 'interest' as defined by section 347(2). The Ontario Court of Appeal accepted the judgement of the lower court, but explicitly refused to comment on whether the LPP may be defined as an 'interest'.[19] Both courts, however, agreed in *obiter* that 'credit advanced' may refer to the deferral of payments for goods and services.

The case was appealed to the Supreme Court of Canada which gave judgement in the matter in October of 1998.[20] Justice Major wrote the decision, with which five other justices concurred. Justice Bastarache wrote the lone dissent. The appeal was allowed and the matter was remitted back to the Ontario Court, General Division.

Citing the purposive reading of section 347 in *Thomson*, Justice Major decided that the LPP must constitute an 'interest' under section 347(2). Consumers' Gas argued that the LPP was simply a fixed incentive for timely payment which did not compound, and therefore was not in form an 'interest'. Major, however, replied that the definition of 'interest' within 347(2) encompassed a variety of fixed payments which would not, in form, be considered an 'interest' at common law. Thus, as Justice Blair in *Thomson*, he deduced that it was the Parliament's intent to opt for a

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[18] *Garland v. Consumers' Gas* (1995) 22 O.R. (3d), 457.

[19] *Garland v. Consumers' Gas* (1996), 30 O.R. (3^{rd}) 415.

[20] *Garland v. Consumers' Gas* (1998) S.C.C. File No. 25644.

more substantively inclusive ‘cost of loan’ concept derived from the *Small Loans Act*. The broadness of the section was viewed as ensuring that creditors would be unable to avoid punishment by merely manipulating the form of the payment.

It was then noted that not all ‘interests’ would be subjected to the criminal interest rate provision; the interest must also be ‘paid in the advancement of credit’. Consumers’ Gas argued that there could be no advancement of credit between itself and its customers, as ‘credit’ assumes a transfer of monies. In this respect, the Supreme Court concurred with the lower courts’ decisions that ‘advancement of credit’ may refer to the deferral of payment for goods, services or benefits. In order for section 347 to be applicable, however, this deferral must be permitted under the payment relationship which exists between the parties. In this respect, the Supreme Court drew a distinction between two situations. First, there is the possibility of a <u>unilateral taking of credit</u> which suggests a situation wherein the consumer simply fails to pay on time. Second, there is the possibility of a <u>consensual taking of credit</u>, which suggests a situation wherein the creditor agrees to accept late payment in exchange for further consideration, such as an additional charge. The Supreme Court decided that section 347 is only applicable to a situation wherein there is a consensual taking of credit.

After examining Consumers’ billing statements, Major concluded that in the present case, the taking of credit is consensual, and therefore section 347 is applicable. In this view, Consumers’ Gas effectively created two payment options. There is a short term payment option, which costs consumers no additional charges, as well as a long term offer, where consumers must agree to pay the additional LPP charge. Thus, the court did not agree that the LPP was solely an incentive for timely payment. The charge was also meant to compensate Consumers’ Gas for the cost of payments deferred, which is itself a hallmark of a credit agreement.

The Court was then forced to deal with the *Nelson* exception, narrowed by the court in *Degelder*, which was released jointly with *Garland*. It is here that the Supreme Court was forced most explicitly to deal with the distinction between section 347(1)(a) and section 347(1)(b). Following *Nelson*, it is clear that section 347(1)(a) cannot apply; this offence intimates an agreement which requires the payment of a criminal interest rate. As it had already been established that Consumers' Gas had created two payment options, no such requirement existed.

Nelson, as discussed, also established that the agreement or arrangement cannot be found illegal under section 347(1)(b) due to the voluntary act of the debtor. Consumers' Gas continued to argue that the case could be disposed of on this point. It was, after all, the consumer who both (a) chose not to pay the bill on the due date prescribed, and (b) had the opportunity to wait the approximately 37 days to pay the overdue bill such that the LPP did not constitute a criminal interest rate. Major decided that the fact that the consumer chose not to pay the bill by the due date could not logically be considered a voluntary act. If it were, the inclusion of 'penalty' in section 347(2) would be rendered meaningless. Further, Major rejected the company's second argument. He found that as there was no clear invitation to wait the appropriate time period; there was an implied limit to the extension of credit. Consumers simply do not have the explicit opportunity to further defer payment, and therefore such inaction is not voluntary.

Thus, following the line of argumentation described above, the Supreme Court found that the LPP is contrary to section 347(1)(b) of the *Criminal Code*.[21] It is clear that the Supreme Court's decision followed the instruction of Justice Blair in *Thomson* in recognizing that they could not "permit any erosion of the protection of the public from usurious charges which Parliament manifestly intended to provide". The subsequent discussion will attempt to look at how the decision may be used to protect consumers from the negative impacts of what has been termed 'proxy credit'[22] and other excessive charges. In this respect, it is also instructive to briefly

[21] Justice Bastarache, in dissent, argued that the majority of the Court has applied section 347 on the basis of an extension of credit which did not exist. He viewed the LPP simply as an inducement for prompt payment. The company, in essence was not offering an option characterized by a consensual taking of credit. Rather, the LPP was an attempt to deter consumers from unilaterally taking credit; a failure to pay a bill on time does not naturally equate to a deferral of payment. Bastarache rejected the notion that there were two payment options being offered to consumers; there was no agreement by the lender to delay payment for further consideration.

[22] 'Proxy Credit' has been defined by the National Consumer Council as the deferment

examine the ways in which other jurisdictions have attempted to protect consumers from similar usurious charges.

of payment of fuel and water bills. (NCC, Credit and Debt: The Consumer Interest. (London: HMSO, 1990, p. iii.)

Chapter Two

Usury Rates In the United States: Federal Preemption

Compared to the powers of Canadian provinces, US states have an extensive amount of control over the establishment of usury rates. To a great extent, it is state governments which determine if the charging of interest beyond a certain rate will be prohibited, and if so, what the ceiling rate will be. Jurisdictional arrangements thereby ensure that American usury provisions are somewhat confusing as they vary markedly across state borders.

The above is not to intimate, however, that the federal government has no tools with which to protect consumers from unjust credit transactions. First, there are federally enforceable criminal provisions against loan sharking. Although these provisions do not criminalize interest rates per se, there is a presumption that loan sharking activities may be inferred from high interest rates. In addition, the *National Bank Act* and the *Depository Institutions Deregulation and Monetary Control Act* serve to exempt national banks and federally chartered financial institutions from state usury laws. Instead of being regulated by state laws, the rate of interest that these institutions charge is tied to federal reserve discount rates. The enactment and enforcement of this federal legislation originally stemmed from fear of the continuation of the high inflation rates of the 1980s. It was also during this era that a push to create a federally imposed uniform cap on interest rates was debated in Congress, although ultimately no action was taken.[23]

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[23] Michelle Samand. “Usury Laws Offer Diminishing Protection for Credit Card Holders”, July 5, 1999, http://www.bankrate.com/brm/news/cc/19980202.asp., p. 2.

Above and beyond the federal government's ability to preempt state law as described above, ancillary federal legislation has been adopted which serves to protect consumers from unjust credit transactions.[24] The Federal Trade Commission (FTC) has the authority to enforce the majority of this legislation, as well as its own regulations and directives.[25] For example, section 5 of the *Federal Trade Commission Act* contains a prohibition against the use of unfair or deceptive acts which affect commerce. This section has been used to challenge loan 'packing'[26]. US Courts, in this context, have utilized an expansive 'cost of loan' concept, as discussed with regard to the Canadian usury provisions.

The *Truth in Lending Act,* (TILA), implemented by the FTC in *Regulation Z,* also affords consumers protection from excessive fees in credit transactions. The Act requires the honest and clear disclosure of the costs and terms of credit before the transaction is agreed to. One portion of TILA, the *Home Ownership and Equity Protection Act*, (HOEPA), provides more stringent requirements with respect to mortgage payments. HOEPA prohibits balloon payments which are due less than 5 years following the consummation of the credit transaction. Similarly, the ability of the lender to increase interests rates following partial default is curtailed[27], as is his or her ability to impose prepayment penalties.

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[24] FTC. <u>FactSheet: Relevant Statutes Enforced By The Federal Trade Commission</u>, 1998. p. 1-2.

[25] Actions under the FTC Act can only be brought by the Commission itself, not by individual consumers. The legislation discussed below, however, does allow consumers to bring an action, either individually or as part of a class.

[26] Loan 'packing' refers to a situation wherein consumers are persuaded to execute documents stating that they *voluntarily* incurred extra costs, when in reality these 'extras' were *mandatory* so as to secure the loan itself. [re. *Money Tree Inc*., Docket No. 3-3735 (F.T.C.,1997)].

[27] Other jurisdictions have referred to this as the creation of 'two tiered' interest rates.

The *Fair Debt Collection Practices Act*, is also relevant to consumer credit transactions. This Act ensures that third party debt collectors do not utilize practices characterized by harassment or unfairness. In this respect, federal jurisdiction prohibits the collection of service fees[28] not explicitly provided for in a credit transaction or permitted by state law. Thus, the Act is cognizant that the 'amount of the debt' to be collected refers to more than merely the principal amount; incidental fees are also included. The FTC, however, defers to state governments in terms of determining the reasonableness, and hence the consequential legality, of all such fees.

It is the FTC's *Credit Practices Rule*, which became effective on March 1, 1985, that deals most explicitly with late fees as a form of interest which has the potential to harm consumers. The Rule focuses on the prohibition of 'pyramiding' late fees. Although late fees are not in and of themselves federally prohibited,[29] consumers cannot be forced to pay additional fees solely based on their failure to pay a previously incurred late fee. The US National Consumer Law Center has also noted that in most instances, previously unpaid late charges cannot be included as part of the underlying principal on which additional late charges are assessed.[30]

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[28] Section 808(1). It is interesting to note that in *FTC v. Capital City Mortgage*, service fees were defined as including late payment penalties and such fees were included in the concept of 'loan payments'.

[29] Most states have permitted the charging of late fees in numerous industries. California courts once characterized these fees as unconscionable charges. This characterization allowed for the Supreme Court's decision in *Smiley v. Citibank* (discussed below). Late fees, however, are no longer considered *ipso facto* unconscionable by the State of California.

[30] National Consumer Law Center, Access to Utility Service, 1996, p. 107.

Thus, using the various pieces of legislation outlined above, the US federal government has the potential to preempt state law in specific circumstances. Further, the FTC has been given the authority to aid in the prevention of unjust credit transactions through the enforcement of ancillary legislative and regulatory consumer protections. In general, however, it is the state government which has the capacity to determine the usurious nature of interest rates within their jurisdictions, as well as to assess the reasonableness of ancillary fees imposed on the borrower.

State Variation of Usury Rates and Implications

The clarity of usury provisions in the United States is greatly hampered by differences between states in terms of both the rates identified, and the functional variation of these rates. Each state has the jurisdiction to determine both general usury limits and the legal rate of interest. The *general usury rate* is the interest rate below which one person or corporation can charge another for credit advanced. The *legal rate of interest* is the rate which will be charged if a contract provides for the payment of interest without reference to a specific rate, or if it simply provides for payment at the highest legal rate. Although most states need to specify a legal rate of interest to be used in determining a judgement rate for legal cases, many states do not have general usury limits.[31] In many of those states that do have general limits, however, the usury ceilings are often thought too high to afford adequate consumer protection.

Beyond the establishment of usury rates, states also have the capacity to determine what constitutes a 'loan' or 'credit' or 'interest' in accordance with their own legislation. In many instances these definitions, as well as the usury rates themselves, are dependent on who is contracting and what industry is being regulated. Usury regulations are politically sensitive, and thus they tend to be myopic. There are a variety of exceptions and conditions to the application

[31] The Information Research Association, Interest Rates and State Statutory Maximums, July 5, 1999, http://www.ira-wg.com/library/usury.html, p.1-7.

of these state laws, and they often change with great frequency.

An example of the political nature of state usury laws may be found with respect to credit card operations. Although to a great extent banks are regulated federally, states have the capacity to regulate these institutions with respect to their credit card businesses. A Supreme Court decision in 1978 ruled that it was permissible for nationally chartered banks to export the higher interest rates of the state in which they are headquartered to consumers in other states.[32] In 1996, the US Supreme Court further ruled that banks, in terms of their credit card operations, may similarly charge fees in accordance with the regulations of the state in which they are headquartered to <u>all</u> of their consumers nation wide.[33]

These decisions gave the banking industry the power to pressure state politicians to dismantle usury laws and to define unreasonable fees restrictively. Competition to become the most 'banker-friendly' state became acute. California, Delaware, South Dakota and Tennessee seem to be ahead in the race; these states have placed no maximums on delinquency fees, cash advance fees, over limits, transaction costs, stop payments, or ATM charges, and have not implemented minimum mandatory grace periods for credit card payments. Both Delaware and South Dakota have also declined to establish usury rates. It is therefore far from coincidental

[32] *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation,* 439 U.S. 299 (1978).

[33] *Smiley v. Citibank*, (S.D.), N.A., 517 U.S. 735 (1996). This case is also relevant, as the Supreme Court affirmed the Comptroller of Currency's interpretation of 'interest' as including "*any payment compensating a creditor or prospective creditor for an extension of credit, the making available of a line of credit, or any default or breach by a borrower of conditions upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, <u>late fees</u>, NSF fees, over limit fees, annual fees, cash advance fees and membership fees...*", p. 2. [emphasis added].

that six of the top ten credit card issuers in the US are headquartered in one of these two states.[34]

Despite the volatility of state usury, and other civil limitations on interest rates, there has been no trend towards widespread repeal. Most states have recognized that the regulation of interest rates aids in deterring the extension of exploitive, high risk credit to low income consumers. There is the fear that the complete repeal of credit legislation may initiate an increase in loan sharking activity and harm the poor by catapulting them into further default.[35]

The rationale with respect to usury rates, however, has not been uniformly applied to the charging of late fees by public utilities. Regardless of state usury limits, the ability of public utilities to charge usury limits has been authorized at least since 1915.[36] Most state courts have not characterized late fees as constituting 'interest' so as to make usury laws applicable. Instead, late fees have been viewed as penalties incurred through the voluntary act of the debtor.

This is not to intimate, however, that all states allow utilities free reign to establish late penalties at whatever level they see fit. Rather, 22 states, and the District of Columbia, have created uniform regulations for late fee payments; Alabama, Colorado and Vermont have actually outlawed the practice altogether. Some states have also created regulatory mechanisms which exclude certain classes of consumers from general late fee policies. Residential and low-income residential consumers are most often excluded.[37]

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[34] Michelle Samand. "Usury Laws Offer Diminishing Protection for Credit Card Holders", p. 2.

[35] Eric A. Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations On The Freedom to Contract", Journal of Legal Studies 24(2) 1995, p. 313-315.

[36] *Southwestern Telegraph and Telephone Co. v. Danaher*, 238 US 485 (1915).

[37] NARUC , *Compilation of Utility Regulatory Policy in the US and Canada*, (1994-95) p. 457, Table 208, quoted in National Consumer Law Center, Access to Utility Service, 1996, p. 98. Specifically, utilities in Kentucky, Massachusetts, New Jersey, Rhode Island, and Texas

This brief account of the American experience with usury provisions and consumer credit protections illustrates that jurisdictional arrangements are often key in determining how such policy is coordinated. Despite jurisdictional differences, however, there is a great deal to be learned from the US law and policy in this area. First, it is interesting to note that for those states which have adopted general usury provisions, the average rate is approximately 16%. Thus, in the Canadian context, one wonders about the harm done to consumers due to the imposition of onerous credit conditions which fall short of the threshold standard of 60% set by the *Criminal Code*. Further, as usury rates do not necessarily apply specifically to late fees, many US states have recognized that alternative mechanisms must be created to protect consumers from the charging of additional fees for utility service.

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cannot charge late fees to residential customers.

The United Kingdom

In 1571, the UK Parliament enacted a strict *Usury Act*. Courts were not to enforce any loans which provided for the payment of interest above 10%. The influential critics of the *Usury Act* eventually forced its repeal in 1854. Since this time, there has been no specific usury rate in the UK.[38] This is not to intimate, however, that the freedom to contract has been absolute in this jurisdiction.

For instance, the *Moneylenders Act*, first enacted in 1900, allowed for the reopening of credit transactions which were found to include either harsh and unconscionable terms, or excessive interest charges. In addition, there are numerous statutory instruments and public bodies which deal with specific types of credit arrangements. For example, there are specific statutory instruments for loan, building and so-called 'friendly' societies. Public bodies dealing with credit include the Public Work Loan Commissioners and the Agricultural Mortgage Corporation.[39]

None of these mechanisms, however, served to create a comprehensive code to deal with consumer credit arrangements. Thus, in 1974, the *Consumers' Credit Act* (CCA) was enacted. The CCA, enforced by the Office of Fair Trading (OFT), is now the main instrument used to deal with credit issues in the UK. The fact that the CCA was to be a comprehensive and far reaching document was obvious from its enactment. Upon creation of the CCA, the British Parliament repealed a number of older statutes, including the *Moneylenders Act* and the *Pawnbrokers Act* of 1862. The implementation of many sections of the CCA was temporally staggered with the repeal of the *Moneylenders Act*, so as to give consumers and businesses time to adjust to the new

[38] Norman Jones, "God and Money-Lenders: Usury Law in Early Modern England", in A. Clay, Economic Expansion and Social Change: England 1500-1700, p. 232-233.

[39] The *Halisbury Statutes*, (1998) vol. 32, para 122-24.

credit regulations.[40]

The CCA includes provisions with which to deal with usurious charges in the UK. As stated, the CCA did not seek to criminalize a particular interest rate, or to impose a civil rate ceiling. Instead, a more conceptual approach was taken.[41] Parties have the freedom to contract as they see fit. Courts, however, have the capacity to determine whether certain payments are excessive. In this respect, the common law has historically set benchmarks for interest rates that it will accept for different types of transactions. These traditional benchmarks, (rarely exceeding 5%), quickly become outdated. Thus, courts are currently more apt to consider the text of the CCA and the guidelines it sets out.[42]

Sections 137-140 of the CCA,[43] describe the prohibition of what are considered 'extortionate credit bargains'. The text of these sections is notable for its vagueness, despite the attempt to define relevant terms in both section 137 and 138. In section 138 (1), 'extortionate' bargains are described as transactions whereby debtors are forced to make payments which are 'grossly exorbitant', or which 'grossly contravene the ordinary principles of fair dealing'. This provision, however, does not state what exactly may be characterized as 'exorbitant' and leaves open what constitutes the 'ordinary principles of fair dealing'.

In light of this vagueness, section 138(2) is vital in terms of its potential impact on interpretation. This provision lists factors which may be considered in identifying extortionate credit bargains.

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[40] For example, the *Moneylenders Act* still applied to non-personal credit agreements consummated before May, 1977.

[41] Specifically, the authors of the CCA declined to replicate the presumption, found in section 10(a) of the 1927 *Moneylenders Act*, that any interest charge over 48% was excessive.

[42] The *Halisbury Statutes*, (1998) vol.32, para. 111-12.

[43] The text of these sections is reproduced in Appendix D.

This list of factors includes a comparison of the interest rate being charged under the transaction and prevailing interest rates. In contrast to the application of usury law in Canada and the United States, section 138(3) and 138(4) of the CCA also point to the need to consider the contracting parties in each specific case. Section 138(3) urges courts to consider the characteristics of the debtor which may illustrate his or her vulnerability, such as, age, experience and business capacity. Section 138(4) urges courts to consider the relevant characteristics of the creditor, including, the degree of risk he or she has incurred. These provisions point to the necessity of examining the relationship, and relative positions of the creditor and the debtor. Thus, in the UK, the determination of excessive interest rates is examined using the same method as all other unconscionable transactions.

In terms of remedies, section 139 expressly authorizes courts to reopen transactions. Courts may order either the debtor or the creditor to repay either the transaction costs or the principal, in whole or in part. Unlike Canadian courts, the judiciary in the UK is explicitly mandated to alter contractual terms as it sees fit. These provisions, according to section 140, are applied regardless of whether or not the transaction in question is regulated or unregulated.

Immediately following its initiation in 1974, the CCA had little impact. The 1980s witnessed a credit boom; by and large all types of consumers were able to secure credit under relatively favourable, low risk terms. This boom, however, did not last. With the end of the credit boom in the late 1980s and early 1990s, the credit industry underwent a severe realignment; lenders became cautious with respect to who they would lend to and under what terms.[44] Thus, an increasing number of non-status consumers[45] were unable to gain access to conventional forms

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[44] UK, Office of Fair Trading Magazine (18) "Crackdown on Unscrupulous Lenders", July 7, 1999, http://www.oft.gov.uk/html/trading/tr-arch/ftr18-3.htm, p. 1-6.

[45] The OFT refers to non-status consumers as consumers who have either a low credit rating or no credit status. Such status may be due to a poor record of employment, irregular or hard-to-verify earnings, (perhaps due to self employment), or an averse credit history, including uncleared arrears or other debts. Non-status lenders, in turn, are defined as those creditors who

of credit.

Restricted supply, without a corresponding fall in demand, gave incentive to the rise of 'street-lenders' and 'payday lending'. Some lenders were specifically targeting non-status consumers, who often had no experience with, or knowledge of, financial matters. The credit that such lenders offer is characterized by high, and two tiered interest rates, front loaded prepayments, and a plethora of brokerage fees.[46] The use of this type of credit by non-status consumers has the potential to induce a debt spiral which is difficult to halt. Especially since consumers often face increased interest rates as they fall into arrears, default on interest payments is common, leaving aside the issue of principal repayment.

In 1997, the OFT published a set of *Guidelines* addressing consumer protection issues in the non-status credit market. The Guidelines intimated that such credit practices should be held as 'unfair' or 'improper' under section 25 (2)(d) of the CCA. This interpretation would allow the OFT to revoke the licenses of non-status lenders.[47]

The Guidelines also revisited the OFT *Unjust Credit Transaction Report* of 1991. This report was written as an attempt to flesh out the approach to be taken in interpreting section 137-140 of the CCA. The report recommended the replacement of the 'extortionate credit bargain' terminology, with a focus on 'unjust credit transactions'. This was viewed as making the section more flexible in dealing with a variety of improper credit practices. The report also cited a number of additional factors to be examined in determining if a particular transaction was 'unjust'. For example, if creditors were found to be specifically targeting consumers already in

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serve the non-status consumer market.

[46] OFT, "Crackdown", p. 2.

[47] UK, Office of Fair Trading, "Non-Status Lending: Guidelines for Lenders and Brokers", November 1997.

debt, the OFT may want to look closely at the terms of the transaction. The advancement of credit based heavily on equity, and the existence of brokerage and advance fees were similarly frowned upon. High interest rates were a sign of an 'unjust credit transaction', as was an automatic increase in interest rates paid upon partial default.[48]

[48] Such situations may also be dealt with through the use of section 93 of the CCA. This section prohibits the increase of interest rates on default in a number of instances. In response to the issuance of the Guidelines, may creditors felt obliged to remove 'unfair' terms from their loan agreements. For example, in 1998, City Mortgage Corporation (CMC), agreed to remove all unfair terms from its loan agreements. It agreed to backdate these changes to August of 1997. [OFT Fair Trading Magazine, "CMC Backdates Ban: Lender Agrees To Change Unfair Terms For All Borrowers", (Spring 1998)].

The Guidelines stated that <u>all</u> ancillary charges must be examined when determining if a transaction was ‘unjust’. Such charges must be characterized by both clarity and transparency. In addition, they must be found to reasonably reflect the cost of the loan. Thus, the expansive ‘cost of loan’ concept, also employed by Canadian law, ensures that courts in the UK will be forced to rule on the unconscionable nature of all components of the loan, including ancillary charges such as late payment fees.

Chapter Three

Implications for Consumers

The preceding discussion has illustrated that a variety of jurisdictions are looking, or have the potential to look, at the charging of late fees as unconscionable transactions. In order to understand both the rationale behind this stance, and its implications for consumers, it is important to examine the impact of consumer debt. The following discussion, therefore, seeks to outline the place of late fees in what may be termed the 'consumer debt spiral'.

As has been noted, the use of credit has drastically increased since the 1980s, and traditional sources of credit, have not kept pace with this demand. Credit is no longer used solely for emergency purchases. Nor is credit used for the sake of convenience. Rather, credit is being used as a means of purchasing necessary products and 'managing' revolving debt. Thus, the rise of the use of consumer credit has witnessed a corresponding rise in the use of 'proxy credit'.[49] Consumers, more than ever, are being forced to defer payment for utility services. By buying basic needs with credit, consumers are becoming increasingly vulnerable to rising interest rates and the imposition of ancillary fees.

[49] NCC, Credit and Debt, p. 26.

Thus, in general terms, there is an increased need to deter exploitive high risk credit extensions to vulnerable consumers. Usury limits, and other consumer protections have proven worthwhile in this respect. Evidence indicates that usury limitations have lowered the risk inherent in the small loans markets in a number of jurisdictions.[50] They have done so with minimal interference with contractual freedom. Given alternatives such as licensing and excise taxation, usury limits have been thought preferable as they are largely self enforcing. Creditors are deterred from imposing onerous terms as there is a chance that these terms will not be enforced. Thus, consumer protections will be considered by the parties during the contract formation process.

Usury limits, however, are not a panacea for consumer credit problems. As opposed to administrative penalties, usury laws are generally only activated by consumers. It is the consumer, as opposed to the government, who brings a claim. Thus, consumers must be informed of their rights in this regard. They must understand, and be able to identify, a violation of the usury regulations. Additional consumer protections must also be in place. In the past, creditors have found ways to bypass usury laws. For example, the growth of retail installment plans burgeoned as a means by which to avoid limits on interest rates.[51] Usury rates will also

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[50] See Daniel J. Villegas, "The Impact of Usury Ceilings on Consumer Credit", S. Econ. Journal, 56 1989, p. 126, which is discussed in E. Posner, "Contract Law in the Welfare State", p. 302-303.

[51] Although many state governments in the US have now imposed usury limits on retail installment plans, they are considerably higher than the general usury limits, (imposed for monetary loans), set by the states. This is said to "reflect the intuition that allowing people to borrow money to acquire durable goods is not as socially costly as allowing people to borrow money for any purpose they choose". [E. Posner, "Contract Law in the Welfare State"p. 303.]

only be effective if interest rates are set at a level low enough to deter consumer harm. Finally, usury laws and related regulations must take a comprehensive view of the term 'interest' so as to adequately protect consumers from additional fees, including late charges.

The imposition of late fees, based on the assumption that those consumers who pay late are willfully withholding their payment, is flawed. Many consumers simply cannot pay. Thus, an 'incentive' for timely payment will not achieve its desired ends. This incentive argument also ignores that there is a profit motive behind the charging of fees. Companies benefit from the payment of ancillary fees; they are not simply attempting to ensure the efficient management of accounts receivable. For example, if the US Supreme Courts had ruled against Citicorp in the aforementioned *Smiley vs. Citibank*, US credit card issuers would have lost an estimated $5 billion of annual revenue.[52]

The extent to which consumers are unable to pay is variable. Many consumers are in a position where they have over-committed themselves financially. This over-commitment has the potential to evolve into unmanageable credit problems which, in turn, may lead to insolvency. In this respect, it is important to recognize that debt is often self perpetuating; there exists a consumer debt spiral.

It is also important to note that this consumer debt spiral invariably impacts the most vulnerable consumers. These low income consumers are often young adults, or families with small children. [53] By and large they have little knowledge or experience with financial matters. Even if it is possible for them to better manage their debt, they are often not being given the necessary tools with which to do so. Billing material is often confusing, interest rates are increased without

[52] New York (AP), "Consumer Groups Fear Court Decision Will Mean New Banking Fees", http:// centralohio.thesource.net/Files3/9606076.html, June 7, 1996.

[53] NCC, Credit and Debt, p. 92.

their knowledge, and ancillary fees are imposed. There must be a greater recognition that billing documents are "financial management tools", and as such, they must be clear and understandable to all consumers.[54]

The imposition of late fees play a large role in the perpetuation of the consumer debt spiral. As mentioned above, there is little sense in charging an additional fee if the consumer cannot even pay the principal amount. Late fees heighten the debt burden of the consumer and ultimately make it more difficult for him or her to pay what is owed. In the context of utilities, this can lead to 'fuel poverty'. In this respect, there is a great threat that energy supply will be terminated. Thus, late fees have the potential to threaten the universal supply of public goods.The consumer debt spiral has other ramifications for the vulnerable consumer. The non-payment of bills, (exacerbated by the imposition of late fees), has the potential to harm consumers' credit ratings. Late payments, if reported by the lender, may remain on the consumer's credit rating for six years.[55] This is only one year less than the amount of time a first bankruptcy remains on a consumer's credit report.

A poor credit rating, combined with the already precarious credit status of a vulnerable consumer, will result in the payment of higher interest rates. The imposition of high interest rates on future credit arrangements will exacerbate the consumer's inability to pay, in turn lowering his or her credit rating. As the spiral proceeds, consumers will be denied access to credit from traditional sources. Consumers will then be forced to gain credit from non-traditional sources, such as 'payday lenders' or 'street-lenders'. The terms under which such creditors lend often makes it impossible for consumers to break the debt spiral without declaring

[54] John Terradus, "Know Your Niche When Going Shopping For New Credit Cards", The Toronto Star, June 27, 1998.

[55] James Daw, "The Hard Facts About Climbing Out of Debt", The Toronto Star, June 22, 1999.

bankruptcy. Indeed, interest rates for these 'loans' may be as high as 800%.[56] In addition, as consumers become more burdened by debt they must deal with the potential harassment of collection agencies and the claims of those who offer to 'repair' credit ratings for exorbitant fees.[57]

Given the debt spiral described above, it is obvious that consumers must to be protected from excessively high interest rates and ancillary charges, including late fees. In this respect, the Canadian Supreme Court responded to the needs of consumers in the *Garland* case. As described above, there is a sound legal and policy rationale behind the decision. The question then becomes: what are the practical consequences of the ruling?

As has been discussed, it was late payment penalties charged by Consumers' Gas which were at issue in the *Garland* case. It should not be assumed, however, that Consumers' is the only utility employing such a practice, or that the decision could not be applied to other industries. Many different types of companies charge LPPs. It should not be overlooked that LPPs are a source of revenue for these companies. After all, the creation of late charges result in the transfer of ancillary monies from the consumer to the supplier, intensifying consumer debt load.

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[56] Tennessee (AP), "State Invoke Usury Laws Against Controversial 'Payday Loan'", Lubbock Avalanche-Journal, http://www.lubbockonline.com/stories/011099/0110990018.shtml., January 10, 1999. Some US states and Canadian provinces do not consider these practices to constitute 'loaning'. As such, there is often no regulation of the interest rates or ancillary fees involved.

[57] See, for example, J. Daw, "The Hard Facts", and Joel Ruimy, "Collection Agencies Top List of Consumer Grumbles", The Toronto Star, January 21, 1999.

Many other natural gas and electricity distributors have instituted late penalties similar to those charged by Consumers' Gas. Thus, the *Garland* decision has the potential move far beyond simply changing the policy of one company. Rather, the decision has the capacity to impact on many industries which allow deferred payment for the provision of goods or services.

Thus, the way in which consumers interact with their utility suppliers, (and providers of other goods and services), has the potential to be fundamentally altered by the Supreme Court ruling. In an attempt to anticipate such change, this discussion takes a brief look at the late penalty policies of some companies within a variety of industries. This survey will include a description of the companies involved so as to illustrate the scope of the potential impact on consumers. Specifically, the following discussion focuses on providers of energy, telecommunications, cable, Internet service providers, and credit cards issuers.

Chapter Four

Implications for Industry:
Energy, Telecommunications, Cable, Internet Service and Credit Card Issuers

The Energy Industry

Consumers' Gas

Considering the extensive customer base of Consumers' Gas, the *Garland* decision has the potential to affect a large number of Ontario consumers. In 1998, Consumers' Gas provided natural gas services to 1.5 million consumers. Through its affiliate, Enbridge, Consumers' Gas also engages in appliance sales and rentals. Consumers' Gas holds $4 billion of assets, and in 1997 its revenue stream exceeded $2 billion.[58] Thus, given the size of the Consumers' Gas operation, it is hardly surprising that the *Garland* claim sought the restitution of over $112 million dollars paid by consumers in the form of LPPs since 1981. LPP's continue to be charged as Ontario courts revisit the actuarial evidence in the *Garland* case. Thus, there is the potential for more claims to be brought in the future.

[58] Enbridge Consumers' Gas, *Corporate Profile: About Enbridge*, July 21, 1999.

Union Energy

Union Energy[59] distributes natural gas to consumers in Ontario. The Company is regulated by the Ontario Energy Board, and is subject to the *Energy Act* and *Public Utilities Act*. Its transmission lines serve Northern Ontario from the Manitoba and Muskoka border. In the North, Union Energy distributes natural gas from Windsor to Toronto, and in the East its market extends from Port Hope to Cornwall. The consumer base of Union Energy was greatly enlarged in 1998, when Centra Gas Ontario merged with Union Energy. The Company has 1 075 000 customer accounts, 967 000 of which are residential households. Union holds $4 billion of assets, and its total revenue in 1998 was $1.6 billion.[60]

Like Consumers' Gas, Union Energy has a late penalty policy in place. If a consumer does not pay the balance owing on their account within 35 days after the bill is issued, a penalty of 1.5% of the amount owed is charged. An additional charge will be imposed, (and the original fee compounded), in the next billing period if the consumer again fails to pay the amount due.

Centra Gas Manitoba

[59] Union Energy is a subsidiary of Westcoast Energy Inc. Westcoast is a leading North American energy company, holding approximately $11 billion in assets.

[60] Union Energy Inc. *Union Energy: About the Company*, July 21, 1999.

Although Centra Gas Ontario merged with Union Energy in 1998, Centra Gas continues to supply natural gas to consumers throughout Manitoba. The Company is regulated by the Public Utilities Board of Manitoba. Its business is concentrated mostly in the south. Centra Gas is headquartered in Winnipeg, and operates district offices in Brandon, Portage la Prairie, Selkirk, Steinbach and Winkler. Centra Manitoba holds a market share of 93% in the City of Winnipeg and has 242 000 customer accounts throughout the province.[61] The Company, like Union Energy, is a wholly owned subsidiary of Westcoast Energy Inc.

Centra Gas Manitoba charges a late fee of 1.5% of the outstanding balance. This fee is imposed if the customer has not paid the amount owed by the due date, which is 21 days after the bill has been issued. Centra Gas, however, will <u>not</u> charge consumers late fees if the balance owing is less than $50.

<u>Gaz Metropolitain</u>

Gaz Metropolitain is the major natural gas distributor operating in Quebec. The Company is regulated by the Regie de l'Energie. It is the fourth largest natural gas distributor in Canada, and the tenth largest in North America. The Company supplies 150 000 consumers in 236 municipalities across the province. This equates to the supply of 97% of natural gas consumers in Quebec, and to total annual sales of approximately $2 billion.[62]

Gaz Metropolitain has instituted a late fee policy. Failure to pay the amount owing by the due date results in the charging of a 1.5% penalty on the balance in arrears. There is no set grace period, although discretion is used in this respect. The imposition of the fee is repeated, (and the original charge compounded), if the bill remains unpaid through the following billing cycle.

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[61] Centra Gas Manitoba. *Corporate Profile*, July 22, 1999.

[62] Gaz Metropolitain. *Activities: A Dynamic Connection*, July 22, 1999.

Ontario Hydro

Ontario Hydro, (through the Ontario Hydro Services Company), is the major supplier of electricity in Ontario. The OHSC is a holding company which deals with both the delivery of electricity and retail operations. It is currently regulated by the Ontario Energy Board. The Company has over $9 billion dollars in assets and operates a 120 000 kilometre distribution system. The OHSC has approximately 1 000 000 retail consumers, excluding industrial users. In addition, the Company provides electricity to 305 municipalities which provide electricity to 2 946 000 Ontario consumers.[63]

Ontario Hydro charges consumers late fees if they are delinquent in paying their bills on time. The grace period before late payment fees are imposed is 21 days from bill issuance. The late penalty consists of a 5% charge which is compounded if the amount owing remains unpaid. Considering the similarity between the Ontario Hydro late penalty and the Consumers' Gas LPP, the *Garland* decision has a great potential to impact Ontario Hydro's policy.

Hydro Quebec

Hydro Quebec is the major provider of electricity for all of Quebec. Like Gaz Metropolitian, the Company is regulated by the Regie de l'Energie. Hydro Quebec has 3 457 000 customer accounts. Electricity consumption rates in Quebec are extremely high. The average residential household consumes 16 017 kWh per annum.[64]

Like its Ontario counterpart, Hydro Quebec has a late fee policy. If consumers fail to pay the balance owing by the due date recorded on the initial bill, they will be charged a penalty of 1.2% of the amount in arrears. This percentage will repeat, and compound, if it remains unpaid

[63] Ontario Hydro Services Company. *About OHSC*, July 21, 1999.

[64] Hydro Quebec. *Corporate Profile*. July 22, 1999.

through the next billing cycle.

BC Hydro

BC Hydro, which distributes and retails electricity throughout British Columbia, is the 3rd largest electric utility in Canada. It is regulated by the British Columbia Utilities Commission (BCUC). 94% of BC's electricity consuming population is served by BC Hydro. This translates into 1.5 million consumers. BC Hydro holds considerable assets, operating 61 dams at 43 locations.[65]

BC Hydro[66] consumers who do not pay their bill by the due date stated face a potential late fee of 1.5% of the balance owing. This fee will be compounded, (and repeated), if the consumer continues to default on payment. Not all consumers, however, will face this penalty. BC Hydro consumers are awarded a credit rating dependent on their payment history with the utility and their general credit standing. In this respect, a numeric rating of 1-4 is given to each customer. Those with high scores, (generally with a credit rating of 1 or 2), will not be charged late fees if their bills are occasionally late. Consumers who regularly encounter difficulty making payments, however, will be consistently penalized as these consumers typically have lower credit ratings.

Telecommunications

BCE Enterprises

Bell Canada, a wholly owned subsidiary of Bell Canada Enterprises Inc. provides a variety of telecommunication services including local and long distance telephone services, wireless services, Internet access and data services. Bell operates in Ontario, Quebec, Eastern Canada,

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[65] BC Hydro. *Company Facts and Finances*, July 21, 1999.

[66] BC Gas is administered and operated jointly with BC Gas. Thus, the late payment policies are identical for both utilities.

Manitoba and British Columbia, as well as in the United States. Bell's overall market share in Canada is approximately 36%.[67] The Company has 12.6 million telephone access lines, and more than 1.5 million cellular lines. Its overall revenue stream was 12.7 billion in 1998, and it currently holds $20 billion in assets.[68]

In terms of its telephone services, Bell Canada has a 32 day grace period; late payment penalties are not generally charged until the second billing period has passed without payment. The late penalty charge is a formulated at 1.25% of total arrears. This charge is repeated and compounded if the balance owed is left outstanding past the next billing cycle.

[67] Bell Canada. Annual Report, 1998.

[68] Bell Canada. *Corporate Profile: Quick Facts*, July 19, 1999.

BCT-Telus Communications Inc. With approximately 22% of the telecommunications market, BCT-Telus, is Canada's second largest competitive communications company.[69] Currently, the company operates predominately in Western Canada, with over 100 offices throughout BC and Alberta. Its operations includes local and long distance services, Internet and e-commerce services, a wireless business, and advanced data services. BCT Telus' market share translates into 4.4 million access lines. The Company currently holds $9 billion of assets and its annual revenue stream is $6 billion.[70]

Similar to the policy of BC Hydro and BC Gas, BCT-Telus does not have a set grace period before the imposition of late fees. All customers are given a credit rating which will determine if, and when, they will be required to pay a late penalty charge. If a late fee is imposed it will consist of 1.25% of the balance owing. This charge will be repeated and compounded as long as the consumer remains in default.

AT&T Canada Inc.

[69] BCT-Telus Communications Inc. Annual Report 1998.

[70] BCT-Telus Communications Inc. *Corporate Profile: Who We Are*, July 19, 1999.

Following the merger of AT&T Canada Long Distance, MetroNet Communications, NetCom Canada, and ACC TelEnterprises in June of 1999, At&T Canada became the largest competitive telecommunications company operating in Canada. (AT&T's long distance service is now operated by Primus Telecommunications Group) The merger ensured that AT&T is capable of competing in the full range of telecommunication services across the country. The Company has a Canadian market share of more than 7%. It serves approximately 700 000 customers, from its 147 offices. AT&T Canada Inc.'s revenues in 1998 were approximately $1.2 billion, and it holds $3.5 billion in assets.[71]

Like Bell, AT&T has implemented a late penalty policy for its telephone services. Specifically, consumers are charged a fee of 2% on any outstanding balance following the completion of every billing cycle. The imposition of this fee will be repeated if the amount due remains unpaid at the end of the next billing cycle.

Sprint Canada Communications Inc.

Sprint Canada, wholly owned by Call Net Enterprises Inc., has captured approximately 6%[72] of the Canadian market. Sprint operates nationwide, (out of 18 offices), and competes in a full range of voice and data services. Sprint has approximately 500 000 customers throughout Canada.[73]

Sprint Canada customers are afforded a 14 day grace period on unpaid bills before ate fees are imposed. If they have not paid the balance owing in full by this time, they will be charged a late payment penalty fee of 1.5% of the outstanding amount. This fee will be repeated, (and

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[71] AT&T Canada. *Corporate Overview*, July 19, 1999, and Lawrence Surtees, "Primus Poised to Spark Long Distance War", The Globe and Mail, Wednesday June 2, 1999, B5.

[72] Sprint Canada. Annual Report, 1998.

[73] Sprint Canada. *About Sprint Canada*, July 19, 1999.

compounded), if the consumer continues to default on payment.

Cable Providers

Rogers Communication Inc.

Rogers Communication Inc. is involved in the provision of cablesystems, wireless and other media services throughout Canada. The Company has an annual revenue of approximately $2.8 billion, $1 027 million of which stems from its cable business. In 1980, after the acquisition of Canadian Cablesystems Ltd. and Premier Cablesystems Ltd., Rogers Communication became the largest cable television company in Canada. It also expanded its operations to the United States.[74]

Rogers Communication has instituted late fee charges. After a 35 day grace period, (generally equivalent to one billing period), a $2 late penalty or 'surcharge' is levied. If the balance owing is left unpaid in the next billing period as well, (approximately 65 days from the original date due), the customer is charged a $20 'account processing fee'. For all intents and purposes this 'processing fee' may be characterized as a late penalty.[75] Basic cable rates can be as low as $10 per billing period, and average at about $17-35 per billing period. Given these facts and the

[74] Rogers Communications Inc. *Roger's Company Structure*, and *Historical Overview*, July 19, 1999.

[75] In this respect, NCLC has noted that, *"the name given to these charges does not change their nature. They may be called late payment charges, forfeited discounts, a "net" bill versus a "gross" bill, a penalty, or a late service charge. There is no conceptual difference between the promise of a lower bill for prompt payment and the threat of a higher bill for late payment."* [National Consumer Law Center, Access to Utility Services, 1996, p. 98.]

Garland decision, it is quite possible that the $20 'account processing fee' may, in many cases, contravene section 347 of the Criminal Code.

Shaw Communications Inc.

Shaw Communications Inc., like Roger's, is a multimedia communications company operating in a variety of industrial sectors. For example, the Company is involved with cable television operation, television programming development, radio broadcasting, and a variety of ancillary telecommunication services. In terms of its cable business, Shaw Communication has 1.46 million subscribers. The Company provides cable service in British Columbia, Alberta, Saskatchewan, Manitoba and Ontario, providing service for approximately 30% of the market in these provinces. This business translates into approximately $550 million in revenue per annum.[76]

If Shaw Cable customers have not paid their outstanding balance by 45 days from the date of bill issuance, they will be charged a fee of 2% of the amount in arrears. If the bill, (and the late payment fee), remain unpaid for an additional 20 days, consumers will be charged an account processing fee of $15 dollars. As is the case with Rogers Cable, these fees may be problematic given section 347 of the Criminal Code.

Internet Service Providers

[76] Shaw Communications Inc. *Company Profile*, July 20, 1999.

Internet providers do not charge late fees. The general billing practice within this industry, however, does raise concern in terms of consumer debt and credit issues. Some service providers such as ACC and Bell Sympatico[77] allow the consumer to choose between making payments with their credit card, and paying by preauthorized account deductions. Many providers, however will only receive payment by pre-authorized credit card payments. For example, AT&T, Sprint[78] and most local carriers, (such as Cyberus in Ottawa), have this policy. The cost of Internet service is charged monthly onto a consumer's credit card. The rate of interest to be paid by the consumer will therefore be dependent on the credit card used and the speed of repayment. Thus, access to Internet services is often tied to the use of credit, and has the potential to add to consumer debt. If a consumer defaults on credit payments, (thereby losing the right to use the credit card), Internet service will be terminated immediately.

Credit and Charge Card Issuers

In general, credit card issuers do not charge late fees if the monthly minimum repayment is not made. Rather, the card user continues to pay interest on the arrears. A consumer who fails to make timely payments, (of at least the minimum amount required), however, will not be eligible for such bonuses as 'preferred customer' interest rates. Such reduced interest rates offer the potential for real consumer savings. For example, the preferred customer interest rate on an American Express Credit Card is 14.95%, vis a vis the standard interest rate of 18.25%.[79]

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[77] Bell Sympatico. *Monthly Billing*, July 20, 1999.

[78] If a consumer, however, has chosen to use Sprint as both its long distance carrier and its Internet service provider, the customer will receive one bill with charges for both services. In such a case, the late fees applicable for Sprint telephone service will be charged on the total amount due.

[79] American Express. *American Express Cards at a Glance,* July 19, 1999.

It is also interesting to note that issuers in Canada often offer an introductory interest rate to entice consumers to take their card. After a period of approximately six billing periods, this interest rate is substantially increased. Many US jurisdictions, (as noted previously), have regulated, or are attempting to regulate, against this practice of 'teaser' rating.

Consumers using *charge* cards may be required to pay late fees. Charge cards require the cardholder to pay the total balance owing on a monthly basis. A failure to do so will result in a late charge or what is termed a delinquency fee. For example, American Express late fees are assessed based on a 30% per annum interest rate. (This equates to a daily interest rate of $0.0822 on the balance owing.)

This charge is overshadowed by the policy of the Discover/Novus Network which is the largest independent credit card network in the US. The Network issues 6 credit card brands, resulting in the service of 46 million card members with a transaction volume of $54.5 billion in 1997.[80] If the amount due is not paid on any Discover/Novus credit card bill by the completion of the next business cycles, a charge of $29 will be imposed, regardless of the balance owing.

Summary of Findings

The preceding discussion illustrates that the imposition of late payment penalties are commonplace in a variety of industries. The list of industries and companies described is by no means exhaustive. In many instances, these fees are quite substantial and have the potential to increase over time. Thus, late payment fees will augment the momentum of the consumer debt spiral. Further, the fact that the imposition of late charges is a prevalent practice for the energy and telecommunication industries raise concerns about the need to ensure universal service.

[80] Discover/Novus Network, *About the Network*, July 23, 1999.

There is a threat that as debt is increased through the imposition of ancillary fees, consumers will no longer be served. In addition, the poor credit ratings which consumers accrue will hinder their ability to participate in the economy in the future.

The Supreme Court's ruling in the *Garland* case is a tool with which to check the negative impact of ancillary charges such as late fees. The ultimate decision, and the reasoning upon which this decision is based, has the potential to affect a wide variety of consumer transactions in a large number of industries. The scope of the minimal usury limitations in Canada has been broadened in a fashion which recognizes the problems that consumers face.

Although utilities may be deterred from raising their late fees, substantial late fees have not been eradicated. For instance, following the *Garland* decision, Centra Gas Alberta and Bonneville Gas applied to the Alberta Energy and Utilities Board to reduce their late fees so as to comply with the *Garland* decision. The companies' argued that a penalty of 3.5% with a 28 day grace period would ensure that the penalty would never exceed an interest rate of 60%. The Board accepted this evidence and the utilities' request, although they did note that a review of the penalty would be held at the next rate hearing.[81]

Thus, although the Garland case may result in the minimal lowering of late fees in certain areas, the case does not sufficiently address the needs of consumers. The use of section 347 of the *Criminal Code* must be complemented by, and integrated with, other consumer protections. This is vital if consumer debt spirals are to be reversed.

[81] Alberta Energy and Utilities Board, *Order U99050 & U99051*, June 30, 1999.

Conclusion

Garland and Beyond

Even when *Garland* does have the potential to impact consumer credit and proxy credit transactions, it application is not inevitable. As has been noted, section 347 has been rarely used since its inception. There is little enforcement of the usury provision criminally; its application is mainly in civil courts where it can be raised in terms of contractual illegality.

As it stands now, even the minimal consumer protections embodied by *Garland* will not be beneficial if consumers are left unaware of section 347 of the *Criminal Code* and how it works. Usury provisions are particularly confusing for consumers as violations are difficult to identify and calculate. Consumers must be educated in this respect. Additionally, if government and regulators are committed to enforcing the usury provisions, violations must be anticipated and corrected. Ex post facto application is not enough. If such steps are not taken, even the limited benefits of section 347 and the *Garland* decision will not be achieved.

It must also be recognized that the 60% ceiling imposed by section 347 of the *Criminal Code* is less than adequate in protecting consumers from exploitative credit arrangements. This was explicitly illustrated by a comparison of the American and Canadian jurisdictions in Chapter Three, and the analysis of Chapter Four. More systematic safeguards and industrial benchmarks need to be in place so as to ensure that creditors are unable to create contractual terms which are wholly one sided.

With specific reference to public utilities, the issue of proxy debt spirals need to be explicitly addressed. First and foremost, consumers must be offered rates and prices which are affordable.

Second, with use of *Garland*, ancillary fees must be minimized and exorbitant fees abolished. Third, utilities must offer consumers payment options and repayment plans which afford the consumer flexibility. Although many utilities offer to personalize debt repayment, this is often not known by consumers, and the practice must become more widespread. It is, after all, to the benefit of both the creditor and the debtor if payment is made. Fourth, the abolition of late payment penalties must in no way accelerate shut off; 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 telecommunication markets.

In conclusion, the *Garland* case must be viewed as an important step forward for consumers. The Supreme Court has explicitly recognized that consumers must be shielded from exploitative credit transactions and excessive ancillary charges, (such as late payments), which accelerate consumer debt spirals. The ground which has been gained through *Garland*, however, will not provide consumers with sufficient credit protection. Section 347 of the Criminal Code cannot stand alone; it must be integrated with other consumer protection measures. There must be a cohesive strategy with which to protect consumers from exploitive credit arrangements and increased proxy and non-proxy debt.

Post-Script

On October 18, 1999, the Ontario Energy Board (OEB) released its Decision with respect to the proposed Standard Supply Service Code For Electricity Distributors (RP 1999-0040). The OEB considered a number of different models to supply electricity on a standard supply basis to customers who do not choose an alternate supplier than the utility. The provision of standard supply service is governed by the provisions of section 29 of the *Electricity Act 1998* of Ontario.

The models that the OEB examined included one that would provide a passthrough of the weighted average of the hourly wholesale price for electrical energy plus an administrative charge to standard supply customers. This was the “spot price” model. The Board also examined a “yardstick” model (proposed by PIAC on behalf of vulnerable consumers) that would permit LDC’s to establish a fixed rate for standard supply service customers. As well, a model that provided for the utility initiating a bidding process with the LDCs acting as consignment retailers was also under consideration.

In the end, the OEB chose to treat small market and large market customers on a different basis. For small market customers (less than 50 kw of demand) the Board provided a one year fixed price option to be provided by the utilities with an annual trough up based on variances with the actual spot market power cost of the utility for these customers. Large customers will simply receive the price based on a pass through from the spot market “spot price model”.

In coming to its conclusion to reject the proposal for a bidding process or a portfolio procurement approach, the Board found:

"... there would be significantly greater regulatory burden including the procurement process guidelines and a process for regulatory oversight of the result. In addition, the Board found it questionable that a utility should have to provide power for large volume customers except from the spot market due to the associated risk in customer mobility issues."[82]

[82] RP 1999-0040, p. 34

347. (1) Notwithstanding any Act of Parliament, every one who
(a) enters into an agreement or arrangement to receive interest at a criminal rate
or
(b) receives a payment or partial payment of interest at a criminal rate, is guilty of
(c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
(d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

"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 collateral agreement or arrangement;

"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 the agreement or arrangement;

"insurance charge" means the cost of insuring 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" 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" 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" 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” means a fixed or 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.

(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.

(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 personal appearing to have signed the certificate

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

(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 purposes of cross-examination.

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

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

Penalty for Late Payment

(Consumers' Rate Schedule for Residential Consumers)

When payment in full is not made within sixteen (16) days of the date of mailing, or hand delivery of the bill, a penalty of five per cent (5%) of the current amount billed shall be levied. Where payment is made by mail, payment will be deemed to be made on the date postmarked.

Section F: Payment Conditions

(Consumers' Rate Schedule for Residential Consumers)

Payment in full should be received by the Company, or by an institution authorized by the Company to accept payments on its behalf, on or before the due date specified in the monthly bill, which date is at least ten (10) days (sixteen (16) in the case of Rates 1,2,6 and 9), after the date of rendering the bill. A penalty of five (5) percent of the unpaid portion of the current amount billed shall be added to the amount due if payment is not received as outlined above. When payment is mailed, the penalty will be added if the postmark on the envelope containing such payment is later than the due date.

Appendix C

See attached Consumers' Gas bill insert.

137 Extortionate credit bargains

(1) If the court finds a credit bargain extortionate it may reopen the credit agreement so as to do justice between the parties

(2) In this section and sections 138-140 –

(a) "credit agreement" means any agreement between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit of any amount, and

(b) "credit bargain" –

(i) where no transaction other than the credit agreement is to be taken into account in computing the total charge for credit, means the credit agreement, or

(ii) where one or more other transactions are to be taken into account, means the credit agreement and those other transactions taken together.

138 When bargains are extortionate

(1) A credit bargain is extortionate if it –

(a) requires the debtor or a relative of his to make payments (whether unconditionally or under certain contingencies which are grossly exorbitant, or

(b) otherwise grossly contravenes ordinary principles of fair dealing

(2) In determining whether a credit bargain is extortionate, regard shall be had to such evidence as adduced concerning –

(a) interest rates prevailing at the time it was made

(b) the factors mentioned in subsections (3) to (5)

(c) any other relevant considerations

(3) Factors applicable under subsection (2) in relation to the debtor include –

(a) his age, experience, business capacity and state of health; and

(b) the degree to which at the time of making the credit bargain, he was under financial pressure, and the nature of that pressure

(4) Factors applicable under subsection (2) in relation to the creditor include –

(a) the degree of risk accepted by him, having regard to the value of any security provided;

(b) his relationship to the debtor; and

(c) whether or not a colourable cash price was quoted for any goods or services included in the debt bargain.

(5) Factors applicable under subsection (2) in relation to a linked transaction include the question of how far the transaction was reasonably required for the protection of the debtor or the creditor, or was in the interest of the debtor.

139 Reopening of extortionate agreements[83]

(1) A credit agreement may, if the court thinks just, be reopened on the ground that the credit bargain is extortionate –

(a) on an application for the purpose made by the debtor or any surety to the High Court, county court or sheriff court; or

(b) at the instance of the debtor or a surety in any proceedings to which the debtor and creditor are parties, being proceedings to enforce the agreement, and security relating to it, or any linked transaction; or

(c) at the instance of the debtor or a surety in other proceedings in any court where the amount paid or payable under the credit agreement is relevant.

(2) In reopening the agreement, the court may, for the purposes of relieving the debtor or a surety from payment of any sum in excess of that fairly due and reasonable, by order –

(a) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons,

(b) set aside the whole or part of any obligation imposed on the debtor or a surety by the credit bargain or any related agreement

(c) require the creditor to repay the whole or part of any sum paid under the credit bargain or any related agreement by the debtor or surety, whether paid to the creditor or any other surety, or

(d) direct the return to the surety of any property provided for the purposes of the security, or

(e) alter the terms of the credit agreement or any security instrument.

(3) An order may be made under subsection (2) notwithstanding that its effect is to place a burden on the creditor in respect of an advantage unfairly enjoyed by another person who is party to a linked transaction.

(4) An order under subsection (2) shall not alter the effect of any judgement.

140 Interpretation of sections 137 and 139

Where the credit agreement is not a regulated agreement, expressions used in sections 137 to 139 which, apart from this section, apply only to regulated agreements, shall be construed as nearly as may be as if the credit agreement were a regulated agreement.

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[83] Section 139 (5), (6), and (7) are not reproduced here. These subsections relate to the jurisdiction of courts under the section in both Scotland and Northern Ireland.

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