

WHITE COLLAR USURY: ANOTHER LOOK
AT THE CONVENTIONAL WISDOM

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Section 347 of the Criminal Code provides that it is an offence to charge a rate of interest on a loan in excess of sixty per cent per annum. In civil cases, even in cases involving experienced and sophisticated borrowers and lenders, the courts have been prepared to deny recovery of interest where the "criminal" rate of interest is exceeded. This article considers some of the issues that have arisen in those cases. It concludes that the courts have applied section 347 quite rigorously and that, while there are aspects of the law which require clarification, the approach of the courts is on balance justifiable.

L'article 347 du Code criminel stipule que le prélèvement sur un prêt d'un taux d'intérêt annuel supérieur à soixante pour cent est un délit. Dans les affaires de droit civil, même quand il s'agissait d'emprunteurs et de prêteurs confirmés et sophistiqués, les tribunaux se sont montrés prêts à refuser le recouvrement des intérêts quand le taux "criminel" était dépassé. L'auteur de cet article examine quelques-uns des problèmes soulevés dans ces affaires et en conclut que les tribunaux ont appliqué l'article 347 de façon très rigoureuse et que, quoiqu'il soit nécessaire de clarifier certains aspects de la loi, leur approche se justifie dans la plupart des cas.

Introduction

Throughout Western history, the usurer is a person despised. In part, the reasons are found in our Judeo-Christian heritage. Certainly, the Old Testament promises some very unpleasant things will happen to those who lend at any interest at all.¹ But, of course, this is not really an explanation of why, although most crimes attract social disapproval, we have tended to react to usury more strongly, it would seem, than to other crimes against property.

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The author would like to thank Mr. Jeff Boschert for his assistance and Professor Jamie Cassels for his helpful comments on the draft version.

¹ See, for example, Ezekiel 18:13, or Nehemiah 5.

Usury, in the form most of us conceive it, in common with most crimes, creates misery. Also, in the form most of us imagine, it exists because of human misery and imposes its consequences on the most vulnerable members of the population. The typically-imagined case is like that of Ms Diaz in *R. v. Dimmerman*.² Ms Diaz went to a pawnbroker. Having pledged an asset valued at \$900.00 to secure a \$350 loan for one month, she was forced to negotiate several extensions to the loan. Finally, five months later, she was told that to redeem the pledged item she would have to pay \$1,030. The effective interest rate, depending upon the particular extension considered, ranged from a “low” of 937% per annum to a high of 1339% per annum. Although the defendants in that case argued that the legislation applied only to “loansharks”, the court observed: “In any event, the appellants were loansharks. A loanshark is someone who lends money at an excessive rate of interest. That is exactly what the appellants were doing.”³ However, loansharking often involves something more. In *R. v. McRobb*,⁴ not only were excessive rates charged,⁵ but the victims were subject to threats of violence as well.

In Canada today, the usurers who most commonly come before the courts are mainstream business people who have loaned money to other similar business people, frequently with benefit of legal advice.⁶ They are not being prosecuted for a criminal offence. Instead, in a civil suit it is being argued that they should not be able to recover their loan, or at least the compensation for the loan, because the interest rate is usurious as defined in the Criminal Code⁷ and the loan transaction therefore illegal. In many cases, the borrowers are, in the words of the Ontario Court of Appeal, “attempting on technical grounds to avoid performance of an important business obligation”.⁸ They do not appear to deserve much sympathy.

This situation developed when in 1980 the federal Parliament repealed the Small Loans Act⁹ and, at the same time, amended the Criminal Code to make it an offence to charge or receive interest at a rate in excess of 60% per annum.¹⁰

² (1993), 82 Man. R. (2d) 184 (Man. Q.B.).

³ *Ibid.*, at p. 188.

⁴ (1984), 20 C.C.C. (3d) 493 (Ont. Co. Ct.), *aff'd.* (1986), 32 C.C.C. (3d) 479n. (Ont. C.A.).

⁵ They were, however, more “moderate” than in *Dimmerman*. The interest rates on the loans ranged from 154% per annum to 300% per annum.

⁶ This is based on reported cases of which few are criminal prosecutions. As I have remarked elsewhere, *Can Canadian Commercial Law be Rehabilitated: A Question of Interest* (1992), 20 C.B.L.J. 357, the information as to whether the usury provisions of the criminal code are really of use in controlling loansharking is not available.

⁷ R.S.C. 1985, c. C-46. References to sections are to the Code, unless otherwise noted.

⁸ *William E. Thomson Associates Inc. v. Carpenter* (1989), 61 D.L.R. (4th) 1, at p. 12, 69 O.R. (2d) 545, at p. 556 (Ont. C.A.).

⁹ S.C. 1939, c. 23.

¹⁰ 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.

This amendment was not a replacement for the Small Loans Act.¹¹ That act had been enacted to control the market price of money for loans below a certain limit. Over the years it was in force, the limit varied from \$500 to \$1500. It was an exception to the general Canadian conventional wisdom that the price of money ought not to be directly controlled by legislation but should follow market pressures.¹² The result of the legislation was simply that credit for small amounts was rarely available.¹³

Giving up on the practicality of limiting rates on small loans to modest charges, Parliament at the same time acceded to the wishes of the Montreal police who argued that loansharking was very difficult to prosecute under the then existing Criminal Code sections.¹⁴ A new, objective test was sought. It was enacted in section 305.1 (now section 347) of the Criminal Code which set a limit of 60% per annum for legal lending transactions. It has been suggested that 60% was chosen because it was expected to be high enough to exempt "legitimate" loans, but low enough to catch most underworld transactions.¹⁵ It has also been frequently argued that the framers of the section were wrong in that expectation.¹⁶ Instead, the section has been characterized as an undesirable interference in justifiable business transactions that, because of high risk or some unusual feature, involve rates that surpass the 60% ceiling.

The courts have not, for the most part, struggled to avoid the application of the section to the commercial world as one might expect if its application in that sphere were so clearly undesirable. Instead, they have developed a body of jurisprudence that applies the section to the commercial loan, accepting that Parliament intended to make charging or receiving a rate of interest in excess of 60% unacceptable of itself whatever the parties' motives, positions or access to advice. They appear to have concluded, as Huddart J. remarked in *Pacific National Development Ltd. v. Standard Trust*:¹⁷

If, as some commentators have suggested, Parliament could not have intended to intervene in legitimate commercial bargaining designed to allocate risk between experienced and sophisticated lenders and borrowers, it has now had over ten years in which to amend the Code with the benefit of academic and judicial comments on the effect of the provisions. Those comments have not produced any amendments.

¹¹ *Supra*, footnote 9.

¹² Attempts by the first Federal Parliament to enact general usury legislation in its second session in 1869 ended in failure.

¹³ Also, when the Small Loans Act had been passed in 1939, consumer loans were not generally part of the business of Canadian chartered banks but were left to small loan companies. This, by 1980, was of course very different.

¹⁴ See J.S. Ziegel, Comment: Bill C-44: Repeal of the Small Loans and Enactment of a New Usury Law (1981), 59 Can. Bar Rev. 188, at p. 192.

¹⁵ Although Ziegel notes, *ibid.*, at p. 193, the government had available figures that showed an effective annual interest rate of 91.36% would be needed for a consumer loan company to make an 11% return on equity on a one year loan of \$100.

¹⁶ *Ibid.* See also J.S. Ziegel, *The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost* (1986), 11 C.B.L.J. 233; Waldron, *loc. cit.*, footnote 6, at pp. 378-379.

¹⁷ (1991), 53 B.C.L.R. (2d) 158, at p. 163 (B.C.S.C.).

In this article, I will review the judicial history of the usury section. In doing so, I will suggest that perhaps the time has come to reassess the criticisms that would have the section repealed. While I conclude that some issues require clarification by statutory amendment, I will argue that the judicial development of section 347 in the commercial context has generally proceeded rationally and in a manner that has not gravely hampered commercial dealings. Further, I will suggest that sound policy reasons may exist for applying the section to “white collar usury” notwithstanding that its practitioners do not fit the mould of Messrs. Dimmerman or McRobb.¹⁸

I. *The Illegal Commercial Loan*

Certain features existing in a number of common commercial lending transactions raise particular risks that the transaction will be illegal.¹⁹ In this section, I will consider three of these features and discuss how the case law has responded to each.

A. *The Brokered Loan*

The definition of “interest” under section 347 includes many charges not commonly thought of as part of the interest rate. Indeed, these charges do not fall within the generally accepted legal definition of interest which is defined as a return on money that accrues from day to day.²⁰ The definition in section 347 by contrast includes “all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge ... paid or payable for the advancing of credit ... irrespective of the person to whom any such charges and expenses are or are to be paid or payable”.²¹ Certain narrowly-defined amounts are then excluded, including “official fees” defined as fees to government authority.

The purpose of such inclusive language is to prevent concealment of interest in the form of various other charges. Parliament has had extensive experience with the problems that can arise when these charges are not expressly included in a definition of interest. Under the old Moneylenders’

¹⁸ I admit that this is a reversal of my original opinion. (*Supra*, note 6). As a famous judge once said: “The matter does not appear to me now as it appears to have appeared to me then.”

¹⁹ The most likely offender of s. 347 is a loan with a very high bonus or set up fee paid to the lender. No real debate exists that this will violate the section. Further, since it is blatantly obvious from the inception of the loan that the criminal rate has been exceeded, parties can plan a legal rate without great interference in their financial affairs. All that is limited is the degree of return the lender can claim. In this section, I will discuss only those transactions in which it may be more difficult to plan in advance to remain within the limits of the section or those transactions in which it is not in fact a payment to the lender that will move the return above the legal rate. These are the transactions which have raised concerns that the application of s. 347 is commercially unreasonable.

²⁰ *Attorney-General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570, (1963), 42 D.L.R. (2d) 137.

²¹ Section 347(2).

Act,²² an attempt was made to limit interest rates on loans under \$500 to 12% per annum. Prosecutions under the act failed because regularly the defendants had charged a lump sum for the loan, part of which (unspecified) was for various administration fees. The court could not tell therefore whether the act had been violated, even though it was abundantly clear that the lender was receiving a usurious return.²³ Similarly, attempts to control the interest rates of small loan companies faltered when a variety of fees for other services were added to the borrower's cost. Even though these fees were limited by the courts to those actually incurred,²⁴ lenders were able to subvert the purpose of the legislation by incorporating a separate company to charge administration fees which were then paid, of course, by the borrower.²⁵

Having learned from these experiences, the drafters of section 347 obviously tried to frame the definition in the broadest language. However, this has caused practical difficulties. Commonly, large commercial loans are arranged through a broker. In the commercial usury cases, the lender is typically a lender of last resort who is matched with the borrower through the agency of an often-independent third party. Additionally, because of the complexity of the transaction, most borrowers and lenders will have legal advice. Normally, the resulting fees are paid by the borrower. Giving the definition of interest its broadest scope, one could conclude that all such fees, none of which in the typical commercial case enriches the lender, should be added to the interest and deducted from the credit advanced,²⁶ causing a substantial increase in the per annum rate.

The Ontario Court of Appeal first considered the inclusion of fees in interest in *William E. Thomson Associates v. Carpenter*.²⁷ The court used very broad terms to describe the definition of interest, stating:²⁸

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.

The court held that a "facility fee" paid to the lender and the lawyers' fees were both within the definition of interest. Since the question of criminal rate turned upon the inclusion of the "facility fee", the court did not clearly

²² S.C. 1906, c. 32.

²³ See, for example, *R. v. Climans*, [1938] 2 D.L.R. 711 (Ont. Co. Ct.).

²⁴ See *Kellie v. Industrial Loan and Finance Corp.*, [1937] 1 D.L.R. 57 (Que. Circ. Ct.).

²⁵ See *Discount and Loan Corp. v. Superintendent of Insurance*, [1938] Ex. C.R. 194, [1938] 4 D.L.R. 225 (Ex. Ct.), upheld for other reasons on appeal, [1939] S.C.R. 285, [1939] 3 D.L.R. 270.

²⁶ The section requires that these fees be counted as interest, but also be deducted from the credit advanced. So, if a loan for a one year period of \$100 is made and out of that \$100 a bonus of \$10 is paid, the interest is \$10 and the credit advanced is \$90, giving an annual interest rate of approximately 11.1%.

²⁷ *Supra*, footnote 8.

²⁸ *Ibid.*, at pp. 6 (D.L.R.), 550 (O.R.).

distinguish between the fees to the lender's lawyer and those payable to the borrower's.²⁹

The distinction between fees paid to the borrower's lawyer and those paid to the lender's had been earlier recognized as important by the British Columbia Supreme Court in *Cresswell v. Raven Bay Holdings Ltd.*³⁰ In that case, the rate was criminal if a finders' fee paid to a third party acting as agent for the lender was included in interest. In holding that the finders' fee was not to be used in computing the interest, Mackoff J. distinguished classes of fees as follows:³¹

It is not every fee which is deducted from the money advanced to arrive at the amount of the "credit advanced". It would not, for example, apply to the fee paid by the borrower to his own lawyer. The "fee" mentioned in the above definitions must be a fee which is not ordinarily payable by a borrower and which directly or indirectly results in a benefit to the lender personally or to someone whom he designates. Further, it must be a condition of the agreement, imposed by the lender, that he will lend only if the borrower agrees to pay that fee...

The requirement that the fee benefit the lender in some way has now also been adopted by an Ontario court,³² which held that a fee to a third party broker should not be included in the calculation, but the fees paid to the lender's lawyer should be.³³

On first consideration, these latter cases appear to be contrary to the plain words of the section. They also appear to have the potential to weaken the protection of the public so strenuously advocated by the Ontario Court of Appeal in *William E. Thomson Associates Inc. v. Carpenter.*³⁴ However, this limitation may strike a reasonable balance between public protection and the recognition of commercial reality. Members of the public who deal with "street level loan sharks" are frequently charged a variety of "fees" for the loan. Indeed, as in the case of *Dimmerman*,³⁵ the entire compensation to the lender may be expressed as a "fee". But these fees usually go directly to the lender. Rarely does the loan involve a third party agent and certainly not a lawyer to protect the borrower in structuring the transaction. Therefore, the distinctions adopted in *Cresswell v. Raven Bay Holdings Ltd.*³⁶ will as a rule apply to legitimate payments to third parties over which the lender may have no real control and from which it receives no benefit.

²⁹ They did, however, quote, *ibid.*, at pp. 4-5 (D.L.R.), 548 (O.R.), from the preamble to the Small Loans Act, *supra*, footnote 9. That preamble had characterized the fees included as "charges primarily payable by the lender but required by the lender to be paid by the borrowers".

³⁰ (1984), 53 B.C.L.R. 183 (B.C.S.C.).

³¹ *Ibid.*, at p. 192.

³² *Ingram v. Dorian* (1992), 22 R.P.R. (2d) 148 (Ont. Gen. Div.).

³³ The same result followed in *Simon v. Kopas & Burrit Funding Inc.*, unreported, Sept. 23, 1991, Van. Reg. No. C915066 (B.C.S.C.).

³⁴ *Supra*, footnote 8.

³⁵ *Supra*, footnote 2.

³⁶ *Supra*, footnote 30.

For clarity, one might suggest that section 347 be amended to ensure that this interpretation is both adopted and confined to fees paid to arm's length third parties for legitimate services rendered. But we should perhaps consider further whether fees paid by the borrower for the lender's lawyer should not normally be also excluded from the computation of interest. It is true that the lender does receive a benefit from this payment so that the payment looks suspiciously like interest by another name. If the lender had to bear the costs itself, no doubt it would charge a correspondingly higher interest rate to cover its additional loan cost.

However, a distinction may be made between these types of fees and those commonly paid to the more typical "loan shark" for such things as "administration charges" or "investigation costs". When these fees are a legitimate expense incurred to prepare necessary documentation, the borrower can also be said to benefit from them. Moreover, this is not a payment that would likely seriously undermine the protection of the general public, since traditional loan sharking transactions are not documented with elaborate contracts, or at all. Finally, and perhaps most significantly as I will discuss more fully in the next section of this article,³⁷ the inclusion of lenders' lawyers fees in interest when the loan is a demand loan puts even the most orthodox transaction at risk of being criminal. If lenders' lawyers fees were excluded, this problem would be substantially alleviated.

B. Short-Term or Demand Loans

Because the legal limit of return on a loan is expressed in section 347 as a per annum rate, even loans which in dollar amounts do not appear costly may offend the section. To determine whether the loan is illegal, the return must be converted into a per annum rate. That means the period over which the return has been earned is of crucial importance. For example, a loan of \$20.00 for one week at a fee of \$1.00 produces a per annum interest rate of more than 260% per annum.³⁸ If the length of the loan had been one year, the per annum rate would have been merely 5%.

The section itself contains no instructions to assist in determining the relevant period.³⁹ This has been left to the courts. Clearly, the length of the loan is one possible choice and one which, in circumstances like the example above, will often be obviously correct. The question of what is the relevant period in more difficult circumstances was first directly raised in *Nelson v. C.T.C. Mortgage Corporation*.⁴⁰ In that case, the borrower repaid a term loan before the expiry of the term. If the interest was calculated over the term of the loan, the rate was less than 60% per annum. If it was calculated over the period for

³⁷ See pp. 7-10.

³⁸ The effective annual rate would be higher to account for payment weekly.

³⁹ The section simply requires that the interest be computed in accordance with generally recognized actuarial practise.

⁴⁰ [1985] 2 W.W.R. 560, (1984), 59 B.C.L.R. 221 (B.C.C.A.), aff'd., [1986] 1 S.C.R. 749, [1986] 4 W.W.R. 481.

which the loan was actually outstanding, the rate exceeded the limit. The majority of the court held that the appropriate period was the date at which the lender could require repayment. They were not prepared to hold that the mortgagor could, by electing to take advantage of early prepayment, turn what had been a legal arrangement in its inception into a criminal one. This is a sensible commercial conclusion in the circumstances.

However, section 347 contains two separate offences. The relevant portion of the section is as follows:

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 of 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.

In *Nelson*, the amount received by the lender, considered as earned over the period ending when it was received, was above the criminal rate. In dissent, Hutcheon J.A. considered that this made the loan criminal pursuant to the offence described in section 347(1)(b), even if it was not a violation of section 347(1)(a). The majority did not discuss this second branch of the section, but seem simply to have ignored it. The decision of the majority was upheld by the Supreme Court of Canada without additional reasons.⁴¹ To have held otherwise would certainly have subverted the purpose of the section which is to control the behaviour of lenders, not to put them at the mercy of the choice of their borrowers. Prepayments rights might have become impossible for borrowers to obtain had any other result been reached.

An arguably inconsistent result was arrived at by the Saskatchewan Court of Appeal in *R. v. Duzan*.⁴² In that case, a pawn broker was charged with receiving a criminal rate of interest contrary to section 347(1)(b). Presumably, the charge was laid under this section because, at the commencement of the loans, it was not thought possible to predict whether a criminal rate would be exceeded. The loans were each an advance of \$100 and payments, which in one case continued over fourteen months, and in the other case over eleven months, were a flat payment of \$20 per month for as long as the borrower kept the money. The defendant argued that because the borrower could have repaid the advance before any criminal rate was reached, it was entirely in the hands of the borrower to decide how many payments would be made. The court held the defendant guilty, stating:⁴³

⁴¹ *Ibid.*

⁴² (1993), 105 Sask. R. 295 (Sask. C.A.), upholding (1992), 99 Sask. R. 171 (Sask. Q.B.).

⁴³ *Ibid.*, at p. 299.

However, the fact to be remembered here is that the appellant has designed this agreement and must be responsible for the consequences which flow from its implementation. It could have been designed so as to avoid the risk of offending this section ... That was not done here and in fact it should be assumed that when an agreement such as this is designed, it is intended that the party pawning an article will take advantage of its terms. It is then not acceptable to allege that no fault lies with the party designing the agreement because the person pawning the article did what the agreement said he could properly do.

The case is, I suggest, distinguishable from *Nelson v. C.T.C. Mortgage Corporation*.⁴⁴ First, the court clearly thought that the substance of the transaction was that all parties anticipated the borrower keeping the advance for a period greater than that required to trigger a criminal payment.⁴⁵ Further, the actual loan arrangement was not clearly set out by the court. If the borrower was to pay \$20 per month plus the full advance upon repayment, then the loan rate was in fact from its inception criminal since a monthly rate of 20% clearly translates into an illegal per annum rate. It may be that the more appropriate charge would have been under section 347(1)(a).

But if the majority decision in *Nelson* is correct, the effect of the principle in the case on demand loans may arguably be equally inconvenient. If the legal date at which a lender can demand payment is the relevant date, one could conclude that the period for a demand loan is as short as a day (or even a minute!). Since, as already discussed, a wide variety of charges other than the interest rate stipulated in the contract are included in interest for purposes of calculation, the interest rate on a demand loan, based upon the return after one day, would virtually always be greater than 60%. Under the present rules, the legal fees alone would usually make the loan illegal.⁴⁶

The question of the relevant period for a demand loan has not yet been settled by the courts. The court in *Nelson*⁴⁷ suggested that lenders in demand loan transactions should include a clause in their agreement stipulating that the return on the loan would never exceed the legal rate. But such clauses, as I will discuss in a later part of this article,⁴⁸ have not yet been held by the courts effective in preventing a finding of illegality.

This is an area of uncertainty that might best be addressed by legislation. However, the problem is not insoluble, even in the absence of legislative change. It would not be, I suggest, inconsistent with *Nelson* to find that in a demand loan transaction, the legal term is set, not by the date on which the lender could have demanded payment, but by the date on which it did demand payment.

⁴⁴ *Supra*, footnote 40.

⁴⁵ Courts have generally ignored terms that were intended to disguise the rate. See *infra*, at p. 14.

⁴⁶ This is an additional reason why legitimate third party fees should be excluded from interest. Since a traditionally expressed rate only accrues from day to day, a demand after a day or a minute would not normally produce a criminal rate.

⁴⁷ *Supra*, footnote 40, at pp. 567 (W.W.R.), 227-228 (B.C.L.R.).

⁴⁸ See *infra*, at p. 16.

This then should be the relevant date. This would also mean, as discussed in more detail below,⁴⁹ that the contract was not, in its inception, criminal.

This does not completely remove risk to the lender in these transactions. If the lender does demand an early repayment (and it might do so for reasons that were quite legitimate such as a default by the borrower), the rate may well exceed the 60% limit. This consideration must be addressed by the lender and might hamper it from behaving in its own commercial best interests. The problem might be solved by inserting into the loan contract a provision for rebate of fees in the case of an early demand. Of course, lenders will not find this appealing.⁵⁰ However, it does not seem unfair to suggest that if the lender wants the freedom to terminate the loan quickly, it may have to pay for that freedom by giving up any return that would make the loan return exceed 60%. This result would be even more reasonable if, as already suggested, the section were amended to exclude all legitimate fees paid to arm's length third parties for services necessary to the loan transaction.

C. *The Participatory Loan*

The most frequently raised objection of the mainstream lender to section 347 is that if the section applies, it could make loans in which the lender is to receive a share of profits illegal.⁵¹ In considering this concern, one must distinguish two types of profit sharing. In the first, the lender receives a percentage of the profits if and as earned. In the second, the lender receives as part of its compensation a pre-determined estimate of what the profits will be.⁵²

The definition of interest in section 347 is almost certainly broad enough to apply to the second type of profit sharing arrangement. Indeed, the loan in the first case to consider section 347 in a commercial context was an arrangement of that type. In *Mira Design v. Seascope Holdings*,⁵³ the defendant gave a mortgage to the vendors of property to secure the balance of the purchase price. The parties regarded the loan as a short term financing, to be replaced by other financing as soon as possible. Because the market was rapidly rising, the vendors insisted that the financing agreement compensate them for the expected

⁴⁹ See, *infra*, at p. 11.

⁵⁰ A certain anomaly exists here. Commitment and set up fees for a loan are frequently expressed to be non-refundable. If, despite the commitment to lend, a borrower decided not to accept the loan but to borrow elsewhere, presumably, no offence has been committed by the lender retaining the fees, although they may well be exorbitant for the amount of work done. However, if the loan is made and demanded early, the lender would be at risk of offending the section.

⁵¹ See A. Manzer and R.M. Ip, *Participatory Loans: The Criminal Problem* (Parts 1-2) (1990), 9 *Nat. Banking Law Rev.* 43.

⁵² Manzer and Ip, *ibid.*, consider a loan in which the lender is given an opportunity to acquire stock in the borrower at a favourable price. I do not consider this aspect of the problem, but agree with their conclusion that this arrangement would not be "interest" for purposes of the Criminal Code.

⁵³ [1982] 1 *W.W.R.* 744, (1981), 34 *B.C.L.R.* 55, [1982] 4 *W.W.R.* 97, (1982), 36 *B.C.L.R.* 355 (*B.C.S.C.*).

increased value of the property over the mortgage term.⁵⁴ Although the unpaid balance of the price was \$84,000, the mortgage was written with a face value of \$100,00 plus interest at prime plus 2%. However, if the mortgage was repaid within a month, only \$84,000 would need to be repaid; if not, then the entire face value would be owing on demand. The market declined; the expected financing did not materialize; and the vendors demanded repayment of the full \$100,000 a very short time later. Huddart J. found the additional \$16,000 to be interest within the meaning of the Code, making the rate exceed 60% per annum.

But would the same result follow had the mortgage loan in *Mira Design* provided for a percentage of the increase in the property value if the loan was not repaid in one month? Two observations may be made. First, in that type of arrangement, one could not determine what the return on the loan would be at the date of contracting. Arguably, this could never be an agreement to receive interest at a criminal rate as prohibited in section 347(1)(a). "Agreement or arrangement to receive", as required by the section, presumably means an agreement or arrangement that, by its terms, provides for a criminal rate.⁵⁵ In *Mira Design*, since the market fell drastically in the month, this arrangement would also not have resulted in receiving interest at a criminal rate as prohibited in section 347(1)(b). However, the question remains whether, if a large profit had been made, collecting it would constitute a violation of section 347(1)(b).

The question of profit participation was raised in *677950 Ontario Ltd. v. Artell Developments Ltd.*⁵⁶ The parties had agreed to a mortgage under which \$375,000 was to be advanced to proceed with the development of property. The amount repayable after three months was \$1,675,000. The additional \$1,300,000 was an estimate of 50% of the profits that would be made from development. At first instance, the court held that this sum was not interest but rather a "collateral arrangement for profit sharing" to which the Criminal Code had no application.

The appeal court disagreed.⁵⁷ Blair J.A. held that although the \$1,300,000 was an estimate of profit, its payment was not contingent upon profits being made and could not be characterized as "profit sharing" as distinct from a

⁵⁴ *Ibid.*, at pp. 749 (W.W.R.), 60 (B.C.L.R.).

⁵⁵ It is possible to argue that the question of whether the agreement was to receive interest at a criminal rate should be looked at in the light of the actual return received. However, I suggest that this would be inconsistent with the general approach taken by the court in such cases as *Terracan Capital Corporation v. Pine Projects Ltd.*, [1992] 1 W.W.R. 472, (1991), 60 B.C.L.R. (2d) 384, 20 R.P.R. (2d) 187 (B.C.S.C.), aff'd. (1993), 100 D.L.R. (4th) 431, [1993] 3 W.W.R. 724, (1993), 75 B.C.L.R. (2d) 256 (B.C.C.A.). As discussed later, the British Columbia Court of Appeal in this case held that granting extensions to the borrower which effectively reduced the rate below the criminal limit over the whole outstanding period of the loan did not affect the criminality of the original agreement. This was also probably the unstated assumption of the Crown in *R. v. Duzan*, *supra*, footnote 42.

⁵⁶ Unreported at first instance, Aug. 9, 1989, Doc. Toronto No. 15565/86, 22599/87 (Ont. H.C.).

⁵⁷ Indexed as *Horvat v. Artell Developments Ltd.* (1992), 57 O.A.C. 189 (Ont. C.A.).

payment that would be “interest” as defined in the Code. This appears correct. To have held otherwise would certainly have defeated the intent of the section. But, unfortunately, the court did not comment on what result would have followed had this been a true risk-taking venture.

The meaning of section 347(1)(b) has only twice been directly considered in the case law, and only once in a civil trial.⁵⁸ As noted above, in dissent, in *Nelson v. C.T.C. Mortgage Corporation*,⁵⁹ Hutcheon J.A. would have held that when a mortgagor prepaid, if the return to the mortgagee at the early prepayment date exceeded 60%, the transaction was illegal as being a receipt of interest at a criminal rate. That neither the majority nor the Supreme Court of Canada⁶⁰ accepted this argument suggests that certain policy limitations on the scope of the section may apply.

What these limitations might be, at this time, remains speculative. Professor Ziegel has suggested that the most likely reason for inclusion of section 347(1)(b) was to catch the lender who did not reduce the agreement to writing or inserted a fictitious date.⁶¹ If therefore the paragraph does not apply to written loans that accurately reflect the parties’ arrangement, at least many participatory loans would not be caught by this section. But if this is the correct interpretation, a participatory loan would be criminal or not depending solely on whether the parties had accurately reduced their agreement to writing. This does not appear to be a defensible outcome.

Clearly, certain types of arrangements that involve profit sharing would not be covered by section 347, even though a loan transaction were involved. It would be absurd to apply the section to partnership agreements, joint ventures, or even shareholders’ agreements, even though these agreements commonly provide both for a share of the profits and also for loans to the joint entity. However, in all these cases, the participants are usually bearing a very real risk of loss if the business fails.

Efforts to insulate oneself from risk of loss while claiming profits of an enterprise are in many contexts regarded with disfavour. Partnership statutes of all provinces provide that if a loan is made with interest tied to profit, the creditor is subordinated to other creditors on insolvency or bankruptcy,⁶² although it appears that if the creditor has security, it may enforce that interest.⁶³ Although small corporations have traditionally been financed in Canada by minimal contributions to capital and large shareholder loans, the shareholder certainly runs a risk that unless the formalities are very carefully observed he or she will

⁵⁸ The criminal prosecution in *R. v. Duzan*, *supra*, footnote 42, was discussed above.

⁵⁹ *Supra*, footnote 40, at pp. 573 (W.W.R.), 233 (B.C.L.R.).

⁶⁰ *Ibid.*

⁶¹ Ziegel, *loc. cit.*, footnote 16, at pp. 237-238.

⁶² A typical section is found in the Partnership Act, R.S.A. 1980, c. P-2, ss. 4 and 5(1).

⁶³ See *Sukloff v. A.H. Rushforth & Co.*, [1964] S.C.R. 459, (1964), 45 D.L.R. (2d) 510.

be held to have made not a loan but a capital contribution.⁶⁴ The United States, of course, has a well developed jurisprudence on the doctrine of equitable subordination in the case of under-capitalized corporations.⁶⁵

Is it then an unreasonable policy to limit the amount of profit that may be shared by a party in the position of lender only?⁶⁶ If it were not so limited, the lender could enforce its security for the entire amount owing under the loan agreement, including, under normal priority rules, any agreed share of profit. And each dollar of profit “scooped” by the secured creditor is a dollar of profit unavailable to the lesser secured or unsecured creditors. Considered in that light, perhaps a return of 60% per annum on the credit advanced by a financier who does not care to participate in the risk of the enterprise and indeed is even protected against the risk of failure to repay by security over the borrower’s most substantial assets is sufficient.

If the latter analysis is correct, the courts might apply section 347(1)(b) to loans providing for a share of profit where the profit is sufficient to raise the rate of return above 60%. The policy reasons for avoiding the application of the section that existed in *Nelson v. C.T.C. Mortgage Corporation*⁶⁷ may have been that to apply section 347(1)(b) would be to put in the borrower’s hands the power to cause his or her lender to commit a criminal offence. Arguably, these reasons do not apply to participatory loans.

But if section 347(1)(b) does apply to participatory loans, does this mean, as one article speculated,⁶⁸ that in entering into a participating loan agreement, the creditor is committing or may in the future find it has committed a criminal offence, albeit one for which there is little chance of prosecution? The answer is no. The agreement itself should not be held to be illegal.⁶⁹ Should the venture turn out to have been sufficiently profitable to make the return criminal, the lender need only ensure that it does not receive a payment that makes the annual rate of return more than 60% to avoid violating the section.⁷⁰

⁶⁴ See *Laronge Realty Ltd. v. Golconda Investments Ltd.* (1986), 7 B.C.L.R. (2d) 90 (B.C.C.A.). See also M.A. Waldron, *The Single Shareholder Company*, in P. Glenn (ed.), *Contemporary Law: Canadian Reports to the 1990 International Congress of Comparative Law* (1992), pp. 330-345; R.W. Ewasjuk, *Defeating Shareholders’ Loans: Laronge Realty Ltd. v. Golconda Investments Ltd.* (1986-87), 25 Alta. L. Rev. 504; J.T. English, *Salomon v. Salomon Revisited* (1989), 47 *The Advocate* 261.

⁶⁵ The literature, of course, is voluminous. See, for a general review, W. Clark Watson, *Deep Rock in the Deep South - Equitable Subordination of Claims in Fifth Circuit Bankruptcy Proceedings* (1980-81), 11 *Cumberland L. Rev.* 619.

⁶⁶ In fact, usually a real property mortgage, although in *Croll v. Kelly* (1983), 48 B.C.L.R. 306 (B.C.S.C.), the security was provided by securities to be held by a solicitor.

⁶⁷ *Supra*, footnote 40.

⁶⁸ Manzer and Ip, *loc. cit.*, footnote 51, at p. 43.

⁶⁹ It is not a contract or arrangement to receive interest at a criminal rate because the rate is not known at the time the contract is entered into.

⁷⁰ This suggestion is consistent with the decisions in *Nelson v. C.T.C. Mortgage Corporation*, *supra*, footnote 40, and *R. v. Duzan*, *supra*, footnote 42. Particularly in the latter case, the court suggested that simply putting a limit on the amount to be received could prevent the commission of the offence in s. 347(1)(b); see p. 7 of the judgment.

II. *The Avoidance of Illegality*

In an effort to ensure that a transaction is not illegal, lenders have adopted a number of avoidance techniques, most of which have been unsuccessful in protecting them. These techniques fall into two distinct categories. First, lenders have attempted to manipulate the terms of the loan to produce an apparently lower rate. Second, they have attempted to include saving or exclusionary clauses in their agreements. In this part of the article, I will review judicial treatment of these two avoidance devices.

A. *Loan Terms*

1. *Picking an Artificial Date*

Where a date is inserted for convenience to ensure that the term of the loan will be long enough to avoid the 60% rate, the court will look at the substance of the transaction.⁷¹ If the parties' commercial arrangement was in fact for a shorter term, that is the term the court will use for computation of interest.⁷²

2. *Granting Extensions*

If the original term of the loan would make the rate criminal, then there has been an agreement to receive interest at a criminal rate. Neither potential extensions that might have been granted the borrower under the loan terms⁷³ nor actual extensions granted⁷⁴ will be taken into account in determining the rate.

3. *Disguised Loans*

Avoiding inconvenient interference by the courts in mortgage terms by disguising the mortgage as a sale with an option to repurchase has a venerable history.⁷⁵ It has also generally not been successful.⁷⁶ Not surprisingly, the same device failed to convince the British Columbia Supreme Court that a transaction was not a loan and therefore should not be considered under section 347 of the Criminal Code.⁷⁷

⁷¹ The problem might also have been solved by the application of s. 347(1)(b) as suggested by Professor Ziegel, *loc. cit.*, footnote 61.

⁷² *Pacific National Developments Ltd. v. Standard Trust Co.*, *supra*, footnote 17. The loan was written for a two year period, but in fact, as a matter of commercial reality, the parties contemplated that the actual term would be about five months. See also *R. v. Duzan*, *supra*, footnote 42, in which the absence of a due date did not prevent the court from finding that a criminal rate had been received.

⁷³ *Horvat v. Artell Developments*, *supra*, footnote 57.

⁷⁴ *Terracan Capital Corp. v. Pine Projects Ltd.*, *supra*, footnote 55.

⁷⁵ See discussion, W.B. Rayner and R.H. McLaren, *Falconbridge on Mortgages* (4th ed., 1977), p. 59ff.

⁷⁶ For a less clear case, see *Kreick v. Wansborough*, [1973] S.C.R. 588, (1973), 35 D.L.R. (3d) 275.

⁷⁷ *Cresswell v. Raven Bay Holdings Ltd.*, *supra*, footnote 30.

4. Computation of Interest

Just as extending the term of a loan produces a lower rate of interest per annum, expressing the interest rate as a more frequently compounded rate produces a smaller percentage figure. For example, 26.8% per annum compounded annually may be expressed as 24% per annum compounded monthly. If the daily equivalent were given, the per annum figure would be even lower. Interest may also be expressed as a continuously compounded rate. That produces the lowest nominal figure possible.

In *TFP Investments v. Beacon Realty*,⁷⁸ the defendant introduced actuarial evidence to show that the continuously compounded rate was less than 60% per annum. The plaintiff argued that the Criminal Code requires the rate to be expressed as if compounded annually, not continuously. In that case, the rate exceeded 60%.

The section provides that a criminal rate is “an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles”.⁷⁹ The judge at first instance accepted that these words were ambiguous as to compounding period. Since this was a criminal statute, the meaning most favourable to the defendant should be accepted and that was the continuously compounded rate.

The case is now under appeal. Prior to the appeal, the Canadian Institute of Actuaries issued a public statement defining effective rate. In that statement, the Institute included a table showing various nominal rates for various compounding periods and the equivalent effective annual rate. From that table, a nominal rate of 60% per annum, compounded annually, is the equivalent to an effective annual rate of 60%. A nominal rate of 47% per annum, continuously compounded is equivalent to 60% effective annual rate. This table is expressed to be “accepted actuarial practices and principles as referred to in the Criminal Code of Canada”.⁸⁰ Therefore, whether or not the appeal in *TFP Investments v. Beacon Realty*⁸¹ is successful, the argument that the courts should have regard to continually compounded rates will not succeed in the future.

Moreover, *Beacon Realty* was rejected by the British Columbia Court of Appeal in *Terracan Capital Corp. v. Pine Projects Ltd.*⁸² Upholding trial judgment, the court found that there were not two or more methods of computing the effective annual rate according to “generally accepted actuarial practices”. Continuous compounding was not the correct method of assessing the rate according to that standard.

⁷⁸ (1991), 3 O.R. (3d) 537 (Ont. Gen. Div.).

⁷⁹ Section 347(2).

⁸⁰ A Public Statement on Effective Rates of Interest, Feb. 1992, Canadian Institute of Actuaries.

⁸¹ *Supra*, footnote 78. A notice of motion seeking leave in the Ontario Court of Appeal to introduce the statement as new evidence was filed Nov. 20, 1992. At the time of writing, the issue had not been decided.

⁸² *Supra*, footnote 55.

B. *Saving Clauses*

A number of cases have arisen in which the parties have inserted a clause stipulating that the rate of interest on the loan will never exceed the maximum allowable rate. The most extensive consideration of the typical clause was given by Meredith J. in *BCORP Financial Inc. v. Baseline Resort Developments Inc.*⁸³ Holding first that a general expression of intention that the rate would not be illegal was irrelevant, he continued by saying:⁸⁴

But it is also ineffective because the instrument does not say how the interest charged on the credit advanced is to be adjusted downward so as to bring the interest charged below the legal limit. To invent a provision which would accomplish this end would be to make a new agreement for the parties.

It was also relevant that the lender had in fact claimed the entire amount of interest (a criminal rate).

I have suggested in this article and elsewhere⁸⁵ that a saving clause that actually directed rebate of certain fees until a legal rate was reached might be effective because it would give clear directions about what was to happen in the event of illegality. In the meantime, these cases, like those dealing with attempts to avoid liability by formal provisions of the contract, show no eagerness on the part of the courts to protect the usurious investor from at least some of the civil consequences.

III. *Consequences of an Illegal Loan*

One might think the major consequence of a breach of the Criminal Code would be prosecution of the offender. This is not the case for a lender who has made an illegal commercial loan. The section requires the consent of the Attorney-General before a prosecution can be brought under it.⁸⁶ In virtually no case has a “white collar usurer” been prosecuted. The major consequences are civil. The section is usually raised by a borrower now dissatisfied with the loan, frequently as a defence to proceedings by the lender to enforce security given in the loan transaction. Here the courts have exercised considerable creativity, developing the doctrine of severance to avoid unfair enrichment of the borrower. When severance will be used is largely settled. What will be severed, as I will discuss, is still a matter of controversy.

A. *When Severance Applies*

Despite a substantial body of law holding that a court will not enforce any part of an illegal contract, Huddart J., considering the first case of an illegal commercial loan in the courts, decided to sever a portion of the contract and

⁸³ (1990), 46 B.C.L.R. (2d) 89 (B.C.S.C.). See also *Pacific National Developments c. Standard Trust*, *supra*, footnote 17; *General Investments Inc. v. Chester*, Nov. 27, 1991, Van. Reg. #910217 (B.C.S.C.).

⁸⁴ *Ibid.*, at p. 100.

⁸⁵ See M.A. Waldron, *The Law of Interest in Canada* (1992), pp. 201-203.

⁸⁶ Section 347(7).

enforce the remainder.⁸⁷ In that case, as in most of the cases that have followed, a refusal to enforce the contract at all would have left the borrower with a windfall at the expense of the lender.⁸⁸ This is particularly unfair when, as is often true, the borrower is sophisticated, has legal advice and is simply seeking the court's protection from bad financial judgment or bad timing.

Since the decision of Huddard J., the conditions for severance have been refined and elaborated. The test now applied in virtually every case is that enunciated by the Ontario Court of Appeal in *William E. Thomson v. Carpenter*.⁸⁹ The court adopted the approach of Krever J. in *Royal Bank of Canada v. Grobman*.⁹⁰ The test requires a court to consider first whether the policy of the act will be subverted by severance. In most civil cases, this criterion will be met because as the Court of Appeal noted, "[t]he enforcement of the valid part of the loan does not absolve the respondent company from criminal responsibility..."⁹¹ Second, the court must determine whether the parties had an illegal intention. Third, the court will look at any unfairness in reaching the agreement. Finally, the court will consider whether (as again will almost always be true) one party would be unjustly enriched by a failure to sever. In only one reported case did a court refuse to sever a portion of the agreement.⁹²

B. *What Will Be Severed*

Three theories of how severance ought to operate have been propounded at various times. Huddart J., in *Mira Design v. Seascope Holdings*,⁹³ applied a blue (or red) pencil test. If she could strike out a part of the agreement without affecting the rest and thereby reduce the interest to a legal rate, that was sufficient. In the result, she struck out a clause providing for the increase in principal of the loan after the one month term. That lowered the effective annual rate below the criminal limit. This technique has been used in a number of cases.⁹⁴

⁸⁷ *Mira Design v. Seascope Holdings Ltd.*, *supra*, footnote 53. As pointed out by Ziegel, *loc. cit.*, footnote 16, at pp. 240-241, allowing severance in such cases was contrary to a substantial body of existing authority.

⁸⁸ In that case, particularly, the defendants had the land of the plaintiffs who were vendors under the agreement.

⁸⁹ *Supra*, footnote 8.

⁹⁰ (1977), 83 D.L.R. (3d) 415, 18 O.R. (2d) 636 (Ont. H.C.). The court also relied on the comments of S.M. Waddams, *The Law of Contracts* (2nd ed., 1986), p. 653.

⁹¹ *Supra*, footnote 8, at pp. 11 (D.L.R.), 555 (O.R.).

⁹² *Croll v. Kelly*, *supra*, footnote 66. The court held the loan transaction in this case "fundamentally illegal". What exactly distinguished this case from others in which severance was allowed is unclear. However, the action was an action in negligence against a solicitor who had failed to hold securities for the lender's loan as agreed upon. The lender was then able to recover the principal of his loan from the solicitor as damages for negligence.

⁹³ *Supra*, footnote 53.

⁹⁴ For example, see also *Pacific National Development v. Standard Trust Co.*, *supra*, footnote 17. There, as in *Mira Design*, the provision that caused the rate to be illegal was readily identifiable. The interest apart from that provision was not excessive (prime plus 2%).

In *Nelson v. C.T.C. Mortgage Corporation*,⁹⁵ Hutcheon J.A. considered a different approach. He suggested the lender be allowed to recover the principal balance of the loan and whatever sum would provide an interest rate under 60%. This would certainly be the most favourable approach from the lender's perspective. It probably, however, could be used only in cases in which, like *Nelson*, the argument that the loan is illegal is based on section 347(1)(b). If the only illegality alleged is receiving interest at a criminal rate, the offence would not be committed if the lender took less than 60%. No agreement has been made for a higher rate, it is merely that circumstances have later resulted in this effective annual rate. A good argument could be made for this approach where, for example, the illegal rate was produced by a commercially reasonable demand at an early date in a demand loan transaction. No other case has considered severance in conjunction with section 347(1)(b) and no case has applied the 60% approach.⁹⁶

A third option is for the court to sever all consideration for the loan and allow the lender to recover principal only. Recent cases suggest that this approach may prove popular. The courts have justified this approach by refusing to pick and choose among the relevant clauses to determine what makes the interest rate illegal. That, it has been suggested, is too much like making a new contract for the parties.⁹⁷

The British Columbia Court of Appeal considered the matter in *Terracan Capital Corp. v. Pine Projects*.⁹⁸ It held that how severance would be applied in a particular case is a matter for the discretion of the trial judge. However, it also stated that courts should not be too quick to pick and choose from alternative provisions to reduce the rate to a legal level. The risk of losing all compensation for the loan was viewed by the court as a necessary incentive to ensure that lenders kept their loans within the legal limits.

Conclusion

The courts have apparently become comfortable with the application of section 347 to commercial lending transactions. A review of the jurisprudence shows no substantial reluctance to apply the section or corresponding eagerness to avoid its consequences. In fact, the cases considering avoidance measures of lenders suggest, instead, a determination to apply the section to the substance of the transaction even when the formal aspects could have provided the court with an opportunity to limit its effect. Further, although civil consequences have generally been limited to allow the lender to recover at least the principal

⁹⁵ *Supra*, footnote 40.

⁹⁶ As Professor Ziegel noted, *loc. cit.*, footnote 16, at p. 242, allowing a lender who had made an agreement for a criminal rate to recover up to 60% would encourage lenders to take their chances in violating the section, knowing that a substantial rate of return, at least, was assured.

⁹⁷ See *Kebet Holdings Ltd. v. 351173 B.C. Ltd.* (1991), 25 R.P.R. (2d) 174 (B.C.S.C.). The decision was upheld by the Court of Appeal (1992), 74 B.C.L.R. (2d) 198, although this point does not appear to have been appealed.

⁹⁸ *Supra*, footnote 56.

of the loan and avoid unjust enrichment of the rarely naive borrower, recent case law discloses a developing trend toward a stricter treatment of the lender. The comments of the British Columbia Court of Appeal in *Terracan Capital Corp. v. Pine Projects*⁹⁹ support this proposition and indeed amount to the imposition of penalties, although not criminal penalties, on the guilty lender.

Judgments which have determined the state of mind of the lender required before the court will find a criminal rate has been charged are also instructive. In criminal cases such as *R. v. McRobb*¹⁰⁰ and *R. v. Dimmerman*,¹⁰¹ the test established is that the lender need only know the terms of the loan. The knowledge that the rate exceeded 60% per annum is unnecessary. A similar standard is imposed in the civil cases.¹⁰² In *Kebet Holdings Ltd. v. 351174 B.C. Ltd.*,¹⁰³ the lender argued before the British Columbia Court of Appeal that it ought not to be found to have violated section 347 because to ascertain the rate in this case it was necessary to apply discount rates which were both uncertain as to amount and complex. The court held that it was up to borrowers and lenders to obtain the aid of actuaries to ensure that the loan rate was legal if simpler methods did not suffice.

What, in light of previous academic commentary, and indeed of traditional Canadian distaste for legislative interference in the price of money, has produced this result? Any answer must be speculative. However, we should remember that interest rates generally are much lower than they have been for many years.¹⁰⁴ It may simply be the view of the courts, and perhaps a very reasonable view, that 60% per annum is plenty. And, if interest rates continue to be low, commercial transactions with interest returns in excess of 60% per annum may decline, making the section less troublesome for the majority of lenders.

It may also be relevant, as noted above, that most of these transactions were secured loans. Our legal commercial system has generally allowed secured creditors broad latitude to take and enforce security, despite literature that questions the economic benefits of such a regime.¹⁰⁵ But some recent legislative trends, such as the amendments to the Bankruptcy and Insolvency Act,¹⁰⁶ suggest that more limits may be imposed upon the secured creditor's rights. The 60% limit of the Criminal Code may have a role to play in performing this function.

⁹⁹ *Ibid.*

¹⁰⁰ *Supra*, footnote 4.

¹⁰¹ *Supra*, footnote 2.

¹⁰² See also *William E. Thomson Associates Inc. v. Carpenter*, *supra*, footnote 27, at pp. 6-7 (D.L.R.), 550 (O.R.); *Terracan Capital Corp. v. Pine Projects*, *supra*, footnote 55, at pp. 264-265 (B.C.L.R.).

¹⁰³ *Supra*, footnote 97.

¹⁰⁴ The current Bank of Canada rate, on January 11, 1994, was 3.98%.

¹⁰⁵ See, for example, A. Schwartz, *The Continuing Puzzle of Secured Debt* (1984), 37 *Vand. L. Rev.* 1051.

¹⁰⁶ S.C. 1992, c. 27. See, for example, the requirement of 10 days notice to seize in s. 244(2).

Certain clarifications of the legislation as it applies to commercial loans would be welcome. But, reviewing the development of the jurisprudence, one might conclude that no urgent need exists for repeal. Courts have shown an ability to adapt the section to commercial realities. Particularly with the development of the doctrine of severance, flexible tools are available to the court to avoid substantial unfairness. And perhaps, although the borrowers in these cases deserve and need little protection, the continued existence of the section serves broader interests of society in limiting secured creditors' rights and in upholding the general principle that the largest returns must go to those who risk their capital.