

CANADIAN CONSUMER-CREDIT LEGISLATION

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I. INTRODUCTION

American and Canadian legislation regulating consumer-credit transactions invites comparison. Each country presents the consumer with similar credit arrangements and lending institutions; each has, in recent years, experienced stress upon its credit-regulating apparatus due to an explosive growth in consumer credit;¹ and each must cope with the resulting problems within the context of a similar economic order and legal heritage. This article examines some of the principal areas of Canadian consumer-credit legislation and draws comparisons with analogous U.S. legislation.²

The scope of this study is restricted in several ways. First, it does not attempt to evaluate the impact of the various aspects of the law that have an important but only indirect bearing upon the consumer-credit problem. The general law of sales and contracts, bankruptcy, and remedies is of this type. Second, some of the legislation considered has been the subject of judicial interpretation; however, this case law has not been systematically canvassed, since the intent here is to examine broad trends in Canadian consumer-credit legislation rather than to answer the innumerable legal questions involved.

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¹ See the chart in Proceedings of the Special Joint Committee on Consumer Credit of the Senate and House of Commons, 26th Parl., 2d Sess. 118 (1964) [hereinafter cited as Canadian Hearings]. The chart compares the two countries for the years 1948-1963 with respect to the total volume of consumer credit outstanding and the ratios of such credit to disposable income and to gross national product. During the period 1953-1963, these ratios corresponded quite closely. The rate of growth of consumer credit for Canada (about 10%) compares with the figure for the United States (about 8½%). Each country also evidences similar rates of growth in personal disposable income and gross national product.

² Comparison between the two is facilitated by recent studies in each country evaluating aspects of the consumer-credit problem. Heavy reliance is placed upon the following sources: the extensive record of the Canadian Hearings; the broad survey of the Canadian financial system found in the Report of the Royal Commission on Banking and Finance (1964) [hereinafter cited as Royal Commission]; and the highly useful analysis in Curran, Trends in Consumer Credit Legislation (1965) [hereinafter cited as Curran].

Legislation concerning consumer credit is undergoing continual change. Analysis, however, is restricted to those Canadian statutes available by October 1, 1965.

Third, there is no attempt to review all the laws dealing with the consumer-credit problem, but only a limited number dealing with some of the more important facets.

Credit can, of course, be extended either as a direct loan to the borrower or as a credit sale of goods or services to the consumer. In Canada, as in the United States, each type of credit has essentially been regulated by a separate body of law. In Canada, federal legislation deals with lender credit, while provincial legislation deals primarily with vendor credit. This division of economic control results in part from the constitutional distribution of power. Section 91 of the Canadian Constitution expressly delegates to the Federal Parliament exclusive control over interest and banking. Under these powers, Parliament has enacted the Interest Act,³ the Small Loans Act,⁴ the Pawnbrokers Act,⁵ and the Bank Act.⁶ Section 91 also confers on Parliament authority to legislate with respect to bankruptcy, bills of exchange and promissory notes, and the regulation of trade and commerce.

Section 92 of the Canadian Constitution, on the other hand, confers on the provinces exclusive legislative authority regarding property, civil rights, and "generally all matters of a merely local or private nature in the province." By virtue of these powers, the provinces have enacted laws concerning credit unions and certain types of credit transactions, such as installment sales, conditional sales, and "unconscionable" transactions.

Potential conflicts between such "exclusive" grants of provincial and federal jurisdiction can be readily imagined. For example, since the Constitution allocates to the Dominion control over "interest," does this include the regulation of other loan charges? Are such charges "interest"? If not, are they nonetheless within the federal power as necessary incidents to the effective regulation of interest? If such charges are "interest," is their regulation necessarily denied to the provinces? Or, on the other hand, does such power fall within one of the broad areas of "exclusive" provincial power mentioned above?

Even assuming that the regulation of such loan charges is within the federal jurisdiction, what of finance charges imposed by a merchant selling goods on credit? Are such charges within the ambit of the federal interest power, or are they merely part of the price of the merchandise, and therefore beyond the control of Parliament? In fact,

³ Can. Rev. Stat. c. 156 (1952).

⁴ Can. Rev. Stat. c. 251 (1952), as amended by Can. Stat. c. 46 (1956).

⁵ Can. Rev. Stat. c. 204 (1952).

⁶ Can. Stat. c. 48 (1953-1954).

federal interest legislation has not been construed to apply to a merchant's charges for the buyer's privilege of buying on time.⁷ It by no means automatically follows, however, that "interest" in the constitutional sense must receive an equally restrictive interpretation. The matter has yet to be definitely resolved.⁸

The language of the Canadian Constitution might lead one to conclude that a broader federal power over consumer-credit transactions exists in Canada than in the United States. Examination of the relevant legislative application, however, indicates that parliamentary control may be less "exclusive" than a casual reading of section 91 suggests. On the other hand, the commerce clause probably grants the U.S. Congress ample power to regulate the vital aspects of the consumer-credit field. This, at any rate, is the premise of the Douglas bill which seeks to compel the disclosure of finance charges in credit transactions;⁹ and the premise is not likely to prove unsound.¹⁰

II. NATIONAL LEGISLATION: REGULATION OF LENDER CREDIT

A. *A Contrast in the Scheme of Legislation*

Broad usury statutes are in effect throughout most of the United States.¹¹ The rate limits found in these statutes, however, have proven unrealistic for the demands of the developing U.S. credit market. The history of U.S. loan regulation is, therefore, largely the story of successive exceptions to the usury laws. These exceptions developed in response to the expanding needs and pressures of the credit market. The affected category might be a class of lending institution or a type of lending arrangement, but in either case the category is withdrawn from the scope of the usury law and is governed by a different schedule of maximum rates.

In Canada, however, no such general usury law exists today. A lender may charge what he wishes unless specific legislation limits his power to do so. Actually, such limiting legislation does exist in abundance, and it applies to the principal participants in the consumer loan market—banks, small loans companies, and credit unions. It therefore seems that the distinctions in the scheme of legislation between the two countries are of no more than formal significance.

⁷ In the Matter of Pyke, 9 N.S. 342 (1873).

⁸ See Canadian Hearings 480-81 (brief of Professor Ziegel).

⁹ Truth in Lending Bill, S. 2275, 89th Cong., 1st Sess. (1965).

¹⁰ Compare, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹¹ Exceptions are Maine, New Hampshire, and Massachusetts. Curran 15. For a discussion of interest and usury statutes in the United States, see generally *id.* at 15-16.

B. *The Interest Act*

The Interest Act¹² establishes a legal rate of interest¹³ of five per cent per annum, but section 2 permits the parties to contract for "any rate of interest or discount" they please, with one narrow limitation: Whenever the interest rate is expressed in terms of any period less than a year, the interest must also be stated in terms of the annual rate; if it is not, the maximum rate allowed is five per cent.¹⁴

Since very little consumer credit today can be profitably extended at five per cent per annum, this provision might be thought more effective as a disclosure requirement than as a rate limitation. Yet this is probably not the case. First, the provision applies to written contracts only. Second, it applies only to interest rates for periods less than a year, and therefore appears to be inapplicable to loans in which the charge is expressed as a lump sum rather than as a rate over time.¹⁵ Third, "interest" is undefined in the act, thus inviting the usual abuses accorded an interest rate regulation that does not unequivocally specify what charges must be included within the limit. Finally, the only remedies provided in case of overcharge are restitution or an equal deduction from any principal or interest outstanding under the contract;¹⁶ these are hardly remedies calculated to secure maximum compliance.

C. *The Small Loans Act*

The Small Loans Act,¹⁷ passed in 1939, has proven highly effective, both in regulating legitimate moneylenders and in curbing loan sharks.¹⁸ Originally covering only loans up to \$500, the act has, since 1956, regulated loans up to \$1,500 made by those in the business of lending money.¹⁹ Its restrictions are enforced by rigid licensing requirements and effective administrative supervision. A detailed consideration of its provisions follows.

Coverage in General. The Small Loans Act defines two categories of regulated lenders: "moneylenders" and "small loans companies." The principal distinction is that the latter are federally incorporated, whereas moneylenders are companies provincially incorporated, partnerships, or individuals.²⁰ Except for chartered banks

¹² Can. Rev. Stat. c. 156 (1952).

¹³ The "legal rate" of interest is the rate which governs if the parties agree on no other.

¹⁴ Can. Rev. Stat. c. 156, § 4 (1952). This provision applies to all written or printed contracts except real estate mortgages.

¹⁵ Canadian Hearings 27 (testimony of the Superintendent of Insurance).

¹⁶ Can. Rev. Stat. c. 156, § 5 (1952).

¹⁷ Can. Rev. Stat. c. 251 (1952), as amended by Can. Stat. c. 46 (1956).

¹⁸ Canadian Hearings 25-26 (testimony of the Superintendent of Insurance).

¹⁹ Can. Rev. Stat. c. 251, § 2(c) (1952), as amended by Can. Stat. c. 46, § 1 (1956).

²⁰ A few partnerships and individuals were in business before the act came into

and registered pawnbrokers, which are regulated under separate federal acts, these categories appear to embrace every participant in the small loans market. As in the case of the American acts, the Small Loans Act applies only to money loans, although "loan" is defined in section 2(c) to include the purchase of a wage assignment.²¹ The act does not apply to credit granted by the seller of goods.

Licensing and Supervision. Sections 5 and 13(1) of the act require those in the business of making small loans (under \$1,500) to be licensed by the Minister of Finance. No license is required, however, of lenders whose charges never exceed one per cent per month on the unpaid principal. Technically at least, credit unions may fall within this class of unlicensed moneylenders, since the charges on their small loans generally do not exceed this designated rate. The Superintendent of Insurance is empowered to investigate all unlicensed lenders to verify that they are in fact not charging in excess of one per cent, nor otherwise violating the terms of the act. Credit unions, however, are not subjected to such scrutiny, perhaps because the job is adequately performed by local authorities under the provincial credit union acts.

The licensing requirement is an important feature of the Small Loans Act, and serves two distinct functions: first, it permits the licensing authority to limit access to the lending market; second, the concomitant power of license revocation provides a continuing stimulus for lender compliance with the terms of the act.

The standard for issuance of licenses differs sharply from that found in many of the U.S. acts, including the Uniform Small Loan

force in 1939, but are today licensed under it. Subsequent licensees have all been corporations, incorporated either by special act of Parliament (thus "small loans companies") or by the provinces (thus "moneylenders"). The Report of the Superintendent of Insurance for Canada, *Small Loans Companies and Money-Lenders Licenced Under the Small Loans Act for the Year Ended December 31, 1962* [hereinafter cited as 1962 Report] indicates that as of 1962, there were 7 licensed small loans companies and 80 licensed moneylenders. Among the moneylenders were 1 partnership and 2 individuals. The remainder were provincially-incorporated bodies. *Id.* at 68-69. In 1963, 55% of the small loans business was conducted by wholly-owned subsidiaries of U.S. companies. Canadian Hearings 819.

²¹ Whether the definition of "loan" found in § 2 is applicable to small loans companies is not clear, since the provisions refer only to "moneylenders." The structure of the act suggests that the two business categories are mutually exclusive. On the other hand, the act provides no separate definition of "loan" applicable to small loans companies. If § 2(c) were read to apply only to moneylenders, and not to small loans companies, the word "loan" would be undefined with respect to the latter, even though used repeatedly in the provisions relating to such companies. Fortunately, for most purposes it is unnecessary to determine the precise relationship between the two categories, since most of the key provisions of the act are separately stated with reference to each. Where significant, however, it is assumed that moneylenders and small loans companies are mutually exclusive categories.

Law.²² Sections 5(2) and 13(1) of the Canadian act provide the following guideline: the "experience, character, and general fitness" of the applicant must warrant the belief that he would carry on the moneylending business "with efficiency, honesty and fairness to borrowers" This standard focuses upon the personal qualities of the applicant—his integrity and competence—rather than upon the community need for lending facilities. The approach of the U.S. uniform law, on the other hand, is to condition issuance upon a finding that the "convenience and advantage of the community" will be promoted.²³ Under this standard, a license might be denied an exemplary applicant if additional facilities would, for example, result in "excessive" competition.²⁴ A consequence of the Canadian licensing standard is that once the business entity receives a license it is free to open branch offices as it pleases. Under the approach of the U.S. uniform law, however, a separate license is required for each office.²⁵

Lending Powers. The Small Loans Act imposes restrictions upon the lending powers of small loans companies which are different from those imposed upon moneylenders. For example, small loans companies are barred from lending on the security of real property.²⁶ They have under section 14(a), however, the power to "buy, sell, deal in and lend money on the security of, conditional sale agreements, lien notes, hire purchase agreements, chattel mortgages, trade paper, bills of lading, warehouse receipts, bills of exchange and choses in action" Small loans companies may thus engage in sales financing through the purchase of conditional sales agreements from retail merchants. In contrast to the practice in the United States, these sales financing activities are carried on in the same premises as the small loans activities.²⁷ The sales financing aspect of a licensee's business is, however, wholly unregulated under the act.

²² Uniform Small Loan Law (Tent. Draft No. 7, 1942) [hereinafter cited as Uniform Small Loan Law].

²³ Uniform Small Loan Law § 4(b)2.

²⁴ Sympathy for such a "convenience and advantage" standard is to be found in Canada. In 1956, the Superintendent of Insurance observed: "Too many [lending] offices must tend to encourage people to borrow As competition increases, expenses are prone to rise through more aggressive advertising, the opening of additional lending offices in close proximity to those of competitors, and in other ways." Brief of the Department of Insurance, Small Loans Act, p. 32, submitted to the Standing Committee of the House of Commons on Banking and Commerce, 22d Parl., 3d Sess. (1956). He concluded, however, that a "convenience and advantage" standard would "clearly be unconstitutional since it would not be legislation respecting interest." Ibid. In the event excessive competition were to result in higher rates, however, it might be plausibly argued that restrictive licensing was constitutionally justified as an aspect of interest regulation.

²⁵ Uniform Small Loan Law § 4(b)2.

²⁶ This can be inferred both from the definition of small loans companies in § 2(f) and from the enumeration of powers of such companies in § 14(a).

²⁷ Canadian Hearings 818 (testimony of the President of the Canadian Consumer Loan Association).

The act contains no restriction on a moneylender's powers which is analogous to that imposed on small loans companies. Such limitations are left to the provincial authorities that charter the moneylender. The powers granted moneylenders by provincial charters, however, normally parallel those set forth in the act for small loans companies.²⁸ Nothing in the act appears to bar moneylenders from making loans over \$1,500. In defining the powers of the small loans companies, however, section 14(b) provides that they may "lend money in sums not exceeding fifteen hundred dollars" Taken literally, these words would appear to bar loans in excess of the stated sum. Nevertheless, in view of the history and objectives of the act, there probably was no intent to prohibit larger loans. Licensees do, in fact, frequently lend greater amounts,²⁹ and the enforcing officials do not take issue with the practice.

Charges Permitted the Licensees and Other Terms of the Loan Contract. The Canadian act, like the U.S. Uniform Small Loan Law, provides a graduated scale of maximum charges applicable to different ranges of the loan. The "cost of a loan" may not exceed 2 per cent per month on the unpaid principal balance not exceeding \$300; 1 per cent on the amount exceeding \$300 but not exceeding \$1,000; and $\frac{1}{2}$ per cent on the remainder.³⁰ In the case of long-term loans (loans up to \$500 for over 20 months and loans exceeding that amount for over 30 months), the loan cost ceiling is 1 per cent per month on the unpaid principal balance.³¹ The statutory limits are almost invariably charged.³² These rates must, of course, be applied to the principal balance outstanding at the time of payment, and not taken in advance. The premise behind such a variable rate structure is, no doubt, that the cost of lending is disproportionately high for smaller or shorter term loans.

Assuming a borrower made an additional loan before an existing one was repaid, it would frequently be to the lender's advantage to regard them as separate loans, since he could then impose the higher rates permitted for smaller loans. The act, however, bars this. If such an additional loan is made, either by the borrower or the borrower's spouse, the separate loans must be added, and the cost computed on the new total.³³

²⁸ See Canadian Hearings 28 (testimony of the Superintendent of Insurance).

²⁹ Outstanding balances of large loans on the books of licensees during 1962 totaled almost \$117 million, compared with about \$482 million for small loans. 1962 Report at vii.

³⁰ Can. Rev. Stat. c. 251, §§ 3(2), 14(2) (1952), as amended by Can. Stat. c. 46, §§ 2, 6 (1956).

³¹ Can. Rev. Stat. c. 251, §§ 3(3), 14(3) (1952), as amended by Can. Stat. c. 46, §§ 2, 6 (1956).

³² Royal Commission 211.

³³ Can. Rev. Stat. c. 251, §§ 3(4)a, 14(4)a (1952), as amended by Can. Stat. c. 46, §§ 2, 6 (1956).

Credit regulation is rarely effective if it extends only to that portion of the loan charge the lender pleases to designate "interest." Other charges making up the cost of the loan, however styled, must also be controlled. On this premise, no doubt, the "cost" of a loan was comprehensively defined to mean the *whole* cost, whether designated "interest" or

discount, deduction from an advance, commission, brokerage, chattel mortgage and recording fees, fines, penalties or charges for inquiries, defaults or renewals or otherwise, and whether paid to or charged by the lender or paid to or charged by any other person, and whether fixed and determined by the loan contract itself, or in whole or in part by any other collateral contract or document by which the charges, if any, imposed under the loan contract or the terms of the repayment of the loan are effectively varied³⁴

Thus far, few items have fallen outside the definition of "cost" to be allowed as additional charges. Exceptions have been made, however, for the following items: credit life insurance, though the imposition of this charge is closely regulated;³⁵ property insurance on property given as security on the loan, provided the insurance is placed through an agency other than that of the licensee;³⁶ court costs in the event of default and attorney fees if permitted by provincial law;³⁷ and certain expenses of recovery of the security on chattel mortgage loans, including out-of-pocket expenses of seizure, charges by public officials, and reasonable expenses of repair to render the seized chattel saleable.³⁸ Expenses for storage and sale of the chattel and other de-

³⁴ Can. Rev. Stat. c. 251, § 2(a) (1952). The preamble of the Small Loans Act suggests that this listing is a tribute to the ingenuity of earlier generations of money-lenders in devising various forms of additional charges to circumvent usury legislation that reached only "interest." Such legislation included the Interest Act, Can. Rev. Stat. c. 156 (1952), and the Money-Lenders Act, Can. Rev. Stat. c. 181 (1952) (repealed).

³⁵ See the lengthy directive, Memorandum for Licensees Under the Small Loans Act, Re Group Insurance on the Lives of Borrowers (April 3, 1959), issued by the Superintendent of Insurance. The lender must offer the service through a group life policy and on a wholly voluntary basis. While the maximum charge is not specified, the lending institutions and the Superintendent of Insurance have informally agreed that the premium will not exceed 50¢ per \$100 of the initial amount of the loan. There has been full compliance with this agreement. See Canadian Hearings 65 (testimony of the Superintendent of Insurance). As of December 31, 1962, 59 of the licensees under the act were offering group life insurance, the cost in one case being borne by the lender and, in the other 58 cases, by the borrower. 1962 Report at viii. In 1962, 96.2% of the small loans made were covered by credit life insurance. *Id.* at 53.

³⁶ Report of the Superintendent of Insurance for Canada on Small Loans Companies and Money-lenders Licenced Under the Small Loans Act, 1939, at 6 (1940).

³⁷ Letter from K. L. Bullerwell, Administrative Officer of the Canadian Department of Insurance, to the author, March 2, 1966.

³⁸ Department of Insurance, Small Loans Act, 1939—Memorandum for Licensees (March 12, 1940).

fault costs, on the other hand, form a part of the cost of the loan, and no additional charges for such expenses are allowed.³⁹

It has been pointed out above that licensees do grant loans in excess of \$1,500—the point after which there ceases to be regulation of loan costs. The question arises whether the first \$1,500 of such a loan remains subject to the statutory limits. It does not.⁴⁰ Once a loan exceeds \$1,500, no part of it is regulated. An exception arises when the \$1,500 figure is exceeded as a result of successive small loans to the same borrower or the borrower's spouse. In that case, the first \$1,500 of the loan remains subject to the statutory limits while the charge on the excess is restricted to one-half of one per cent per month.⁴¹

The Canadian practice of not regulating loans which are in excess of the small loans limits is in contrast to the situation under many U.S. small loans acts. In the United States, regulation generally takes place against the back-drop of a broad usury statute. Thus, that portion of the loan above the small loan limit⁴² is not exempt from operation of the usury law.

The theory of the Canadian arrangement probably is that loans over \$1,500 are not typically made to the class of needy small borrowers for whose protection the act was designed. A substantial school of thought, represented by the Royal Commission on Banking and Finance, is, however, of the view that regulation should extend up to \$5,000, and that the maximum loan charge applicable to a balance in the range of \$300 to \$5,000 should be one per cent per month. Such a proposal may imply objectives broader than those of the classical small loans act. In any event, such a change would raise the ceiling, but would not eliminate the abrupt termination of regulation once the ceiling was reached.

An unintended result of the Canadian system is that relatively few loans are made in the \$1,000-\$1,500 range. The policy of one company, for example, permits it to make loans in the "dead" area between \$1,000 and \$1,500 only if it is "trapped" by competitive pressure, but in no event for an amount "in excess of \$1222 on up to \$1500."⁴³ Such a policy reflects a preference for the higher rates permitted for smaller loans, or the unregulated rates for those over \$1,500.⁴⁴

³⁹ Ibid.

⁴⁰ See Canadian Hearings 27 (testimony of the Superintendent of Insurance).

⁴¹ Can. Rev. Stat. c. 251, §§ 3(4)b, 14(4)b (1952), as amended by Can. Stat. c. 46, §§ 2, 6 (1956).

⁴² \$300 under the Uniform Small Loan Law and \$200 to \$5,000 under the various state laws. Curran 21.

⁴³ Royal Commission 382.

⁴⁴ Canadian Hearings 835 (testimony of the President of the Canadian Consumer

Loans must be made repayable in approximately equal installments of principal, plus interest computed on the outstanding balance, which results in declining payments as the loan cost decreases, or of principal and cost of loan, which results in uniform payments, but with a growing proportion allocated to principal as the loan cost decreases.⁴⁵ In the event of default, no special charges are permitted. The borrower merely continues to pay the ordinary contract rate. If, however, the default continues beyond the due date of the final installment, one per cent interest per month from that date may be charged on the installments in default.⁴⁶ No such interest charge for default, nor any loan cost, may be compounded; nor may either be deducted or received in advance.⁴⁷ This, of course, bars the use of the discount form of loan contract. Prepayments of any portion of the principal balance are permitted on any regular payment date, and no penalties whatever may be assessed for such payments.⁴⁸

Compulsory Disclosure of Loan Costs by Licensees. The disclosure problem is confronted at two points: first, in the lender's advertising practices; second, in his manner of stating loan costs in the contract. Neither aspect is in any way regulated by the act. However, in a manner perhaps less formal than commonly encountered in the United States, lenders' advertising practices are in fact regulated. The Superintendent of Insurance has testified that

from the time the licensee is first licensed we get proof copies of proposed advertising, and always copies of the contracts. In fact the licensees are generally anxious to have us look at them to comment on them [The requirement] is not in the act. But as a matter of practice we do it [The companies] have been very cooperative in their advertising [O]ur disposition has been to keep them away from superlatives and anything of any unjustifiable nature.⁴⁹

With respect to disclosure in the loan contract, it has been previously observed that under limited circumstances the Interest Act

Loan Association). It is interesting to observe that in many of the loans for over \$1,500, the companies depart from the method of charging rates under the Small Loans Act, and utilize instead the add-on or discount method. Canadian Hearings 860 (brief of the Canadian Consumer Loan Association).

In 1962, the number of loans between \$1 and \$500 was 642,108; between \$501 and \$1,000, 584,825; and between \$1,001 and \$1,500, 77,222. 1962 Report at v, 64. The rate charged by small loans companies on loans over \$1,500 seems to average about 1½% monthly. Royal Commission 210.

⁴⁵ Can. Rev. Stat. c. 251, §§ 6(1), 14(5)a (1952), as amended by Can. Stat. c. 46, §§ 4, 6 (1956).

⁴⁶ Ibid.

⁴⁷ Can. Rev. Stat. c. 251, §§ 6(2), 14(5)b (1952).

⁴⁸ Can. Rev. Stat. c. 251, §§ 6(3), 14(5)c (1952).

⁴⁹ Canadian Hearings 68.

indirectly presses a lender to disclose interest in terms of annual rate, upon penalty of being restricted to a five per cent interest charge.⁵⁰ The question arises, however, whether this applies to transactions under the Small Loans Act. Are "loan costs" under the Small Loans Act "interest" under the Interest Act? The Superintendent of Insurance believed they were. And, in fact, all licensees do state loan costs in terms of both monthly and annual rates in their contracts.⁵¹ The practice, moreover,⁵² is to provide every borrower with a copy of the loan contract,⁵² though the act does not require this.

D. *The Bank Act*

Growth in personal installment lending by chartered banks has been rapid since 1958.⁵³ The Federal Bank Act,⁵⁴ which provides the general framework of bank regulation, contains some provisions that bear on such consumer loans.⁵⁵ This, however, is an incidental effect rather than the original purpose, since the relevant provisions were in effect long before banks entered the consumer loan market. Section 91(1) of the Bank Act, governing "interest and charges," provides:

[N]o bank shall in respect of any loan or advance payable in Canada stipulate for, charge, take, reserve or exact any rate of interest or any rate of discount exceeding six per cent per annum and no higher rate of interest or rate of discount is recoverable by the bank.⁵⁶

The annual interest rate of most banks actually ranges from 9¼ per cent to 11¼ per cent. This amount of loan charge may be justified despite the statutory language just quoted. First, the six per cent statutory maximum applies to rate of interest *or* rate of discount, at the lender's option. Assume a loan of \$100, for example, was arranged on a one-year installment basis at the discount rate of six per cent

⁵⁰ See p. 204 *supra*.

⁵¹ Canadian Hearings 27 (testimony of the Superintendent of Insurance).

⁵² *Ibid*.

⁵³ See chart, Canadian Hearings 803-04. The total of outstanding bank loans at the end of 1963 has been broken down as follows:

loans secured by motor vehicles	\$319,000,000
loans secured by other personal property	51,000,000
other personal loans repayable by installments	465,000,000
other personal loans	597,000,000

Total \$1,432,000,000

Id. at 109 (brief of the Bank of Canada).

⁵⁴ Can. Stat. c. 48 (1953-1954).

⁵⁵ The Small Loans Act, it will be remembered, expressly excluded chartered banks from its provisions. See pp. 204-05 *supra*.

⁵⁶ Section 91(2) permits the following exceptions: The bank may charge a minimum of \$1 on loans and advances over \$25 and a minimum of 50¢ on those under that amount.

authorized by the statute. Six dollars would be deducted in advance, leaving net proceeds of \$94. The borrower would be obliged to repay the principal amount of \$100 in twelve equal monthly installments. Such an arrangement would produce a yield in the $9\frac{1}{4}$ per cent to $11\frac{1}{4}$ per cent range noted above, if calculated in terms of simple annual interest.⁵⁷ The reason that a given discount translates into a higher simple interest rate is, of course, that the former is figured on the original amount of the loan, and the latter on the declining balance. Second, section 93(2) of the act provides that "no bank shall directly or indirectly charge or receive any sum for the keeping of an account unless the charge is made by express agreement between the bank and the customer." This could be interpreted to authorize additional charges for the loan "account," so long as the parties expressly agree.⁵⁸ Third, neither "rate of interest" nor "rate of discount" are defined in the act, nor is any method of computation prescribed. Therefore, various other loan charges might be justified in addition to the maximum rate.⁵⁹ Whatever the theory, "banks have taken the view that the charges under these plans do not involve a breach of Section 91 of the Bank Act and this interpretation has not been challenged by the authorities."⁶⁰

It is interesting to contrast the provisions regulating loan charges in the Bank Act with those of the Small Loans Act. For example, the Small Loans Act defines the maximum loan charge with considerable precision;⁶¹ the Bank Act merely refers to "rate of interest or rate of discount." In addition, the maximum rate of charge under the Bank Act differs from that permitted for an equivalent loan under the Small Loans Act.⁶² Also, the Small Loans Act regulates the rates only on loans under \$1,500; the Bank Act provides no cutoff point.

Why are there differences in the regulation of similar loans by the two types of lending institutions? The phenomenon is probably not the product of policy, but rather the unintended result of an explosive

⁵⁷ It appears to be the common practice for banks to disclose their rate of loan charge neither in terms of true interest rate nor in terms of total dollar charge. See Canadian Hearings 29 (testimony of the Superintendent of Insurance), 478 (brief of Professor Ziegel). This produces considerable dissatisfaction in other segments of the lending industry, which fear the existence of a public illusion that banks merely charge an annual rate of six per cent. See, e.g., *id.* at 148 (testimony of a representative of the Ontario Credit Union League).

⁵⁸ See *id.* at 29 (testimony of the Superintendent of Insurance).

⁵⁹ See *id.* at 190-91 (testimony of the Executive Secretary of the Canadian Federation of Agriculture).

⁶⁰ Royal Commission 127. Though not apparently required to do so by the act, at least some banks permit a borrower to prepay a discount loan with "a corresponding equitable rebate in the cost of the loan." See Canadian Hearings 478 (brief of Professor Ziegel).

⁶¹ See p. 207 *supra*.

⁶² *Ibid.*

growth in the consumer-credit industry to which the law has not yet adjusted. The maximum loan rate prescribed by the Bank Act was originally intended to protect small borrowers who, until recently, were mainly business borrowers. Banks are today often unwilling to lend at such rates, however, and the act therefore works against these borrowers by "denying them access to bank funds and sending them elsewhere to borrow at interest rates which are often well in excess of the rates which banks would charge."⁶³ This same practice may similarly be driving consumer borrowers to more expensive sources of credit.

III. PROVINCIAL LEGISLATION: REGULATION OF VENDOR CREDIT

A. Credit Unions

Canada was the continental birthplace of the credit union movement.⁶⁴ In 1900 the first credit union, or as it was called, "caisse populaire," was established in Quebec, modeled after the cooperative "Peoples' Banks" of Europe. From that province, the institution gradually spread across Canada and into the United States. The Canadian credit union movement today consists of the "caisses populaires" of French-speaking Canada and the "credit unions" of English-speaking Canada. The traditional objective of these institutions was to promote thrift by collecting the savings of members and lending this money to them at favorable rates for "provident or productive purposes."⁶⁵ Today these institutions play a vital role in the Canadian consumer-credit market,⁶⁶ and legislation regulating them has been passed in every province.⁶⁷

Maximum Rate of Charge. Loan rates are limited by statute in every province except Newfoundland and Quebec. This limit is generally set at one per cent per month computed on the unpaid balance of the loan.⁶⁸ Within this limit the union is free to set its own rates.

As with every statute imposing loan charge limits, the question

⁶³ Royal Commission 129.

⁶⁴ Id. at 155. For a general account of the history and operations of the Canadian credit union movement, see id. at 155-71.

⁶⁵ E.g., Ont. Rev. Stat. c. 79, § 4(1)b (1960).

⁶⁶ See chart, Canadian Hearings 803-04.

⁶⁷ Alba. Rev. Stat. c. 67 (1955), as amended by Alba. Stat. c. 19 (1961); B.C. Stat. c. 14 (1961), as amended by B.C. Stat. c. 15 (1964); Man. Rev. Stat. c. 54 (1954), as amended by Man. Stat. c. 12 (1964); N.B. Stat. (2d Sess.) c. 2 (1963), as amended by N.B. Stat. c. 24 (1964); Newf. Rev. Stat. c. 172 (1952), as amended by Newf. Stat. No. 4 (1963); N.S. Rev. Stat. c. 64 (1954), as amended by N.S. Stat. c. 20 (1964); Ont. Rev. Stat. c. 79 (1960), as amended by Ont. Stat. c. 14 (1964); P.E.I. Rev. Stat. c. 38 (1951), as amended by P.E.I. Stat. c. 9 (1963); Que. Stat. c. 57 (1963); Sask. Stat. c. 40 (1962), as amended by Sask. Stat. c. 24 (1964).

⁶⁸ E.g., Ont. Rev. Stat. c. 79, § 29(2) (1960); N.S. Rev. Stat. c. 64, § 47 (1954) (50¢ minimum charge permitted for any loan even if actually more than 1%).

arises as to which items are to be included in the calculation (and therefore subject to the statutory limit) and which excluded (therefore collectible in addition to the statutory limit). Credit union laws, in contrast to the small loan laws of both Canada and the United States, devote little attention to this problem. Several acts make no mention of additional charges, but are content merely to limit "interest" rates.⁶⁹ Others provide that the rate limit applies to interest together with "all charges and penalties,"⁷⁰ or to interest together with "all charges incident to making the loan."⁷¹ Prepayment penalties are not normally barred by express language in these statutes. With their emphasis on thrift, however, one would scarcely expect credit unions to penalize members for excessive zeal in repayment.

Credit unions do not typically charge the highest rate the market will bear and, therefore, do not seek to test the limits of legality. The statutory rate is widely interpreted by the credit unions to apply to every conceivable charge. "There is [sic] no hidden charges or penalties in the credit union loan business," the Ontario Credit Union League has asserted.⁷² Even the cost of credit life insurance is generally included within the maximum rate.⁷³ In addition, "because of the underlying philosophy of credit unions, delinquents are treated as reasonably and fairly as possible, and everything possible is done to help a borrower in difficulty, including the postponement of principal payments, and sometimes the waiving or reduction of interest."⁷⁴

Credit unions probably constitute the only significant segment of the consumer moneylending market which generally charges less than the maximum permitted by statute. The methods by which this is accomplished, however, vary. Some of these institutions follow the practice of charging, initially, the maximum one per cent rate because of the ease of calculation this permits. They then refund a portion in the form of an annual rebate.⁷⁵ Others charge less from the outset.⁷⁶ Whatever the technique, the Royal Commission has estimated that the effective charges of credit unions, "after allowance for insurance benefits and the partial rebates of loan interest which are a regular part of the annual distribution of some co-operatives' income, range between 8% and 10% for most credit unions and a little lower for the larger ones and for rural societies."⁷⁷

⁶⁹ E.g., N.S. Rev. Stat. c. 64, § 47 (1954).

⁷⁰ E.g., Ont. Rev. Stat. c. 79, § 29(2) (1960).

⁷¹ N.B. Stat. (2d Sess.) c. 2, § 23 (1963).

⁷² Canadian Hearings 165.

⁷³ *Id.* at 140 (testimony of the General Manager of the Ontario Credit Union League).

⁷⁴ *Id.* at 167 (brief of the Ontario Credit Union League).

⁷⁵ *Id.* at 165 (brief of the Ontario Credit Union League).

⁷⁶ *Id.* at 255 (brief of the Credit Union National Association).

⁷⁷ Royal Commission 158.

It should also be noted that such interest regulation takes place in the face of the constitutional allocation of the interest power to Parliament. The legislation, however, has apparently never been challenged,⁷⁸ nor is it likely to be, so long as credit unions are content to operate within the one per cent rate limit.

Maximum Amount of Loans. Most of the provinces set no general limit on the amount unions may lend to individuals. In some acts, no mention is made of the subject;⁷⁹ in some, the matter is left to the directors;⁸⁰ and in others, it is to be determined by the by-laws.⁸¹ A substantial number of the acts do, however, set limits on the size of unsecured loans and specify at least some of the types of security that may be accepted for loans exceeding that amount. The dividing line is generally drawn between \$300 and \$500. Some laws permit this unsecured amount *in addition* to the unencumbered value of any shares the member holds in the union,⁸² while others regard an assignment of shares or deposits as good security.⁸³ Several expressly give the union a lien on a member's shares and deposits to the extent of his debt.⁸⁴ Another form of acceptable security mentioned in some of the acts is "an endorsement of a note"⁸⁵ or real estate.⁸⁶ Presumably, the statutory designations of valid security are not intended as exclusive. Some acts expressly provide that loans may be made upon such security as is satisfactory to the credit committee.⁸⁷

Though not required in the acts, it is the widespread practice of credit unions to disclose loan charges in terms of both total dollar cost and interest rate.⁸⁸ Not surprisingly, the Credit Union National Association recommended legislation requiring such disclosure for the "extenders of every kind of credit."⁸⁹

⁷⁸ See Canadian Hearings 28 (testimony of the Superintendent of Insurance).

⁷⁹ E.g., Quebec.

⁸⁰ E.g., Alta. Rev. Stat. c. 67, §§ 28(1)b(ii), (1)f (1955); N.B. Stat. (2d Sess.) c. 2, § 14f (1963).

⁸¹ E.g., Ont. Rev. Stat. c. 79, § 15(c) (1960).

⁸² E.g., B.C. Stat. c. 14, § 18(8)a (1961).

⁸³ E.g., N.B. Stat. (2d Sess.) c. 2, § 18(2) (1963).

⁸⁴ E.g., Ont. Rev. Stat. c. 79, § 27(2) (1960).

⁸⁵ E.g., N.B. Stat. (2d Sess.) c. 2, § 18(2) (1963).

⁸⁶ See Sask. Stat. c. 40, § 70 (1962). This section also prescribes that the maximum loan which may be made on the security of real estate is a percentage of its value, and provides that a loan higher than that percentage can be made if guaranteed by any organization approved by the supervisory authority.

⁸⁷ E.g., Man. Rev. Stat. c. 54, § 63(3) (1954).

⁸⁸ The Credit Union National Association has stated:

Our credit unions stress the fact that their rates include all borrowing costs, and they are careful to provide each borrower with full information about the amount of his repayment, and the total cost of the loan expressed both in dollars and cents and in terms of per centum per annum.

Canadian Hearings 255.

⁸⁹ Id. at 257.

Summary. In both the United States and Canada, the form and tone of credit union legislation differ sharply from that of small loan legislation. The latter type was a reaction to moneylenders who had repeatedly and ingeniously taken advantage of needy and helpless borrowers. The legislation therefore aimed at precise control of the terms of the lending agreement.

Credit unions, on the other hand, developed as membership-controlled cooperative ventures dedicated to the service of their members. The statutes tend to focus on guaranteeing their continued democratic operation under sound financial practices. Provisions are made to insure that the membership will have knowledge of and control over the activities of the society. The credit union's bylaws are regulated, and it is subject to inspection and supervision by government officials and sometimes also by the credit union league or "central" with which it may be affiliated. Substantial reliance is placed on such devices and on the underlying benevolent objectives of the movement, rather than on detailed control of the terms of the loan agreement.

B. *Retail Installment Sales*

The principal types of retail credit sales arrangements prevalent in Canada roughly parallel those found in the United States.⁹⁰ Each country utilizes the short-term, thirty-day charge account, under which payment in full is expected of the purchaser shortly after receipt of the bill. No finance charge is made, and the seller normally retains no security interest in the goods. There is no relevant regulation, and such accounts are not further considered herein.

The revolving charge account is also found in both countries. Under this arrangement, the buyer may make purchases from time to time and charge them to his account. He is billed for accrued charges, usually on a monthly basis. He then has the option either to pay the entire amount, in which case there is no finance or "service" charge, or to pay a lesser amount down to a specified minimum, in which case a finance charge is computed on the unpaid balance and added to the following bill. The service charge is sometimes stated as a flat amount for a given range of account balance (e.g., \$.60 for an account balance between \$35.01 and \$45.00; \$.75 for an account balance between \$45.01 and \$55.00, etc.) and sometimes as a percentage per month on the outstanding balance as of a given date.

⁹⁰ For Canada, see generally *id.* at 461-65 (brief of the Retail Council of Canada); for the United States, see generally Curran 10-13. For a comparative study of conditional sales arrangements covering the Commonwealth countries and the United States, see generally Goode and Ziegel, *Hire-Purchase and Conditional Sale—A Comparative Survey of Commonwealth and American Law* (1965).

With some sellers, the percentage rate varies depending upon the balance outstanding; with others, it remains constant. Though not required by statute, some sellers remit a portion of the finance charge if the account is paid before maturity.⁹¹

In both Canada and the United States, the credit sale of higher-priced durable goods is traditionally arranged under a retail installment sales contract covering a single purchase.⁹² The seller gives possession of the goods to the buyer who agrees to pay the cash price plus finance charges over a specified period of time. The seller usually retains a security interest in the property in the form of a conditional sales agreement or chattel mortgage. While a feasible alternative, the chattel mortgage is rarely used for this purpose.⁹³

A greater degree of flexibility is introduced into the purchase of such higher-priced items by the add-on or open-end form of the retail installment sales contract. Such a contract differs from the traditional single-item installment sales contract by expressly permitting further purchases on the same account. When this right is exercised, the amount of the new purchase and finance charge is added to the old balance, resulting in a new schedule as to the number and size of payments.

As in the United States, the Canadian seller frequently does not retain the installment sales contracts until maturity. He sells such contracts at discount to a sales finance company, or to some other participant in the sales financing market, which thereafter collects the payments. The finance company then credits part of the finance charge to the dealer as his payment for having obtained the business for it. Instead of paying him immediately, "the company normally credits the amount to a 'reserve' account against which losses, or deductions resulting from rapid repayment, are charged."⁹⁴ In addition, the finance company and seller share the risk of default. "In most cases, the company accepts part of the risk by agreeing to find the goods if the buyer has 'skipped,' repossess them and deliver them to the dealer who then repurchases the contract, usually by a charge against his reserve with the company."⁹⁵

Thus, as in the United States, there tends to be a close relationship between dealer and finance company. Generally, however, under the terms of the sale contract, the buyer's defenses against the seller are waived as against an assignee of the contract. The finance com-

⁹¹ See Canadian Hearings 465 (brief of the Retail Council of Canada).

⁹² Succeeding purchases require a separate contract or revision of the original contract.

⁹³ Goode and Ziegel, *op. cit.* supra note 90, at 13.

⁹⁴ Royal Commission 205-06.

⁹⁵ *Ibid.*

pany is thus insulated from such defenses, and its detached position is often fortified by its status as holder in due course of the buyer's promissory note. While Canadian courts have recently demonstrated a tendency to deny the company such insulation,⁹⁶ legislation has not yet dealt with the problem. National legislation does govern some of the institutions that participate in the installment sale process—small loans companies, for example, part of whose business is sales financing—but it does not regulate the process itself. Any effort to intervene in this area would probably raise a substantial constitutional issue as to the authority of Parliament.

The provinces have, on the other hand, legislated with respect to many aspects of vendor credit.⁹⁷ The treatment varies widely among the provinces in a number of respects. First, variations exist as to the scope of the regulated transactions. In some provinces, for example, the legislation pertains only to sales in which the seller retains a security interest in the goods; in others, it applies generally to installment sales or to a defined category of retail installment sales. Second, there are variations in the functional aspect of the transaction governed. Thus, the object of legislation may be to regulate finance charges and minimum down-payments, to require disclosure of finance charges, or to protect the purchaser's equity in the goods in the event they are seized by the seller because of the purchaser's default. Finally, there are significant variations among the provinces in the substance of analogous provisions.

The principal aspects of vendor credit legislation can be classified as follows: (1) The regulation of finance charges. Potentially, at least, this embraces the regulation of the initial finance charge, penalties, the rebate of "unearned" charges in the event of prepayment of the credit balance, and, in the case of sales finance companies, the dealer's reserves maintained by the finance company and rebates to the dealer.⁹⁸ (2) The requirement of disclosure of finance charges, either in the advertising practices of the seller or in the sales contract, and in the case of revolving charge accounts, in the periodic statements to the buyer. (3) The protection of the buyer's interest in the property in the event of repossession by the seller.

Cutting across the substance of such protective measures is the issue as to how they are to be enforced. To what degree should lender compliance depend upon the buyer's desire or ability to enforce his

⁹⁶ See Goode and Ziegel, *op. cit.* supra note 90, at 112 & n.14.

⁹⁷ For a useful general review and critique of the Canadian legislation, see Ziegel, *Retail Instalment Sales Legislation: A Historical and Comparative Survey*, 14 *U. Toronto L.J.* 143 (1962).

⁹⁸ These reserves and rebates are generally not subject to regulation. The exception is Nova Scotia, N.S. Stat. c. 4, § 11(n) (1965).

statutory rights in a lawsuit? To what degree should enforcement be remitted to the public authority through criminal prosecutions? Should the power to license, inspect, and supervise be given to some specialized administrative authority? In the moneylending field, the Small Loans Act utilizes all of these techniques, although its effectiveness no doubt depends largely upon the provisions for administrative supervision. A few provincial statutes have begun to utilize a similar device with respect to vendor credit transactions.

Regulation of Finance Charges. As has been noted above,⁹⁹ the limitations found in Dominion legislation on maximum interest or loan charges do not apply to finance charges imposed in connection with the credit sale of goods. Such charges are not viewed as interest, but rather as an increase in the price of goods for the risk of selling on time.¹⁰⁰ This produces the anomaly, from the point of view of credit regulation, that if a person borrows \$1,000 from a small loans company to finance the purchase of an automobile, the loan cost and other aspects of the transaction are rigidly controlled; but, if he buys the car with a credit balance of \$1,000 due the seller, the finance charges are, in general, unregulated. And this is so even though, typically, the automobile vendor will promptly sell the sales contract to a finance agency.

Disclosure of Finance Charges in the Contract. The question of compulsory disclosure is not so much whether it is desirable or not, but the form it should take. Consumer representatives and the credit unions have traditionally favored disclosure in terms of annual interest. Lenders have opposed such a requirement, preferring disclosure in terms of the dollar amount of credit charges. Among the arguments heard during the Canadian Hearings in support of the latter method were the following: (1) Disclosure in terms of annual percentage rate serves no useful purpose since borrowers are interested in the dollar amount of charges and monthly payments. (2) Disclosure in terms of annual percentage rate introduces a spurious degree of accuracy since there are various ways to calculate this rate, each producing a different result. (3) To translate credit charges into annual percentage rates is a difficult undertaking at best, and in some situations impossible.

This last argument was advanced with particular vehemence by those retailers who offered revolving charge accounts.¹⁰¹ The reduc-

⁹⁹ See pp. 206, 218 *supra*.

¹⁰⁰ For a discussion of the time-price doctrine prevalent in the United States, see Curran 13-14, 84-90; Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 *Yale L.J.* 839, 840-51 (1959).

¹⁰¹ Service charges on revolving charge accounts are unregulated in Canada, in contrast to the case in some of the United States. For the U.S. practice, see Curran 101-02.

tion of service charges in such accounts to annual interest would, they claimed, be literally impossible owing to the unpredictability of the dates and the amounts of both payments and purchases.¹⁰²

The argument for percentage-rate disclosure was perhaps best summarized in the report of the Royal Commission.¹⁰³ It acknowledged that there were different formulas for calculating yield, but that the variations were not great. Besides, a single formula could be adopted, since "comparability is more important than the precise level."¹⁰⁴ As to the argument that borrowers were more interested in dollar cost than percentage rate, the Commission responded that the latter information "will certainly not do any harm—and may well do much good . . ."¹⁰⁵ The Commission conceded that it is difficult to calculate the annual rate of a revolving charge account, but suggested it might be enough if the customer were shown the effective charge under a typical plan.

Protection of the Buyer's Interest in the Property in the Event of Repossession. Every province makes some provision for protection of the buyer's interest in the property in the event of his default.¹⁰⁶ Generally, the seller must retain the property for twenty days during which period the buyer has the right to redeem.¹⁰⁷ The amount he must pay to redeem varies from merely the existing deficit to the entire balance of the contract price together with charges such as interest¹⁰⁸ and the actual "costs and expenses of taking and keeping possession."¹⁰⁹ The opportunity to redeem on condition that he pay off the entire balance due on the contract is, of course, of dubious utility to the over-extended debtor.

If the buyer does not redeem the property, the seller may resell it. In several of the provinces the sale must be by public auction if the seller wishes to preserve his right to a deficiency judgment.¹¹⁰ In the others, the sale may be made either privately or by public auc-

¹⁰² Canadian Hearings 466-70 (brief of the Retail Council of Canada).

¹⁰³ Royal Commission 382-83.

¹⁰⁴ *Id.* at 383.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Alba. Rev. Stat. c. 54, § 19 (1955); B.C. Stat. c. 9, § 14 (1961); Man. Rev. Stat. c. 144, § 3 (1954); N.B. Rev. Stat. c. 34, § 14(1) (1952); Newf. Stat. No. 62, § 12(1) (1955), as amended by Newf. Stat. No. 67, § 2 (1962); N.S. Rev. Stat. c. 47, § 11 (1954); Ont. Rev. Stat. c. 61, § 9(1) (1960); P.E.I. Rev. Stat. c. 28, § 10(1) (1951); Que. Civ. Code, c. 73, arts. 1561a-j (1947), as amended by Que. Stat. c. 47 (1948); Sask. Stat. c. 97, § 14(1) (1957).*

The repossession and resale provisions of these statutes, or their earlier versions, are analyzed in chart form in Ziegel, *Uniformity of Legislation in Canada, The Conditional Sales Experience*, 39 *Can. B. Rev.* 165, 231 (1961).

¹⁰⁷ *E.g., B.C. Stat. c. 9, § 14(1) (1961); Ont. Rev. Stat. c. 61, § 9(1) (1960).*

¹⁰⁸ *E.g., Ont. Rev. Stat. c. 61, § 9(1) (1960).*

¹⁰⁹ *E.g., B.C. Stat. c. 9, § 14(1) (1961).*

¹¹⁰ *E.g., N.B. Rev. Stat. c. 34, § 14(3) (1952).*

tion.¹¹¹ In most cases, the statutes provide that notice of the intention to sell and of other details must be given to the buyer or to the buyer and guarantor.¹¹² In some cases, however, notice is required only when the price of the goods exceeds \$30 and the seller intends to seek recovery for any deficiency.¹¹³ In several of the provinces, the seller must elect between repossession and the right to seek the balance of the contract price,¹¹⁴ and thus is denied the right to a deficiency judgment.

*The Quebec Installment Sales Act.*¹¹⁵ Since they represent an effort at broad protection of consumer interests in conditional sales agreements, it is useful to review some provisions of the Quebec act. The act does not cover sales exceeding \$800 and some classes of goods, such as the automobile,¹¹⁶ but does impose a ceiling on finance charges.¹¹⁷ It also requires a minimum down-payment of fifteen per cent and provides a graduated scale of maximum maturity periods depending on the amount of the deferred payments. These provisions contribute to a similar result—prevention of the financial over-commitment of the buyer. The rate limitation does so by making it unprofitable for the lender to extend credit to poor risks, thereby invoking the seller's self-interest to establish minimum credit standards. Such standards are also created by the minimum down-payment and maximum maturity requirements, both of which bar credit to buyers unable to comply.

Deferred payments must be equal except that the last one may be for a smaller amount. The buyer may prepay single payments or the entire balance, and in so doing is entitled to a reduction of the finance charge.¹¹⁸ Furthermore, the contract must disclose the regular cash price, the time price, the down-payment, and the amount of each payment, and the buyer must be given a duplicate of the agreement.¹¹⁹ It must be easily readable and, if printed, in at least six-point type.¹²⁰

In the event of default, the seller must elect between suing for the installments due or repossessing the goods.¹²¹ In the event of re-

¹¹¹ E.g., N.S. Rev. Stat. c. 47, § 11(2) (1954).

¹¹² E.g., Ont. Rev. Stat. c. 61, § 9(2) (1960) (to buyer only); N.B. Rev. Stat. c. 34, § 14(3) (1952) (to buyer and guarantor).

¹¹³ E.g., N.S. Rev. Stat. c. 47, § 11(3) (1954).

¹¹⁴ E.g., Alta. Rev. Stat. c. 54, § 19 (1955); Man. Stat. c. 15, §§ 3(1), 4 (1965).

¹¹⁵ Que. Civ. Code c. 73 (1947), as amended by Que. Stat. c. 47 (1948).

¹¹⁶ Que. Civ. Code c. 73, art. 1561j (1947).

¹¹⁷ Que. Civ. Code c. 73, art. 1561d (1947). The Civil Code allows the court to reduce or annul finance charges which it determines to be excessive or unconscionable. Que. Civ. Code arts. 1040c-d, added by Que. Stat. c. 67, § 1 (1964).

¹¹⁸ Que. Civ. Code c. 73, art. 1561b (1947), as amended by Que. Stat. c. 47 (1948).

¹¹⁹ Que. Civ. Code c. 73, art. 1561c (1947).

¹²⁰ Que. Civ. Code c. 73, art. 1561e (1947).

¹²¹ Que. Civ. Code c. 73, art. 1561f (1947).

possession, the buyer or his creditors may redeem within twenty days of repossession,¹²² "though it is not clear whether the amount which must be paid is the whole of the unpaid balance of the time price or only the installments—unaffected by any acceleration clause—which are actually in arrears."¹²³

The sanction for violation of various provisions of the act is that the seller loses his security interest in the property, leaving him only his right to sue for the contract balance.¹²⁴

C. *The Unconscionable Transactions Relief Acts*

In 1960, Ontario passed the Unconscionable Transactions Relief Act,¹²⁵ providing that where the "cost of the loan" is "excessive" and "the transaction is harsh and unconscionable," the court may relieve the debtor from the obligation to pay any excessive sum, order repayment of any such amount already paid, and set aside or revise the loan contract.¹²⁶ "Cost of the loan" is defined in section 1(a) to mean "the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges" except certain official fees.

The constitutionality of the act was upheld in 1963 in *Attorney-General v. Barfried Enterprises Ltd.*¹²⁷ It is useful to consider this case because of its implications as to the constitutional distribution between Dominion and provincial legislatures of power to regulate loan charges. Sampson, the borrower, had executed a first mortgage to Barfried Enterprises, obligating himself to pay a principal amount of \$2,250 with interest at seven per cent per annum. The amount actually advanced by the lender to Sampson, however, had been only \$1,432.50. The difference represented a "bonus" of \$750.00 (retained by the lender) and a "commission" of \$67.50 (paid to a firm of mortgage brokers owned or controlled by the lender).¹²⁸ Sampson brought suit under the Unconscionable Transactions Relief Act to have the

¹²² Que. Civ. Code c. 73, art. 1561h (1947).

¹²³ Ziegel, *supra* note 97, at 154-55.

¹²⁴ Que. Civ. Code c. 73, art. 1561i (1947).

¹²⁵ Ont. Rev. Stat. c. 410 (1960).

¹²⁶ Ont. Rev. Stat. c. 410, § 2 (1960).

¹²⁷ [1963] Can. Sup. Ct. 570, 42 D.L.R.2d 137 (1963). Encouraged by that decision, three provinces recently enacted virtually identical laws. Alta. Stat. c. 99 (1964); N.B. Stat. c. 14 (1964); N.S. Stat. c. 12 (1964). A similar statute had earlier been enacted in Newfoundland. Newf. Stat. No. 38 (1962). Legislation has also been enacted in Quebec, but it applies to finance charges in connection with sales transactions, as well as money loans. Que. Civ. Code arts. 1040c-d, added by Que. Stat. c. 67 (1964). Similar legislation has been introduced in two other provinces, British Columbia and Saskatchewan. See Canadian Hearings 57. The present status of these bills is unknown to the writer.

¹²⁸ Re The Unconscionable Transactions Relief Act (Ontario), [1962] Ont. 1103, 1104, 35 D.L.R.2d 449, 450 (1962).

terms of the mortgage revised. The trial court granted relief by reducing to \$1,500 the principal sum due on the mortgage, while increasing the interest to eleven per cent per annum.

The Ontario Court of Appeals reversed,¹²⁹ holding that the Constitution delegated to the federal government exclusive legislative authority over interest, and that this included compensation for the use of money, whether denominated bonus, discount, or premium. Furthermore, the court held that the Ontario act conflicted with the Federal Interest Act which permits any person to "stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon," unless Parliament otherwise provides.¹³⁰

The Supreme Court of Canada reversed.¹³¹ It found no conflict between the Ontario act and the Interest Act, since "it is settled that a bonus is not interest" within the meaning of the Interest Act.¹³² Nor did the Ontario statute infringe on Parliament's exclusive legislative power of interest. It related rather to "annulment or reformation of contracts" and, therefore, was legislation with respect to "property and civil rights in the province."¹³³ The court declared that "the fact that interference with such a contract may involve interference with interest as one of the constituent elements of the contract is incidental."¹³⁴

The court concluded that most of the items of compensation making up "cost of the loan" in the Ontario act were not interest, because "the day-to-day accrual of interest seems . . . to be an essential characteristic."¹³⁵ Did the court mean that the constitutional power to regulate interest extended only to "day-to-day" accruals, but not to components of the loan charge expressed in any other terms? If so, how could Parliament effectively regulate loan charges? Was the Federal Small Loans Act, with its sweeping definition of loan "costs,"¹³⁶ now unconstitutional because its regulation extended to charges which do not accrue on a day-to-day basis? Or did the court mean merely that the exclusive federal power to regulate interest did not imply *exclusive* power over other loan costs? If so, federal legislation would

¹²⁹ Supra note 128.

¹³⁰ Can. Rev. Stat. c. 156, § 2 (1952).

¹³¹ Supra note 127.

¹³² Id. at 575, 42 D.L.R.2d at 145. The court cited cases decided under § 6 of the Interest Act. Why a "bonus" was not, however, a "discount" under § 2 was not discussed.

¹³³ See the British North American Act, 1867, 30 Vict. c. 3, § 92(13).

¹³⁴ [1963] Can. Sup. Ct. at 577-78, 42 D.L.R.2d at 147.

¹³⁵ Id. at 575, 42 D.L.R.2d at 145. The implications of this remark have caused a good deal of concern and comment among Canadian observers. See, e.g., Canadian Hearings 43-56 (testimony of the Superintendent of Insurance).

¹³⁶ For that definition see p. 208 supra.

not necessarily be precluded. Provincial and Dominion power might overlap "in which case neither legislation will be ultra vires if the field is clear . . ."¹³⁷ In the event both jurisdictions acted, however, federal power would presumably prevail.¹³⁸ The full implications of the *Barfried* case for the respective powers of Dominion and province have yet to be clarified.

Nor is the intended scope of coverage of unconscionable transactions relief acts yet clear. It seems likely that they will have little significance for those moneylending transactions governed by the Federal Small Loans Act or the Bank Act, since the provinces probably lack authority to interfere significantly with such loans, and in any event, loans complying with federal law are unlikely to be deemed "unconscionable." In addition, it should be noted that they restrict themselves, except in the case of the Quebec act, to instances of unconscionable money loans rather than "transactions in goods."¹³⁹ So long as vendor credit is not viewed as "money lent," these Canadian acts will, of course, not permit a review of harsh clauses in installment sales contracts. Thus, the unconscionable transactions relief acts will probably prove of limited significance in relation to consumer loans, too.

¹³⁷ *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111, 118 (P.C. 1929) (Can.).

¹³⁸ See *ibid*; [1963] Can. Sup. Ct. at 580, 42 D.L.R.2d at 139 (concurring opinion).

¹³⁹ Compare Uniform Commercial Code § 2-302.