

Downright Criminal Interest

By Albert S. Frank, LL.B.

Interest rates on certain kinds of financing, such as credit cards, are notoriously high. Some lenders, however, push interest to levels far beyond the realm of credit card debt. Some lenders charge interest that is downright criminal.

Criminal Code

Section 347 of the *Criminal Code* creates the offence of charging a criminal interest rate. This offence is committed by anyone who agrees to receive, or actually receives, interest at a "criminal rate." A "criminal rate" means:

an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60 per cent on the credit advanced under an agreement or arrangement

As is usually the case with criminal offences, the prosecution would have to show that the accused acted with the necessary "*mens rea*," which can be translated as "wrongful purpose" or "criminal intent." Thus, if the accused has entered into an agreement providing for the receipt of over 60 per cent interest, the prosecution would have to show that the accused voluntarily entered into the loan agreement and that the loan agreement provided for the receipt of a criminal rate of interest.

The prosecution does not, however, have to show that the accused knew that charging a rate of interest above 60 per cent was illegal.

What is "interest"?

Section 347 of the *Criminal Code* defines "interest" broadly to mean "the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form..." with a few specific exceptions.

The Supreme Court of Canada has stated that the broad language of section 347 was presumably intended to prevent creditors from avoiding the section simply by manipulating the form of payment. It is the substance of a charge or expense, not its form, that determines whether it is governed by section 347.

Thus, in the case of ***Transport North American Express Inc. v. New Solutions Financial Corp.*** (2001), 54 O.R. (3d) 144, there was a factual dispute concerning whether various charges and expenses were "interest" within the meaning of section 347. Under the circumstances of that case a monitoring fee, an administrative fee, a commitment fee, and a so-called "royalty payment" were all found to be part of the interest.

Actuarial Evidence

The *Criminal Code* contains a method of proving what the effective annual rate of interest actually is for the agreement or arrangement in question. Section 347 (4) provides that in any proceedings under section 347:

a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under

an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence of the contrary, proof of the effective annual rate....

This evidence can be challenged by the other side, but certainly gives a good starting point for addressing the issue of what the effective annual rate might be in a given case.

Severability and Enforcement

Can a creditor enforce a loan agreement or arrangement that contains a criminal interest rate? Or is the creditor limited to getting back the principal amount advanced?

Courts have ruled that to some extent creditors can indeed enforce. They can do this on the basis of "severability." In other words, in some cases the Court rules that the illegal part can be severed from (cut out of) the rest of the agreement or arrangement. The creditor is then entitled to collect based on the new version created by the Court.

This was done in the above-mentioned ***Transport North*** case. In that case the Court ruled that the creditor could enforce the agreement except that the interest rate was to be changed to reduce the effective annual interest rate to 60 per cent per year.

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The above article first appeared in the Mid-September, 2001 issue of ***The Bottom Line***.

Please note that in the later – June 17, 2002 – decision of the Court of Appeal for Ontario, an appeal was allowed in the above-mentioned ***Transport North*** case. In a 2 to 1

decision, the Court of Appeal eliminated, instead of just reducing, the 4 per cent per month interest provision. See ***Transport North American Express Inc. v. New Solutions Financial Corp.*** (2002), 60 O.R. (3d) 97. For a discussion of the appeal, see my article [**Blue Pencil Blues**](#).

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