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PREPAYMENT RIGHTS

Henry Brown

PREPAYMENT RIGHTS

(1) Prepayment - Scope and Introduction

Prepayment occurs when a borrower (including mortgagor or hypothec debtor) repays to the lender (including morgageee or hypothec creditor) the borrowed sum before it is due under the agreement, and the lender completely releases the borrower from the debt obligations in return. Frequently, at the time the loan is made, the borrower undertakes to pay interest and borrowing costs to the end of the agreement in addition to repaying the principal borrowed. After the deal is made, circumstances often change; the borrower has more money, wants to consolidate his debts, simply wants to be rid of debt obligations or perhaps the interest rate has fallen and financial savings from refinancing are possible. Whatever the reason, prepayment of the old debt becomes desirable. Two issues arise: is there a right to prepay, and, if prepayment is possible, what will be the cost to the borrower? The essential element in the cost issue is whether the borrower is entitled to a reduction in or rebate of the interest and borrowing charges covering the period after prepayment, that is, must the borrower pay "unearned" interest or borrowing charges.

There are three sources of law for prepayment. The first is the common law, formed by judges over several centuries. The remaining two are enactments of the Parliament of Canada, and those of provincial legislatures.

At common law, there is no general right to prepay mortgage or non-mortgage loans. Consequently, there is no right to a rebate upon prepayment of interest that may have been paid to a lender though not yet earned by him. Exceptions exist in both mortgage and non-mortgage situations, either by agreement of the parties, or by special rules governing the right to redeem mortgages. The federal response has been two statutes. The Interest Act allows prepayment of mortgages after the fifth anniversary. The Small Loans Act allows prepayment anytime of certain mortgage and non-mortgage loans where the loan does not exceed $1,500. Every province has enacted legislation also. Ontario and Manitoba allow prepayment of mortgages on exactly the same conditions as the federal Interest Act. Quebec allows the prepayment of some hypothecs.

Each province allows consumer borrowers to prepay many non-mortgage loans, and entitles them to reduction in or a rebate of unearned credit charges on so doing. However, they vary widely and warrant individual scrutiny.

Generally, provincial law allows prepayment with rebate of unearned credit charges in most consumer loan situations where the loan has been precomputed. A loan is generally regarded as precomputed if the cost of borrowing for the full term is added to the principal sum. In Alberta, British Columbia, Ontario and Saskatchewan, if a loan is not precomputed and exceeds $1,500, neither federal nor provincial laws of general application allow prepayment and rebate. Loans from banks are wholly exempt under federal law. They are covered in Alberta, British Columbia, Ontario and Saskatchewan, only if the bank precomputed the loan. In the other provinces, bank loans are covered. Occasional lenders are exempted by federal law, and by Manitoba, New Brunswick and Quebec. In Alberta, British Columbia, Ontario and Saskatchewan, the occasional lender is covered only if he precomputed the loan. Newfoundland, Nova Scotia and Prince Edward Island give an unqualified ability to prepay with rebate when dealing with the occasional lender.

Alberta, Newfoundland, Ontario and Prince Edward Island have unfair practices acts which may allow prepayment of mortgage loans. Where a merchant has exploited the inexperience of a consumer, prepayment may be ordered of some hypothecs in Quebec. In all provinces but Quebec, unconscionable transactions relief laws permit prepayment of mortgages where the mortgage is unconscionable.

In Alberta, British Columbia, Newfoundland, Ontario and Prince Edward Island, unfair practices laws may allow prepayment of non-mortgage loans. In Quebec prepayment of a non-hypothec loan may be ordered where a merchant has exploited the inexperience of a consumer. In all provinces except Quebec, prepayment of non-mortgage loans may be ordered by the court if the loan is unconscionable.

Alberta, Manitoba, Nova Scotia, Prince Edward Island and Saskatchewan have legislation which gives a statutory right to prepay mortgage and non-mortgage loans where the lender is a credit union governed by the provincial legislation. All the provinces have many other statutes, including credit union legislation, which enable the provincial government to prescribe by regulation the terms and conditions for special types of mortgage and non-mortgage loans. While these special acts have been noted, they are not analysed in this study.

(2) PREPAYMENT OF MORTGAGES COMMON LAW POSITION

General

The right to prepay mortgage loans arises in those circumstances in which the mortgagor has a right to redeem before the expiry date of the term. The general rule is that at common law, the mortgagor has no right to redeem before the expiry of the term. However, a right to redeem arises in five circumstances, any of which may exist before the expiry of the term. They are: (i) when the mortgagee takes proceedings (foreclosure, sues for the debt, repossession) to enforce or realize his security, (ii) when the mortgagee has a right to call in the mortgage-secured loan on demand, (iii) when the mortgage is irredeemable or the date for redemption is unreasonable, (iv) when the two parties have agreed upon a prepayment clause in the original mortgage, and (v) when the two parties, having no prepayment clause in the original agreement, mutually agree to pay off the mortgage at an early date. Certain formalities respecting cases (iv) and (v) must be observed: in all provinces the agreement must be written, and in Quebec it must be notarized. In the nine common law provinces, the courts may enforce an unwritten agreement when the parties have shown very clearly such an agreement exists by their actions.

(2) PREPAYMENT OF MORTGAGE LOANS - THE GENERAL RULE

The ability of a mortgagor to insist upon the acceptance of payment and a discharge of the mortgage by the mortgagee is known as the right to redeem. At common law, a mortgagor has no right to redeem before the expiry of the term. This is the general rule.

Example A:

A, a mortgagor, gives a mortgage to B, the mortgagee, on January 1, 1975, as security for a loan B has made to A. The agreement signed by the parties provides a payment schedule, with the last payment due January 1, 1978 on which date the mortgagee will discharge the mortgage. There is no clause entitling the mortgagor to prepay. In the middle of 1977, A gets a tremendous offer from a developer for his land, but the developer insists the land be free and clear of all mortgages. On July 1, 1977, A goes to B, and places the principal amount, interest right up to January 1, 1978, plus one hundred dollars for costs on B's desk and asks for a discharge. B can legitimately refuse to accept the money, and A cannot go to court insisting that B accept the money and discharge the security.[1]

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1. See Brown v. Cole (1845), 14 Sim. 427, 60 E.R. 424 (High Court of Chancery); cited and approved in Rutherford v. Walker (1907), 8 W.W.R. 52 (Alta. S.C.); followed and applied in Falardeau v. Kennedy [1940] O.W.N. 225 (H.C.J.). Principal approved in Coplan v. Sparling, [1969] 2 O.R. 166 (Master).

(2) (i) Enforcing the Security

However, a right to redeem does arise before the expiry of the term where the mortgagee takes proceedings to enforce or realize his security. This right arises and may be insisted upon immediately the mortgagee starts such proceedings. These proceedings may be any of the following: an action for full payment, an action for foreclose, and the mortgagee taking possession.

Example A:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan B has made to A. A defaults on payment and B starts an action for foreclosure. The property is sold. A dispute arises as to how much B is entitled. A says B can only insist upon receiving the principal, interst due to the time B is paid, and B's costs. B says he is entitled to the complete mortgage debt up to the end of the term. B is wrong. His starting a foreclosure action entitled A to redeem immediately, paying only the principal, interest to the date of payment, and B's legal costs. The action of foreclosure is interpreted as a demand for payment, and in this case, the right to redeem arises.[1]

Example B:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan B has made to A. The mortgage contains an acceleration clause which states that the entire debt becomes due and payable immediately if the mortgagor misses a single payment of interest or principal. A misses a payment of interest or principal. B, invoking the acceleration clause, demands that A pay him immediately the entire sum. A refuses. B starts a court action claiming the entire amount of the debt, and also asks that the court put an end to A's right to redeem (that is, B seeks foreclosure). A then goes to B and places on his desk the entire principal amount, interest due up to the

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1. See Re Bank of Montreal and Sam Richman Investments (London) Ltd. (1973), 45 D.L.R. (3d) 24 (Ont. H.C.), citing and applying Bouvill v. Endel, [1966] 1 Ch. 648 (C.A.). This is codified in Manitoba in the Mortgage Act, R.S.M. 1970, c. M-200, s. 14.

same day, and enough money to cover all the legal fees B has incurred since A defaulted. A asks B to accept the tender, and to discharge the security. B refuses. A can go to court and compel B to accept the money and ask the court to order B to discharge the mortgage.[1]

Example C:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan B has made to A. There is an acceleration clause which states that the entire debt becomes due and payable upon A missing an instalment. B is also given the right to take possession of the land if an instalment is missed. A misses an instalment. B takes possession of the land and asks for full payment of the principal and interest, invoking the acceleration clause. A then tenders the full amount of principal, interest to that day, and the legal costs incurred by B. A insists on B accepting the payment and discharging the security. B refuses. A goes to court to compel B to accept and discharge. A will win since the taking of possession is seen, in the context of the demand for full payment, as taking possession for the purpose of realizing the security. Hence, B will not be entitled to claim interest to the end of the term.[2]

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1. See Cruso v. Bond (1882), 1 O.R. 384 (Ont. C.A.); cited and approved in The Great West Permanent Loan Co. v. Jones (1914), 7 W.W.R 767 (Alta. S.C.); Re Bank of Montreal and Sam Richman Investments (London) Ltd. (1973), 45 D.L.R. (3d) 24 (Ont. H.C.). This is codified in Ontario in The Mortgage Act, R.S.O. 1970, c. 279, s. 41.
2. See Ex Parte Wickens, [1898] 1 Q.B. 543 (C.A.) approved in Ex Parte Ellis, [1898] 2 Q.B. 79 (C.A.); approved in Tytler v. Genung (1914), 6 W.W.R. 191 (Man. C.A.); see also Bouvill v. Kennedy, [1896] 1 Ch. 648.

Mortgagee's Intention

The courts look to the intention of the mortgagee when he takes such proceedings. Intention is a question of fact which is inferred from all the circumstances. If the purpose, or intention, for which the proceedings are taken is to enforce or realize the security of the mortgagor, then the right to redeem arises immediately. However, if the intention or purpose for which proceedings are taken is merely to protect or maintain the security, then no right to redeem will arise. Because reasonable men may disagree on a question of fact, the cases which have held against the mortgagor and those which have held for the mortgagor are often hard to reconcile. All the surrounding circumstances must be examined by the court as it draws the inference of intention.[1]

Example A:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan B has made to A. A misses one instalment. B takes possession of the land under a term of the mortgage entitling him to do so. He sues for the one missing instalment, holding the land ready to give back to A as soon as A pays the one instalment. A goes to B and gives him the whole principal amount, interest up to that day, and the legal costs which B has incurred since A's default. A insists B accept the tender and discharge the property. In this case, A is wrong. Here, it is clear that B entered the land for the purpose of maintaining the security and protecting it, and to enforce payment of the one instalment. In such a case, A has no right to redeem.[2]

Example B:

A, the mortgagor, gives a mortgage to B, the mortgagee to secure a loan B has made to A. The agreement permits B to take possession on default. A defaults on payments. B, having received a court order

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1. See Ex Parte Ellis, [1898] 2 Q.B. 79 (C.A.), especially per Vaughn Williams, L.J.
2. See Ex Parte Ellis, [1898] 2 Q.B. 79 (C.A.); approved and applied in Tytler v. Genung (1914), 6 W.W.R. 191 (Man. C.A.).

entitling recovery, retakes possession of the land. B keeps the land under cultivation, and rents it out to C. B maintains a right to end the lease with C and re-enter the property. B then sues A for the payments in arrears. In the action, A asks the court to compel B to accept the principal, the interest up to that date, and the costs of B's action, and to compel B to discharge the security. A is wrong to insist upon this. The court looking at all the circumstances, holds that when B took possession of the land he did so to protect and maintain the security, not to realize the security. Thus no right to redeem arises.[1]

1. See Tytler v. Genung (1914), 6 W.W.R. 191 (Man. C.A.).

(2) (ii) Demand Loan

Where the mortgage is merely temporary as the case of a mortgage given to secure a demand loan, the mortgagor has a right to redeem at any time upon the giving of reasonable notice. Reasonable notice would be the length of time it takes for the mortgagee to look up the transaction, and discharge the mortgage.

Example

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a demand loan B has made to A. B, under the loan agreement, may call in the loan at anytime. A goes to B's office and places upon his desk the principal, and interst due up to that date, and asks for a discharge. B refuses, saying he will decide when the loan is due. B is wrong. A may go to court and compel B to discharge the mortgage.[1]

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1. See Fitzgerald's Trustee v. Mellersh, [1892] 1 Ch. 385, and Falconbridge on Mortgages, 4th ed. (1977, Toronto), at p. 543.

(2) (iii) Clog on the Right to Redeem

A right to redeem arises whenever there is a clog or fetter on the contractual right to redeem. Two typical circumstances are: (a) where the mortgage, whether expressly or for practical purposes, is irredeemable; and (b) where the date contractually agreed for redemption is, in all circumstances, unreasonably distant. The circumstances are very important: the court, in the latter situation is assessing what is reasonable. Thus, the decisions are often difficult to reconcile.

Example A:

A, the mortgagor, gives a mortgage to B, the mortgagee, to secure a loan B has made to A. The mortgage is made in 1975, the mortgaged property being a lease which expires in 1995. The mortgage provides that A may not repay the principal, except on instalment dates, without the consent of B. The last instalment date is one or two weeks before the lease expires. In 1977, A has a dispute with B. As a result he wishes to cease dealing with B, and offers to redeem. A sues for a declaration that he is entitled to redeem. A will win. In all the circumstances, the mortgage is irredeemable. It was intended that way. It operates that way. Practically speaking, by the time B discharged the mortgage, the lease would probably have expired. A would get back nothing. Accordingly, the clause prohibiting redemption was void. A has a right to redeem at any time.[1]

Example B:

A, the mortgagor, gives a mortgage to B, the mortgagee, to secure a loan B has made to A. The mortgage provides that A may not redeem for 20 years or until he dies (in which case his estate could redeem) whichever was the earliest. A had a mutual right to prevent B from calling upon A to pay any part of the mortgage for the same period. Both parties were competent and of age. The date of the mortgage was 1926. In 1934, A goes to B and places the principal

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1. Fairclough v. Swan Brewery Co. Ltd., [1912] A.C. 565 (J.C.P.C.).

due, interest to date, and 6 months interest on B's desk, and asks for a discharge. B refuses. A goes to court and asks for a court order to compel redemption. A succeeds. The court holds that in all the circumstances, the period of redemption was delayed for an unreasonable period time. Though there was mutuality, it was not conclusive. Thus the clause was a fetter or clog on the right to redeem and was void. The mortgagor could redeem anytime.[1]

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1. See Davis v. Symons, [1943] 1 Ch. 443, and Fitgerald's Trustee v. Mellersh, [1892] 1 Ch. 385. Principal affirmed recently in Coplan v. Sparling, [1969] 2 O.R. 166 (Master).

(2) (iv) and (v) Prepayment Agreements

The mortgagor may have a contractual right to redeem before the term expires. If he does, then he may exercise it, upon meeting the conditions in the agreement. Likewise, the mortgagor and mortgagee may agree later between themselves to redeem the mortgage before the expiry of the term.

Example:

A, the mortgagor, gives a mortgage to B, the mortgagee as security for a loan B has made to A. The date for redeeming the mortgage is April 1st, 1980. On April 1st, 1979, the mortgagor approaches the mortgagee, to discuss the possibility of immediate redemption. The mortgagee, knowing he cannot be forced to redeem before April 1st, 1980, demands compensation for early redemption. The parties negotiate a mutually acceptable rate of compensation. They agree in writing that upon payment of the compensation, the mortgagee will discharge the mortgage at an agreed upon date. This is then an enforceable contract.

Even if the mortgagee does not demand compensation for giving up his right to insist upon redemption, an agreement to pay a sum before it is due is an enforceable contract: it has the offer, acceptance and good consideration. The consideration, or value, given by the mortgagor and received by the mortgagee is the use of his money before the due date.

Example A:

A, the mortgagor, gives a mortgage to B, the mortgagee as security for a loan B made to A. It is dated April 1, 1978. The date for redeeming the mortgage is April 1st, 1980. Later, the parties agree that upon A paying the principal outstanding, interest just up to the date of the payment and B's legal fees, the mortgagee will discharge the mortgage April 1, 1979. This agreement is written (and notarized in Quebec). A goes to B's office and places the agreed upon sum on B's desk. B refuses to accept it, and refuses to discharge the mortgage. A can go to court and compel B to discharge the mortgage. This is because the parties made a binding agreement to alter their prior agreement.[1]

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1. The potential difficulty with this situation is that at common law, an agreement between two parties in which one party promises to do what he is already obliged to do under an earlier contract is not enforceable. See Stilk v. Myrick (1809), 2 Camp. 317, 170 E.R. 1168, and Gilbert Steel Ltd. v. University Construction Ltd. (1977), 12 O.R. 19 (Ont. C.A.). Likewise, with the same underlying reason, namely absense of legal consideration, payment of a lesser sum will not discharge a larger sum. See Pinnel's Case (1602), 5 Co. Rep. 117a, and Foakes v. Beer (1884), 9 A.C. 605 (H.L.), approved in Foot v. Rawlings, [1963] S.C.R. 197. But obiter dictum in

There is one exception to the rule requiring writing. This is in the case of acts of part performance. The courts will enforce an unwritten contract dealing with land if the parties having done things which imply unequivocally that the very contract alleged does in fact exist. In practice, the acts of the parties should be inconsistent with any dealing other than the very contract alleged.

(3) PREPAYMENT OF MORTGAGES - FEDERAL STATUTORY RIGHTS

A right to prepay certain mortgage loans exists under the Interest Act,[1] and the Small Loans Act.[2] Under the Interest Act, prepayment may be made at any time after the fifth anniversary of a mortgage within a term greater than five years. The prepayment consists of the principal outstanding, the interest to date, and three months interest as bonus. Under the Small Loans Act, any mortgagor or hypothec debtor may prepay a mortgage (or hypothec) where the loan did not exceed $1,500, except where the mortgagee is an infrequent or occasional lender, a chartered bank or a registered pawn broker. Prepayment may be made in full or in part, but only on an instalment date. Prepayment is the principal outstanding, and the cost of borrowing accrued and unpaid on the date of prepayment. The Interest Act applies to hypothecs in Quebec in the same manner it applies to mortgages in the other nine provinces.

Formalities

In all provinces, any agreement involving land which is not in writing is technically void. British Columbia, New Brunswick, Nova Scotia and Ontario have enacted this in their respective Status of Frauds.[3] Alberta[4], Manitoba[5], Newfoundland[6] and Saskatchewan[7] are governed by the Statutes of Fraud[8] of the United Kingdom. So

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1. R.S.C. 1970, c. 1-18.
2. R.S.C. 1970, c. 5-11.
3. See R.S.B.C. 1960, c. 369, s. 2; R.S.N.B. 1973, c. S-14, s. 1; R.S.N.S. 1967, c. 290, s. 6; and R.S.O. 1970, c. 444, s. 4.
4. See, for example, Brownscombe v. Public Trustee of the Province of Alberta, [1969] S.C.R. 658.
5. See, for example, Sarbiti v. Booth Fisheries Ltd., [1951] 2 D.L.R. 108 (Man. C.A.)
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7. See, for example, Chapman v. Kopitoski, [1972] 6 W.W.R. 525 (Sask. Q.B.)
8. 1677, 29 Car. II, c. 3, s. 4 (Imp).

is Prince Edward Island[1] although it has in additional its own Statutes of Frauds.[2] Quebec demands such contracts be written and notarized - the Quebec hypothec borrower must see a notary to formalize any agreement to prepay his hypothec.[3]

Example A:

A man worked the farm of another for 46 years. His work was the leading factor in the farm enterprise. The farm owner relied solely on the worker's intelligence and labour. The worker rebuilt the house, and constructed granaries on the land. The worker received virtually no wages, and was left nothing on the death of the owner. He said that he had agreed to work all those years in return for a promise made orally by the owner that upon the owner's death, the worker would get the farm. He sought to compel the estate to turn the farm over to him. He won. Looking at all these facts, the court came to the conclusion that there must have been an agreement between the two, and moreover, it must have been a promise of the farm. Notwithstanding the Statute of Frauds and nothing being written, they ordered the owner's estate to give the farm to the worker.

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1. See, for example, Peters v. Euloth (1976), 11 N.B.P.E.I.R. 109 (P.E.I.C.A.)
2. R.S.P.E.I. 1974, c. S-6.
3. Civil Code, article 2151.
4. See Thompson v. Guaranty Trust Co. of Canada, [1974] S.C.R. 1023; and Maddison v. Alderson (1883), A.C. 467 (H.L.)

(3) (i) Interest Act, R.S.C. 1970, c. 1-18

This statute allows any non-corporate mortgagor to prepay any mortgage with a term greater than five years at any time after the fifth anniversary. Payment must include the principal outstanding, the interest to the time of payment and three months further interest as a bonus.[1] The right is denied where the mortgage was given by (that is, the original mortgagor or borrower was) a corporation or joint stock company.[2] This means that a person who is an assignee of a corporate mortgagor cannot exercise the right to prepay.[3] A mortgagor cannot give three months notice and thereby avoid paying three months interest.[4] A mortgage extension agreement, the usual way of extending a mortgage with a five year term amortized over 25 years, is considered to be a new mortgage and time starts to run anew upon signing such an extension agreement.[5] It seems that a mortgagor cannot contract out of the benefit conferred by section 10, and thus be denied the operation of the statute.[6] The section is practically identical to provisions in Manitoba and Ontario.[7] The federal statute has been held to be constitutionally valid.[8] Upon prepayment being offered, the mortgagee cannot charge or recover any further interest. The mortgagee, however, is under no obligation to discharge the mortgage unless he accepts the money.[9]

Example A:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan B has made to A. The term of the mortgage is 25 years, and was made on January 1, 1965. On January 2, 1970, A goes to B, and

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1. See Thompson v. Guaranty Trust Co. of Canada, [1974] S.C.R. 1023; and Maddison v. Alderson (1883), A.C. 467 (H.L.)
2. Section 10(1)
3. Section 10(2)
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places on B's desk the principal then outstanding, the interest to date, and three months additional interest, nor is A the assignee of a corporate mortgagor. B refuses to discharge the mortgage or to accept the money. A can go to court and have the court declare that B cannot charge or recover any further interest. But A cannot compel B to discharge the mortgage.

<u>Example B</u>:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan B has made to A. The term of the mortgage is 5 years, but payments are made as if the mortgage were for a term of 25 years (amortized over 25 years). The original mortgage was given on January 1, 1965, the term expiring December 31, 1969. On January 1, 1970, A and B signed a mortgage extension agreement. In this agreement, the instalments remained roughly the same, all the terms and conditions of the original mortgage were referred to as being repeated in the new agreement, and the agreement was for a term of five years ending December 31, 1974. On June 1, 1970, A goes to B, says he is acting under s. 10 of the <u>Interest Act</u>, gives B the principal outstanding, interest to date, and three months further interest. A asks for a discharge. B refuses. B is correct. The original mortgage died on December 31, 1969. A new one was made on January 1, 1970. The time elapsed under the first mortgage is not counted.

<u>Example C</u>:

A buys a home from X. X is a development company, and is incorporated. X had previously given a mortgage on the land to B, the mortgagee, to secure a loan B made to X. When A buys the home, X simply assigns the mortgage to A. X is still the mortgagor. A is now the assignee of the mortgagor. The term of the mortgage is 25 years, starting January 1, 1965. On January 2, 1970, A goes to B, and puts the principal outstanding, interest to date, and three months interest as bonus on B's desk. A asks B to discharge the mortgage, invoking s. 10 of the <u>Interest Act</u>. B refuses. B is correct. Neither the federal nor provincial statutes apply to a situation in which the mortgage was given by a corporation. Here, X was a corporation. A, the assignee of X, ha no greater rights than X had. Since X could not invoke the statute, neither may A.

(3) (ii) Small Loans Act, R.S.C. 1970, c. S-11

This statute applies to mortgages where they secure a loan up to $1,500[1]. Therefore, it would also apply to hypothec-secured loans up to $1,500 in Quebec. Prepayment is allowed without bonus or penalty provided it is made on an instalment date.[2]

Prepayment is allowed either in part or in full. To prepay, the mortgagor must pay the outstanding principal or a part of it plus the portion of the cost of borrowing accrued and unpaid up to the date of prepayment. The right to prepay may be exercised by any mortgagor, but is not applicable when the mortgagee is a chartered bank[3], an occasional lender (6), or a registered pawnbroker[4]. The mortgagor, upon being prepaid, is under no obligation to discharge the mortgage.[5]. Precomputed loans are not allowed, that is, the lender may not add the cost of borrowing to the principle sum.[6]

Example A:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan of $1,400 B has made to A. B has only made a few loans over the past few years. The mortgage is for a term of 4 years, ending December 31, 1969. On June 30, 1968, A goes to B and places the outstanding principal, plus the accrued cost of the loan on B's desk and asks B to discharge the mortgage. B refuses. B is correct, because he is not a "moneylender". He does not carry on the business of moneylending. This is a question of fact. The court looks at the system and continuity of B's lending money. It finds it insufficient to hold B as carrying on the business of moneylending. The act does not apply to infrequent or occasional lenders.

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1. Stephen Investments Ltd. v. LeBlanc (1963), 37 D.L.R. (2d) 346, 41 W.W.R. 422 (Alta. S.C.).
2. Section 6(3)
3. Section 2, definition of "moneylender" and "loan".
4. The statute applies to loans made by "moneylenders". Moneylenders is defined in s. 2 to meach any person, other than a chartered bank, who carries on the business of moneylending.
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6.

Example B:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan of $1,400 that B has made to A. B is a chartered bank. The term of the mortgage is 4 years, expiring December 31, 1969. On June 30, 1968, A goes to B and places the outstanding principal plus the cost of borrowing accrued and unpaid to that date on B's desk. He asks B to discharge the mortgage. B refuses. B is correct. The Small Loans Act does not apply when the mortgagee is a chartered bank.

Example C:

A, the mortgagor, gives a mortgage to B, the mortgagee, as security for a loan that B has made to A for $1,400. B carries on the business of making loans. The mortgage expires December 31, 1969, being for a term of four years. On June 30, 1968, A goes to B and gives him the outstanding principal, and the cost of borrowing accrued and unpaid to that date. A asks B to discharge the mortgage. B refuses to accept the money or to discharge the mortgage. B is only partly correct. It seems he must accept prepayment, but cannot be compelled to discharge the mortgage.

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1. Section 2, definition of "moneylender" and "loan".
2. The statute applies to loans made by "moneylenders". Moneylenders is defined in s. 2 to mean any person, other than a chartered bank, who carries on the business of moneylending.

(4) PREPAYMENT OF MORTGAGES - PROVINCIAL STATUTORY RIGHTS

(a) Introduction

A statutory right to prepay some mortgage loans is found in Manitoba, Ontario and Quebec. In all provinces but Quebec, prepayment of a mortgage may be ordered by a court if it finds the cost of a mortgage to be excessive and the transaction harsh and unconscionable. Where the mortgage is tainted by an unfair act or practice, prepayment may be ordered by a court in Alberta, Newfoundland, Ontario and Prince Edward Island. Where a merchant has exploited the inexperience of a consumer, prepayment of certain hypothecs may be ordered in Quebec. In Alberta, Manitoba, Nova Scotia, Prince Edward Island and Saskatchewan, those who borrow from credit unions are given a statutory right to prepay mortgages. Nova Scotia is the only province with a Moneylenders Act,[1] which contemplates prepayment orders if the costs associated with a mortgage are excessive or unreasonable. British Columbia's Mortgagor's Relief Act[2] allows the mortgagor to prepay his mortgage when the mortgagee takes action to regain possession. While not analysed in this study, every province has legislation governing or authorizing loans to special interest groups (such as farmers and fishermen), which may contain prepayment provisions.

Three provinces have general legislation entitling a mortgagor to prepay his mortgage: Manitoba, Ontario, and Quebec. Manitoba, with The Mortgage Act[3] and Ontario with The Mortgages Act[4], have duplicated the provisions in the federal Interest Act. They allow a mortgagor to prepay any time after the fifth anniversary. Three months interest must be paid as a bonus for the mortgagee. The mortgagor must be neither a corporation nor the assignee of a corporation. A mortgage extension agreement is a new mortgage.[5] In Quebec, the Consumer Protection Act confers a right to prepay at any time certain hypothec

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1. R.S.B.C. 1960, c. 249
2. R.S.N.S. 1967, c. 188
3. S.Q. 1971, c. 74
4. R.S.O. 1970, c. 279
5. R.S.M. 1970, c. M200

ranking after first (that is, second, third, etc.). The hypothec must have been for non-commercial purposes. However, prepayment is denied where the lender properly discloses the cost of credit. Upon prepayment the lender gives the borrower a credit or rebate. If the hypothec term is greater than five years, the maximum bonus allowed the lender is three months interest.

(4) (b) Unconscionability or Excessive Cost

(1) Unconscionability

In all provinces but Quebec, a mortgage in which the cost is excessive and that is harsh and unconscionable may be prepaid if so ordered by the court. In Alberta,[1] British Columbia,[2] New Brunswick,[3] Newfoundland,[4] Nova Scotia,[5] Ontario,[6] and Prince Edward Island,[7] the cost of the loan must be excessive and the transaction harsh and unconscionable before the relief powers of the court are engaged. In Manitoba[8] and Saskatchewan[9] the test is whether the cost is excessive or the transaction harsh or the transaction unconscionable. In British Columbia, the relief powers are also engaged if the transaction is "otherwise inequitable".[10] Newfoundland spells out factors the court must consider in judging whether the cost is excessive and the transaction harsh and unconscionable; namely, the prevailing interest rates, the degree of risk, the cost to similar debtors, the understanding of the mortgagor, the pressure on the mortgagor and the reasonableness of expecting full payment.[11] Unconscionability is discussed more fully elsewhere.[12]

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1. The Unconscionable Transactions Act, R.S.A. 1970, c. 377, Section 3
2. Consumer Protection Act, S.B.C. 1967, c. 14, s. 17(a)
3. Unconscionable Transactions Relief Act, R.S.N.B. 1973, c. V-1, s. 2.
4. The Unconscionable Transactions Relief Act, R.S. Nfld. 1970, c. 382, s. 3
5. Unconscionable Transactions Relief Act, R.S.N.S. 1970, c. 382, s. 3
6. The Unconscionable Transactions Relief Act, R.S.O. 1970, c. 472, s. 2
7. Unconscionable Transactions Relief Act, R.S.P.E.I. 1974, c. V-2, s. 3
8. The Unconscionable Transactions Relief Act, R.S.M. 1970, c. 86, s. 3
9. Unconscionable Transactions Relief Act, S.S. 1967, c. 86, s. 3
10. Section 17(b)
11. Section 4B.
12. See para.

Example A:

A, a layman, borrows money from B a finance company. The simple effective rate of interest was 23%. The loan agreement provided that if A missed any payments, B could demand the entire principal and cost of the loan accrued immediately. The loan and no provision for prepayment, and no provision for a rebate on prepayment. A could not read English, the language of the agreement. The loan was secured by a chattle mortgage on A's truck. A defaulted. B seized the truck and sold it. B then demanded payment in full of the balance of the loan. Based on the amount of money borrowed, less the proceeds from selling the truck, the effective sale of interest demanded was 38.4%. The usual rate of interest charged by lenders like B was 11% to 24%. B eventually sued A. A pleaded Manitoba's Unconscionable Transactions Relief Act. A was successful. The court revised the loan agreement, reducing interest rate to 1% per month. Even though the originally agreed rate of interest was not harsh or excessive, the transaction was harsh and unconscionable. This was because in theory, had default been made early in the term, and had B insisted on the acceleration clause, the rate could have reached astronomical proportions. This was partly because there was no prepayment provision nor rebate entitlement.[1]

Example B:

A, a shrewd businesswoman, borrowed money from B, a finance company. The principal was $3,500.00. The insurance charge, added to the principal was $330,00. The finance charges were $2,770. The loan was payable over 5 years, monthly a $110 per month. As security, A gave B promissory notes for the total principal and cost of borrowing. An acceleration clause provided that on default the entire loan would become due and payable. A missed many payments. Eventually A tells B she will no longer honour the agreement. B sues A on the promissory notes. A says the loan's cost is excessive and that the transaction is harsh and unconscionable. A seeks to have the contract revised. The court agrees. A was

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1. Brock Acceptance Co. v. Klassen, (1969) 5 D.L.R. (3d) 749 (Man. Q.B.)

a shrewd businesswoman, she was a high credit risk, and she gave no security for the loan, and the comparative rates for such loans were high. Nonetheless, the insurance fee was grossly overcharged and a rebate should be allowed in view of the acceleration. Prepayment was considered but rejected, as was a reduction in the interest rate.[1]

Example C:

A borrows $9000 from B. The loan is well secured, presenting minimal risk to B. The loan is to be repaid over 4 years. The contract permitted A to repay at anytime without bonus or penalty, but said nothing about A getting a rebate of unearned interest. Five months after the loan was signed, A prepaid in full. In addition to the principal amount outstanding, A was required to pay $2551 in interest, which was equal to interest to the full term. The loan had been "precomputed". A then went to court pleading the loan was harsh and unconscionable. On the principal borrowed over 5 months, the interest payment equalled an effective annual rate of 61%. A won. The court held the transaction was harsh and unconscionable. The court indicated the cost was excessive. B was ordered to repay most of the $2551 to A.[2]

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1. C.A.C. International Finance Corp. v. Corey (1975), 11 N.B.R. (2d) 156 (N.B.S.C.A.D.)
2. Stepper v. Laurel Credit Plan Ltd. (1968), 63 W.W.R. 168 (Sask. D.C.)

(4) (b) (iii) Excessive Cost

Money-Lenders Act, R.S.N.S. 1967, c. 188

This Act applies to all loans including those in which money is advanced, whatever form it takes, if it is substantially a loan, or secures the repayment by such person of the money advanced.[1] Thus it covers mortgage loans. It only applies to loans made by a "money-lender", which is defined to include those carrying on a "loaning business" (which would exclude occasional lenders)[2] and any person "who engages" in any loan trnasaction (which would include occasional lenders).[3] It excludes registered pawn-brokers and banks.[4] The Act is engaged where the court finds the charges exceed the legal rate, where any conveyancing charges were excessive, or where insurance other than that reasonably proper for securing the loan was required.[5] The court, once it makes the above finding, is granted a power to revise which is practically identical to that in the Unconscionable Transactions Relief Act.[6] Thus it seems that prepayment may be ordered under the Money-Lenders Act.

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1. Section 1(b)
2. See R. v. Morgan (1913), 21 C.C.C. 225 (Que. C.A.), and McIntosh v. Minister of National Revenue [1959] S.C.R. 119 at p. 120.
3. See R. v. Morgan (1913), 21 C.C.C. 225 (Que. C.A.), and McIntosh v. Minister of National Revenue [1959] S.C.R. 119 at p. 120.
4. The word "engage" has the same force as the word "covenant", see Rigby et al. v. The Great Western Railway
5. Section 1(c)
6. Ibid., s. 2

(4) (c) Trade Practice Laws

The courts are granted powers wide enough to embrace a prepayment order and rebate entitlement in respect of mortgages and hypothecs tainted by unfair business practices in Alberta, Newfoundland and Quebec. In Ontario and Prince Edward Island, the consumer mortgagor may be able to rescind the agreement in such circumstances. The Unfair Trade Practices Act[1] of Alberta applies to mortgages of private dwellings, and lists unfair acts or practices. The Business Practices Act[2] of Ontario applies to non-commercial mortgagors. It has examples of false, misleading or deceptive consumer representations, and gives factors to be considered in finding unconsionable consumer representations. The Business Practices Act[3] of Prince Edward Island does likewise. Newfoundland's statute[4] covers consumer mortgages taken in respect of loans for the maintenance or repair of real property - where they are tainted by unfair or unconscionable practices. Quebec's Consumer Protection Act permits the court to order prepayment when a merchant has exploited the inexperience of a consumer.[5]

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1. S.A. 1974, C. 33
2. S.O. 1974, C. 131
3. S.P.E.I. 197, C. 31
4. The Trade Practice Act, S. Nfld. 1978, c. 10.
5. S.Q. 1971, c. 74, s. 118

(4)(c)(i) The Unfair Trade Practices Act, S.A. 1975 (2), c. 33

This statute allows a consumer to commence an action against the supplier of services who engaged in or acquiesced in an unfair act or practice that cause damage or loss, and claim relief.[1] The court is empowered in such an action among other things, to rescind the transactions[2] and to "make such directions and grant such other relief as the court considers proper".[3] This last power probably enables an order that the consumer be granted prepayment privilege on such terms as the court considers proper. The statute directs itself to transactions relating to both "goods" and "services". "Services is defined in such a way as to embrace mortgages when the loan is taken out, "in respect of the maintenance or repair... of real property used as a private dwelling by an individual, or used by an individual in conjunction with a private dwelling".[4]

The Alberta statute does not yet have regulations made pursuant to it, and it is possible that mortgage transactions will be exempted. This should be followed closely as a power to exempt by regulation exists in s. 21(c). The regulations have not yet narrowed the definition of "consumer" and "supplier", and until this is done it seems a businessman can be a "consumer" for the purposes of the Act. However, in terms of mortgage loans being services, the only "consumer" who could claim relief would be a non-commercial person as the service or mortgage has to have been provided in respect of a private dwelling, as already noted. Nonetheless, the regulations may well spell this out by narrowing the definition of "consumer".

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1. Section II(1)
2. Ibid., s. 11(2)(d)(iii)
3. Ibid., s. 11(2)(f)
4. Ibid., s. 1(g)(i). That "services" include loans is discussed at para. 4.2.4.8.8, footnote (2).

The statute only operates once an unfair act or practice has taken place. The statute declares the following to be unfair acts or practices:[1]

(a) the subjection of the consumer to undue pressure by a supplier to enter into a consumer transaction;

(b) the entering into a consumer transaction by a supplier where
  i) the consumer's ability was such that he was not reasonably able to understand the character or nature of that consumer transaction, and
  ii) that supplier took unfair advantage of that consumer's inability to understand the character or nature of that consumer transaction;

(c) the entering into a consumer transaction by a supplier in circumstances where
  i) the supplier knew that there was a defect in the goods or that any or all of the services could not be provided,
  ii) the supplier knew that the consumer was not aware of or could not reasonably become aware of the defect in the goods or the fact that any or all of the services could not be provided, and
  iii) the defect in the goods or the failure to provide any or all of the services substantially impairs or is likely to impair substantially the benefit or benefits reasonably anticipated by that consumer under that consumer transaction;

(d) any representation or conduct that has the effect, or might reasonably have the effect, or deceiving or misleading a consumer or potential consumer and, without limiting the generality of the foregoing, includes any representaiton or conduct of the following kinds:

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1. S. 4.

i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

ii) a representation that the supplier has a sponsorship, approval, status, affiliation or connection that he does not have,

iii) a representation that the goods are of a particular standard, quality, grade, style or model if they are not,

iv) a representation that the goods have been used to an extent that is different from the fact,

v) a representation that the goods are new if they are not,

vi) a representation that the goods are new if they are deteriorated, altered, reconditioned or reclaimed,

vii) a representation that the goods have a particular prior history or usage if they have not,

viii) a representation that the goods or services are available for a reason that is different from the fact,

ix) a representation that the goods or services have been made available in accordance with a previous representation if they have not,

x) a representation that the goods or services are available if the supplier has no intention of supplying or otherwise providing the goods or services as represented or if the supplier does not have any reasonable grounds on which to believe that he has the ability to supply or otherwise provide the goods or services as represented,

xi) a representation that a specific price benefit or advantage exists if it does not,

xii) a representation that a part, replacement, repair or adjustment is needed if it is not,

xiii) a representation by a supplier that a solicitation made by that supplier is for a particular purpose if, in fact that solicitation is made for a different purpose that was represented.

xiv) a representation that a consumer transaction involves or does not involve rights, remedies or obligations if the representation is deceptive or misleading,

xvi) a representation as to the authority of a salesman, representative, employee or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact,

xvii) giving an estimate or quotation of the price of the goods or services which is materially less than the price of the goods or services as subsequently determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express consent of the consumer,

xviii) giving, in any representation, less prominence to the total price of the goods or services than to the price of any part of the goods or services, (1976, c. 54, s. 3, effective January 1, 1977).

xix) giving, in any representation, the price of any part of the goods or services without giving the total price of the goods or services, (1976, c. 54, s. 3, effective January 1, 1977).

xx) giving, in any representation, less prominence to the total price of the goods or services than to the amount of any instalment to be paid in respect of the goods or services, (1976, c. 54, s. 3, effective January 1, 1977).

xxi) giving, in any representation, the amount of any instalment to be paid in respect of the goods or services without giving the total price of the goods or services. (1976, c. 54, s. 3, effective January 1, 1977).

(4)(c)(ii) The Trade Practices Act, S.Nfld. 1978, c. 18

This statute allows a consumer to start an action against the supplier or services who engaged in an unfair trade practice or an unconscioanble act for practice that caused the consumer damage, and claim relief.[1] Courts are authorized to rescind the transaction[2] and to "make such other directions and grant such other relief as the court considers proper".[3] This last power probably enables an order that the consumer be granted prepayment privileges on such terms as the court considers proper. The statute directs itself to transactions of goods and services. "Services" is defined in such a way as to embrace mortgages given to secure loans taken out "in respect of the maintenance or repair...of real property owned by the consumer."[4]

The Newfoundland statute does not yet have regulations made pursuant to it, and it is possible that mortgage transactions will be exempted. This should be followed up, as the power to exempt by regulation is in s. 21(d). A "consumer" is defined to mean a natural person engaged in a consumer transaction except where in the course of carrying on business.[5] Consumer transactions include sales, leases or other disposition of goods, contract for service and awards by chance of goods or services.[6]

The statute only operates once an unfair trade practice or an unconscionable act or practice has taken place. Each is defined. An unfair trade practice is:

> any representation, conduct, or failure to disclose material facts that has the effect of deceiving or misleading a consumer, and without limiting the generality of the foregoing, includes:

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1. Section 14
2. S. 14 (2)(c)
3. S. 14 (2)(f)
4. S. 2 (f)(i) "Services" includes loans. See para. 4.2.4.8.8 footnote 2
5. S. 2 (a)
6. S. 2 (b)

(a) a representation that the goods or services have sponsorship, approval, performance characteristics, accessaries, ingredients, quantities, components, uses or benefits that they do not have;

(b) a representation that the supplier has sponsorship, approval, status, affiliation or connection that he does not have;

(c) a representation that the goods or services are of a particular standard, quality or grade if they are not;

(d) a representation that the goods are of a particular style, model or origin if they are not;

(e) a representation that the goods have been used to an extent that is different from their actual use;

(f) a representation that the goods are new or unused if they are not or if they are reconditioned, reclaimed, altered or deteriorated;

(g) a representation that the goods have a particular prior history or usage if they have not;

(h) a representation that the goods or services have been made available in accordance with a previous representation if they have not;

(i) a representation that the goods or services are available, or are available at a reduced price, for a reason that is different from the fact;

(j) a representation that the goods or services have been supplied in accccordance with a previous representation, if they have not;

(k) a representation that the goods or services are available when the supplier knows or ought to know that they are not, or have no intention of supplying them;

(l) a representation that a specific price advantage exists if it does not;

(m) a representation that a part, replacement, repair or adjustment is needed if it is not;

(n) a representation that repairs have been made or parts installed if such is not the case;

(o) a representation that the supplier is soliciting or communicating with consumers with a certain interest or purpose if he is not;

(p) a representation that a consumer transaction involves or does not involve rights, remedies or obligations if such a representation is deceptive or misleading;

(q) a representation such that a consumer might reasonably conclude that the goods are available in greater quantities than are in fact available from the supplier;

(r) a representation as to the authority of a saleman, representative, employee or agent to negotiate the final terms of a consumer transaction if the representation is not accurate;

(s) the giving of an estimate or evaluation of the price of goods or services that is materially less than the price subsequently determined or demanded, if the supplier has proceeded with the performance of the consumer transaction without the express prior consent of the consumer;

(t) the giving of less prominence in an advertisement or display to the total price of goods or services than to the price of any part of the goods or services;

(u) the giving of less prominence in a representation, advertisement or display to the amount of any instalment to be paid for goods or services than to the total price of the goods or services;

(v) a representation that goods or services are free when such is not the case; and

(w) a representation using exaggeration, innuendo or ambiguity as to a material fact.[1]

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1. S. 5(1)

In determining whether an act or practice is unconscionable the court shall consider all the circumstances that the supplier knew or ought to have known, including, without limiting the generality of the foregoing.

(a) that at the time the consumer transaction was entered into there was no reasonable probability of full payment of the purchase price by the consumer;

(b) that the consumer was unable to receive a substantial benefit from the consumer transaction;

(c) that at the time the consumer transaction was entered into the price grossly exceeded the price grossly exceeded the price at which similar goods or services were available to like consumers;

(d) that the terms and conditions of the consumer transaction were so onesided, harsh or adverse to the consumer as to be inequitable;

(e) that the supplier used trickery or undue pressure in order to induce the consumer to enter into the consumer transaction; or

(f) that the supplier took advantage of the extreme necessity or helplessness of the consumer or the inability of the consumer to protect his interests by reason of his physical or mental infirmity, his ignorance, illiteracy, age or emotional state, or his inability to understand the character, nature or language of the consumer transaction.[1]

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1. S. 6(1)

(4)(c)(iii) The Business Practices Act, S.O. 1974, c. 131

Like The Unconscionable Transactions Relief Act, this statute contemplates relief only in particular circumstances; namely, when a non-commercial consumer has been induced into an agreement respecting goods or services after the other party made a consumer representation that is an "unfair practice." Arguably, a mortgage loan is a service "provided in respect of goods or of real property",[1] thus covered by the statute. The statute deems false, misleading or deceptive representations, statements, offers, requests or proposals made respecting or view a view to supplying goods or services to a consumer to be "unfair practices",[2] and gives a list of included examples.

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1. S.O. 1974, c. 131, s. 1(i)
2. Ibid., s. 2(a) and S. 1(c)
   There are two reasons for concluding tht loans are included in the meaning of "services." First, the dictionary meaning of the word "service" and secondly, a statutory ground. There is little useful authority either as to the meaning of loan or of service in the case law examined. The Shorter Oxford English Dictionary, volume II (1969) at p. 1850 defines "service" in part as follows: "IV. 1. The action of serving, helping, or benefitting; conduct tending to the welfare or advantage of another. Chiefly to do, render s. 1582. b. An act of helping or benefitting; an instance of

In the mortgage loan context, the following statutory examples of false, misleading or deceptive consumer representations are noteworthy.

> "a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have,"[1]

> "a representation that the goods or services are available for a reason that does not exist"[2]

> "a representation that a specific price advantage exists, if it does not,"[3]

> "a representation that misrepresents the authority of a salesman, representative, employee or agent to negotiate the final terms of the proposed transaction,"[4]

> "a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the indication is false or misleading,[5]

> "a representation using exaggeration, inuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive,"[6]

> "a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer."[7]

The statute also deems unconscionable representations, statements, offers, requests, or proposals made in respect of a particular transaction to be "unfair practices". Rather than give examples,

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1. *Ibid.*, s. 2(b)
2. *Ibid.*, s. 17
3. *Ibid.*, s. 4(1)(a) & (b)
4. *Ibid.*, s. 4(5)
5. *Ibid.*, s. 4(a)
6. *Ibid.*, s. 4(2)
7.

the statute gives factors to be considered. Included are whether the person making the representation, his employer or principal "knows or ought to know" any of the following:

i) that the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,

ii) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers,

iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,

iv) that there is no reasonable probability of payment of the obligation in full by the consumer,

v) that the proposed transaction is excessively one-sided in favour of someone other than the consumer,

vi) that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable,

vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment,

viii) that he is subjecting the consumer to undue pressure to enter into the transaction;

It is an offence to engage in such "unfair practices", for which penalties are provided. Additionally, the aggrieved party may rescind the contract, or if that is not possible, the consumer can recover the amount he paid over the fair value.[1] However, he must notify the representor/mortgagee in writing no more than 6 months after the contract was entered into,[2] if he seeks such recovery or rescission.

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1. _Ibid._, s. 4(1)(a) & (b)
2. _Ibid._, s. 4(5)

While rescission is more closely related to non-payment than prepayment, the result of rescinding the agreement is a discharge - and if an earlier than agreed upon discharge results, the effect is the same as prepayment. Rescission involves putting the parties into the position they were before the agreement was entered into. Thus, to seek to rescind, the mortgagor must be able to give back to the mortgagee any money he has received. In practical terms, this would require him to refinance the mortgaged property. While this may involve expenses, the statute authorizes a court to award damages if the contract is rescinded,[1] and if the unfair practice falls into the unconsionable group, then punitive or exemplary damages may be awarded.[2]

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1. Ibid., s. 4(a)
2. Ibid., s. 4(2)

(4)(c)(iv) Business Practices Act, S.P.E.I. 1977, c.31

A mortgagor is entitled to rescind any agreement entered into after a consumer representation that is an unfair practice.[1] This only applies where the mortgagor is a "consumer", that is, not acting in the course of carrying on business.[2] Unfair practices may relate to goods or services. "Services" means, among other things, services provided in respect of goods or of real property.[3] Since a loan is a service,[4] and a loan provided in respect of real property may be evidenced by a mortgage, the act applies to mortgages. The right to rescind may be claimed by written notice to the other party within six months.[5] The Act declares that the right to rescind applies notwithstanding any agreement or waiver to the contrary.[6] Unfair practices are of two types: false, misleading or deceptive consumer representations, and unconscionable consumer representations.[7] A consumer representation is a representation, statement, offer, request or proposal made respecting or with a view to the supplying of goods or services or both to a consumer, to receiving consideration (being paid) for goods or services.[8]

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1. Section 5(1)
2. Ibid., s. 2(b)
3. Ibid., s. 2(i)(i)
4.
5.
6.
7.
8.

The statute gives the following examples of false, misleading or deceptive consumer representations:

i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have.

ii) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have,

iii) a repreentation that the goods of a particular standard, quality, grade, style or model, if they are not,

iv) a repreentation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, provided that the reasonable use of goods to enable the seller to service, prepare, test and deliver the goods for the purpose of sale shall not be deemed to make the goods used for the purposes of this subclause.

v) a representation that the goods have been used to an extent that is materially different from the fact,

vi) a representation that the goods or services are available for a reason that does not exist,

vii) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not,

viii) a representation that the goods or services or any part thereof are available to the consumer when the person making the representation knows or ought to know they will not be supplied,

ix) a representation that a service, part, replacement or repair is needed, if it is not,

x) a representation that a specific price advantage exists, if it does not,

xi) a representation that misrepresents the authority of a salesman, representative, employee or agent to negotiate the final terms of the proposed transaction,

xii) a representaiton that the proposed transaciton involves or does not involve rights, remedies or obligations if the representation is false or misleading,

xiii) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive,

xiv) a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer;[1]

The statute provides that in determining whether or not a consumer representation is unconscionable, the court may consider whether the person makign the representation, his employer, or principal, knows or ought to know the following:

i) that the consumer is not reasoanbly able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,

ii) that the price grossly exceeds the price at which similar goods or services are readily available to the consumers,

iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,

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1. Section 3(a)

iv) that there is no reasonable probability of payment of the obligation in full by the consumer,

b) that the proposed transaction is excessively one-sided in favour of someone other than the consumer,

vi) that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable,

vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment,

viii) that he is subjecting the consumer to undue pressure to enter into the transaction[1];

While rescission is more closely related to non-payment than to prepayment, the result of rescinding the agreement is the avoidance of contractual obligations. And if this avoidance takes place at a time that is earlier than the agreed determination date, the effect of rescission is the same as prepayment. Rescission involves putting the parties into the position they were before the agreement was entered into. Thus to seem to rescind the mortgagor must be able to give back to the mortgagee the money he has received, and vice vera.

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1. S. 3(b)

(4)(c)(v) Consumer Protection Act, S.Q. 1971, c.74

Consumer Protections Act - Exploitation of Inexperience

This statute which might enable prepayment of certain hypothecs operates when a consumer's inexperience has been exploited by a merchant. In such a case, the statute says a consumer may demand "the nullity of the contract or a reduction in his obligations."[1] The consumer's obligations must be "greatly disproportionate to those of the merchant".[2] Prepayment may be one way in which the court can reduce the obligations of the consumer.

This relief applies to certain types of hypothecs only. The borrower must be a physical person who is a party to the contract in a capacity other than that of merchant.[3] The hypothec must be for $50.00 or more.[4] It will not apply to any loan guaranteed by the governments of Canada or Quebec or their agencies.[5] It will apply to a first hypothec if it is extended for other than the purchase, construction or improvement of immoveable property.[6] It will apply to all other hypothecs, whatever the rank, provided that the immoveable is made up of four units or less[7] and is not used mainly for commercial, industrial, or professional purposes.[8]

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1. Section 118
2. Ibid.
3. Section 1(d)
4. S. 10
5. O.C. 1408-72, s. 2.05(c)
6. Section 10
7. O.C. 1408-72, s. 2.05(h)(i)
8. Ibid., s. 2.05(h)(ii)

(4) (d) Express Right to Prepay

(i) Manitoba

The Mortage Act, R.S.M. 1970, c. M200

The Mortage Act allows prepayment in three circumstances. It appears to restate the common law position in conferring upon a mortgagor the right to redemption and discharge upon prepayment if the mortgagee has commenced sale or foreclosure proceedings after the mortgagor has defaulted in a payment of principal. Secondly, the statute purportss to enable prepayment of mortgage whose term is greater than 5 years at any time after the fifth anniversary, duplicating the federal Interest Act and being identical to the right in The Mortgage Act of Ontario.

Section 15 provides that "where default has occurred in making any payment of original principal due under any mortgage and by reason of the default the mortgagee has taken proceedings by sale or foreclosure, the mortgagor may, notwithstanding any law or statute or any provision in the mortgage to the contrary, at any time prior to sale of foreclosure pay to the mortgagee the full amount of moneys unpaid under and secured by the mortgage as at the date of such payment, together with costs of proceedings to that date, and that payment shall be full payment of the mortgage...". The statute goes on to state that the mortgagee shall give a discharge, or assign the mortgage to a person as the mortgagor directs, on receiving payment of the conveyancing fee. He is allowed "a reasonable time" in which to give the discharge. This provision simply codefies part of the common law rules regarding redemption of mortgages outlined earlier, with the exception that the mortgagee's intention is irrelevant to the statute.[1]

The second, and major, prepayment privilege is contained in s. 20(8). It is practically identical to the provision in s. 10(1) of the federal Interest Act. Thus assuming Re Hodgson and Raskin[2] would be followed in Manitoba, this prepayment privilege would not apply when the mortgage is into a period covered by

1. Compare with para. 4.2.2.3.
2. (1974), 4 O.R. (2d) 234, per Goodman, J.(Ont. H.C.)

a mortgage extension agreement. A mortgagor cannot avoid prepayment of the "three months' further interest in lieu of notice" by giving the mortgagee three months' notice in advance of his intention to prepay.[1] Indeed, internal evidence in the Manitoba Act makes this latter point clearer than it is under the federal Interest Act.[2] As with the Ontario and federal statutes, the prepayment right after the fifth anniversary is denied to mortgagors who are corporations or joint stock companies.[3] It would seem that home owners who assume a mortgage originally given by such corporations will also be denied this prepayment privilege.[4] It seems this right may be waived by the mortgagor in the mortgage agreement.[5] And since the statute confers no right to a discharge from the mortgagor, the churlish mortgagee can refuse same, though he cannot recover any further interest.

The effective operation of section 20(6) and (7) is as follows: if the mortgage is for a term greater than five years, and if the mortgagor is neither a corporation nor an assignee of a corporate mortgagor, he may prepay his mortgage by paying or offering to pay the amount due for principal and interest to the time of the payment or offer of payment plus three months' interest. This he may do at any time after the fifth anniversary of the mortgage, and a mortgage extension agreement is considered to be a new mortgage so the five year period starts to run afresh with the start of each such extension.[6]

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1. Due to the interpretation of the similar provision in the Interest Act given in Payment V. Prudential Insurance Co. of
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3.
4.
5.
6. This provision, it should be noted, is almost certainly constitutionally invalid. See paraê 4.2.3.2, footnote 8. Thus Manitobans should act under S. 10 of the Interest Act, or at least plead both statutes.

(4) (d) (ii) Ontario

The Mortgages Act, R.S.O. 1970, c.1979

Section 17 of this statute is practically identical to s. 10 of the federal Interest Act. It grants a non-corporate mortgagor a right to prepay or tender prepayment of the interest and principal then due "together with three months' interest in lieu of notice" at any time after the fifth anniversary of a mortgage whose term is greater than five years. It operates by preventing thereafter the mortgagee from charging or recovering interest. Four problems were identified by the Ontario Law Reform Commission in a study of the section completed in 1972; namely, whether an assignee of an incorporated mortgagor is denied its benefit, whether three months, notice may be given in the place of three months' interest, whether a mortgage extension agreement is a new mortgage, and whether the mortgagor may contract out of the right.[1] Because of its similarity with section 10 of the federal Interest Act, this section may well be unconstitutional. Therefore, Ontario mortgagors should always rely on both statutes.[2]

While no cases were noted to support the point, the Commission concluded that the right to prepay would be denied by s. 17(2) to any successor or assignee of a corporate mortgagor. A mortgagor cannot give three months' notice and thereby avoid paying three months' interest.[3] A mortgage extension agreement merely alters the date for termination, thus a mortgagor cannot prepay during a mortgage extension even if more than five years have passed since the date of the original mortgage.[4] It seems that a mortgagor may sign away his right to prepay after the fifth anniversary.

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1. Report on the Mortgage Act, Section 16 (Toronto, 1972)
2. See para. 4.2.3.2., footnote 8.
3. Payment v. Prudentical Insurance Co. (1959), 28 W.W.R. 197 (Alta. D.Crt.)
4. Re Hodgson and Raskin (1974), 4 O.R. (2d) 234. Provided of course the extension term was not greater than five years.

(4) (d) (iii) <u>Quebec</u>

<u>Consumer Protection Act</u>, S.Q. 1971, c. 74

The Consumer Protection Act has two provisions which may enable prepayment of hypothec loans. The first is the general prepayment right which is applicable to certain hypothecs ranking after first, that is, second, third, etc. hypothecs. The second provision is applicable in certain first hypothec loans, and certain hypothec loans ranking after first, where a merchant has exploited the inexperience of the consumer.[1]

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1. See <u>para</u>.

Consumer Protection Act - General Right to Prepay

While this statute does not apply to any hypothec ranking first[1], it does apply to those loans secured by hypothecs ranking after first. However, this applicability is qualified by several factors. First, the regulations exempt all hypothecs attached to an immovable comprising more than four dwellings[2], or used mainly for commercial, industrial or professional purposes.[3] Secondly, all loans guaranteed by the Governments of Canada and Quebec or their agencies, are exempted.[4] All the remaining hypothecs are exempted if the merchant discloses the credit charge in the correct manner two days before concluding the contract,[5] discloses this in French unless requested in English,[6] annexes a copy of the disclosure to the contract,[7] and sets out the notice to recover more than one payment still owing at the expiration of the term.[8]

Finally, the hypothec must exceed $50[9] and be taken in respect of a physical person other than a merchant.[10]

If these tests have been met, prepayment may be made in respect of the balance on the amount of the consumer's total obligation at any time before maturity.[11] The mode of calculation is generally the same as that provided for non-hypothec loans. However, if prepayment is made of a contract in which the credit extended is secured by a hypothec whose term exceeds five years, the creditor cannot retain a protion of the credit charge greater than that fixed by s. 10 of the federal Interest Act.[12] Presumably he could be entitled to less. The Interest Act calls for the payment of "three months further interest in lieu of

1. O.C. 1408-72, s. 2.06A(b)
2. Ibid., s. 2.05(h)(i)
3. Ibid., s. 2.05(h)(ii)
4. Ibid., s. 2.05(c)
5. Ibid., s. 2.07(a)
6. Ibid., s. 2.07(b)
7. Ibid., s. 2.07(c)
8. Ibid., s. 2.07(d)
9. S.Q. 1971, S. 10
10. Ibid., s. 1(d)
11. Section 14
12. O.C. 1408-72, s. 4.27

notice".[1] The regulations seem to have accepted as correct the cast law which holds that three months' notice may not be given as a substitttue for the three months' interest.[2]

1. R.S.C. 1970, c. I-18
2. <u>Payment v. Prudential Insurance Co. of America</u>

PREPAYMENT OF NON-MORTGAGE LOANS - COMMON LAW POSITION

General

The general rule at common law is that a borrower has no right to prepay a loan before the expiry of the term. The only instance in which such a right arises are: (a) when the parties have agreed in the original contract to a right to prepay, (b) when the parties agree after the contract is made to make and accept early payment, (c) when the lender starts a proceeding to collect the debt.

General Rule

The general rule with respect to prepayment rights of non-mortgage loans is that a borrower has no right to prepay, and, as a consequence, no right to a rebate.

Example A:

A, a borrower, borrows money from B, the lender. The loan agreement sets out dates for payment, the final installment being due January 1, 1975. A, for whatever reason, wants to rid himself of the debt. A goes to B and places the entire outstanding principal, and interest up to the date, on B's desk in June 1974. He asks B to accept and to discharge the loan. B refuses. B has every right to refuse. A borrower cannot compel his lender to accept payment of a debt not yet payable, even though, if it bears interest, the interest to the date of maturity accompanies a tender of the principal.[1]

Prepayment Agreement

A borrower may insist upon the discharge of any loan upon prepayment if the lender and borrower have provided for prepayment in the loan agreement. Even if the parties have no such agreement, they may at anytime get together and agree to early payment, with or without bonus.

Example B:

A, the borrower, borrows money from B, the lender. The loan agreement states that A may prepay upon meeting certain conditions. Usually these conditions are as to the dates upon which prepayment may be made, and as to the amount the borrower must pay for the right to prepay. Upon the borrower paying the agreed upon amounts, and upon the correct dates, the lender must discharge the loan.

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1. Rutherford v. Walker (1907) 8 W.W.R. 52 (Alta. S.C.) expressly applying in the non-mortgage context, the principal found in Brown v. Cole (1845), 14 Sim. 427, 60 E.R. 424.

Example B:

A, the borrower, borrows money from B, the lender. The loan agreement is silent as to any prepayment rights. A comes into some money, the interest rate falls, or for some other reason, A desires to rid himself of the debt. He approaches B and suggests prepayment. The lender, knowing he cannot be forced to agree, demands compensation for discharging the debt before the expiry of the term. A agrees to the amount. A then takes the total amount agreed to, including the bonus or compensation to the lender and asks for a discharge. The agreement to prepay is written, as was the original agreement. The lender must discharge the loan.

Example C:

A, the borrower, borrows money from B, the lender. The loan agreement is silent as to any preepayment rights. A comes into some money, and wants to rid himself of the debt before the expiry date. The lender agrees to this, and asks only for the outstanding principal and the interest to the date of prepayment. B does not ask for any bonus. A goes to B, and places the principal outstanding and the interest to the date on B's desk. Both the original loan agreement, and the agreement to prepay are in writing. A can insist that B discharge the debt.[1]

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1. The potential difficulty with this situation is that at common law, an agreement between two parties in which one party promises to do what he is already obliged to do under an earlier contract is not enforceable. See Stilk v. Myrick (1809), 2 Camp. 317, 170 E.R. 1168, and Gilbert Steel Ltd. v. University Construction Ltd. (1977), 12 O.R. 19 (Ont. C.A.). Likewise, with the same underlying reason, namely absence of legal consideration, payment of a lesser sum will not discharge a larger sum. See Pinnel's Case (1602), 5 Co. Rep. 117a and Foakes v. Beer (1884), 9 A.C. 605 (H.L.), approved in Foot v. Rawlings, (1963) S.C.R. 197. But obiter dictum in Pinnel's Case, and in Sibree v. Tripp (1846), 15 M & W 23, 153 E.R. 745 (Ex. Ct.), approved in Foot v. Rawlings, (1963)

S.C.R. 197 at p. 203 affirm that payment of a lesser sum at a time earlier or different from that originally agreed is good consideration. The lender gets the use of his money before it was due. This rational was accepted in Goodchild v. Bethel, (1914), 7 W.W.R. 832 (Alta. S.C.A.D.). Thus even at common law, a contract of prepayment is always supported by good consideration. For greater certainty, in five provinces the legistlatures have enacted that "part performance" is good consideration for a new contract. Early payment was held to be "part performance" in (Goodchild v. Bethl), supra. See the Judicature Act R.S.A. 1970, c. 193, s. 34(8); Laws Declaratory Act, R.S.B.D. 1960, c. 213, s. 34 (as am.); Mercantile Law Amendment Act, R.S.M. 1970, c. M-120, s. 6; Mercantile Law Amendment Act, R.S.O. 1970, c. 272, s. 16; and Queen's Bench Act, R.S.S. 1965, c. 73, s. 45(1). See also para. 4.2.2.7, footnote 1.

Proceedings to Collect Debt

When a lender starts legal proceedings to collect the loan, the borrower has a right to pay it off before the court action commences. At this point, the borrower will be obliged to pay the outstanding principal, whatever interest is seeking, and all the lender's legal costs to the date of prepayment.

Example A:

A, the borrower, borrows money from B, the lender. The loan agreement says that if A misses a single payment, B can demand the entire outstanding principal and interest for the full term immediately. A misses a payment. B starts a legal action by issuing and serving a writ, claiming the entire outstanding principal and interest for the full term as allowed in the acceleration clause. A goes to B's office and places these amounts plus a sum equal to B's legal expenses to date on B's desk, and demands that B discharge the loan. B, having had second thoughts, decides he does not want to accept: he prefers to collect the debt on the terms of the old agreement. A can insist that B accept.[1]

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1. See Cruso v. Bond (1882), 1 O.R. 384 (O.C.A.). The court stated "it is a good rule to apply as far as possible in all judicial proceedings, that where anything is sought by a party he should be treated as prepared to receive what he asks for".

PREPAYMENT OF NON-MORTGAGE LOANS - FEDERAL STATUTORY RIGHTS

Small Loans Act, R.S.C. 1970, c. S-11

This statute allows prepayment of any loan that does not exceed $1,500 except where the lender is a chartered bank,[1] registered pawnbroker,[2] or occastional lender.[3] Prepayment is allowed either part or in full. No bonus or penalty may be charged upon prepayment. To prepay, the borrower must pay the outstandingprincipal or a part of it, plus the cost of borrowing accrued and unpaid up to the date of prepayment.[4] Prepayment, to engage the statute, must be made on an installment date.

1. Section 2, definition of "loan" and "money lender".
2. Ibid.
3. The statute applies to loans made by "money lenders". Money lenders is defined in s. 2 to mean any person, other than a chartered bank, who carries on the business of money lending, or who advertises or holds himself out as carrying on the business of money lending. In R.V. Morgan (1913), 11 D.L.R. 794 (Que. C.A.), the expression carry on business" was held to mean more than making an occasional loan. Some degree of sysem and continuity must be shown. This same definition was applied in McIntosh v. M.N.R., [1959] S.C.R. 119 at 120. See also Shaw v. Hossack (1917), 40 O.L.R. 475 (1918), 56 S.C.R. 581.
4. Section 6(3)

Example A:

A, the borrower, borrows $1,400 from B, the lender. B has made only a few loans in the past few years. The loan is for a term of four years, ending December 31, 1969. On June 30, 1968, A goes to B and places the outstanding principal and the accrued cost of borrowing on B's deska and asks B to discharge the loan. June 30 is an installment date. B refuses. B is correct. He does not carry on the business of money lending. This is a question of fact. The court looks at the degree of system and continuity in B's lending money. It finds it to be sufficient to hold B as carrying on the business of money lending. The Act does not apply to infrequent or occasional lenders.[1]

Example B:

A, the borrower, borrows $1,400 from B, the lender. B is a chartered bank. The term of the loans is four years, ending December 31, 1969. On June 30, 1968, A goes to B and places the outstanding principal plus the cost of borrowing accrued and unpaid on B's desk. June 30 is an installment date. A asks B to discharge the loan. B refuses. B is correct. The Small Loans Act does not apply where the lender is a chartered bank.[2]

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2. See para. 4.2.6.2., footnote 3.
3. Section 2, definition of "loan" and "money lender".

PREPAYMENT OF NON-MORTGAGE LOANS - PROVINCIAL STATUTORY RIGHTS

(1) Overview

Every province has legislation which enables a borrower to prepay non-mortgage loans, and which entitles the borrower to a rebate upon such prepayment.[1] Alberta, British Columbia, Newfoundland, Ontario and Prince Edward Island have unfair practices legislation which may enable a court to order prepayment of non-mortgage loans. In Quebec, prepayment of certain non-hypothec loans may be ordered by a court where a merchant has exploited the inexperience of a consumer. In all provinces except Quebec, prepayment of non-mortgage loans may be ordered if a court finds a loan to be unconscionable. In Alberta, Manitoba, Nova Scotia, Prince Edward Island and Saskatachewan, borrowers from credit unions have a statutory right to prepay non-mortgage loans. Every province has legislation covering special lenders, including credit unions, which enables the provincial government to prescribe by regulation terms and conditions of loans. They are noted here, but not analysed.

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1. Alberta - The Credit and Loan Agreements Act, R.S.A. 1970, c. 73; B.C. - Consumer Protection Act , S.B.C. 1967, c. 14; Manitoba - The Consumer Protection Act, R.S.M. 1970, c. C200; New Brunswick - The Cost of Credit Disclosure Act, R.S.N.B. 1973, c. C-28; Newfoundland - The Newfoundland Consumer Protection Act, R.S. Nfld. 1970, c. 256; Nova Scotia - Consumer Protection Act, R.S.N.S. 1967, c. 82; P.E.I. - Consumer Protection Act, R.S.P.E.I. 1974, c. C-17; Quebec - Consumer Protection Act, S.Q. 1971, c. 74; Saskatchewan - The Cost of Credit Disclosure Act, 1967, S.S. 1967, c. 85.

(2) Unconscionability/Excessive Cost

In all provinces but Quebec, a mortgage in which the cost is excessive and that is harsh and unconscionable may be prepaid if so ordered by the court. In Alberta[1], British Columbia[2], New Brunswick, [3] Newfoundland,[4] Nova Scotia,[5] Ontario[6] and Prince Edward Island,[7] the cost of the loan must be excessive and the transaction harsh and unconscionable before the relief powers of the court are engaged. In Manitoba,[8] and Saskatchewan[9] the test is whether the cost is excessive or the transaction harsh or the transaction unconscionable. In British Columbia, the relief powers are also engaged if the transaction is "otherwise inequitable".[10] Newfoundland spells out factors the court must consider in judging whether the cost is excessive and the transaction harsh and unconscionable; namely, the prevailing interest rates, the degree of risk, the cost to similar debtors, the understanding of the mortgagor, the pressure on the mortgagor and the reasonableness of expecting full payment.[11]

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1. The Unconscionable Transactions Act, R.S.A. 1970, c. 377, Section 3
2. Consumer Protection Act, S.B.C. 1967, c. 14, s. 17(a)
3. Unconscionable Transactions Relief Act, R.S.N.B. 1973, c. V-1, s. 2.
4. The Unconscionable Transactions Relief Act, R.S.Nfld. 1970, c. 382, s. 3
5. Unconscionable Transactions Relief Act, R.S.N.S. 1970, c. 382, s. 3
6. The Unconscionable Transactions Relief Act, R.S.O. 1970, c. 472, s. 2
7. Unconscionable Transactions Relief Act, R.S.P.E.I. 1974, c. V-2, s. 3
8. The Unconscionable Transactions Relief Act, R.S.M. 1970, c. V-20, s. 3
9. Unconscionable Transactions Relief Act, S.S. 1967, c. 86, s. 3
10. Section 17(b)
11. Section 4B

Example A:

A, a layman, borrows money from B a finance company. The simple effective rate of interest was 23%. The loan agreement provided that if A missed any payments, B could demand the entire principal and cost of the loan accrued immediately. The loan had no provision for prepayment, and no provision for a rebate on prepayment. A could not read English, the language of the agreement. The loan was secured by a chattle mortgage on A's truck. A defaulted. B seized the truck and sold it. B then demanded payment in full of the balance of the loan. Based on the amount of money borrowed, less the proceeds from selling the truck, the effective sale of interest demanded was 38.4%. The usual rate of interest charged by lenders like B was 11% to 24%. B eventually sued A. A pleaded Manitoba's Unconscionable Transactions Relief Act. A was successful. The court revised the loan agreement, reducing interest rate to 1% per month. Even though the originally agreed rate of interest was not harsh or excessive, the transaction was harsh and unconscionable. This was because in theory, had default been made early in the term, and had B insisted on the acceleration clause, the rate could have reached astronomical proportions. This was partly because there was no prepayment provision nor rebate entitlement.[1]

Example B:

A, a schrewd businesswoman, borrowed money from B, a finance company. The principal was $3,500.00. The insurance charge, added to the principal was $330.00. The finance charges were $2,770. The loan was payable over 5 years, monthly at $110 per month. As security, A gave B promissory notes for the total principal and cost of borrowing. An acceleration clause provided that on default the entire loan would become due and payable. A missed many payments. Eventually A tells B she will no longer honour the agreement. B sues A on the promissory notes. A says the loan's cost is excessive and that the transaction is harsh and unconscionable. A seeks to have the contract revised. The court agrees. A was a schrewd businesswoman, she was a high credit risk,

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1. Brock Acceptance Co. v. Klassen, (1969) 5 D.L.R. (3d) 749 (Man. Q.B.)

and she gave no security for the loan, and the comparative rates for such loans were high. Nonetheless, the insurance fee was grossly overcharged and a rebate should be allowed in view of the acceleration. Prepayment was considered but rejected, as was a reduction in the interest rate.[1]

Example C:

A borrows $9000 from B. The loan is well secured, presenting minimal risk to B. The loan is to be repaid over 4 years. The contract permitted A to repay at anytime without bonus or penalty, but said nothing about A getting a rebate of unearned interest. Five months after the loan was signed, A prepaid in full. In addition to the principal amount outstanding, A was required to pay $2551 in interest, which was equal to interest to the full term. The loan had been "precomputed". A then went to court pleading the loan was harsh and unconscionable. On the principal borrowed over 5 months, the interest payment equalled an effective annual rate of 61%. A won. The court held the transaction was harsh and unconscionable. The court indicated the cost was excessive. B was ordered to repay most of the $2551 to A.[2]

1. G.A.C. International Finance Corp. v. Corey (1975), 11 N.B.R. (2d) 156 (N.B.S.C.A.D.)
2. Stepper v. Laurel Credit Plan Ltd. (1968), 63 W.W.R. 168 (Sask. D.C.)

Money-Lenders Act, R.S.N.S. 1967, c. 188

This Act applies to all loans including those in which money is advanced, whatever form it takes, if it is substantially a loan, or secures the repayment by such person of the money advanced.[1] Thus it covers mortgage loans. It only applies to loans made by a "money-lender", which is defined to include those carrying on a "loaning business" (which would exclude occasional lenders)[2] and any person "who engages" in any loan transaction (which would include occasional lenders.[3] It excludes registered pawn-brokers and banks.[4] The Act is engaged where the court finds the charges exceed the legal rate, where any conveyancing charges were excessive, or where insurance other than that reasonably proper for securing the loan was required.[5] The court, once it makes the above finding, is granted a power to revise which is practically identical to that in the Unconscionable Transactions Relief Act.[6] Thus it seems that prepayment may be ordered under the Money-Lenders Act.

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1. Section 1(b)
2. See R. v. Morgan (1913), 21 C.C.C. 225 (Que. C.A.), and McIntosh v. Minister of National Revenue, [1959] S.C.R. 119 at p. 120
3. The word "engage" has the same force as the word "covenant", see Rigby et al. v. The Great Western Railway Company (1845) L.J. Ex. 60, at p. 62, per Baron Parke. The second part of the definition of money lender, "and any person who engages in any transaction referred to in clause (b) [i.e., loan] is not found in Ontario's Money Lenders Act, R.S.O. 1914, c. 175, s. 2(3). One can therefore argue that it was added to sweep into the governed class those occasional lenders who had avoided coverage under the Ontario statute, as in Shaw v. Hossack (1917), 40 O.L.R. 475 (Ont. C.A.). In Shaw v. Hossack the lender had, apparently, made loans that were "few and far between" and thus was held not to be carrying on the business of a money lender. The Nova Scotia statute was enacted in 1938 and The Nova Scotia Money-Lenders Act, S.N.S. 1938, c. 7. The federal Money-Lenders Act, R.S.C. 1952, c. 181, which did not have the "engages" provision either, was repealed in 1956, S.C. 1956, c. 47, s. 8.
4. Section 1(c)
5. Ibid., s. 2
6. R.S.N.S. 1967, c. 319

(3) TRADE PRACTICES LAWS

(a) General

Alberta, British Columbia, Newfoundland, Ontario and Prince Edward Island have passed legislation aiming at unfair practices. Two types of conduct are attacked: The telling of falsehoods to lead a consumer to the agreement, and the abuse of superior bargaining power. Each province attacks these problems separately; therefore, the response of each is examined individually.

(3)(b) Alberta

The Unfair Trade Practices Act, S.A. 1975 (2) c. 33

This statute allows a consumer to commence an action claiming relief against the supplier of goods or services who engaged in or acquiesced in an unfair act or practice that caused damage or loss.[1] Among others, a court is then empowered to rescind the transaction[2] and to "make such directions and grant such other relief as the court considers proper".[3] This last power enables the court to order prepayment privileges on such terms as it considers proper. The statute directs itself to transactions relating to both "good" and "services". "Services" can include loans.[4] The Act applies only to services "in respect of the maintenance or repair....of real property used as a private dwelling"[5], "provided to an individual in conjunction with the use of social, secretarial or physical fitness facilities,"[6] "provided to an individual in respect of the movement, transport or storage of goods"[7] or services "that are in their nature instructional or educational".[8] Therefore, the right to prepay loans only applies where the loan is provided in respect of these circumstances.

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1. S. 11
2. Ibid., s. 11(2)(d)(iii)
3. Ibid., s. 11(2)(f)
4. See para. 4.2.4.8.8
5. Ibid., s. 1(g)(i)
6. Ibid., s. 1(g)(ii)
7. Ibid., s. 1(g)(iii)
8. Ibid., s. 1(g)(iv)

The Act spells out what are unfair acts or practices, as the following:[1]

a) the subjection of the consumer to undue pressure by a supplier to enter into a consumer transaction;

b) the entering into a consumer transaction by a supplier where
   i) the consumer's ability was such that he was not reasonably able to understand the character or nature of that consumer transaction, and
   ii) that supplier took unfair advantage of that consumer's inability to understand the character or nature of that consumer transaction;

c) the entering into a consumer transaction by a supplier in curcumstantces, where:
   i) the supplier knew that there was a defect in the goods or that any or all of the services could not be provided,
   ii) the supplier knew that the consumer was not aware of or could not reasonably become aware of the defect in the goods or the fact that any or all of the services could not be provided, and
   iii) the defect in the goods or the failure to provide any or all of the services substantially impairs or is likely to impair substantially the benefit or benefits reasonably anticipated by that consumer under that consumer transaction;

d) any representation or conduct that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer or potential consumer and, without limiting the generality of the foregoing, includes any representation or conduct of the following kinds:

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1. Section 4.

i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have;

ii) a representation that the supplier has a sponsorship, approval, status, affiliation or connection that he does not have;

iii) a representation that the goods are of a particular standard, quality, grade, style or model if they are not;

iv) a representation that the goods have been used to an extent that is different from the fact;

v) a representation that the goods are new if they are not;

vi) a representation that the goods are new if they are deteriorated, altered, reconditioned or reclaimed;

vii) a representation that the goods or services have a particular prior history or usage if they have not;

viii) a representation that the goods or services are available for a reason that is different from the fact;

ix) a representation that the goods or services have been made available in accordance with a previous representation if they have not;

x) a representation that the goods or services are available if the supplier has no intention of supplying or otherwise providing the goods or services as represented grounds on which to believe that he has the ability to supply or otherwise provide the goods or services as represented;

xi) a representation that a specific price benefit or advangtage exists if it does not;

xiii) a representation by a supplier that a solicitation made by that supplier is for a particular purpose, if, in fact, that solicitation is made for a different purpose than was presented;

xiv) a representation that a consumer transaction involves or does not involve rights, remedies or obligations if the representation is deceptive or misleading;

xv) a representation that a consumer might reasonably conclude that the goods are available in greater quantities than are in fact available from the supplier;

xvi) a representation as to the authority of a salesman, representative, employee or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact;

xvii) giving an estimate or quotation of the price of the goods or services which is materially less than the price of the goods or services as subsequentially determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express consent of the consumer;

xviii) giving, in any representation, less prominence to the total price of the goods or services than to the price of any part of the goods or services; (1976, c. 54, s. 3, effective January 1, 1977).

xix) giving, in any representation, the price of any part of the goods or services without giving the total price of the goods or services; (1976, c. 54, s. 3, effective January 1, 1977).

xx) giving, in any representation, less prominance to the total price of the goods or services than to the amount of any installment to be paid in respect of the goods or services (1976, c. 54, s. 3, effective January 1, 1977).

xxi) giving, in any representation, the amount of any instalment to be paid in respect of the goods or services without giving the total price of the goods or services (1976, c. 54, s. 3, effective January 1, 1977).

Other remedies are provided. The Director of Trade Practices may seek to have the supplier guilty of unfair practices sign an undertaking to refrain from their repitition.[1] He may also start an action in his own name.[2] Consumer organizations may also start an action against such suppliers.[3]

It seems the aggrieved borrow is not entitled to rescind the contract unilaterally, but must apply to the court. There is no time limit in the Act for the bringing of the actions provided in the *Act*.

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1. S. 10
2. *Ibid*., s. 12
3. *Ibid*., s. 14

(3) (c) British Columbia

Trade Practices Act S.B.C. 1974, c. 96

This statute applies to consumer transactions, which include the supply of credit other than credit extended solely on the security of real property.[1] However, the supply of credit (loans) must be made to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity requiring both expenditure of money or property and personal services by that individual and in which he has not been previously engaged.[2] The statute aims at eliminating deceptive acts or practices and unconscionable acts or practices, by offering different remedies to consumers who have entered into agreements so tainted. Prepayment, or effective prepayment, is a possible order for a court to make if the consumer is involved in any action in respect of a consumer transaction affected by either deceptive or unconscionable acts or practices.

Deceptive acts or practices include any oral, written, visual descriptive, or other representation including non-disclosure, or any conduct having the capability, tendency or effect of deceiving or misleading a person.[3] They may occur before, during or after a consumer transaction. The statute gives the following examples of deceptive acts or practices:

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1. Section 1(1). See definitions of "consumer transaction" and "personal property".
2. Ibid., s. 1(1), definition of "consumer transaction". If the transaction relates to a business opportunity, then the buyer must provide both money (or property) and personal services. See Tropeano v. B.&H. Industries Inc. and Berenbaum (1977), 4 B.C.L.R. 217 (S.C.B.C.).
3. Section 2(1)

a) a representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses, or benefits that it does not have;

b) a representation that the supplier has a sponsorship, approval, status, affiliation, or connection that he does not have;

c) a representation that the subject of a consumer transaction is of a particular standard, quality, grade, style or model if it is not;

d) a representation that the subject of a consumer transaction has been used to an extent that is different from the fact;

e) a representation that the subject of a consumer transaction is new or unused if it is not, or if it is deteriorated, altered, reconditioned, or reclaimed;

f) a representation that the subject of a consumer transaction has a particular prior history or usage if it has not;

g) a representation that the subject of a consumer transaction is available for a reason that is different from the fact;

h) a representation that the subject of a consumer transaction has been made available in accordance with a previous representation if it has not;

i) a representation that the subject of a consumer transaction is available if the supplier has no intention of supplying or otherwise disposing of the subject as represented;

j) a representation that is such that a person could reasonably conclude that a price benefit or advantage exists, if it does not: (1975, Bill 88, s. 3.)

k) a representation that a service, part, replacement, or repair is needed if it is not;

l) a representation that the purpose or intent of any solicitation of, or any communication with, a consumer by a supplier is for a purpose or intent different from the fact;

m) a representation that a consumer transaction involves or does not involve rights, remedies, or obligations if the representation is deceptive or misleading;

n)* a representation such that a consumer might reasonably conclude that the subject of a consumer transaction is available in greater quantities than are in fact available from the supplier, unless the limitation of availability represented by the supplier has been given such prominence as is required by the regulations;

o) a representation as to the authority of a salesman, representative, employee, or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact;

p)* where an estimate of the price of a consumer transaction is materially less, as determined by the regulations, than the price of the consumer transaction as subsequently determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express consent of the consumer; (1975, Bill 88, s. 3.)

q) where the price of a unit of a consumer transaction is given in an advertisement, display, or representation, the failure to give, in the same advertisement, display, or representaiton, at least equal prominence to the total price of the consumer transaction; (1975, Bill 88, s. 3.)

r) the use, in any oral or written representation, of exaggeration, innuendo, or ambiguity as to a material fact, or failure to state a material fact, if the representation is deceptive or misleading;

s) such other acts or practices as may be prescribed by the regulations.[1]

Unconscionable acts or practices are not defined. They may occur before, during or after a consumer transaction.[2] The statute gives the following as factors a court must consider in determining whether or not an act or practice is unconsionable:

a) that the consumer was subjected to undue pressure to enter into the consumer transaction;

b) that the consumer was taken advantage by his inability or incapacity to reasonably protect his own interest by reason of his physical or mental infirmity, ignorance, illiteracy, age, or his inability to understand the character, nature, or language of the consumer transaction, or any other matter related thereto;

c) that, at the time the consumer transaction was entered into, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by like consumers;

d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the price by the consumer;

e) that the terms or conditions on, or subject to, which the consumer transaction was entered into by the consumer are so harsh or adverse to the consumer as to be inequitable; and

f) such other circumstances as may be prescibed by the regulations.[3]

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1. Ibid., s. 2(3)
2. Section 3(1)
3. Ibid., s. 3(2)

Any consumer transaction tainted by an unconscionable act or practice is enforceable by the supplier.[1] In addition to other remedies available to the consumer, in the case of both deceptive and unconscionable acts or practices, the consumer in a court action may claim damages and seek rescission of the contract.[2] The court is authorized in such an action to make any order, and to impose such other terms as the court considers just.[3] This remedial power in the court is wide enough to encompass a court order for prepayment on terms.

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1. Section 3(3)
2. Ibid., s. 20(1)(b)
3. Ibid., sa. 20(1)(b) and (c)

(3) (d) Newfoundland

The Trade Practices Act, S. Nfld. 1978, c. 10.

This statute allows a consumer to start an action against the supplier of services who engaged in an unfair trade practice or an unconscionable act or practice that caused damage and claim relief.[1] Courts are authorized to rescind the transaction,[2] and to "make such other directions and grant such other relief as the court considers proper".[3] This last power probably enables an order that the consumer be granted prepayment privileges on such terms as the court considers proper. The statute directs itself to loans ("services") taken out "in respect of the maintenance or repair of goods or real property owned by a consumer", "in conjunction with the use of social, recreational, or physical fitness facilities", "in respect of the movement, transport or storage of goods", or for education purposes."[4] The loan must also have been provided to the consumer, his family, or household.

A consumer is defined to mean a natural person engaged in a consumer transaction except where carrying on business.[5] Consumer transactions include the sale, lease or other disposition of goods, contracts for service, and awards by chance of goods or services.[6]

The statute only operates once an unfair trade practice or an unconscionable act or practice has taken place. Each is defined. An unfair trade practice is:

> any representation, conduct, or failure to disclose material facts that has the effect of deceiving or misleading a consumer, and without limiting the generality of the foregoing, includes:

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1. S. 14
2. S. 14(2)(c)
3. S. 14(2)(f)
4. S. 2(f)
5. S. 2(a)
6. S. 2(b)

a) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have;

b) a representation that the supplier has sponsorship, approval, status, affiliation or connection that he does not have;

c) a representation that the goods or services are of a particular standard, quality or grade if they are not;

d) a representation that the goods are of a particular style, model or origin if they are not;

e) a representation that the goods have been used to an extent that is different from their actual use;

f) a representation that the goods are new or unused if they are not or if they are reconditioned, reclaimed, altered or deteriorated;

g) a representation that the goods have a particular prior history or usage if they nave not;

h) a representation that the goods or services have been made available in accordance with a previous representation if they have not;

i) a representation that the goods or services are available, or are available at a reduced price, for a reason that is different from the fact;

j) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not;

k) a representation that the goods or services are available when the supplier knows or ought to know that they are not, or has no intention of supplying them;

l) a representation that a specific price advantage exists if it does not;

m) a representation that a part, replacement, repair or adjustment is needed if it is not;

n) a representation that repairs have been made in parts installed if such is not the case;

o) a representation that the supplier is soliciting or communicationg with consumers with a certain interest or purpose if he is not;

p) a representation that a consumer transaction involves or does not involve rights, remedies or obligations if such a representation is deceptive or misleading;

q) a representation such that a consumer might reasonably conclude that the goods are available in greater quantities than are in fact available from the supplier;

r) a representation as to the authority of a salesman, representative, employee or agent to negotiate the final terms of a consumer transaction if the representation is not acurate;

s) the giving of an estimate or evaluation of the price of goods or services that is materially less than the price subsequently determined or demanded, if the supplier has proceeded with the performance of the consumer transaction without the express prior consent of the consumer;

t) the giving of less prominence is an advetisement or display to the total price of goods or services than to the price of any part of the goods or services;

(u) the giving of less prominence in a representation, advertisement or display to the amount of any instalment to be paid for goods or services than to the total price of the goods or services;

v) a representation that goods or services are free when such is not the case; and

w) a representation using exaggeration, innuendo or ambiguity as to a material fact.[1]

As to unconsionable acts or practices, the statute:

in determining whether an act or practice is unconsionable the court shall consider all the circumstances that the supplier knew or ought to have known, including, without limiting the generality of the foregoing.

a) that at the time the consumer transaction was entered into there was no reasonable probability of full payment of the purchase price by the consumer;

b) that the consumer was unable to receive a substantial benefit from the consumer transaction;

c) that at the time the consumer transaction was entered into the price grossly exceeded the price at which similar goods or services were available to like consumers;

d) that the terms and conditions of the consumer transaction were so considered, harsh or adverse to the consumer as to be inequitable;

e) that the supplier used trickery or undue pressure in order to induce the consumer to enter into the consumer transaction; or

f) that the supplier took advantage of the extreme necessity or helplessness of the consumer or the inability of the consumer to protect his intersts by reason of his physical or mental infirmity, his ignorance, illiteracy, age or emotional state, or his inability to understand the character, nature or language of the consumer transaction.[2]

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1. S. 5(1)
2. S. 6(1)

(3) (e) Ontario

The Business Practices Act, 1974, S.O. 1974, C. 131

This statute entitles a non-commercial consumer[1] to rescind[2] or recover amounts paid in excess of fair value[3] under contracts he was induced into after the other party made a consumer representation that is an unfair practice. Unfair practices include false, misleading or deceptive consumer representations[4] and unconscionable consumer representations.[5] The statute lists factors to be considered in determining whether these exist.[6] These unfair practices may relate to goods or services, and "services" is defined to include services provided in respect of goods or of real property.[7] Arguably a loan agreement can be a type of service in respect of goods if it is provided in respect of those goods.[8] Thus the borrower who is induced by such representations or unconscionable dealings into making a loan may be able to avoid it completely.

The statute states that the following are to be included as situations of false, misleading or deceptive consumer representation:

i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessaries, uses, ingredients, benefits or quantities they do not have,

ii) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have,

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1. S. 1(b)
2. Ibid., s. 4(1)(a)
3. Ibid., s. 4(1)(b)
4. Ibid., s. 2(a).
5. Ibid., s. 2(b).
6. Ibid., s. 2(a) and (b) respectively
7. Ibid., 1(i).
8. See above, para. 4.2.4.8.8, footnote 2.

iii) a representation that the goods are of a particular standard, quality, grade, style or model, if they are not,

iv) a representation that the goods are new, or unused, if they are not or are reconditioned or relaimed, provided that the reasonable use of goods to enable the seller to service, prepare, test and deliver the goods for the purpose of sale shall not be deemed to make the goods used for the purposes of this subclause,

v) a representation that the goods have been used to an extent that is materially different from the fact,

vi) a representation the the goods or services are available for a reason that does not exist,

vii) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not,

viii) a representation that the goods or services or any part thereof are available to the consumer when the person making the representation knows or ought to know they will not be supplied,

ix) a representation that a service, part, replacement or repair is needed, if it is not,

x) a representation that a specific price advantage exists, if it does not,

xi) a representation that misrepresents the authority of a salesman, representative, employee or agent to negotiate the final terms of the proposed transaction,

xii) a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the indication is false or misleading.

xiii) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive,

xiv) a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer;

The statute gives the following factors which may be taken into account in determining whether an unconscionable consumer representation has taken place:

that the person making the representation or his employer or principal knows or ought to know,

i) that the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,

ii) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers,

iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,

iv) that there is no reasonable probability of payment of the obligation in full by the consumer,

v) that the proposed transaction is excessively one-sided in favour of someone other than the consumer,

vi) that the terms or conditions of the proposed transaction are so adverse to the consuemr as to be inequitable,

vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment,

viii) that he is subjecting the consumer to undue pressure to enter into the transaction;

c) such other consumer representations under clause (a) as are prescribed by the regulations made in accordance with section 16.

The right to rescind means that the consumer borrower may demand the return of all his money, and for his part give up all he has received. The objective is to restore the two parties to substantially the same position they were in before the deal took place. The Act allows the consumer to make the demand if there has been an unfair practice. No lender would dispute the right. But more than likely a dispute over whether there was an unfair practice will arise. Only a court can settle this -- should it come to that.

(3) (f) Prince Edward Island

Business Practices, S.P.E.I. 1977, c. 31

A Borrower is entitled to rescind any agreement entered into after a consumer representation that is an unfair practice.[1] This only applies where the borrower is a "consumer", that is, not acting in the course of carrying on business.[2] Unfair practices may relate to goods or services "Services means, among other things, services provided in respect of goods or of real property.[3] Since a loan is a service,[4] the act applies to loans. The right to rescind may be claimed by written notice to the other party within six months.[5] The Act declares that the right to rescind applies notwithstanding any agreement or waiver to the contrary.[6] Unfair practices are of two types: false, misleading or

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1. Section 5(1).
2. Ibid., s. 2(b).
3. Ibid., s. 2 (i)(i).
4. The Oxford English Dictionary, vol. IX (1933), p. 517 defines "service" in part as follows: "26. Permission to use; the loan of a thing for use." This definition is broad enough to cover loans of money. There is little case law of relevance which could be found. However, even in the context of mechanics liens legislation, it has been held that the word "service" has a much wider meaning than at common law. Originally, it seems the word 'service' applied only to something that was done by a servant or workman. See Peterson Truck Co. Ltd. v. Socony-Vacuum Exploration Co. et. al (1955), 17 W.W.R. 257, at 259 (Alta S.C.A.D.), approving Read v. Whitney (1919), 450. O.L.R. 377, at 378 (Ont. C.A.). If the word service in the mechanics lien context can have a meaning much wider than things done by a workman, a fortiori it would have a wide meaning in consumer protection statutes aimed at preventing unfairly induced contracts. Since a loan is a contract under which money is advanced with an obligation to pay (see The Equitable Life Assurance Society of the U.S. v. Larocque' [1942] S.C.R. 205), there would seem to be reason to cut down the wide meaning of services to exclude lending contracts.
5. S. 5(5).
6. Ibid., s. 5(8).

deceptive consumer representations, and unconscioanble consumer representations. A consumer representation is a represetation, statement, offer, request or proposal made respecting or with a view to the supplying of goods or services or both to a consumer, or to receiving consideration (i.e. being paid) for goods or services.[1]

The statute gives the following examples of false, misleading or deceptive consumer representations:

i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have,

ii) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have,

iii) a representation that the goods are of a particular standard, quality, grade, style or model, if they are not,

iv) a representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, provided that the reasonable use of goods to enable the seller to service, prepare, test and deliver the goods for the purpose of sale shall not be deemed to make the goods used for the purposes of this sub-clause,

v) a representation that the goods have been used to an extent that is materially different from the fact,

vi) a representation that the goods or services are available for a reason that does not exist,

vii) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not,

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1. Ibid.. s. 2(c)

viii) a representation that the goods or services or any part thereof are available to the consumer when the person making the representation knows or ought to know they will not be supplied,

ix) a representation that a service, part, replacement or repair is needed, if it is not,

x) a representation that a specific price advantage exists, if it does not,

xi) a representation that misrepresents the authority of a salesman, representative, employee or agent to negotiate the final terms of the proposed transactions,

xii) a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the representation is false or misleading,

xiii) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive,

xiv) a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.[1]

The statute provides that in determining whether or not a consumer representation is unconscionable, the court may consider whether the person making the representation, his employer, or principal, knows or ought to know the following:

i) that the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,

ii) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers,

iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,

iv) that there is no reasonable probability of payment of the obligation in full by the consumer,

v) that the proposed transaction is excessively onesided in favour of someone other than the consumer,

vi) that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable,

vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment,

viii) that he is subjecting the consumer to undue pressure to enter into the transaction,

ix) such other consumer representations under clause (a) as are prescribed by the regulations made in accordance with section 18.[1]

While rescission is more closely related to non-payment than to prepayment; the result of rescinding the agreement is the avoidance of contractual obligations. And if this avoidance takes place at a time that is earlier than the agreed termination date, the effect of rescession is the same as prepayment. Rescission involves putting the parties into the position they were before the agreement was entered into. Thus to seek to rescind the borrower must be able to give back to the lender the money he has received, and vice versa.

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1. S. 3(b).

(4) Express Right to Prepay - with Rebate

When allowed cost

Manitoba and Quebec create a statutory right to prepay, while the other provinces create a right to a rebate upon prepayment. No province requires notice be given to the lender. Every province permits prepayment at any time before the due date, or the expiry of the term, except Saskatchewan which requires prepayment of variable credit be made on an instalment date. In Alberta, Manitoba, Ontario, Quebec and Saskatchewan prepayment may be made in full or in part, the rebate being given once the debt is fully prepaid. In the other provinces, only prepayment in full will entitle a rebate.

How to Calculate the Rebate

The provinces follow two separate paths to arrive at the borrower's rebate. In Alberta, British Columbia, Manitoba, Ontario, Quebec and Saskatchewan the statute provides a formula for determining the lender's share of the cost of borrowing, and by subtraction arrives at the borrower's share. They use the sum of the actual balances method (a modification of the Rule of 78ths), except that in Alberta, Manitoba, Ontario, Quebec and Saskatchewan the simpler Rule of 78ths scheduled balances is used if the loan is not substantially prepayment prepaid before prepayment in sum of the full. In the four Atlantic provinces, the statute sets out a formula to enable direct calculation of the borrower's basic rebate in one step. They use the sum of the scheduled balances method, expressly noting in their regulations that it is a variant of the Rule of 78ths.

You should follow the steps indicated for the province in which you live.

(a) <u>Alberta, British Columbia, Manitoba, Ontario, Quebec and Saskatchewan</u>

These provinces use the sum of the actual balances method to calculate the lender's share of the cost of borrowing, then arrive at the rebate by subtracting the result from the total cost of borrowing. In Alberta, Manitoba, Ontario, Quebec and Saskatchewan, a slight modification (which is identical to the Rule of 78ths in most cases) is used if the loan is <u>not</u> being substantially prepaid. Therefore, the first step is to determine which method you use. In British Columbia, you use the sum of the balances (actual) method in all cases. Otherwise, you must determine from the following whether or not you are substantially prepaying your loan.

(a) (i) <u>Substantial Prepayment</u>

Because the option of using the 'sum of the balances' or the 'sum of the actual balances' depends upon whether 'substantial prepayment' is made in Alberta, Manitoba, Ontario, Quebec and Saskatchewan, the term is defined here. In ontario and Saskatchewan, a substantial prepayment occurs when: (the balane at the end of the period just before prepayment) plus [the greater of (one payment) and (15% of the total obligation)] is less than (the originally scheduled balance at the end of the period just before prepayment).

<u>Example</u>: $1100 principal, $100 cost of borrowing, 12 payments @ $100 each.

Period	As Scheduled Balance	Example A Payment	Example A Balance	Example B Payment	Example B Balance
0	1200	--	1200	--	1200
1	1100	110	1090	140	1060
2	1000	110	980	140	920
3	900	110	870	140	780
4	800	110	760	140	640
5	700	110	650	140	500
6	600	650	0	500	0
7	500				
etc.					

Is there substantial prepayment?

<u>Example A</u>: is 650 + [greator of $100) and (15% x 1200 = $180] less than $700?
$650 + 180 = $830, thus <u>no</u> substantial prepayment. Therefore use sum of scheduled balances.

<u>Example B</u>: is 500 + [greater of ($100) and (15% x 1200 = 180)] less than $700?
$500 + 180 = $680, thus substantial prepayment. Therefore use sum of actual balances method.

In Alberta, a substantial prepayment can occur in two circumstances: (1) where there has been a payment (before prepaying) which was 10% or more of the original face (principal plus cost of borrowing) amount of the loan (<u>e.g.</u>, total debt $4800, look for a payment of $480 or more), or, (2) on prepayment, the <u>actual</u> balance owing is 10% or more less than the <u>scheduled</u> balance at that point in time.

Example

Principal	$3,205.34	
Interest Charges	1,594.66	
Total Gross	$4,800.00	at 21% for 48 months

Loan taken out January 27th, 1976. First payment due March 1st, 1976 at $100.00/month.

Actual Activity on Account - From Ledger Card

Date	Amount Paid	Balance	
January 27th, 1976	Opening Account	$4,800.00	
February 6th, 1976	$500.00*	$4,300.00	
May 4th, 1976	$ 50.00	$4,250.00	
July 17th, 1976	$100.00	$4,100.00	
September 29th, 1976	$250.00	$3,850.00	(a)
Paid out October 4th, 1976			

Activity on Account as it should have occurred (Scheduled Payments)

Date	Amount to be paid	Balance	
January 27th, 1976	Opening Account	$4,800.00	
March 1st, 1976	$100.00	$4,700.00	
April 1st, 1976	$100.00	$4,600.00	
May 1st, 1976	$100.00	$4,500.00	
June 1st, 1976	$100.00	$4,400.00	
July 1st, 1976	$100.00	$4,300.00	
August 1st, 1976	$100.00	$4,200.00	
September 1st, 1976	$100.00	$4,100.00	
October 1st, 1976	$100.00	$4,000.00	(b)

In order for a substantial prepayment to have occurred subtract (b-a). In this case the balance has not been reduced by greater than 480.00 (actual difference $150) but there has been a substantial payment of $500 made on February 6, 1978.

Thus, use the sum of the actual balances method.

In Manitoba, the issue is whether there has been prepayment by a "substantial amount". To determine this, you must know whether: (the sum of the balance unpaid at the beginning and at the end of every period before prepayment according to the schedule) minus (the sum of the balances actually unpaid at the beginning and at the end of every period before prepayment) produces a sum that is greater than (10% of the original debt.)

If so, then you use the sum of the actual balances method. Otherwise, you may use the sum of the scheduled balances method.

Example: $1100 principal, $100 cost of borrowing, 12 payments @ $100 each.

As Scheduled		Example A		Example B	
Period	Balance	Payment	Balance	Payment	Balance
0	$1200	0	$1200	0	$1200
1	1100	100	1100	110	1090
2	1000	100	1000	110	980
3	900	100	900	110	870
4	800	100	800	110	760
5	700	200	600	110	650
6	600(5700	600	0	650	0
etc.	total)	total	5600	total	5550

Example A: is (5700) - (5600) greater than (10% x 1200 = 120) ?
is 100 greater than 120?
Thus, answer is "no" and use the sum of the scheduled balances method.

Example B: is (5700) - (5550) greater than (10% x 1200 = 120) ?
Since answer is yes, use sum of the actual balances method.

In Quebec, the issue is whether there has been enough of a prepayment to amount to the equivalent of one periodic (e.g. monthly) payment. To determine this, you must know whether:

(the sum of the balance owning at the begining of the contract and at the end of each period before prepayment according to the schedule) minus (the sum of the balances actually unpaid at the beginning and at the end of every period before prepayment) produces a sum that is greater than (one periodic payment).

If so, then you use the sum of the actual balances method. Otherwise, you may use the sum of the scheduled balances method.

If so, then you use the sum of the actual balances method. Otherwise, you may use the sum of the scheduled balances method.

Example: $1100 principal, $100 cost of borrowing, 12 payments @ $100 each.

As Scheduled		Example A		Example B	
Period	Balance	Payment	Balance	Payment	Balance
0	$1200	0	$1200	0	$1200
1	1100	100	1100	110	1090
2	1000	100	1000	110	980
3	900	100	900	110	870
4	800	100	800	110	760
5	700	175	625	110	650
6	600(5700	625	0	650	0
etc.	total)	total	5625	total	5550

Example A: is (5700) - (5625) greater than (100)? Thus, answer is "no" and use the sum of the scheduled balances method.

Example B: is (5700) - (5550) greater than (100? Thus, answer is "yes" and use the actual sum of the balances method.

(a) (ii) Sum of the Actual Balances method

Use this method when (a) you are in British Columbia or (b) you are in Alberta, Manitoba, Ontario, Quebec or Saskatchewan and have substantially prepaid your loan. It produces a larger borrower rebate than the sum of the scheduled balances method where the borrower has been making oversize payments in the past.

1. Determine the sum of the balance at the beginning of the contract and the balances actually unpaid at the end of each period up to the date of prepayment. To do this, add the opening balance owning by the borrower before making any payments, to the actual balance remaining after each period is over.

   Example: $1100 borrowed, $100 cost of borrowing scheduled to repay $100 per month for 12 months. Prepay on 6th instalment date.

Period Opening Balance	Example A Balance End of Periods		Example B Balance End of Periods	
		$1200		$1200
(plus) 1	pay $100 -	1100	pay $100 -	1100
(plus) 2	pay 100 -	1000	pay 100 -	1000
(plus) 3	pay 100 -	900	pay 300 -	700
(plus) 4	pay 100 -	800	pay 100 -	600
(plus) 5	pay 100 -	700	pay 100	500
6	prepay 700 -	0	pay 500 -	0
Sum of Balances	to Prepayment	$5700		$5100

This sun is the "numerator".

2. The second step is to take the sum of the balance at the beginning of the contract and the balances at the end of each period until the loan is paid off as they appear on the schedule of payments.

e.g.		
Opening Balance		$1200
End of Period	#1	1100
	2	1000
	3	900
	4	800
	5	700
	6	600
	7	500

2. The second step is to take the sum of the balance at the beginning of the contract and the balances at the end of each period until the loan is paid off as they appear on the schedule of payments.

e.g.

Opening Balance		$1200
End of Period	#1	1100
	2	1000
	3	900
	4	800
	5	700
	6	600
	7	500
	8	400
	9	300
	10	200
	11	100
	12	0
Sum of Scheduled Periodic Balance		$7800

You must add these up if the schedule of payment is varied. If the schedule calls for identical payments over the term, then the following formula may be used:

$$\frac{\text{Term x (Opening Balance + Last Balance)}}{2}$$

In the above example, this would produce

$$\frac{12 \text{ x } (\$1200 + 100)}{2} = \$7800$$

This is the "denominator".

3. The third step is to take the cost of borrowing for the full term (always disclosed to you somewhere in the loan contract) and multiply it by the fraction obtained by dividing the "numerator" (Step 1) by the "denominator" (Step 2). The resulting figure is the share which the lender may retain.

   Example A: Numerator = 5700
   Denominator = 7800
   Cost of borrowing = 100

   $$\text{Lender's share} = \frac{5700}{7800} \times 100 = \$73.08$$

   Example B: Numerator = 5100
   Denominator = 7800
   Cost of borrowing = 100

   $$\text{Lender's share} = \frac{5100}{7800} \times 100 = \$65.38$$

   Ths basic rebate then is calcualted by subtracting the lender's share from the total cost of borrowing.

In addition to the amount calculated by the sum of the actual balances, every province entitles the lender to a futher portion of the cost of borrowing. In Manitoba, and Quebec it is the lesser of $10 or one-half the rebate. In British Columbia it is the lesser of $15 or one-half the rebate. In Alberta, Ontario, and Saskatchewan it is $20 or one-half the rebate. In all provinces except Manitoba and Quebec, the lender is not entitled to this additional amount where prepayment is made as part of a refinancing arrangement or the extension of additional credit. In all provinces except British Columbia and Quebec, the lender may keep any rebate smaller than $2.00, while Quebec rounds all figures to the nearest dollar.

4. The final step is determined by how much you have to pay out in total. This is arrived at simply by taking the balance actually unpaid at the time of prepayment and subtracting the rebate thus calculated. This is arrived at by subtracting from the total original debt (principal plus cost of borrowing) the amount already paid by instalments, and then the borrower's rebate thus arrived at.

Example A: (Manitoba)

Prepaying on the 6th instalment due date of a 12 instalment contract in which the cost of borrowing is $100. Each instalment was $100. Principal amount is $1100. Payment schedule has been as follows:

	Actual		Scheduled	
Period	Payment	Balance	Payment	Balance
0	0	1200	0	1200
1	110	1090	100	1100
2	110	980	100	1000
3	110	870	100	900
4	110	760	100	800
5	100	650	100	700 (5700)
6	650	0	100	600
7	Total	5550	100	500
8			100	400
9			100	300
10			100	200
11			100	100
12			100	0
				7800 Total

Is there substantial prepayment?
Is (sum of balances scheduled before prepayment) - (sum of balances actually unpaid to prepayment) greater than (10% of original debt)?
(5700) - (5550) greater than (1200) yes, thus substantial prepayment thus use sum of actual balances method.

Step 1: Sum of Balances unpaid from opening to last balance = 5550 - this is the numerator

Step 2: Sum of all Balances per the schedule = 7800

Lender's share = $\frac{5550}{7800}$ x 100 (cost of borrowing) = $71.15

Less: lesser of \$10.00 or 1/2 rebate = \$10.00

Borrower's rebate = \$71.15	= \$28.85
Less: lesser of \$10 or 1/2 rebate	10.00
Borrowers Rebate	\$18.85

Balance owing at time of Prepayment	= \$650.00
Less: Rebate to Borrower	18.85
Total Cash to Prepay	\$641.15

Example B: (Ontario)

Prepaying between the 7th and 8th instalment dates, 12 month term. Principal \$1100, cost of borrowing \$100.

Period	Actual Payment	Balance	Scheduled Payment	Scheduled Balance
0	0	1200	0	1200
1	140	1060	100	1100
2	140	920	100	1000
3	140	780	100	900
4	140	640	100	800
5	140	500	100	700
6	140	360	100	600
7	140	220	100	500
8	220	0	100	400
9	Total	5680	100	300
10			100	200
11			100	100
12			100	0
			Total	7800

Is there substantial prepayment?

Is (balance before payment) + [greater of (one payment) or (15% of total debt)] less than (originally scheduled balance just before prepayment)?
is 220 + [greater of (100) or (15% x 1200 = 180)] less than (500) (220) + (180) = 400, which is less than 500, therefore here is substantial prepayment so use sum of actual balances method.

Step 1: sum of actual balances = 5680 - the numerator
Step 2: sum of all balances per schedule = 7800 - the denominator

Lender's share of cost of borrowing

$$= \frac{5680}{7800} \times 100 = \$72.82$$

Basic rebate to borrower = $100 - 72.82		=	$27.18
<u>Less</u>: lesser of $20.00 or 1/2 rebate		=	13.59
Rebate to borrower			$13.59

Balance at time of Prepayment	$220.00
<u>Less</u> Rebate to Borrower	13.59
Total Cash to Prepay	$206.41

(a) (iii) Sum of Scheduled Balances Method

You use this method if there has been no substantial prepayment in all cases in Alberta, Manitoba, Ontario, Quebec and Saskatchewan. It is much like the sum of the balances (actual) method, except that the legislatures say the lender may consider ("deem") the actual balances at the end of each payment to the time of prepayment to be the same as they are in the schedule of loan repayments. Thus the only difference is in step 1.

1. Determine the sume of the balances at the beginning of the contract and the balances umpaid at the end of each period up to the date of prepayment according to the schedule. To do this, add the opening balance owing before any payments are made to the balance remaining at the end of each period.

Example: $1100 borrowed, $100 cost of borrowing, scheduled to pay $100 per month for 12 months.

	Scheduled		Actual	
Period	Balance	Payment	Balance	Payment
Opening Balance	1200	0	1200	0
1	1100	100	1100	100
2	1000	100	1000	100
3	900	100	900	100
4	800	100	800	100
5 A total 5700	700	100	700	100
6	600	100	0	700
7	500	100		
8	400	100		
9 B total 7500	300	100		
10	200	100		
11	100	100		
12	0	100		

Example A: Prepay on the 6th instalment date. Ignore the actual balances. Total the balances as scheduled from the opening to number 5. Total is 5700. This is the "numerator".

Example B: Prepay between 9th and 10th instalment date. Ignore the actual Balances. Total the Balances as scheduled from the opening to number 9. Total is 7500. This is the "numerator".

2. The second step to take the sum of the balance at the beginning of the contract and the balances at the end of each period until the loan is paid off as they appear on the schedule of payments.

e.g.

Opening Balance		$1200
End of Period	1	1100
	2	1000
	3	900
	4	800
	5	700
	6	600
	7	500
	8	400
	9	300
	10	200
	11	100
	12	0
Sum of Scheduled Period Balances		7800

You must add these up if the schedule of payments is varied. If the schedule calls for identical payments over the term, then the following formula may be used:

$$\frac{\text{Term x (Opening Balance + Last Balance)}}{2}$$

In the above example, this would produce

$$\frac{12 \text{ x } (\$1200 + 100)}{2} = \$7800$$

This is the "denominator".

3. The third step is to take the cost of borrowing for the full term (usually disclosed in the loan contract) and multiply it by the fraction obtained by dividing the "numerator" (Step 1) by the "demoninator" (Step 2). The resulting figure is the share which the lender may retain.

Example A:

Numerator	=	5700
Demoninator	=	7800
Cost of borrowing	=	100

$$\text{Lenders share} = \frac{5700}{7800} \text{ x } 100 = \$73.08$$

Example B: Numerator = 7500
Denominator = 7800
Cost of borrowing = 100

$$\text{Lender's share} = \frac{7500}{7800} \times 100 = \$96.15$$

The basic rebate then is calculated by subtracting the lender's share from the total cost of borrowing.

In addition to the amount calculated by the sum of the balances method, every province entitles the lender to a futher portion of the cost of borrowing. In Manitoba, and Quebec it is the lesser of $10 or one-half the rebate. In Alberta, Ontario, and Saskatchewan it is $20 or one-half the rebate. In all provinces except Manitoba and Quebec, the lender is not entitled to this additional amount where prepayment is made as part of a refinancing arrangement or the extension of additional credit. In all provinces except British Columbia and Quebec, the lender may keep any rebate smaller than $2.00, while Quebec rounds all figures to the nearest dollar.

4. The final step is determine how much you have to pay out in total. This is arrived at simply by taking the balance actually unpaid at the time of prepayment and subtracting the rebate thus calculated. This is arrived at by subtracting from the total original debt (principal plus cost of borrowing) the amount already paid by instalments, and then the borrower's rebate thus arrived at.

Example A: (Ontario)

Principal $1100, cost of borrowing $100, 12 payments each @ $100. Prepaid on 6th instalment date (or between 5th and 6th instalment dates).

Period	Actual Payment	Balance	Scheduled Payment	Scheduled Balance
0	0	1200	0	1200
1	100	1100	110	1090
2	100	1000	110	980
3	100	900	110	870
4	100	800	110	760
5	100	700	110	650
6	100	600	650	0
7	100	500		
8	100	400		
9	100	300		
10	100	200		
11	100	100		
12	100	0		
	Total	7800		

Is there substantial prepayment?

Is (balance just before prepayment) + [greater of (one payment) or (15% of total debt)] less than (originally scheduled balance just before prepayment)?

Is (6500) + [(100) or (180)] (700) ?
No: 830 700, thus no substantial prepayment.

Step 1: Numerator is 5700
Step 2: Denominator is 7800
Lender's share = $\frac{5700}{7800}$ x 100 (cost of borrowing)
= $73.08

Basic Rebate to borrower = $100 - 73.08	=	$26.92
<u>Less</u>: Lesser of 20.00 or 1/2 rebate	=	13.46
<u>Rebate</u>:		$13.46

Balance at time of prepayment =	$650.00
<u>Less</u> Rebate	13.46
Cash to Prepay	$636.54

<u>Example B</u>: (Manitoba)

Principal $1100, cost of borrowing $100, 12 payments each of $100. Prepaid between 9th and 10th instalment due dates.

Period	Payment	Balance		Payment	Balance
0	0	1200		0	1200
1	100	1100		100	1100
2	100	1000		100	1000
3	100	900		100	900
4	100	800		100	800
5	100	700		100	700
6	100	600		100	600
7	100	500		110	490
8	100	400		110	380
9	100	300	Total	110	270
10	100	200	7500	270	0
11	100	100		Total	7440
12	100	0			
		7800			

Is there substantial prepayment?

Is (sum of balances before prepayment per schedule) <u>minus</u> (sum of balances unpaid actually) greater than (10% x 1200 = 120)?
(7500) - (7440)   120, thus no substantial prepayment.

<u>Step 1</u>: Numerator is 7500 (sum of scheduled periodic balances up to date of prepayment)
<u>Step 2</u>: Denominator is 7800 (sum of all scheduled periodic balances)

$$\frac{\text{term x(1st balance+last balance)}}{2} = \frac{12\text{x}(1200+100)}{2}=7800$$

$$\text{Lender's share} = \frac{7500}{7800} \times 100 \text{ (cost of borrowing)}$$

$$= \$96.15$$

Borrower's Basic rebate = \$100 - 96.15 =	\$3.85
<u>Less</u>: lesser of \$10 or 1/2 rebate	1.93
Total rebate	\$1.92

Since rebate is less than \$2.00, the lender may keep it. There is no advantage in prepaying here.

(b) <u>The Atlantic Provinces</u> (New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island)

In the four Atlantic provinces, the statute sets out a formula to enable direct calculation of the borrower's basic rebate in one step. It is identical to the rule of 78ths except that it focuses on the borrowers rebate, while traditionally the rule is shown to work out the lender's proportion of the cost of borrowing. Where the instalments are identical, and the periods of the same length, the rule of 78ths may be used subject to the above. Otherwise, you work with the schedule of balances originally planned. There is no advantage to the borrower who has substantially prepaid his loan before prepaying the balance. The steps are as follows.

1. Determine the sum of the scheduled periodic balances due after the date of prepayment. If prepaying between instalment due dates, use the sum of the scheduled periodic balances due after the instalment due date immediately following prepayment. This is the numerator. If the instalments are identical, and the periods are identical, you may use the following formula. Let A equal the number of instalments due after the prepayment according to the above. Then the sume of them is:

$$\frac{A \times (\text{next scheduled balance due} + \text{last instalment due})}{2}$$

<u>Example</u>: \$1100 principal, \$100 cost of borrowing, 12 equal monthly payments of \$100 each.

Period	Payment	Balance (per schedule)			
0	0	1200			
1	100	1100			
2	100	1000			
3	100	900			
4	100	800			
5	100	700			
6	100	600			
7	100	500			
8	100	400		B	
9	100	300	A		
10	100	200			C
11	100	100			
12	100	0			

A. Prepayment on 5th instalment due date:

add: 600 + 500 + 400 + 300 + 200 + 100 = 2100

<u>or</u> A = 6, thus $\frac{6x(600+100)}{2}$ = 2100 (numerator)

B. Prepayment on 3rd instalment due date:

add: 800 + 700 + 600 + 500 + 400 + 300 + 200 + 100 = 3600

<u>or</u> A = 8, thus $\frac{8x(800+100)}{2}$ = 3600 (numerator)

C. Prepayment between 7th and 8th instalment due dates: (trated as if prepaid on 8th instalment due date)

add: 300 + 200 + 100 = 600

or A = 3, thus $\frac{3x(300+100)}{2}$ = 600 (numerator)

2. The second step to take the sum of the balance at the beginning of the contract and the balances at the end of each period until the loan is paid off as they appear on the schedule of payments.

e.g.	Openning Balance	\$1200
	End of Period 1	1100
	2	1000
	3	900
	4	800
	5	700
	6	600
	7	500
	8	400
	9	300
	10	200
	11	100
	12	0
Sum of Scheduled Periodic ances		7800

You must add these up if the schedule of payments is varied. If the schedule calls for identical payments over the term, then the following formula may be used:

$$\frac{\text{Term x (Opening Balance + Last Balance)}}{2}$$

In the above example, this would produce

$$\frac{12 \text{ x } (1200 + 100)}{2} = \$7800$$

This is the "denominator".

3. The third step is to take the cost of borrowing for the full term (usually disclosed in the loan contract) and multiply it by the fraction obtained by dividing the "numerator" (Step 1) by the "demoninator" (Step 2). The resulting figure is the borrower's basic rebate.

Examples: \$1100 principa, \$100 cost of borrowing, 12 monthly payments of \$ each.

A. Prepay on 5th instalment due date (example A, step 1)

Numerator = 2100
Demonimator = 7800
Basic rebate = $\frac{2100}{7800}$ x 100 = \$26.92

B. Prepay on 3rd instalment due date (example 3, step 1)

Numerator = 3600
Denominator = 7800
Basic rebate = $\frac{3600}{7800} \times 100 = \$46.15$

C. Prepay between 7th and 8th instalment due date (example C, step 1)

Numerator = 600
Denominator = 7800
Basic rebate = $\frac{600}{7800} \times 100 = \$7.69$

The basic rebate thus arrived at is reduced by further amounts. In Newfoundland, it is the lesser of $10 or one half the rebate. In New Brusnwick, Nova Scotia and Prince Edward Island, it is $20 or one half the rebate. The lender is not entitled to this extra amount (called the "acquisition fee") if prepayment is part of a refinancing arrangement or the extension of new credit. In Newfoundland and Prince Edward Island, the lender is entitled to it only where prepayment is made in the first third of the term. The lender may keep any rebate smaller than $2.00.

4. The final step is determine how much you have to pay out in total. This is arrived at simply by taking the balance actually unpaid at the time of prepayment and subtracting the rebate thus calculated. This is arrived at by subtracting from the total original debt (principal plus cost of borrowing) the amount already paid by instalments, and then the borrower's rebate thus arrived at.

<u>Example A</u>: Nova Scotian prepaying on the 9th instalment due date in a 13 instalment contract cost of borrowing \$182, original loan \$1300, each instalment \$114. Total debt at start is \$1482 (\$1300 + 182).

<u>Step 1</u>: Since payment made on 9th instalment due date, 4 instalments left, thus A = 4.

$$\text{Numerator} = 4 \times \frac{(400 + 100)}{2} = 1000$$

<u>Step 2</u>: Term is 13. 1st balance is \$1482. Last balance is \$114.

$$\text{Denominator} = \frac{13 \times (1482 + 114)}{2} = 10374$$

<u>Step 3</u>: Basic rebate = $\frac{1000}{10374} \times 182 = \$17.54$

Reduction in rebate (acquisition fee) - lesser of \$20.00 or 1/2 rebate = \$8.77

Rebate to borrower = <u>\$8.77</u>

Balance at time of prepayment =
\$1482 - (9 x 114) = \$456.00
Less rebate 8.77

Total cash to prepay <u>\$447.23</u> (Pay Out)

<u>Example B</u>: Newfoundlander prepaying between 15th and 16th instalment due dates in a 36 instalment contract, cost of borrowing \$666, principal amount \$3600, each instalment \$118.50. Total debt \$4266.

Step 1: Number of instalments left (treated as if paid on 16th instalment due date) = 20, thus A = 20.
Next balance = $4266 (total debt) - 16 x 118.50 (amount normally paid at end of 16th due date) = $2370

Thus numerator = $\frac{20x(2370+118.50)}{2}$ = 24885

Step 2: Term = 36
First balance = $4266
Last balance = $118.50

Denominator = $\frac{36 \times (4266 + 118.50)}{2}$ = 78921

Step 3: Basic rebate = $\frac{24885}{78921}$ x $666 = $210.00

Reduction in rebate - none since prepayment made outside the first 3rd of the term.

Step 4: Balance at time of prepayment = $4266 (original debt) - (15 x 118.50 the amount actually already paid at that time)

	= $2488.50
Less rebate to borrower =	210.00
Total cash to repay	$2278.50 (Pay out)

Who is covered

In all provinces, the rebate entitlement arises in both loan agreements, and purchases of goods or services where the price is paid over time. All provinces have exempted classes of borrowers, classes of lenders, or classes of loans from the operation of the rebate entitlement. Because of the importance of the exemptions, they are listed in full in this chapter. Every province except Manitoba and Quebec exempts credit given for industrial, business or commercial purposes, although Alberta, British Columbia, Prince Edward Island and Saskatchewan cover business borrowers such as farmers, fisherman, ranchers and feed-lot operators. Manitoba exempts loans to corporations. Quebec's law only applies where the borrower is a consumer, that is, physical persons other than merchants.

Generally, the size of the loan is irrelevant. However. Alberta exempts time sales less than $50., Manitoba exempts arrangements in which the cost of borrowing is $10 or less, and Quebec's statute does not apply where the amount of credit is $50 or less. Manitoba's statute does not apply where the loan, sale or hire purchase exceeds $7500 except loans secured by the borrower's mobile home.

Agreements to Waive Acts

Every province provides that agreements purporting to release or waive the applicability of the act are to be ignored. Manitoba, New Brusnwick, Nova Scotia and Saskatchewan have gone farther and void arrangements which effectively limit the application of the acts. In these four provinces plus Quebec a lender cannot enforce a bonus clause upon the borrower prepaying. Manitoba, New Brunswick, Nova Scotia and Quebec provide that money paid under void agreements is recoverable in court.

Exemptions from the Act

The provincial statutes will cover most consumer loans. However legislation in each provicne has expressly made certain borrowers, lenders or types of loans exempt. Because each province differs, each is treated separately here.

(a) Alberta

The basic exemption is that there is no right to prepay any loan which is not precomputed, that is, in which the cost of borrowing for the full term has not been added to the principal amount to make the total debt.

The statute also exempts time sales where the amount of the sale is less than $50,[1] sales made by manufacturers or distributors to wholesalers,[2] and sales made by manufacturers, distributors and wholesalers to retailers.[3] By regulation, time sales to industrial or commercial enterprises other than those to farms, ranches and feed lot operators for their respective operations,[4] time sales of land[5] sales to provincial, municipal and federal governments and their agencies,[6] and sales of services by public utility companies,[7] are also exempted.

The statute exmpts loans made to manufacturers, distributors, wholesalers, and retailers in the course of their business and upon the security of his stock or inventory,[8] and loans made by pawnbrokers in the ordinary course of their business.[9] The regulations have exempted loans to industrial or commercial enterprises other than those to farms, ranches and feed lot operators for their respective business,[10] loans secured by mortgage[11] loans to municipal, provincial or federal governments and their agencies,[12] loans by life insurance companies on the cash surrender value of their policies,[13] loans made by Greyhound Leasing and Financial of Canada

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1. S. 4(a)
2. Ibid., s. 4(b)(i)
3. Ibid., s. 4(b)(ii)
4. A reg. 178/68 s. 3(a)
5. Ibid., s. 3(c)
6. Ibid., s. 3(d)
7. Ibid., s. 3(e)
8. Ibid., s. (10) (a)
9. Ibid., s. (10) (b)
10. Alta. Reg. 178/68, s. 3(a)
11. Ibid., s. 3(b)
12. Ibid., s. 3(d)
13. Ibid., s. 3(f)

loans made by Greyhound Leasing and Financial of Canada Ltd.,[1] loans made under the Student's Assistance Act and the Canada Student Loan Act,[2] and all loans made under the Alberta Livestock Guarantee Regulations.[3]

1. Ibid., s. 3(g)
2. Ibid., s. 3(h)
3. Ibid., s. 3(i)

(b) British Columbia

British Columbia also exempts loans which are not precomputed from prepayment rights, that is, those loans in which the cost of borrowing for the full term has not been added to the principal amount to make the total debt. Also exempted is credit extended in respect of the sale of goods intended for resale.[1]

The regulations declare the prepayment provisions inapplicable to the following classes of credit transactions: to any person in respect of a sale or extension of credit to an industrial or commercial enterprise other than that of a fisherman or a farm, ranch or feed-lot operator, for its industrial or commercial purposes;[2] to any person in respect of a sale or exension of credit to a municipal, provincial or federal government or their agencies;[3] to a life insurance company in respect of credit extended to its policy-holders solely on the cash surrender values of their policies;[4] to a corporation in respect of credit extended through its bonds or debentures;[5] to any person in respect of an extention of credit on the security of a mortgage or agreement for sale of real or leasehold property;[6] to a credit union in respect of the sale by it of its shares under an endowment contract;[7] and to any lender in respect of a guaranteed student loan within the meaning of the Canada Student Loan Act.[8]

(c) Manitoba

Manitoba exempts the occasion lender, that is, the lender who has neither system nor continuity in his lending. Also exempted by statute are: sales on variable credit[9], and sales in which the cost of borrowing is less than $10.[10] Likewise, it does not apply to the registered pawnbroker.[11]

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1. Section 1, description of "credit".
2. B.D. Reg. 219/67, s. 2.01(a)
3. Ibid., s. 2.01(b)
4. Ibid., s. 2.01(c)
5. Ibid., s. 2.01(d)
6. Ibid., s. 2.01(e)
7. Ibid., s. 2.01(f)
8. Ibid., s. 2.01(g)
9. S. 4(i)(a)
10. S. 4(i)(b)
11. S. 1(p)

The regulations exempt the following:

(a) agreements made by credit grantors under the authority of any statute of Canada or Manitoba where the government of Canada or the government of Manitoba provides any guarantee to the credit grantor; or

(b) sales of service by public utilities companies other than services supplied in connection with a sale of goods; or

(c) loans made by a money lender that are repayable
(i) on demand,
(ii) in amounts that are not fixed, and
(iii) on dates that are not fixed
provided that the cost of borrowing is disclosed as a rate per cent per annum that is applied, not in advance, to the balance outstanding from time to time; or

(d) sales of goods or services, or both, made to federal, provincial or municipal governments or any agencies, thereof.[1]

The words "retail sale" (to which sales alone the prepayment right extends) mean any contract of sale of goods or services or both made by a seller in the course of his business except where the goods are intended for resale by the buyer in the course of his business,[2] sales to retailer of vending machines or bottle coolers for their retail establishments,[3] sale of farm machinery to which The Farm Machinery and Equipment Act apply,[4] sales to corporations,[5] and sales where the price exceeds $7,500.[6]

The prepayment right also exends to every retail hire purchase of goods in which the cost of borrowing exceeds ten dollars.[7] There is statutorily defined to mean any hiring of goods from a

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1. Man. reg. 102/78, effective June 1, 1978, s. 2.
2. Section 1(+)(i)
3. Ibid., s. 1(+)(ii)
4. Ibid., s. 1(+)(iii)
5. Ibid., s. 1(+)(iv)
6. Ibid., s. 1(+)(v)
7. R.S.M. 1970, c. C200 s. 5(i)

person in the course of his business in which the hirer is given an option to purchase[1] or in which the hirer will become owner or be entitled to keep the goods indefinitely upon compliance with the terms of the contract.[2] Several exceptions are found in the statute as follows: hirings in which the hirer is given an option to purchase the goods exercisable at any time during the hiring and which may be determined by the hirer at any time prior to the exercise of the option on not more than two months or notice without any penalty,[3] hire purchases by hirers who intend either to sell them or relet the goods for hire,[4] hire purchases by retailers of vending machines or bottle coolers to be installed in his retail establishment,[5] hire purchases of farm machinery to which The Farm Machinery and Equipment Act applies,[6] hire purchases by corporations[7] and hire purchases in which the cash price exceeds $7500.[8] These exceptions are analogous to those provided in respect of retail sales and basically exempt commercial users.

The prepayment right in the statute is extended to every loan of money made by a money lender except loans secured exclusively on real property,[9] loans of more than $7500 unless the security is a mobile home used primarily as a residence by the borrower,[10] loans to corporations,[11] loans by insurance companies to policy holders pursuant to provisions in their policies,[12] and loans in which the cost of borrowing does not exceed ten dollars.[13] Regulations exempt futher types of loans as follows: loans made the authority of any statute of Canada or Manitoba whereby the government provides a guarantee to the credit grantor;[14] and

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1. Ibid., s. 1(s)(i)
2. Ibid., s. 1(s)(ii)
3. s. 1(s)(iii)
4. Ibid., s. 1(s)(iv)
5. Ibid., s. 1(s)(v)
6. Ibid., s. 1(s)(vi)
7. Ibid., s. 1(s)(vii)
8. Ibid., s. 1(s)(viii)
9. R.S.M. 1970, c. C200, s. 13(1)(a).
10. Ibid., s. 13(1)(b)
11. Ibid., s. 13(1)(c)
12. Ibid., s. 13(1)(d)
13. Ibid., s. 13(i)(e)
14. Reg. 46/72, s. 8, s. 2(a)

loans made by money lenders that are repayable on demand, in amounts that are not fixed and on dates that are not fixed if the cost of borrowing is disclosed as a rate per cent per annum that is applied, not in advance, to the balance outstanding from time to time.[1]

(d) New Brunswick

New Brunswick's statute does not apply to occasional lenders, that is, those lenders who have neither system nor continuity in their lending. Credit given in the security of a mortgage of real property,[2] in respect of the sale of goods intended for resale,[3] for industrial or commercial purposes,[4] or for a sum less than $505 are excluded by the statute.

(e) Newfoundland

The statute does not apply where credit is extended on the security of a mortgage of real property,[6] in respect of the sale of goods for resale[7] or for industrial or business purposes.[8] The regulations stipulate that the Act does not apply to loans made by life insurance companies to policy holders solely on the security of the cash surrender values of their policies,[9] or to loans made by a credit union to its members.[10] Other than to these exceptions, the Act then applies to all classes of borrowers and lenders.

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1. Ibid., s. 2(c)(i), (ii) and (iii)
2. Ibid., ss. (c)
3. Ibid., ss. (d)
4. Ibid., ss. (e)
5. Ibid., ss. (f)
6. Ibid., s. 2(d)(iii)
7. Ibid., s. 2(d)(iv)
8. Ibid.,s. 2(d)(v)
9. Nfld. Reg. 139/70, s. 12(a)
10. Ibid., s. 12(6)

(f) Nova Scotia

Loans on the security of a mortgage of real property,[1] in respect of the sale of goods intended for resale,[2] or for industrial or business purposes of the borrower[3] are exempted by statute. No classes of lenders or borrowers have been exempted by regulation.

(g) Ontario

The statute exempts credit given on the security of a mortgage of real property.[4] The regulations exempt a person who borrows in the course of carrying on business and a person who lends to a person who borrows in the course of carrying on business.[5] They also exempt persons who buy goods or services for purposes of resale in the ordinary course of trade or for ue in the further production of goods or services.[6] They also exempt persons who sell to such buyers.[7] The statute declares itself not to apply to the sale of public utilities or to charges for transmission, distribution or storage of gas.[8]

(h) Prince Edward Island

Credit extended on the security of a mortgage on real property,[9] in respect of the sale of goods intended for resale,[10] or for industrial or business purposes of the borrower (except where principal use is in fishing of farming operations)[11] is excluded by statute. No further classes of borrowers or lenders have been exempted by regulation.

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1. S. 1(d)(ii)(A)
2. S. 1(d)(ii)(B)
3. S. 1(d)(ii)(C)
4. Section 1(e)(ii)
5. O. Reg. 258/74,s. 2(1)(a)
6. Ibid., s. 2(1)(b)
7. Ibid., s. 2(1)(c)
8. Section 2.
9. S. 2(d)(iii)
10. S. 2(d)(iv)
11. S. 2(d)(v)

(i) Quebec

The act does not apply to contracts in which the amount of credit does not exceed $50.[1] Nor does it apply to gas distributors or electricity distributors, as defined, for the sale of electricity or gas;[2] brokers, security issuers and salesmen as defined in the Securities Act;[3] loans guaranteed by either the Government of Canada or of Quebec or their agents;[4] contracts within the jurisdiction of the Transportation Board;[5] contracts of a public service;[6] insurance contracts;[7] annuity contracts;[8] contracts where credit is extended to a consumer secured by a privilege or hypothec attached to an immoveable comprising more than four dwellings or used mainly for commercial, industrial a professional purposes;[9] and contracts of hire of tangible property except where ownership is deferred.[10] Nor does it apply where the consumer is dealing with them than a "merchant".

The regulations exempt every contract under which credit is extended secured by an immovable privilege of whatever rank[11] and by a hypothec ranking first irrespective of the purchase for which the credit is extended.[12] All other hypothecs are exempted if the merchant discloses the credit charge in the correct manner two days before concluding the contract,[13] discloses the credit charge in French unless required in English,[14] annexes a copy of the disclosure to the contract,[15] and sets out the notice to recover more than one payment still owing at the expiration of the term.[16]

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1. Section 10
2. O.C. 1408-72, s. 2.05(a)
3. Ibid., s. 2.05(b)
4. Ibid., s. 2.05(c)
5. Ibid., s. 2.05(d)
6. Ibid., s. 2.05(e)
7. Ibid., s. 2.05(f)
8. Ibid., s. 2.05(g)
9. Ibid., 2. 2.05(h)
10. Ibid., s. 2.05(i)
11. O.C. 1408-72, s. 2.06A(a)
12. Ibid., s. 2.06(A)(b)
13. Ibid., s. 2.07(a)
14. Ibid., s. 2.07(b)
15. Ibid., s. 2.07(c)
16. Ibid., s. 2.07(d)

(j) Saskatchewan

The statute excludes credit given on the security of a mortgage of real property[1] and in respect of goods intended for resale.[2] The regulations exempt loans by life insurance companies to policy holders solely on the security of the cash surrender value of their policies[3], sales of servics by public utility companies,[4] sale or purchase of corporate bonds and debentures[5], sales or loans to industrial or commercial enterprises other than farms, ranches and feed lot operators for their operations,[6] and all contracts of hail insurance.[7]

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1. Section 2(2)(a)
2. Section 2(2)(b)
3. Sask. Reg. 273/67, s. 9(a).
4. Ibid., s. 9(b)
5. Ibid., s. 9(c)
6. Ibid., s. 9(d)
7. Ibid., s. 9(e)

Rights Against Assigness

Introduction

Credit transactions commonly involve consumers in the law of assignment - a complex area governed by a mixture of federal laws, provincial law and Common Law. Assignment almost always arises where the consumer has not paid cash on the line, but has obtained the goods or services in exchange for a promise to pay the seller at a future date. The seller wants (and needs) cash at once, and accordingly will agree with a bank or financier to sell the consumer's promises to pay in exchange for immediate cash. The bank or financier then expects to be able to stand in the shoes of the seller and collect the promised amounts from the consumer thereby recovering his cash outlay. The bank, lending company, financier or other person who gives the seller cash for the consumer's promises is called the "assignee". These transactions, involving consumer, seller and assignee work in most cases; this is, the consumer simply pays the assignee. But the consumer may wish to reduce payments to the assignee if, for example, the product is defective, requires repairs, is never delivered or otherwise causes the consumer financial expense. In some cases such a reduction is possible, in others, it is not.

If the original seller owes the consuemr money for reasons such as these and the law does not permit the consumer to stop or reduce payments to the assignee, the consuemr still has the right to demand that the seller pay him his loss directly. The consumer recovers the loss, although there may be some expense involved in getting the seller to pay. The real problem with assignments arrises when the seller is insolvent, bankrupt, out of business, or has simply disappeared. At this point, the issue whether the consumer may reduce or stop payments to the assignee becomes crucial. If the law does not permit a cessation or reduction of payments, and the original seller has gone, the consumer is left paying the assignee full value when he has received part value or nothing at all. If the law permits a cessation or reduction of payments, the consumer pays the assignee the part value or perhaps nothing at all - depending onthe seriousness of the wrong done by the seller to the consumer.

The consumer must pay particular attention to each of the following rights against assignees. IF YOUR CASE DOES NOT FALL INTO ONE OF THE FOLLOWING CATEGORIES, YOU MUST PAY THE ASSIGNEE: YOU MAY NOT STOP OR REDUCE PAYMENTS BECAUSE OF A DISPUTE WITH THE ORIGINAL SELLER! If you have no right against the assignee, you must make your demand for compensation directly from the original seller. If the original seller for any reason cannot pay you in such as case, you have no further recourse.

(a) A consumer has certain rights against the seller. These rights may be claimed against the assignee, if the assignee is demanding payment of a promissory note[1] or a bill of exchange[2] stamped with the words "consumer purchase",[3] not with standing any agreement on the contrary.[4]

Example:

A agrees to buy a TV from B for $600. A gives B 6 post dated cheques of $100 each. Each is stamped "consumer purchase". B and A also have a contract, signed by both parties detailing the terms. In part, B agrees to pay for repairs for one year. Another clause states:

> "if the seller (B) should assign the poast dated cheques in good faith to a third party, the buyer (A) agrees the the buyer is precluded as against such third party from raising any defence or right of set off, that the buyer would have had an in action by the seller on such post dated cheques."

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1. For discussion of what is a promisory note, see para. .
2. For discussion of what is a bill of exchange, see para. ________.
3. For discussion of when notes must be so stamped, see para. .
4. S. 191, Bills of Exchange Act, R.S.C. 1970, c. B-5, Althought the courts may look behind the words at issue of whether it is in fact a consumer purchase." See Neptune Acceptance Ltd. v. Williams (1974), 5 O.R. (2d) 158.

The TV set breaks down, and repairs total \$125.00. B refuses to pay for them. C, a bank to whom B has assigned the post dated cheques, is upset and demands payment of \$200 when A stops payment on two cheques.

The bank is only half right. B must pay the \$75, but need not pay the \$125. The agreement not to raise defences is meaningless. The bank took the notes subject to the equities; that is, A can defend himself against the bank just as if it was the original seller demanding payment.

(b) A consumer is not obliged to pay the assignee if the assignee is demanding payment of a primissory note or post-dated cheque which should have been stamped "consumer purchase"[1] but is not, if the assignee is <u>not</u> a "holder in due course".[2]

<u>Example</u>:

A buys a TV from B, and pays for it with a promissory note to B for \$600. B immediately assigns the promissory note to C for \$525 cash. The note is not marked "consumer purchase", although it should have been because A bought it for personal use from B, who runs a T.V. sales busines. B sells all his notes to C; C supplies B with all his sales forms and blank promissory notes. C and B regularly lunch together, and C also gives B management advice. B has a shaky reputation; no other lender will take assignments of his notes. C survives by buying B's notes, and enforcing them strictly regardless of the sale lying behind them. C has often boasted to B, "I'll buy all your promissory notes, you get cash, and I make a profit. Who cares about your shoddy merchandise? My lawyer says I'm a 'holder in due course' and am immune from complaints of your customers." C is probably mistaken due to 1. his close relationship, 2. his lack of good faith, and probably, 3. his indifference to known suspicions. He is thus <u>not</u> a holder in due course. He cannot collect on the promissory note -- even if the TV is perfectly sound.

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1. To determine when a note or bill should be so stamped, see para. ________.
2. To determine who is a holder in due course, see para. ________.

(c) A consumer has certain rights against a seller. These rights may be claimed by him against the assignee if the assignee is demanding payment of a promissory note or bill of exchange[1] and is not a "holder in due course.[2] Examples are found in discussion of "who is a holder in due course".[3]

(d) A consumer has certain rights against the seller. These rights may be claimed against the assignee if the assignee is demanding payment according to a simple contractual promise to pay.[4] In every province this right is not affected by a "cut-off" clause.[5] The rights claimed by the consumer against the assignee must be related to the original contract between seller and consumer.[6]

Example A:

A buys a TV from B. A and B write a simple contract. It says that A agrees to pay $100 for the

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1. For discussions of what a promissory note and bill of exchange are, see para. .
2. For discussion of what a holder in due course is, see para. ________.
3. Ibid. See Federal Discount v. St. Pierre (1962), 32 D.L.R. (2d) 86 (Ont. C.A.).
4. For discussion of what a simple contractual promise to pay is, see para. ________.
5. For discussion of what a cut off clause is, see para. ________.
6. While not the place for a detailed discussion of the law of assignment, the following is important. There are two types of assignment - legal and equitable - of two types of choses in action - legal and equitable. Generally, statutes such as Conveyancing and Law of Property Act, R.S.O. 1970, C.85, S.54 dictate that legal assignments are passed "subject to all equities that would have been entitled to priority over the right of the assignee". Likewise, equitable assignments are always viewed as taken subject to the equities. Here the equitable standard has been extended for all purposes. See, for brief discussion of the equitable standard, McManus v. Wilson (1908), W.L.R. 106 (Man. C.A.).

T.V. belonging to B, and B agrees to sell the same T.V. to A. A agrees to pay B $20 per month starting March 15, 1979 and ending with a $20 payment July 15, 1979". B sells his contractual right to be paid to C for $80 immediate cash. The T.V. breaks down in a cloud of smoke and shattering glass -- it was worthless. C, on March 16, tries to collect $20 from A. A refuses to pay, claiming that certain implied conditions of sale were breached and accordingly A owed B nothing, and therefore owes C nothing. A is correct. Since C is the assignee of a simple contract, C took the risk that the contract was bad, that is, the implied conditions of sale were breached.

Example B:

A buys a T.V. From B for $500. A and B sign a simple contract much like that in the previous example, providing instead for 10 monthly payments of $50 ending December 15, 1979. A also employs B to paint his dining room. A pays B $100 in advance for the job, promising to pay B $50 more plus materials upon completion. B assigns the T.V. contract to C for $450 cash. The T.V. works well, but B never paints the dining room. Come March 15, A refuses to pay C the $50, saying he will withhold the first two instalments totalling $100 to recover the $100. A is wrong. The two transactions are wholly independent. A must pay C, notwithstanding the fact that B owes A $100 for the work which was paid for but not completed.[1]

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1. See The Exchange Bank v. Stinson (1881), U.C.P.C. 158 (lawyer successfully resisted assignee); McManus v. Wilson (1908), W.L.R. 106 (Man. C.A.) (lawyer unsuccessfully resisted assignee). The issue is 'how independent' are the two transactions? The above is a clear cut case. But even an independent claim by the buyer can be used against the assignee of a separate contractual promise to pay, if the matter relied upon arose in reliance upon the first contract being fulfilled; that is, where 'the debts are independent, the credit is mutual'. See McManus, op.cit. at p. 109.

How does a simple contractual promise to pay differ from a "promissory note" or "bill of exchange" (cheque)

This question must be asked because both types of document contain a contractual promise to pay. They are both contracts. But they differ in that a simple contract is conditional, while a promissory note or bill of exchange is always unconditional. If what looks to be a bill of exchange or promissory note turns out to be conditional, it reverts to the status of a simple contract.

The law is made complex because a consumer may be asked to sign two different types of documents. While each contains a promise to pay made by the consumer to the seller, their legal significance once assigned is quite different. On the one hand, a consumer may sign a simple contract, one clause of which contains his promise to pay. A financier may buy this promise from the seller (though they seldom do) and will then expect the buyer to pay the financier, not the seller. On the other hand, the consumer may have signed a "promissory note" or a "bill of exchange" (such as a simple cheque). Financiers may buy these two documents as well - in which case they will expect the buyer (if it was a promissory note) or the bank (if it was a cheque) to pay them rather than the seller. The first matter, in cases of assignment, to straighten out is whether or not the document sold (assigned) is a simple contract.

Example of Contractual Promise to Pay

A wants to buy a T.V. from B. A signs a contract with B. In the contract, one clause says that B agrees to sell the T.V. to A. Another says that B agrees to pay for the T.V. at $100 per month for six months starting in thirty days. Other clauses state the the seller warrants the T.V. to be fit, and that B will pay for all parts and labour required in the first twelve months. Despite the clause in which the buyer agreed to pay the seller, this document is not a promissory note. Rather it is a simple contractual promise to pay, with one term requiring the buyer to pay the seller a specific sum of money.

<u>What is a "Bill of Exchange"</u> (for example, a "cheque")

The federal <u>Bill of Exchange Act</u>[1] defines a bill of exchange. The definition has produced many legal disputes. The basic components of a bill of exchange are: 1) it must be unconditional, 2) it must be written, 3) it must be addressed by one person to another, 4) it must order the other person to pay a specified person, 5) it must specify the sum to be paid, 6) it must state either that the specified person is to be paid whenever that person wants (on "demand") or whether he is to be paid on some specified date and 7) it must be signed by the person giving it.[2] The most common bill of exchange is the cheque. The cheque is simply a bill of exchange in which the person ordered to pay another is a bank.[3] Since most cheques are written on printed forms supplied by banks, little problem arises. The most crucial element of a bill of exchange (including cheques) is that they be unconditional - and this is one area where a consumer may have changed the nature of the printed form by adding extra words to it.

<u>Example A</u>:

A wants to buy a T.V. from B. A gives B a note which says "Royal Bank. Pay to the order of B the sum of $300. Signed: A." It is dated January 1, the day it is signed. This is a cheque: an unconditional order addressed to the bank requiring the bank to pay B a specific sum of money.

<u>Example B</u>:

A wants to buy a car from B. A is a member of a co-op where his "chequeing" account is kept. A gives B a "cheque" which says "ABC Co-Operative Society. Pay to the order of B the sum of $300. Signed A." It is dated January 1, the day it is signed. This is a bill of exchange. But it is <u>not</u> a cheque, because the person ordered to pay B is not a bank. Likewise, "cheques" written on accounts in trust companies, credit unionts and Caisee populaires are not, legally, cheques. But they are, legally bills of exchange.

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1. R.S.C. 1970, c. B-5
2. <u>Ibid.</u>, Section 17(1)
3. <u>Ibid.</u>, s. 165

Example C:

A wants to buy a car from B. A has a chequing account at a bank. A writes on the cheque form B's name and the amount $300. A writes below the line for the amount the words "When B gets the car safety checked". These words have made the order conditional. It is no longer a bill of exchange, therefore it is no longer a cheque.

What is a Promissory Note

The federal Bills of Exchange Act[1] defines a promissory note. The definition has produced many legal disputes. The basic components of a promissory note are: 1) it must be unconditiona, 2) it must be written, 3) one person must promise to pay another person, 4) the amount to be paid must be specified, 5) it must state either that the person is to be paid whenever that person wants (on "demand") or that he is to be paid on a specified date, 6) it must be signed by the person making the promise, 7) it either names the person to be paid, or allows that named person to dictate another who is to be paid, or be made "to bearer" in which case anybody possessing it can demand payment.[2] The most common promissory note is a very simple document, saying "I, A promise to pay B the sume of $100 on January 1, 1980. Signed A." Most are made on a printed form. Rarely, however, a buyer or seller will alter the nature of the printed form by adding extra words to it. If the alterations make the note conditional, it ceases to be a promissory note, and becomes a simple contractual promise to pay.

Example A:

A owes B money. A gives B a slip of paper on which is written, "Dated January 1, 1979. I promise to pay B $100 January 1, 1990. Signed: A". This is a promissory note - it is an unconditional promise by A to pay B a specific sum on a specified date, signed by A.

Example B:

A wants to buy a car from B for $1000. They agree to sign the following note: "A agrees to pay B $1000 for B's 1965 Valiant, licence #123-ABC when B delivers the car with a safety check certificate to A's house." This is not a promissory note. It is a promise to pay, but is made conditional on 1) the car belonging to B, 2) the car being safety checked, and 3) the car being delivered to A's house with the safety check. It is a simple contractual promise to pay.

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1. R.S.C., 1970, c. B-5
2. Ibid., s. 165

When must promissory notes or post dated bills of exchange be marked "Consumer Purchase"?

There are two clear situationsl in which the credit granter - be he lender or seller - must stamp these instruments "consumer purchase":

1. the instrument is issued (delivered in completed form) + + s in respect of a "consumer purchase", and the purchase is liable on it; and2

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1. This is the topic of an excellent paper by M. Milrod entitled "Part V of the Bills of Exchange Act: Effective Consumer Protection Legislation" in the files of the Consumer Research and Evaluation Branch (1978); see also Ziegel, "Consumer Notes and Part V of the Bills of Exchange Act - More Trouble Viewing", Can. Bus. L.J. 262 (1977). On the basis of the case of Canadian Acceptance Corp. Ltd. v. Galbiati et al. [1977], 1 W.W.R. 280 it may be argued that any time a lender loans money to a consumer knowing that a consumer purchase will take place with it, the act applies. This is a dubious proposition, and criticized in Royal Bank of Canada v. Seinens (1978), 82 D.L.R. (3d) 527, and Re MacLaven (1979), 88 D.C.R. (3d) 222. It may be true that such a lender will be required to mark the note at least where some sort of close or intimate relationship exists between lender and seller - see C.I.B.C.V. Langois (1977), 2 B.C.L.R. 83 and CIBC v. Lively (1974), 46 D.L.R. (3d) 432. But Bank of Montreal v. Kon et al. (1978), 82 D.L.R. (3d) 609 suggests this is the case only where the lender was a party to the wrongful act of the seller. The difficulty in establishing liability against the non-selling lender is the definition of "consumer purchase" to exclude cash purchases. The courts say that where a lender gives the consumer a bank draft or a cheque, and the consumer uses this to pay for the purchase, then there has been a "cash purchase", therefore no "consumer purchase", therefore no marking is required. This logic would render s. 189(3) completely nugatory if applied in that context. It seems either 189(3) was nonsensically drafted or the courts are wrong in applying this logic. It seems inescapable that the former is the case.
2. Bills of Exchange Act, s. 190(1) and 189(1) and (2)

2. the instrument is issued (delivered in completed form) in exchange for someone other to than the seller lending the purchase money in order to enable the purchaser to make a consumer purchase, if at that time the seller and lender were not dealing "at arm's length" as that term is defined in the Income Tax Act.[1] A "consumer purchase" is defined to mean a purchase, other than a cash purchase, of goods or services by an individual from a business which will not be used in the business of the purchaser.[2] The phase "not at arms length" generally means that the lender controls or is not completely distinct or independent from the seller or vice versa.[3]

Example A:

A wants to buy a car for his own personal use from B, a used car dealer. A does not have the cash, and instead A gives B a series of post-dated cheques covering the total payments. Each one is payable at least thirty days after the form is completed. Each must be marked "consumer purchase". Failure to mark them is an offence for which B can be fined or jailed. If the car turns out defective and B refuses to honour his promises as to fitness, A may or may not be able to reduce the payments to any person to whom B may have sold the notes, depending on whether the buyer of the notes is a "holder in due course".[4]

Example B:

A wants to buy a car for personal use from B (a dealer) for $500. A gives B a post dated cheque for $400 dated June 15, and $100 cash on the date of sale, June 1. The cheque does not have to be stamped consumer purchase, since the post-date is not more than 30 days after the date the cheque was delivered on completed form.[5]

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1. Ibid., s. 190(1) and 189(3)
2. Ibid., s. 188, definition of "consumer purchase"
3. See C.I.B.C. v. Lively (1974), 46 D.C.R. (3d) 432 at 440
4. Bills of Exchange Act, Section 191(2). To determine who is a "holder in due course", see para. ________
5. Bills of Exchange Act, s. 189(i)(c)

Example C:

A wants to buy a car for personal use from B, a company, a dealership for $1500. A has no money, so A goes to C, a money lender and borrows the cash. A gives C a promissory note for $1500, and gives the cash to B company. It turns out C owns 50% plus one of the shares of B company. The promissory note should be stamped because B and C are not dealing at arm's length as defined in the Income Tax Act.[1]

Example D:

A wants to set up a chinchilla ranching business with a dozen animals at first. A has no money, so B, the chinchilla dealer produced forms supplied by C, a bank. The forms are a loan application and a promissory note. The note promised that A would repay C the money C loaned A. A signs them both - B took them to C, and C made out a cheque to B. The promissory note was not stamped "consumer purchase". A never saw the money. B and C had done business before, were friends, and had agreed on this system of financing before A entered the picture. It turned out B had deceived A and the rance was a failure. B stopped payments and C sued A on the promissory note. C won, B had to pay in full despite the failure. The note did not have to be marked because 1. A was buying for a business, not for personal use and 2. because C did not control B nor did B control C, despite the familiarity and close commercial relationship.[2]

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1. Due to s. 189(3) of the Bills of Exchange Act, and assuming the logic applied in Royal Bank of Canada v. Siemens (1978), 83 D.L.R. (3d) 527, and Re MacLaren (1979), 88 D.L.R. (3d) 222 does not apply to s. 189(3). If they do, then since the purchase would accordingly be a "cash purchase", it is not a "consumer purchase" and therefore s. 189(3)(a) is not made out thus no stamping is needed.
2. C.I.B.C. v. Lively (1974), 46 D.L.R. (3d) 432, but see on reason 2. Canadian Acceptance Corp Ltd. v. Galbaiti et al., [1977] W.W.R. 280 and C.I.B.C. v. Langlois (1977), 2 B.C.L.R. 83.

What is a "holder in due course"?

This is a technical term describing a person who holds a cheque or promissory note not payable to him, who has paid for it and who had little or nothing to do with the dealings between the buyer and the seller. The Holder in Due Course has paid the seller (or someone who bought it from the seller) for the cheque or promissory note. Generally speaking, if a consumer made the cheque or promissory note payable to B, and anyone other than B is trying to collect on it, that other person is a holder in due course. But the following facts, if present, will deprive the person of the status of "holder in due course":

(i) the holder did not pay value for it
(ii) the holder did not take the cheque or promissory note in good faith
(iii) the holder had either notice or suspicion of fraud, duress or illegality practices by the seller on the buyer
(iv) the holder was in an intimate commercial relationship with the seller at the time of the sale taking place.

If these factors are present, the holder is not a "holder in due course", and the consumer may raise all the claims against him claimable against the original seller.

(i) <u>The Holder did not pay value for the cheque or promissory note</u>[1]

This situation is largely self explanatory. it is also quite rare that businessmen give their trade accounts receivable away. For example, however, suppose a seller provided defective goods to a businessman who gave a promissory note for $150 in return. The seller gives the note to his favourite nephew as a present. Clearly, the nephew is <u>not</u> a "holder in due course". Likewise, where the holder has paid cash, he has clearly given value. The law demands only that the holder have given "valuable consideration", which is that of normal contract law plus past debt.[2] The area, according to one source, has not been troublesome.[3]

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1. S. 56 (1)(b), <u>Bills of Exchange Act</u>
2. S. 53
3. O.E.D. (2d) at p. 17-112.

(ii) <u>The Holder did not take the cheque or promissory note in good faith</u>

For a holder to acquire "holder in due course" status, he must have acted honestly in acquiring the note. The law protects the innocent holder at the expense of the innocent consumer (except in the area of consumer purchases).[1] Good faith is a vague expression; it is most likely to be used against the holder who paid for less than the notes were worth, or who knew enough to be suspicious but bought the notes anyway - trusting that his special status as "holder in due course" would let him ride roughshod over the consumer.

<u>Example</u>:

A buys goods from B. A gives B two promissory notes. A is suspicious about the goods, and writes "this note not to be sold" on the note (a technique which effectively the possibility of being forced to pay a holder in due course more than the goods turn out to be worth). B is dishonest, and erases the word "not", tears off part of the note, and cuts it to further conceal its intended non-negotiability. B then sells the notes to C, an experienced banker, for far less than face value. C notices the erasure, but confidently pays, believing he is immune. The goods are totally defective. A refuses to pay. C sues A for the value of the notes. C will lose. The alterations would excite the suspicion of a person of ordinary prudence. "Persons dealing in such ventures take them at their own risk, and need not be surprised if the peril outweighs the profit."[2]

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1. Consumer purchases are covered at para. ______
2. <u>Swaisland v. Davidson, et al.</u> (1883), 3 O.R. 320 C.D.)

(iii) The holder had either notice or suspicion of fraud, unconscionability, duress or illegality practices by the seller on the buyer

If this type of practice is known by the holder to have been perpetrated on the buyer in the transaction the promissory note before the holder buys the note, he is not a "holder in due course" because he has the required "notice". If these practices are suspected and not looked into by the holder, he is not a "holder in due course" because he lacks the required "good faith".[1] If the holder is ignorant of these practices, and has no reason to be suspicious, he is a "holder in due course".

Example A:

As part of an elaborate grain speculation swindle, B buys grain from A at for more than it is worth, A promising to sell it and more for B to another. B pays A in a promissory note to A. A sells the note to C, who knew of the fraud on B. The scheme collapses. B refuses to pay. C sues to collect on the note. C will lose. C knew of the illegality and fraud involved in the transaction between B and A. Thus, C is not a "holder in due course". Just as A could have collected nothing, neither may C.[2]

Example B:

A is a promoter of worthless mining stock. A falsely and fradulently misrepresented the market value of the stocks, the worth of the mine, the availability of a refund for dissatisfied customers, and the nature of the shares. B bought the shares, paying with a promissory note. A took the note to another share purchaser, C, and sold them for cash for close to their face value. C honestly believed the shares were good, and accordingly could not know that A was perpetrating fraud on B. A then disappeared. B refused to pay upon discovered the note was worthless. However, B had to pay C, since here, given that C had no notice of the fraud, C was a "holder in due course".[3]

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1. See above, para.
2. Bonisteel v. Saylor (1890), 17 O.A.R. (C.A.)
3. MacNeill v. Stewart (1932), 3 M.P.R. 581 (P.E.I. S.C. - in banco)

(iv) The holder was in an "intimate relationship" with the seller at the time of the sale taking place

Many cases have held that a holder who has technically purchased post dated cheques or promissory notes from the seller, is not legally a "holder in due course" if the holder and seller were working in a "close and intimate relationship". The relationship required is not defined beyond that vague phrase. But the following factors are very relevant:[1]

- did the alleged holder supply the document and forms used by the seller, signed by the buyer, now the basis of holder's claim?
- were there prior agreements between the two covering details of the financing relationship?
- did the two agree on acceptability or form of the seller's sales contacts?
- was there agreement that the seller would deal exclusively with the holder?
- how well did the holder know the credit worthiness of the seller?
- did the holder uphold the value or reputation of the seller to the holder?
- how well did the holder know the general course of the seller's business?
- did the sale of the note take place independently and not affected by the pre-existing arrangement?

Example:

A sold goods to B. B paid by way of promissory notes to A. B promise to pay A for knitted material B supplied in the future, at a fixed rate. B supplies some knitted material. A does not pay B, nor does A reduce the amount owning on the note, refusing to give B credit for B's handiwork. A sells the notes to a finance company, C. C had thoroughly investigated A's business. C had advised A on the sales contract and organization of the business, and all the forms signed by A and the customer were drafted and supplied

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1. See also K. and I.R. Felthams, "Retail Instalment Sales Financing", 40 Can. Bar Rev. 461 (1962); Crawford, "Consumer Instalment Sales Financing", 19 J.T.L.J. 353 (1969)

by C. C purchased all the notes given to A by customers, paying cash to A. A dealt with no other finance company like this. Then A went out of business, B stopped all payments, and C sued for the full value of the notes. C was held not to be a true "holder in due course" due to the close and intimate relationship between it and the seller. This, C was entitled to collect only what A could have collected -- the sales price minus the credits for knitted goods.1

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1. Federal Discount Corporation Ltd. v. St. Pierre et al., [1962] O.R. 310 (C.A.).

What is a cut off clause?

A cut off clause is often found in standard form contracts, and is an attempt to give a simple contract the attributes of a cheque or promissory note. As indicated, the buyer (assignee) of a simple contract is lible to all the claims a buyer could make against the seller. The "cut off" clause says in effect, that the buyer promises not to raise against any assignee the legitimate complaints he could raise against the seller. In effect, this signs away all the consumer's rights once the seller sells the contract to a third person. While these clauses used to be effective,[1] the provinces have enacted that an assignee of a seller or lender takes the contract subject to all the equities arising from the sale.[2]

Example:

A buys a car from B for $500. A and B sign a simple contract outlining standard terms such as that B will pay for repairs needed in the first twelve months, that A will pay by way of five monthly instalments of $100 each, and that B will deliver the T.V. to A. the T.V. breaks down one week after it is delivered. A pays $200 for repairs. B has gone out of business due to an uninsured fire. However, C bought the contract from B. A does not make the first two payments. C is irritated and sues A for the $200. The contract has a "cut off" clause reading:

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1. Due to their perfect effectiveness at common law - see Killoran v. Monticello State Bank (1921), 61 S.C.R. 428.
2. See The Conditional Sales Act, R.S.A. 1970, c. 61, s. 18.1(2); Consumer Protection Act. S.B.C. 1967, c. 14, s. 15; Consumer Protection Act, R.S.M. 1970, c. 200 s. 67(1); Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 20A; The Newfoundland Consumer Protection Act, R.S. Nfld. 1970, c. 256, S s. 22A(1); Consumer Protection Act, R.S.N.S. 1967, c. 53, s. 20B; Consumer Protection Act, R.S.O. 1970, c. 82, s. 42a; Consumer Protection Act, R.S.P.E.I. 1974, c. C-17, s. 23; Cost of Credit Disclosure Act, S.S. 1967, C-85, s. 16A(1)(2).

> "If the seller (B) should assign this contract in good faith to a third party, the buyer (A) shall be precluded as against such third party from raising any defence that the buyer would have had against the assignor (A)".

C says that A gave up all rights to claim the $200 from C by signing this binding contractual promise. C is wrong. Except in Alberta, C taks subject to the equities; that is, A can reduce payments by $200. It is up to C to collect the $200 from B, the seller.

Rights Against Lenders (Non-Sellers) who Financed a Purchase

(a) Introduction

The general rule is that you may only claim rights against the person you made a deal with if that deal later creates loss or damage to you. By extension, a consumer who borrows from A in order to pay cash to a seller, B, must repay A in full despite any dispute which may later arise between A and the seller, B. Generally, this rule provides little dispute, as, generaly, the lender has no idea nor a responsibility for, the nature of the deal A and B are making. But not all loans are like this. Sometimes the seller and lender are working hand in hand, and it seems unfair when the lender expects to be paid in full after the purchase falls through, for example, the goods are worthless, or never delivered. Where such a close business relationship exists, the consumer may be able to raise defences against the lender which could be raised against the seller.

The issues becomes crucial when the seller has gone out of business, is insolvent, or perhaps has disappeared. Otherwise, even if the buyer has no right to reduce or stop payments to the lender, still the rights against the original seller may be asserted. If this is possible, in theory the buyer does not lose - he pays the lender but recovers the 'overpayment' from the seller. But recovery from the seller may be very expensive, and, in many circumstances will not be available at all. The borrower may be able to raise against the lender the defences available against the seller in the following circumstances:

(a) A consumer making a "consumer purchase" from a seller not dealing at arm's length with the lender, will be able to raise all the defences available against the seller against the lender, where the loan is received by a promissory note or bill of exchange[1] stamped "consumer purchase". Non-arm's length is a technical phrase defined by the federal Income Tax Act,[2] meaning

1. For discussion of what a bill of exchange and a promissory note are, see para. _______.
2. R.S.C. 1970-71-72, c. 63, s. 251

'related'. The courts define being 'related' to mean being in control of the other,[1] operating not quite independently or distinctly,[2] or being without 'separate interests' in the transaction.[3] Examples have already been provided under the 'Rights Against Assignees' chapter.[4]

(b) A consumer making a consumer purchase from a seller who not dealing at arm's length with the lender,[5] will be able to escape paying the lender entirely if the promissory note or bill of exchange is not stamped "consumer purchase".[6] However, if the promissory note or bill of exchange is in the hands of a "holder in due course"[7] who did not know or suspect it should have been marked (that is, that it is a consumer note or bill), the consumer must pay it in full.

<u>Example</u>:

A wants to buy a snowmobile from B. Since A has no money, A goes to C and borrows $2000 to finance the purchase. A gives C a promissory note for $2000 for the snowmobile. The note is not stamped "consumer purchase". C, later investigation proves, is the controlling shareholder of B. B and C are therefore not dealing at arm's length. The note is "<u>void</u>" in the hands of C - that is, C could collect nothing if he tried to force A to pay. But if C is able to sell the note to D, who takes it without knowing or suspecting that the promissory note is a consumer note, and if D is a "holder in due course", then D may recover the full $2000. Note that in the hands of C, the note is

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1. See, e.g. <u>Army & Navy Dept. Store. v. M.N.R.</u>, [1953] 2 S.C.R. 49
2. <u>C.I.B.C. v. Lively</u> (1974), 46 D.L.R. (3d) 432 at 440.
3. <u>Swiss Bank Corp. et al. v. M.N.R.</u>' [1972] C.T.C. 614 (S.C.C.)
4. See para. ______, examples ______ and ______
5. See above, para. ______ for discussion of "at arm's length".
6. By virtue of s. 190(2) of the <u>Bills of Exchange Act</u>, R.S.C. 1970, c. B-5.
7. This concept is discussed at para. ______

"void" regardless of anything going wrong with the snowmobile. And note that D may collect the full $2000 even if the snowmobile turns out to be completely worthless (which would allow A to recover the $2000 from B - of small comfort if B has disappeared).

(c) A consumer making any type of purchase from a seller who is in a close and intimate relationship[1] with the lender may be able to raise against the lender all the defences available agains the seller. The closeness or intimacy between seller and lender must be unusual, almost a "joint venture".[2] Relevant factors in this closeness are:

- whether the lender financed the operations of the seller;
- whether the lender influenced the approval of buyers;
- whether the lender and seller had agreed to a close relationship of mutual benefit;
- whether the lender contributed skill, property, work, forms or supplies to the seller;
- whether the lender shared in the profit of the seller's business;
- whether there was mutual control or management of the seller's business; and
- extent of borrower's control over the money "loaned" to him.

Example:

A wanted to go into the sign making business. B could supply him. B agreed to supply A with $3000 worth of materials. A had no money. B suggested A borrow the funds from C, an old friend of B's. C had several sample signs in his office and spoke highly of B. B and C had already discussed the loan when A arrived to see C. C had already decided to approve it. B referred many of his customers to C. C had been alerted that there were problems with the seller's business. But C loaned the money to A anyway, by way

1. See Beneficial Finance Co. of Canada v. Kulig (1970), 13 D.L.R. (3d) 134.
2. C.M.H.C. v. Graham (1974), 43 D.L.R. (3d) 686.

of cheque to B which was to be endorsed over to B. A in return gave C a promissory note. B was a rogue, who failed to deliver the sign material. A refused to pay on the note. C sued. C lost. The court held that the relationship between lender and seller was close and intimate. Thus B was entitled to raise any defence against the lender that could have been raised against the seller.[1]

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1. Beneficial Finance Co. of Canada v. Kulig (1970), 13 D.L.R. (3d) 134; see also C.M.H.C. v. Graham 1974), 43 D.L.R. (3d) 686.

Rights Upon Default

Introduction

The consequences of missing a payment or instalment can be quite drastic for the consumer. The seller (or his assignee) (1) may reposses the goods; the seller (or his assignee) may exercise a contractually-based right to have all future payments made immediately (under an "acceleration clause"); the seller (or his assignee) may proceed to sell the goods seized; and after the sale, the seller (or his assignee) may return demanding the buyer pay the difference between the amount owing at the time of the default and the proceeds of the sale. The common law and provincial statutes provide some limits to what the seller can do. They provide the consumer, in some provinces, and with some qualifications, the following rights upon default:

1. the right not to have goods repossessed once most of the price has been paid, unless the courts allow it (Restrictions on seller's Rights to Repossess).
2. the right to regain possession of the goods within a few weeks of the seizure if the buyer pays either the missed instalments or the total amount due plus expenses of seizure (Buyers or Rights to Regain Possession).
3. the right to be free from all further obligations to the seller once the goods have been repossessed (Freedom from law suits after repossession).
4. the right to resist a demand for immediate payment of all future instalments for minor defaults in payment (Relief from Acceleration Clauses).

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1. For discussion of who is an "assignee" see para. ______.

Restricted Repossession

In British Columbia[1] and Ontario,[2] a seller may not repossess goods once the buyer has paid two thirds or more of the price, unless the seller has the approval of a judge of the county or district court. In Manitoba, a seller may not repossess goods sold on a time sale[3] or served by a chattel mortgage[4] once the buyer has paid more than three quarters of the price, unless the seller-mortgagee has the consent of the courts. In Saskatchewan, a seller must give 30 days notice to the buyer before repossessing, and again before selling the goods, at which time the buyer may go to court and seek relief - such as more time to pay or an order forbidding repossession. This right is available only in respect of certain acticles, however, such as a washing machine, stove, heater, sewing machine, refrigerator, freezers, farm used snowmobile or cream separator.[5] Other rules cover house trailers in Saskatchewan.[6] Otherwise the right to repossess in Saskatchewan is left to the agreement between buyer and seller. In Alberta, only a sheriff can levy a distress, that is, repossess goods - a form of control upon otherwise private action.[7]

Example:

A buys a T.V. from B. A agrees to pay for it over ten months at $60 per month. After paying $480, A mises the 9th payment due on September 15. On September 25th, B demands the return of the set - relying on a clause in their bill of sale saying:

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1. Conditional Sales Act, S.B.C. 1961, c. 9, s. 14A; Bills of Sale Act, S.B.C. 1961, c. 6, s. 22B.
2. The Consumer Protection Act, R.S.O. 1970, c. 82, s. 35(i)
3. The Consumer Protection Act, R.S.M. 1970, c. C-200, s. 49(i)
4. Ibid., A. 57(1)
5. Limitation of Civil Rights Act, R.S.S. 1965, c. 103, s. 19A-22A
6. The Conditional Sales Act, R.S.S. 1965, c. 393, s. 14.
7. The Seinpives Act, R.S.A. 1970, c. 338, s. 18.

> "In the event the buyer misses a payment, the buyer agrees that the seller shall be entitled to reposses the T.V., and for the purpose of taking such repossession, the buyer agrees that the seller shall be entitled to enter the land and dwelling place of the Buyer."

The seller could not take action in British Columbia, Ontario, or Manitoba because more than 2/3 and 3/4 of the price is paid. The seller could repossess in those provinces if he had a court order. A T.V. is not subject to special rules in Saskatchewan. There and elsewhere, the seller is entitled to repossess because the buyer agreed to allow it in the contract. In Alberta, the seller must use a sheriff.

Right to Regain Possession

Every province except Alberta provides the consumer with the statutory right to regain possession of goods seized by the seller upon certain conditions being met. This right must be exercised within 15 days in Ontario,[1] and 20 days in all other provinces[2] except Newfoundland, which gives the consumer a month after the repossession.[3] In Ontario,[4] Nova Scotia[5], and Prince Edward Island,[6] the consumer must pay the full sum owing on the transaction plus the expenses of the seizure in order to regain possession. In British Columbia, New Brunswick, Newfoundland and Saskatchewan, the consumer must pay whatever is "due" plus expenses. How much is "due" depends on the contract. It may be that the contract is silent and then the only sum "due" would be the missing instalments. But if there is an "acceleration clause" in the contract, then the total demanded by it must be paid (plus expenses). The only mitigation to this rule is that in British Columbia an acceleration clause can be not be triggered unless payments are more than 15 days in arreas.[7] In Manitoba, the consumer is required only to pay the

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1. The Personal Property Security Act, R.S.O. 1970, c. 82 as 61 and 58(5)
2. Conditional Sales Act, S.B.C. 1961, c. 9, s. 14(4) and Bills of Sale Act, R.S.M. 1970, c. C-200 s. 46; Conditional Sales Act, R.S.N.B. 1973, c. C-15, s. 15(1); Conditional Sales Act, R.S.N.S. 1967, c. 48, s. 12(1); Conditional Sales Act, R.S.N.S. 1967, C. 48, s. 12(1); Conditional Sales Act, R.S.P.E.I. 1974, C. C-16, s. 10; The Conditional Sales Act, R.S.S. 1965, c. 393, s. 16
3. The Conditional Sales Act, R.S. Nfld. 1970, c. 56, s. 12(1) and The Bills of Sale Act, R.S. Nfld. 1970, c. 21, s. 14
4. The Personal Property Security Act, R.S.O. 1970, c. 82, s. 61
5. Conditional Sales Act, R.S.N.S. 1967, c. 48, s. 12(1)
6. Conditional Sales Act, R.S.P.E.I. 1974, c. C-16, s. 10(1)
7. Conditional Sales Act, S.B.C. 1961, c. 9 s. 14(9) and Bills of Sale Act, S.B.C. 1961, c. 6, s. 22A(9)

missed instalments, default charges and expenses.[1] For selected articles, a Saskatchewan consumer may ask for a court hearing within 30 days of the repossession, and seek the return of the article. The court is empowered to decide how much the consumer should pay.[2]

Example:

A has just lost possession of his colour T.V., due to B's repossession of it according to the terms of a repossession clause. A had paid $480 of the $600 total, and wants it back. B has spent $100 on repossessing the T.V. A has a right to regain the T.V. if he wants. In Ontario, Nova Scotia and Prince Edward Island, he can do so by paying B $220 - the balance owing ($120) plus costs of seizure ($100). There is no acceleration clause. Therefore in the other provinces, he can recover possession for $160 - $100 for expenses plus $60 "due" at that time. The consumer must act within the time period provided.

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1. The Consumer Protection Act, R.S.M. 1970, c. C-200, s. 46(1)
2. Limitation of Civil Rights Act, R.S.S. 1965, c. 103, s. 19L(1) and (3). The articles are agricultural implements, farm trucks, cream separators, washing machines, stoves, heaters, sewing machines, refrigerators, farm used snowmobiles. See s. 19(b).

Freedom from Law Suits After Goods Repossessed

At common law, once the seller repossesses the goods, he cannot sue for the deficiency that might exist between the amount owed at time of seizure and the value of the goods repossessed (less expenses).[1] However, sellers are free to alter this rule in the agreement between seller and buyer in Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan. If your contract entitles the seller to reposses, and to recover the deficiency - then you will b required to pay the amount owed at the time of seizure plus the costs of the sale, less the proceeds of the sale. Therefore, if you live in Alberta, British Columbia, or Newfoundland your obligations to the seller end with the repossession of the goods - regardless of what your agreement says.[2]

Example A:

A had paid $480 of the $600 owning to B on a colour T.V. Then B repossessed it because A missed the ninth instalment. It cost B $100 to repossess the T.V. B has now sold the T.V. at public auction after waiting the required period during which A did not seek to regain possession. The sale cost $75, and brought in $200 as the highest bid -- a resonable bid since the T.V. was damaged by A's use of it. A now seeks to have B pay an additional $95, being the difference between the sum of $120 (owed by A at time of seizure), $100 (cost of seizure) and $75 (costs of the sale) minus $200 (proceeds of sale).

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1. Obee v. Laffey, [1954] O.W.N. 510 (C.A.)
2. This is a result of "seize or sue" legislation: The Conditional Sales Act, R.S.A. 1970, c. 61, s. 9 19(3); Conditional Sales Act, S.B.C. 1961, c. 9, s. 14(1); The Conditional Sales Act' R.S. Nfld. 1970, c.56, s. 12(3); Bills of Sale Act, S.B.C. 1961, c. 6, s. 22A; The Bills of Sales Act, R.S. Nfld. 1970, c. 21, s. 14.

Relief from Acceleration

(1) What is an acceleration clause and why?

Often the agreement signed by the consumer will contain an acceleration clause. Such clauses provide that if the consumer parts to make a payment, thn the entire outstanding balance becomes payable immediately. Another variant of the clause gives the seller the ability to unilaterally accelerate payments anytime he feels "insecure" about being repaid. Such clauses will almost invariably work a hardship on the consumer -- as suddenly a large debt comes due at a completely unexpected time. But they are inserted to give the seller a choice of actions to follow after assessing the seriousness of the consumer's position. If it seems bankruptcy is a possibility, the acceleration clause provides a legal basis for demanding full payment - before the remaining assets of the consumer evaportate. The second purpose of the clause is to encourage regular payments. They are largely unregulated by the common law and legislatives. However, British Columbia, Manitoba and Ontario have some relief provisions, and indeed the common law is exercises some control over acceleration clauses.

(2) Provincial legislation

Ontario law provides that if the acceleration clause allows the seller to unilaterally accelerate payments when he "considers himself insecure", it may only be exercised when the seller honestly believes that his prospets for being repaid are impaired.[1] British Columbia has enacted that no acceleration clause can be exercised until at least fifteen consecutive days have passed since default.[2] Manitoba has a comprehensive provision limiting acceleration clauses. The consumer who is not being sued and whose goods have not been repossed can stop the acceleration clause by paying the arrears and agreed default charges.[3] If the goods have been repossessed,

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1. The Personal Property Security Act, R.S.O. 1970, c. 82, s. 18
2. Conditional Sales Act, S.B.C. 1961, c. 9, s. 14(9) and Bills of Sale Act, S.B.C. 1961, c. 6, s. 22A(9)
3. The Consumer Protection Act, R.S.M. 1970, c. C-200, s. 33(2)(a)

still the acceleration clause can be stopped if the goods are redeemed[1] - and the consumer has a right to redeem the goods.[2] And generally for other cases, Manitoba courts may grant relief against acceleration clauses as they see "fit" - perhaps by ordering payments to continue as before with the addition of a right amount to cover inconvenience to the seller.

(3) Common Law Control

The courts of common law have long refused to enforce what they call "penalty clauses"; that is, clauses whose the purpose is to terrorize the opposite party into performing the agreement under the threat of heavy losses for refusing to perform.[3] Acceleration clauses, given that $1000 today is worth far more than $100 a year for the next ten years (the time value of money theory), may have this same terrorizing effect. Thus, many senior appellate courts have held that acceleration clauses, at least in leases, may be "penalty clauses" and of no effect.[4] However, it was held by our highest court that an acceleration clause in a mortgage is acceptable.[5] And recently, this view has been accepted along with the proposition that acceleration clauses in sale of goods agreements likewise are valid.[6]

Example:

A has bought a T.V. from B for $600, and is paying $60 per month for ten months. A pays $240 and then misses the 5th payment due May 15. A clause in the agreement between A and B reads as follows:

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1. See para. ________.
2. Op. cit., see footnote 3, s. 33(2)(e)
3. Dunlop Prenmatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.
4. See Canadian Acceptance Corp. Ltd. v. Regent Park Butcher Shop Ltd. et al. (1967), 3 D.L.R. (3d) 304 (Man. C.A.) and Unilease Inc. v. York Steel Construction Ltd. (1978), 18 O.R. 559 (Ont. C.A.)
5. Wallingford v. Mutual Society (1880), S.A.C. 685 (J.C.P.C.)
6. Done in both the Regent Park case [at p. 310 D.L.R.] and in the Unilease case [at p. 562].

> "Upon any default the total indebtedness becomes due and payable. Upon the seller feeling himself insecure, the seller may at his sole option accelerate payment, and in the event of such acceleration the buyer agrees the total indebtedness becomes due and payable at the time of such acceleration."

A has not made the payment and it is now June 3. B demands immediate payment of the $360 owing. Since fifteen days have passed of continuous default, the B.C. law gives no relief. Since the default section is triggering the acceleration (not the insecurity provision) Ontario's law gives no relief. Only in Manitoba does the consumer have any choice but to pay the $360. There, given that repossession has not taken place, the consumer may defeat the clause if he pays the seller some amount. Any amount will do, but it seems the seller must accept it. If the seller refuses to take less than the full amount, the clause is effective and $360 must be paid as demanded.