

Guide to Understanding What Constitutes as Unenforceable Late Fee Terms



Business owners often attempt to encourage prompt payment by imposing delayed payment penalties (late fees) upon those who fail to pay on time. Unfortunately, contracts may be deemed unlawful and therefore 'null & void' or otherwise unenforceable when the contract is written in such a way as to impose, or appear to impose, an improper late fee. Commonly, the 'late fee' calculates to an amount that violates the *Criminal Code*, [R.S.C. 1985, c. C-46, s. 347](#), whereas charging an interest rate beyond sixty (60%) percent per annum is deemed a criminal offence. Any contract that prescribes an interest rate in excess of the maximum allowable sixty (60%) percent is therefore an illegal contract; *Garland v. Consumers' Gas Co.*, [\[1998\] 3 S.C.R. 112](#). Do note that a 'severability clause' may save the entire contract from becoming void.

While a business may attempt to disguise 'interest' as a late fee, courts will view a late fee for what a late fee is - an interest charged as an additional amount of money due, and arising from, the extension of credit for an outstanding balance of monies owed. An exception applies if it is shown that the 'late fee' genuinely correlates to the recovery of a disbursement cost incurred in the collection of the debt rather than as an additional fee correlated to the further advancement of the debt; *De Wolf v. Bell ExpressVu Inc.*, [2009 ONCA 644](#); *Garland*, supra.

As an example, consider the business that charges a ten 00/00 (\$10.00) dollar late fee when a monthly payment of one hundred 00/00 (\$100.00) is over due by seven (7) days. This 'late fee' actually calculates as a ten (10%) percent additional charge upon the actual amount due. This ten (10%) percent late fee imposed upon a one week overdue account produces an exorbitant, and unlawful, five hundred twenty (520%) interest rate. Note that the fact that this interest appears lower, and actually does calculate lower, over a greater period of time, it is the trigger date that causes the unlawfulness. While the \$10.00 late fee charged on the 7th day is unlawful, it

might appear that, if six months later, the same \$10.00 is still outstanding, the amount is now become a lawful twenty (20%) percent interest, the very fact that the amount was unlawful when originally imposed continues to make the amount unlawful. What was at first unlawful, fails to become lawful.

