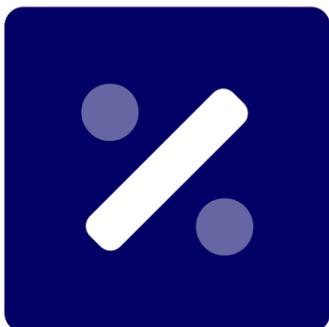


Excessive Interest Terms May Make Transactions Unenforceable



From time to time, a person may be in a desperate situation and thereby agree to a loan with an exorbitant interest rate. In addition to the *Interest Act*, [R.S.C. 1985, c. I-15](#) and [s. 347](#) of the *Criminal Code of Canada*, [R.S.C. 1985, c. C-46](#) which govern interest, the *Unconscionable Transactions Relief Act*, [R.S.O. 1990, c. U.2](#) provides statute authority for a court to set aside an interest rate as unconscionable in certain situations.

It is notable that the *Unconscionable Transactions Relief Act* is without provisions requiring that the dealings wherein an unconscionable interest rate was established were nefariously entered into or involving any form of wrongdoing; and accordingly, the lender may become subject to proceedings per the *Unconscionable Transactions Relief Act* despite acting in good faith. Of course, such is without saying that nefarious intentions will always be absent.

When the court finds that a loan contains interest that is unconscionable, the court may reopen or set aside the loan agreement by substituting an alternate interest rate, altering the security upon the loan, or ordering return of harsh and excessive interest payments. Specifically, the *Unconscionable Transactions Relief Act* states:

The court may,

2 Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,

reopen transaction and take account

(a) reopen the transaction and take an account between the creditor and the debtor;



reopen former settlements

(b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

order repayment of excess

(c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;

set aside or revise contract

(d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order the creditor to indemnify the debtor.

As to when an interest rate will be viewed as unconscionable and worthy of relief such as setting aside or reduction, among other things, such is without specific details within the Act itself and is left to the discretion of a Judge reviewing various factors. As was said in the case of *Morehouse et al. v. Income Investments Ltd. et al.*, [1965 CanLII 353](#):

I do not think that an attempt should be made to set out here firm and unelastic definitions of what constitutes unfair advantage or as to what is "harsh and unconscionable". The minds of many are often facile in the devious and agile in ingenuity for its accomplishment. It would, I think, be futile, perhaps even dangerous, to attempt to establish total safeguards in the hope that they would be effective against all selfishness and chicanery. Invention often adds new oppression to the old.

Furthermore, the cost of a loan in a transaction between some men and under some circumstances might be fair and reasonable but the same cost in transactions between other men and under other circumstances might be harsh and unconscionable. Then, too, what might be an excessive cost at one time might be a reasonable cost at another. Each case must be decided upon its own facts and against its own background.

However, without in any way attempting to limit them, there are certain factors which should be considered.

One of such factors is whether there was on the part of the lender honesty, fair dealing, frankness and full disclosure in terms intelligible to the borrower.

Associated with that is the footing upon which the parties were negotiating. Of importance in this area are such matters as the relationship of the parties to each other, whether there was a fiduciary relationship, their respective experience and whether there was urgency for the borrower of which undue advantage was taken by the lender.

A factor, and a very important one, is the risk involved. Relevant to this would be the security, if any, given for the loan, the ability of the borrower to pay and his attitude towards his obligations.

Another matter for consideration would be whether or not the cost of the loan was reasonably consistent with the prevailing market in the area for the same general type of loan involving a similar risk.

Still another factor is whether the documentation securing the lender's position is fair and reasonable under the circumstances or whether it contains provisions which might work serious hardship against the

borrower quite unnecessary for adequate protection of the lender.

