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Informing the Debate on Lowering the Criminal Rate of Interest

Canada has two markets for consumer credit. Consumers with middle to high incomes can draw on 'mainstream' forms of credit at reasonable interest rates, such as lines of credit and credit cards issued by chartered banks. Consumers living on low to moderate incomes, who also may have a poor credit score or no credit history, often find themselves pushed to high-cost credit products, such as instalment loans issued by alternative financial services providers. The effective annual interest rate on instalment loans can run up to the maximum permitted under section 347 of the Criminal Code. Anything above this constitutes a "criminal rate" of interest. In March 2023, the federal government announced that it would lower the criminal rate from an effective annual rate of sixty per cent to an annual percentage rate (APR) of thirty-five per cent and would consider further reductions in the future. This change will provide some immediate relief to low-income borrowers by lowering the cost of instalment loans. However, it does not address the lack of access to the mainstream credit market.

Le Canada dispose de deux marchés pour le crédit à la consommation. Les consommateurs à revenus moyens ou élevés peuvent recourir à des formes de crédit « classiques » à des taux d'intérêt raisonnables, telles que les lignes de crédit et les cartes de crédit émises par les banques à charte. Les consommateurs à revenus faibles ou modérés, qui peuvent également avoir une mauvaise cote de crédit ou ne pas avoir d'antécédents en matière de crédit, sont souvent poussés vers des produits de crédit à coût élevé, tels que les prêts à tempérament accordés par des prestataires de services financiers alternatifs. Le taux d'intérêt annuel effectif des prêts à tempérament peut atteindre le maximum autorisé par l'article 347 du Code criminel. Tout dépassement constitue un « taux d'intérêt criminel ». En mars 2023, le gouvernement fédéral a annoncé qu'il abaisserait le taux criminel d'un taux annuel effectif de soixante % à un taux annuel effectif global (TAEG) de trente-cinq %, et qu'il envisagerait d'autres réductions à l'avenir. Ce changement apportera un soulagement immédiat aux emprunteurs à faible revenu en réduisant le coût des prêts à tempérament. Toutefois, il ne remédie pas au manque d'accès au marché du crédit traditionnel.

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Introduction

Canadians at all income levels use consumer credit to bridge temporary gaps between expenses and income, but the consumer credit market in Canada is highly bifurcated. Consumers with middle to high incomes and a good credit rating can draw on 'mainstream' forms of credit at reasonable interest rates, such as secured and unsecured lines of credit and credit cards from federally regulated chartered banks. Consumers with a

poor credit score, no credit history in Canada, living on a low to moderate income or living in a low-income neighbourhood, often have access only to high-cost credit products. These include instalment loans and payday loans offered by provincially regulated “alternative financial services” (AFS) providers.¹ AFS providers tend to emphasize the high likelihood and ease of approval with slogans such as “YES when the banks say no” and “get approved in minutes.”² Marketing high-cost credit products to those who can least afford them is nothing new.³ However, the rising cost of living is likely to increase the demand for high-cost credit, particularly among vulnerable consumers:

In contrast to payday loans, which are small, short-term loans repaid in one lump sum, instalment loans are “typically for larger amounts and a longer duration than payday loans.”⁴ Interest rates on instalment loans tend to start at thirty per cent annual percentage rate (APR) and can run up to forty-seven per cent, compared to rates from just above prime to twenty-one per cent for mainstream credit.⁵ The extremely high interest rates, coupled with related fees frequently incurred by borrowers, have earned them the label “predatory.”⁶

In addition to the impacts on individual households, the high cost of payday and instalment loans can undermine government benefits targeted to Canadians living on low to moderate incomes and drain capital from marginalized communities.⁷ Although low- and moderate-income

1. The Government of Ontario defines “alternative financial services” as “high-cost financial services provided outside of traditional financial institutions like banks and credit unions.” Alberta defines “high-cost credit” as any loan with a total cost to the consumer in excess of thirty-two per cent. In Québec, anything greater than twenty-two per cent higher than the Bank of Canada bank rate is “high-cost.” See Government of Ontario, “High-Cost Credit in Ontario” (January 2021) at 2, 8, online (pdf): <ontariocanada.com> [https://perma.cc/7RK2-CT7W].

2. Easyfinancial, “easyfinancial” (2023), online: <easyfinancial.com> [perma.cc/VF2A-QF3T]; MoneyMart, “Instalment Loans in Canada” (2022), online: <moneymart.ca> [perma.cc/K5AM-S6FG].

3. David Caplovitz, *The Poor Pay More: Consumer Practices of Low-Income Families* (New York: The Free Press, 1967).

4. Government of Ontario, *supra* note 1 at 2, 6-7; AFS providers offering instalment loans also offer other types of unsecured loans including personal loans, lines of credit, and debt consolidation loans (*ibid* at 6); Some providers have recently started offering auto-title loans, which are secured against a vehicle the borrower already owns (*ibid* at 18). This article focuses on unsecured instalment loans.

5. Erica Alini, “Forget payday loans, this is Canada’s new generation of high-interest loans,” *Global News* (23 October 2021), online: <globalnews.ca> [perma.cc/TT2D-4PZS]. See also Government of Ontario, *supra* note 1 at 7; Canadian Bankers Association, “Focus: Banks and Alternatives to Payday Loans” (23 March 2023), online: <cba.ca> [perma.cc/A9K4-XE5T].

6. Canada, Office of the Prime Minister of Canada, *Deputy Prime Minister and Minister of Finance Mandate Letter* (Ottawa, 2021), online: <pm.gc.ca> [perma.cc/RT3J-WQW9] [*Mandate Letter*].

7. Micheline Gleixner, “Consumer Credit in Canada: A Regulatory Patchwork” (2020) 43:2 Dal LJ 697 at 701 [Gleixner, “Consumer Credit”]; ACORN, “Fair Banking: Enhancing access to low-cost/

households tend to have lower overall debt loads than those in higher income brackets, this debt is more likely to be unsecured debt used to finance consumption, rather than asset-building mortgage debt. Therefore, they are spending a greater proportion of their income on debt repayments.⁸

Regulators across jurisdictions have long grappled with the challenge of regulating access to credit for financially vulnerable consumers.⁹ In Canada, in 1981, the federal government repealed an admittedly outdated piece of legislation, the *Small Loans Act*, which, as discussed further below, regulated small sum loans through interest caps and licencing requirements.¹⁰ The *Act* was replaced with what is now section 347 of the *Criminal Code*.¹¹ At the time, section 347 set the criminal rate of interest at any amount higher than sixty per cent “effective annual rate of interest,” the equivalent of forty-seven per cent APR.¹² Across Canada, even in the four provinces with high-cost credit regulations in place, the only legislative cap on the cost of instalment loans is the criminal rate of interest.¹³ Payday loans are exempt from the criminal rate of interest where provincial legislation regulating and capping the cost of payday loans is in place.¹⁴ Until recently, the provincial caps ranged from \$14 to \$17 per \$100 borrowed, or 365 to 443 per cent APR, depending on the province.¹⁵

Almost from the moment it was enacted, there were calls for reform and repeal of section 347. At the time of its enactment, it was predicted

short-term credit options among low- and moderate-income consumers” (29 June 2023) at 33, online (pdf): <acorncanada.org> [perma.cc/7FYY-95ET] [ACORN, “Fair Banking”] (ACORN is a national social justice organization directed by its members, who are low- and moderate-income Canadians); Momentum, “High-Cost Alternative Financial Services: Policy Options” (September 2017), online (pdf): <momentum.org> [perma.cc/76UW-P59S]; Abbye Atkinson, “Rethinking Credit as Social Provision” (2019) 71:5 *Stanford L Rev* 1093 at 1104; Iain Ramsay, “The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches” (2001) 35 *Can Bus LJ* 325 at 367.

8. Alex Bucik, Elizabeth Mulholland & Vivian Odu, “Roadblock to Recovery: Consumer debt of low- and moderate-income Canadian households in the time of COVID-19” (November 2020) at 7, online: <prospercanada.org> [perma.cc/39NG-X6WX].

9. See e.g. Anne Fleming, *City of Debtors: A Century of Fringe Finance* (Cambridge: Harvard University Press, 2018).

10. *Small Loans Act*, RSC 1970, c S-11 [*SLA*]. The history of the *Small Loans Act* is discussed in more detail in Part II of this article.

11. *Criminal Code*, RSC 1985, c C-46.

12. *Ibid.*, s 347(2); Government of Canada, “Budget 2023: A Made-in-Canada Plan” at 36, online: <budget.canada.ca> [perma.cc/Q9EZ-PUHK] [Government of Canada, “Budget 2023”]. Although the APR takes into account all potential fees, the criminal rate is currently calculated as an “effective” rate, which takes into account the compounding of interest (i.e. interest charged on interest), which usually results in a higher calculated rate. See Government of Ontario, *supra* note 1 at 7.

13. Government of Ontario, *supra* note 1 at 7. See also Gleixner, “Consumer Credit,” *supra* note 7 at 725-726 on the failure of provincial unconscionable bargain legislation.

14. *Criminal Code*, *supra* note 11, s 347.1(3) [*Criminal Code*].

15. Financial Consumer Agency of Canada (FCAC), “Payday loans,” online: <canada.ca> [perma.cc/53U4-8ZJN] (APRs based on a 14-day loan term).

that market forces would moderate the cost of loans aimed at vulnerable consumers, but they have not. Across the country, payday lenders charge the maximum allowed under provincial regulation, suggesting that these lenders do not compete on price.¹⁶ There is also evidence that, generally, consumers do not shop around for the lowest cost financial product of any type, preferring instead to deal with the same service provider.¹⁷ The rise in marketing and use of instalment loans led to calls from consumer protection and anti-poverty advocacy groups to lower the criminal rate of interest as one step in helping high-cost credit users.¹⁸ In contrast, as discussed in more detail below, even a cap of sixty per cent proved problematic for commercial loans. Commercial lenders and their advocates argued against lowering the rate as a second-best option to repealing the provision altogether. Despite these issues, apart from commentary at the time of enactment, and occasionally since, section 347 has not been the subject of sustained academic attention.¹⁹

After numerous failed attempts to lower the rate through private members' bills, the December 2021 mandate letter of the deputy prime minister and minister of finance included a commitment to lower the criminal interest rate to "crack down on predatory lenders."²⁰ In September 2022, the federal government held consultations on lowering the criminal rate of interest.²¹ In its 2023 budget, the federal government announced its decision to lower the criminal rate of interest to thirty-five per cent APR.²² Although the exemption for payday loans was left out of the consultation's scope, the government also announced that it would amend the exemption to impose a maximum cost of \$14 per \$100 borrowed. A bill implementing these changes received royal assent on 22 June 2023.²³

16. Based on a review of six payday lenders in nine provinces. The exception is PEI which has a higher cap of \$25 per \$100 borrowed. The two lenders who operate in the province charge \$15. See also Freya Kodar, "Conceptions of Borrowers and Lenders in the Canadian Payday Loan Regulatory Process: The Evidence from Manitoba and Nova Scotia" (2011) 34 Dal LJ 443 at 456.

17. Sara Davies & Lorna Trend, *The Poverty Premium: A Customer Perspective* (Bristol: Personal Finance Research Centre, November 2020) at 27, online (pdf): <bristol.ac.uk> [perma.cc/NWK4-7FHQ]; Goeasy, "2021 Annual Report" (16 February 2022) at 35, online: <investors.goeasy.com> [perma.cc/2A5N-FPZY] [Goeasy, "2021 Annual Report"].

18. ACORN Canada, "Revising the Criminal Rate of Interest in Canada" (December 2021), online (pdf): <acorncanada.org> [perma.cc/Y5RF-TTPR] [ACORN, "Revising"].

19. See Gleixner, "Consumer Credit," *supra* note 7; ACORN Canada, "Study on High Interest Loans" (17 February 2021) at 10, online (pdf): <acorncanada.org> [perma.cc/YB27-K3EC] [ACORN, "Study"].

20. *Mandate Letter*; *supra* note 6.

21. Government of Canada, "Consultation on Fighting Predatory Lending" (2022), online: <canada.ca> [perma.cc/U37T-TEJY].

22. Government of Canada, "Budget 2023," *supra* note 12.

23. Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March*

This article seeks to respond to the shortcomings of section 347 for both consumer and commercial loans. The December 2021 mandate letter incentivised its writing, and the scope of the consultations shaped the focus on instalment loans rather than payday loans. It was accepted for publication shortly after the federal government announced its decision to amend the provision and impose a new criminal rate of interest of anything above thirty-five per cent APR. The debate on section 347 and on federal regulation of high-cost credit will continue, however. The amendments allow for exempting other types of loans through regulations.²⁴ The 2023 budget also promised to launch further consultations on whether the criminal rate should be lowered and on further revisions to the exemption for payday loans.²⁵

As the title suggests, this article seeks to inform this ongoing debate by looking back at the history of federal regulation of consumer credit, examining the current landscape, and evaluating options for reform. We agree with the decision to lower the criminal rate of interest to thirty-five per cent to fulfill the goal of protecting consumers from predatory lending, and we provide support for this position in the article. We suggest that exempting most commercial loans from the scope of the provision would address commercial lenders' concerns. We also argue that more should be done to regulate small, short-term loans and to improve access to the mainstream credit market for vulnerable consumers.

The article proceeds as follows. Part I describes the current market for high-cost credit in Canada, focusing on instalment loans. Part II describes the legislative history and content of the *Small Loans Act* and the criticisms leading to its repeal. Part III focuses on the criminal rate of interest provision in the *Criminal Code*, and its interpretation by the courts in the relatively small number of reported cases. Part IV reviews previous attempts to lower the criminal rate of interest and commercial lenders' concerns with these proposals. Part V examines the use of interest rate caps in the US and Québec. Part VI explores policy responses for protecting consumers of high-cost credit, starting with lowering the criminal rate of interest.

28. 2023, 1st Sess, 44th Parl, Part 4, Division 34 (assented to 22 June 2023).

24. *Ibid.*, cl 611.

25. Government of Canada, "Budget 2023," *supra* note 12.

I. *The market for high-cost credit*

1. *Supply*

Payday lenders entered the Canadian market in the early to mid 1990s, were unregulated, and blatantly violated the criminal rate of interest.²⁶ Provincial legislation was eventually introduced in the mid to late 2000s following the federal government's decision to legalize the industry through an exemption to the criminal rate of interest, passed in 2007.²⁷ Over time, many provinces have lowered maximum allowable fees and tightened other constraints on payday lenders, which has led to substantial growth in instalment loans, although the popularity of payday loans remains high.²⁸

Instalment loans are generally for greater amounts and longer durations than payday loans, up to \$50,000 for terms up to five years.²⁹ As the name suggests, they are paid off in monthly instalments over a pre-determined number of months. They are offered by some banks, but are more widely available from AFS providers, including payday lenders and self-described "alternative lenders" who do not offer payday loans.³⁰ They are offered through physical storefronts, online and through retailers or other financial service providers.³¹

Rates on instalment loans can start as low as 9.9 per cent but often run up to forty-seven per cent APR.³² In addition to interest, consumers often pay fees for optional credit insurance products and overdraft fees, which significantly increase the cost of the loan.³³ There is some evidence that existing customers are encouraged to refinance and borrow more.³⁴

26. Canada Consumer Finance Association (CCFA), "About," online: <canadiancfa.com> [perma.cc/Y72F-QA6W]; Gleixner, "Consumer Credit," *supra* note 7 at 735.

27. Gleixner, "Consumer Credit," *supra* note 7 at 735; Kodar, *supra* note 16 at 445.

28. Government of Ontario, *supra* note 1 at 6; ACORN, "Study," *supra* note 19 at 5; Gleixner, "Consumer Credit," *supra* note 7 at 743; Financial Consumer Agency of Canada (FCAC), "Consumer Vulnerability: Evidence from the Monthly COVID-19 Financial Well-being Survey" (November 2022) at 7, online (pdf), <canada.ca> [perma.cc/M46Q-Z7LW] [FCAC, "Consumer Vulnerability"].

29. See MoneyMart, which offers instalment loans up to \$15,000 and for up to 5 years (60 months). MoneyMart, *supra* note 2. See also Government of Ontario, *supra* note 1 at 7 (suggesting terms can run from 6 months to 10 years).

30. Canadian Lenders Association (CLA), "Alternative Lenders: Explained" (2022), online: <clalanding-page.webflow.io> [perma.cc/77XF-AD2Y].

31. Alini, *supra* note 5. For example, fintech company Mogo Inc. provides a pre-approval service that offers loans from easyfinancial. Mogo Inc., "2021 Annual Information Form" at 9, online (pdf): <assets.ctfassets.net > [perma.cc/KLN8-GKVV] [Mogo, "Form"].

32. Goeasy, "2021 Annual Report," *supra* note 17 at 16; Mogo, "Form," *supra* note 31 at 9; CLA, *supra* note 30.

33. Goeasy, "2021 Annual Report," *supra* note 17 at 34, 41; Government of Ontario, *supra* note 1 at 13.

34. Alini, *supra* note 5.

Given the duration and cost of these loans, consumers frequently end up owing more in interest than the principal borrowed. For example, one borrower interviewed by the *Toronto Star* borrowed \$7,418.64 at forty-seven per cent and would have been required to repay \$15,256.08 over 42 months.³⁵ Instead, he filed a consumer proposal to manage repayment of his debts.³⁶

2. Demand

There is a lack of information about the use of high-cost credit in Canada because consumer surveys tend not to distinguish among different types of unsecured consumer debt and even fewer separate out types of high-cost credit.³⁷ Based on its COVID-19 Financial Well-being Survey, a nationally representative survey of 1,000 Canadians conducted online and by phone, the Financial Consumer Agency of Canada (“FCAC”) found that 4.5 per cent of Canadians had “used an online lender or payday loan company to manage their daily expenses.”³⁸ The proportion is higher for Canadians living on a low income and recent immigrants (five per cent), and for Indigenous persons (nine per cent).³⁹ Of these respondents, thirty per cent used an instalment loan.⁴⁰

AFS provider Goeasy describes its “average” instalment loan borrower as 43 years old, steadily employed and housed, probably renting rather than owning their home, “supporting 1.9 dependents, with individual income of \$53,000 per year.”⁴¹ This portrait is typical of that advanced by the industry, which also highlights the use of high-cost credit for one-time, emergency expenses.⁴² Canadians on very low incomes, who depend entirely on social assistance, are unlikely to access the formal economy for credit, instead borrowing from family or friends.⁴³ Goeasy acknowledges that its target market of non-prime consumers “are affected

35. Christine Dobby, “Canada could finally lower its 60% interest cap on loans—but the industry is fighting hard to keep rates high” *Toronto Star* (17 September 2022) [Dobby, “Crushed by Credit”]. See also Alini, *supra* note 5.

36. Alini, *supra* note 5.

37. Jerry Buckland & Brenda Spotton Visano, *Financial Vulnerability in Canada: The Embedded Experience of Households* (Cham, Switzerland: Palgrave MacMillan, 2022) at 101; Bucik, Mulholland & Odu, *supra* note 8.

38. FCAC, “Consumer Vulnerability,” *supra* note 28 at 7.

39. *Ibid* at 8.

40. *Ibid* at 7.

41. Goeasy, “2021 Annual Report,” *supra* note 17 at 14.

42. Jodi Gardner, *The Future of High-Cost Credit: Rethinking Payday Lending* (London: Bloomsbury, 2022) at 36.

43. Buckland & Spotton Visano, *supra* note 37 at 76; Sharanjit Uppal, “Rising prices and the impact on the most financially vulnerable: A profile of those in the bottom family income quintile” (8 February 2023), online (pdf): <150.statcan.gc.ca> [perma.cc/8A9F-Z6YP].

by adverse macroeconomic conditions such as higher unemployment or costs of living.”⁴⁴ Recent surveys indicate that low- and moderate-income working Canadians are accessing high-cost credit to cover groceries, bills and other regular, recurring expenses.⁴⁵ Unlike borrowing for the purpose of acquiring an asset, such as housing or education, borrowing to cover basic expenses, such as rent, is likely to make the borrower worse off financially.⁴⁶ While not all high-cost credit borrowers are low-income, many users of high-cost credit or other high-cost financial services are “financially vulnerable” in that they are likely to live on a low income or lack access to savings or credit or both.⁴⁷ Race and gender are also factors which increase financial vulnerability.⁴⁸

High-cost credit users often lack access to mainstream credit.⁴⁹ According to the Canadian Lenders Association, forty-five per cent of Canadians deemed non-prime borrowers were turned down for a loan in the past year.⁵⁰ A recent survey of 623 low- and moderate-income Canadians found that seven per cent would go to a bank as a first response to a “tough financial situation” and ten per cent said they would go to a payday or instalment lender.⁵¹ Lack of access to mainstream credit may be due to a poor credit score, no credit history in Canada, or low to moderate income. In 2021, there was a “vast and underserved” market of 8.2 million Canadians deemed “non-prime” borrowers based on their credit score—a significant drop from 2019, when the number was 9.4 million, suggesting that the number of non-prime borrowers will rise again with the end of COVID-relief payments.⁵²

44. Goeasy, “2021 Annual Report,” *supra* note 17 at 84. “Non-prime” consumers are those with a credit score too low to access credit from mainstream financial institutions.

45. ACORN, “Fair Banking,” *supra* note 7 at 31; FCAC, “Consumer Vulnerability,” *supra* note 28 at 3.

46. Atkinson, *supra* note 7 at 1099.

47. Financial Consumer Agency of Canada (FCAC), “Payday Loans: Market Trends” (October, 2016) at 2, online: <canada.ca> [perma.cc/9RQM-PEDC] [FCAC, “Market Trends”]. In a survey of payday loan borrowers, twenty per cent reported household incomes above \$80,000 and seven per cent reported incomes over \$120,000; Gardner, *supra* note 42 at 30. See also ACORN, “Fair Banking,” *supra* note 7; Buckland & Spotton Visano, *supra* note 37 at 51 (describing the participants in a “financial diaries” study who relied on debt to supplement their low employment incomes); Government of Ontario, *supra* note 1 at 2 (suggesting that consumers who access high-cost credit are likely to be “individuals experiencing social, health and economic vulnerabilities”).

48. Buckland & Spotton Visano, *supra* note 37; FCAC, “Consumer Vulnerability,” *supra* note 28 at 5; Government of Canada, “Budget 2023,” *supra* note 12 at 289.

49. ACORN, “Study,” *supra* note 19 at 7; Government of Ontario, *supra* note 1 at 2, 6.

50. CLA, *supra* note 30. See also ACORN, “Study,” *supra* note 19 at 35.

51. ACORN, “Fair Banking,” *supra* note 7 at 5.

52. Goeasy, “2021 Annual Report,” *supra* note 17 at 33, 43.

For many neighbourhoods, AFS providers are the only financial service providers within walking distance from their homes. Although credit unions are more likely than banks to locate in low-income neighbourhoods, similar to banks, the overall number of physical credit union branch locations is declining.⁵³ In one survey on experiences with high-cost credit, most respondents learned about the lender from seeing the store in their neighbourhood.⁵⁴

In addition to conditions of financial vulnerability and lack of access to mainstream credit, consumers may, in some cases, prefer dealing with AFS providers, citing “convenience” in terms of location, opening hours, and quick access to cash, as an important factor in their decision to deal with these companies.⁵⁵ Also commonly cited is a more welcoming atmosphere and better customer service.⁵⁶ More troubling is the poor treatment some consumers, including those living on a low income, experience when they access mainstream banks.⁵⁷ There have been recent high-profile news stories of discriminatory treatment of Indigenous customers by these banks.⁵⁸

In sum, most instalment loan borrowers are those who can least afford their extremely high cost. This is not new, but the explosive growth of these loans in Canada in the last decade is challenging regulators at both the federal and provincial levels to keep up.⁵⁹ The next section looks back at how high-cost credit was formerly regulated federally under the *Small Loans Act*.

II. *Federal regulation of high-cost credit: the Small Loans Act*

1. *Enactment*

The federal *Small Loans Act* (“SLA”) was passed in 1939, replacing the *Money-Lenders Act, 1906*.⁶⁰ The *Money-Lenders Act* attempted to limit

53. Buckland & Spotton Visano, *supra* note 37 at 125.

54. ACORN, “Study,” *supra* note 19 at 28.

55. Jerry Buckland, *Hard Choices: Financial inclusion, fringe banks, and poverty in urban Canada* (Toronto: University of Toronto Press, 2012) at 104 [Buckland, *Hard Choices*]; FCAC, “Market Trends,” *supra* note 47 at 13; Buckland & Spotton Visano, *supra* note 37 (re: location).

56. See e.g. Gleixner, “Consumer Credit,” *supra* note 7 at 738; Buckland & Spotton Visano, *supra* note 37 at 40.

57. Buckland & Spotton Visano, *supra* note 37.

58. Angela Sterritt & Bridgette Watson, “Indigenous man and granddaughter handcuffed at Vancouver bank file human rights complaint against BMO, police,” *CBC News* (23 November 2020), online: <cbc.ca> [perma.cc/QB5L-EUYH].

59. Caplovitz, *supra* note 3.

60. *Small Loans Act*, *supra* note 10; Mary Anne Waldron, “A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough from the Past” (2011) 50:105 *Can Bus LJ* 300 at 303 [Waldron, “A Brief History”].

interest rates on loans under \$500 to twelve per cent annually. The *SLA* was enacted in response to lenders' concerns that this law prevented them from earning an adequate rate of return.⁶¹ The primary purpose of the *SLA* was to set the maximum total cost of a small loan to two per cent a month or twenty-seven per cent annually, including interest and charges combined.⁶² This rate was deemed high enough for lenders to generate a profit but low enough to protect consumers.

The *SLA* applied to all lenders, regardless of whether they were incorporated federally or provincially.⁶³ The *Act* required lenders to be licenced based on somewhat arbitrary criteria like character and fitness.⁶⁴ Lenders, including credit unions, whose charges never exceeded one percent per month on the unpaid principal were exempted from the licencing requirements.

A "small" loan was originally defined as up to \$500; this was raised to \$1,500 in 1956. Despite the wording of the *Act*, licensees could still make loans above \$1,500.⁶⁵ If the loan exceeded \$1,500 no part of it fell under the *SLA* unless it was a successive loan made to the borrower or to their spouse.⁶⁶

Interest rate caps imposed by the *SLA* varied based on the size of the loan. At the time of repeal, these were as follows:

- (a) twenty-four per cent per annum for loans of up to \$300 (\$1,085.25 in 2023 dollars);
- (b) twelve per cent per annum for loans exceeding \$300 but under \$1000;
- (c) eighteen per cent per annum for loans exceeding \$1000 (\$3,617.51 in 2023 dollars).⁶⁷

In calculating the cost of a loan, an additional loan made while a previous loan was outstanding could not be treated as a separate loan by the lender to ensure the borrower benefitted from the lower rates for larger loans.⁶⁸ Interest on the portion of the loan above the maximum loan amount of

61. Iain Ramsay, "Access to Credit in the Alternative Consumer Credit Market," paper prepared for the Office of Consumer Affairs, Industry Canada and Ministry of the Attorney General, British Columbia (Ottawa: Government of Canada Publications, 1 February 2000) Appendix 2 at 66, online (pdf): <publications.gc.ca/collections/Collection/C2-543-2000E.pdf> [perma.cc/4LCF-K4UH] [Ramsay, "Access to Credit"]; Gleixner, "Consumer Credit," *supra* note 7 at 704.

62. Mary Anne Waldron, *The Law of Interest in Canada* (Scarborough, ON: Carswell, 1992) at 15.

63. Gleixner, "Consumer Credit," *supra* note 7 at 704.

64. *SLA*, *supra* note 10, ss 5, 13(1); Leon Letwin, "Canadian Consumer-Credit Legislation" (1967) 8:2 Boston College L Rev 201 at 206, online (pdf): <dashboard.lira.bc.edu> [perma.cc/VLV6-GFVN].

65. Letwin, *supra* note 64 at 207.

66. *Ibid* at 209.

67. *SLA*, *supra* note 10, s 3(2)(a-c).

68. Letwin, *supra* note 64 at 207.

\$1,500 was capped at a rate of 0.5 per cent per month. As a result of the legislation, relatively few loans were made in the range of \$1,000–\$1,500.⁶⁹

The *Act* was enforced by the then superintendent of insurance, now the Office of the Superintendent of Financial Institutions.⁷⁰ The superintendent was empowered to investigate lenders to verify compliance with the *SLA*. While not mandated in the *SLA*, it was standard practice that licensees provided copies of their contracts and proposed advertising in their applications to the superintendent of insurance. This practice continues today under provincial regulation of payday lenders, which gives regulators the power to demand copies of contracts and advertisements.⁷¹

2. *Repeal*

At the time of its enactment, small loan companies primarily provided “distress credit” to consumers in times of need. The *SLA* was necessary, therefore, to ensure that lenders did not take advantage of vulnerable borrowers by charging more than necessary to cover the risk of default.⁷² It was also needed to encourage “legitimate” lenders to enter the consumer credit market.⁷³ Over the next 30 years, as the consumer credit market broadened, it became more difficult to distinguish small loan companies from banks and retailers; rate ceilings seemed no longer justified. A major innovation in the market was the introduction of multipurpose credit cards in the 1970s. These could be used to finance purchases normally financed by small loans but were not subject to interest rate caps.⁷⁴ By the 1970s, most lenders licensed under the *SLA* experienced losses on their small loans, and the *Act* came under increasing attack.⁷⁵

There were three main criticisms of the *SLA*.⁷⁶ First, some critics argued that the graduated rate ceilings were unrealistic in light of rising interest rates. Second, some argued that the *SLA*’s restrictions could be evaded easily by offering loans above the maximum regulated loan amount of \$1,500. Third, rate ceilings restricted borrowers’ access to legitimate lenders, forcing them to go to loan sharks.

69. *Ibid* at 209.

70. *Ibid* at 204.

71. See *Payday Loans Act*, SO 2008, c 9, ss 23(1), 53(4); *Payday Lenders Regulations*, NS Reg 248/2009, s 5(1)(a).

72. David Cayne & M J Trebilcock, “Market Considerations in the Formulation of Consumer Protection Policy” (1973) 23:4 U Toronto LJ 396 at 411.

73. Jacob Ziegel, “Bill C-44: Repeal of the Small Loan Act and Enactment of a New Usury Law” (1981) 59 Can Bar Rev 188 at 189, 191 [Ziegel, “Bill C-44”].

74. Waldron, “A Brief History,” *supra* note 60 at 306-307.

75. Ramsay, “Access to Credit,” *supra* note 61 at Appendix 2.

76. Ziegel, “Bill C-44,” *supra* note 73 at 189.

There is very little evidence of the size of the “loan sharking” market, then or now. In 1977, police reported to CBC that ten per cent of the population sought out loan sharks, making it a “multibillion dollar legal business” prior to the enactment of section 347.⁷⁷ Borrowers were identified as unemployed and relying on social assistance—not gamblers as previously assumed. The interest loan sharks collected sometimes reached 1000% per annum.

Critics argued for allowing the market to determine how much borrowers should pay, even though, at this time, the market for loans of \$1,500 or less was not highly competitive. The Superintendent of Insurance supported repeal, allowing the market to set rates and instead protect consumers through disclosure.⁷⁸ The superintendent argued that the *SLA* could not properly address the issue of loan sharks.⁷⁹

Supporters of the *SLA* argued for amendments to address these concerns. The Department of Consumer and Corporate Affairs recommended increasing the maximum loan to \$5,000, equivalent to \$16,119.10 in 2023, and raising the interest rate ceilings.⁸⁰ Professor Ziegel, who was a leading expert in consumer credit and would become a vocal critic of section 347, recommended excluding credit unions from the *SLA* since they were already subject to strict provincial regulation and replacing rate ceilings with an unconscionability test, following the UK. This change would retain the licensing provisions for otherwise unlicensed lenders and introduce additional monitoring.⁸¹ The federal government of the day, however, accepted the criticisms that the *SLA* overly restricted consumers’ access to legitimate lenders, driving them to loan sharks, and repealed the *SLA* altogether.⁸² Part III discusses the accompanying introduction of a criminal rate of interest into the *Criminal Code*.

III. *The criminal rate of interest*

1. *Section 347 of the Criminal Code*

The *SLA* was replaced by what is now section 347 of the *Criminal Code*, which applied to almost all types of loans and lenders.⁸³ Despite the sweeping implications, including for commercial lenders, the bill was

77. Loan Sharks: Desperation, Danger and Debt,” *CBC Radio* (1977), online (news broadcast): <cbc.ca> [perma.cc/244U-3888] [“Loan Sharks”].

78. *William E Thomson Associates Inc v Carpenter*, 1989 CanLII 185 (ONCA) [*Carpenter*].

79. *Ibid.*

80. Ramsay, “Access to Credit,” *supra* note 61 at Appendix 2.

81. Ziegel, Bill C-44, *supra* note 73.

82. *Ibid.*

83. In addition to the exemption for payday loans, tax rebate discounters, e.g. H&R Block, are exempt under section 347(8).

“rushed through in a single day.”⁸⁴ As the amendments to section 347 proposed in the 2023 budget and passed on 22 June 2023 were not yet in force at the time of publication, this part describes section 347, as it stood prior to these recent changes.

Section 347 made it a criminal offence to charge an “effective annual rate of interest” above sixty per cent, punishable by up to five years imprisonment, if found guilty of an indictable offence.⁸⁵ The request to create such an offence came from the Montreal police, who claimed to be facing widespread loan sharking.⁸⁶ Loan sharking received the most attention in Montreal chiefly because of the inquiry into organized crime by the Québec Police Commissions.⁸⁷ The legislative intention, therefore, was to protect all borrowers against “grossly excessive” rates, in contrast to the *SLA*, which “was structured to ensure that lenders obtained a reasonable rate of return while ensuring that small loans would be available at [reasonable] rates to lower income individuals.”⁸⁸ As discussed further below, courts’ acceptance that the purpose of section 347 is to combat loan sharking has been influential in civil cases in which borrowers have resisted collection efforts based on illegality.⁸⁹

The three basic financial elements of the offences contained in section 347 are (1) the amount paid by the lender to the borrower, (2) the due date that the loan is payable, and (3) the total amount which is due by the due date.⁹⁰ For any violation, there needs to be a debt made that charges interest.⁹¹

The provision creates two distinct offences.⁹² First, it is a criminal offence to *enter into an agreement* to receive interest that exceeds the criminal rate of interest. Second, it is an offence to *receive* payment of interest that exceeds this rate. Criminal cases have followed the Supreme Court of Canada’s decision in *Degelder*, which held that the “agreement” offence should be interpreted narrowly, but the “receipt” offence broadly.⁹³

84. Jacob Ziegel, “Time to clarify Canada’s lending law” *Globe and Mail* (20 April 2004), online: <theglobeandmail.com> [perma.cc/3NT2-SHEE] [Ziegel, “Time”].

85. *Criminal Code*, *supra* note 11, s 347(2). A summary conviction carries a punishment of up to two years imprisonment less a day and/or a fine of no more than \$25,000 see *Criminal Code*, *supra* note 11, s 347(1)(a)-(b).

86. Ramsay, “Access to Credit,” *supra* note 61 at Appendix 2.

87. “Loan sharks,” *supra* note 77.

88. Ramsay, “Access to Credit,” *supra* note 61 at Appendix 2.

89. *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7 at para 43 [TNAE].

90. *R v McRobb*, 1984 CanLII 3521 (ONSC) at para 37 [McRobb 1984].

91. *R v Warwaruk*, 1998 CanLII 28173 (MBKB) at paras 24-25 [Warwaruk].

92. *Criminal Code*, *supra* note 11, s 347(1).

93. *Degelder Construction Co v Dancorp Developments Ltd*, 1998 CanLII 765 (SCC) [Degelder]; *R*

For the agreement offence, if an agreement allows payment at the criminal rate of interest but does not require it, then there is no violation of section 347. The result is what has been called a “wait and see” approach to the receipt offence. For determining a violation of the receipt offence, the effective annual interest rate is calculated over the period that the credit is outstanding.

For the purpose of calculating the criminal rate, “interest” is defined in section 347(2) very broadly to include all charges and expenses in any form payable on credit advanced, but expressly excludes insurance charges, official fees, overdraft charges or required deposit balances. In *Garland*, the Supreme Court of Canada noted that the definition is intentionally broad to prevent creditors from using non-interest charges or fees to get around the cap.⁹⁴ As discussed below, one issue for commercial lenders is the ambiguity regarding whether “equity kickers” (issuing discounted shares to a lender) fall within the definition.

A conviction under section 347 requires the Crown to prove *mens rea*.⁹⁵ The Crown must prove beyond a reasonable doubt that the accused intended to enter into an agreement to receive interest higher than the criminal rate.⁹⁶ It does not matter whether the accused was aware that the interest rate was criminal.⁹⁷ However, a defence of mistake of fact is available where the accused believed that the effective annual rate under the agreement was less than the criminal rate.⁹⁸ Section 347(3) creates a presumption applicable to the receipt offence that the accused had “knowledge of the nature of the payment and that it was received at a criminal rate.”⁹⁹ Consent to the agreement is not a defence since this would virtually nullify and defeat the purpose of the provision as, absent evidence of duress or undue influence, all creditors could claim that the contract was entered into freely.¹⁰⁰ The conduct of the creditor or misrepresentations made do not contribute to the determination of guilt, although they may be factors in sentencing.¹⁰¹

The attorney general of Canada must approve any criminal proceedings under the provision, suggesting that “even a criminal remedy is not always appropriate for an infringement of section 347, let alone a civil remedy

v Marsy, 2006 ABPC 371 at para 37 [*Marsy*].

94. *Garland v Consumers Gas Co*, 1998 CanLII 766 (SCC) at para 28 [*Garland*].

95. *McRobb* 1984, *supra* note 90 at para 27.

96. *Ibid* at para 37; *R v Saikaley*, 2017 ONCA 374 at para 101 [*Saikaley*].

97. *McRobb* 1984, *supra* note 90 at para 34.

98. *Saikaley*, *supra* note 96 at para 101.

99. *Ibid* at para 89.

100. *Ibid* at para 31.

101. *Ibid* at para 28.

seeking to promote the criminal law objective of deterrence.”¹⁰² Charges under section 347 are infrequent. Completed cases in most jurisdictions in the majority of years between 1994 and 2019 was less than ten.¹⁰³ At least one police force has stated that it is not their mandate to enforce section 347 of the *Criminal Code*.¹⁰⁴ It has been suggested that Crown attorneys may be reluctant to prosecute small businesses where the individual amounts at stake are also small.¹⁰⁵ For example, the criminal rate of interest has not been widely enforced against pawnshops, despite regular monitoring by police for stolen goods.¹⁰⁶ Although the wording of section 347 implies that any rate above the criminal rate of interest is an offence, the purported legislative purpose of combatting loan sharking may also have resulted in the low number of prosecutions. The next section examines reported cases which resulted in a conviction under section 347.

2. *Convictions under section 347*

a. *Loan sharking cases*

“Loan sharking” is “not a term of art.”¹⁰⁷ Although often associated with a willingness to use violent collection methods, it has been used to describe otherwise law-abiding lenders who charge “an excessive rate of interest.”¹⁰⁸ In *R v McRobb*, the court defined loan sharks as “evil role-player[s] within the money market” who prey on unsophisticated borrowers willing to pay anything because they believe they cannot borrow from traditional lenders.¹⁰⁹ Conduct associated with loan sharking have been factors in sentencing but did not contribute to the determination of guilt.¹¹⁰

In *R v McRobb*, the accused was convicted on multiple counts for entering into loan agreements with five borrowers to receive interest at a criminal rate and on one count of extortion. The loans ranged from \$2,000 to \$15,500, with effective annual interest rates of 85.66 per cent to 616.33

102. *Criminal Code*, *supra* note 11 at s 347(7); *TNAE*, *supra* note 89 at para 44.

103. Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, *Integrated Criminal Court Survey*, 1994-2019. Data provided to authors. Two provinces and three territories had no charges in that timeframe.

104. Thibault Martin, Amelia Curran & Judith Lapierre, “Banking in Winnipeg’s Aboriginal and Impoverished Neighbourhood” (2006) 26:2 *Can J Native Studies* 331 at 348; Manitoba Public Utilities Board, Order No. 39/08 at 114, online (pdf): <<https://cjns.brandonu.ca/wp-content/uploads/26-2-06martin.pdf>> [perma.cc/EYK2-XM3U].

105. Ramsay, “Access to Credit,” *supra* note 61 at 31.

106. Buckland, *Hard Choices*, *supra* note 55 at 352.

107. Ziegel, “Bill C-44,” *supra* note 73 at 193.

108. *R v Dimerman*, 1992 CanLII 13173 (MBKB) at para 23 [*Dimerman*]; Fleming, *supra* note 9 at 23.

109. *McRobb*, *supra* note 90 at para 34.

110. *Ibid.*

per cent. The borrowers went to the accused out of convenience or because they did not think they would be able to obtain traditional forms of credit. Some borrowers feared the accused because he explained that “something would happen” or they would “be sorry” if they did not pay their overdue loans.¹¹¹ Other borrowers considered their agreements to be fair. For two counts, the court held that the crown failed to prove beyond a reasonable doubt that the borrower received the funds from the loan.

The court rejected the defence’s suggestion that the crown must prove that “the accused acted dishonestly or preyed on others by usury or was engaged in swindling or other trickery.”¹¹² The fact that the borrowers consented to the terms of the loans did not constitute a defence, since this would effectively negate the offence. On appeal, the court rejected the accused’s argument that the provision infringed his right to liberty under section 7 of the *Charter*.¹¹³ McRobb was sentenced to one year in prison.

The two accused in *R v Chan* pled guilty to charging a criminal rate of interest and extortion related to a loan sharking business.¹¹⁴ The loans were advertised in a Toronto-based Chinese newspaper. Borrowers were charged an annual interest rate of 520 per cent, collected as weekly payments of ten per cent of the loan amount, starting on the date of the loan. There was a penalty of \$100 per day for late payments, and they were threatened or assaulted if they continued to fail to pay. The defendants collected contact information and used passports for collateral. After being threatened with violence, several borrowers went into hiding, changing their phone numbers and addresses. On arrest, the police found a debt list of 74 names for a weekly total of \$10,000. The accused were sentenced to conditional sentences of two years less a day and 18 months. Sentencing considerations included the length of the operations, premeditation, the guilty pleas, and ongoing restitution to victims, both voluntary and mandated under a separate order.

b. *Other convictions*

R v Dimerman and *R v Marsy* involved rare convictions of pawnshop owners.¹¹⁵ In *Dimerman*, the court rejected the argument that the application of section 347 to pawnshops exceeded the provision’s purpose to combat loan sharking, based on the plain meaning of the section and the lack of an

111. *Ibid* at paras 11, 17.

112. *Ibid* at para 28.

113. *R v McRobb*, 1986 CanLII 4766 (ONCA) at para 1 [*McRobb*, 1986].

114. *R v Chan*, 2014 ONSC 1411 [*Chan*].

115. Gleixner, “Consumer Credit,” *supra* note 7 at 718 (citing evidence from Québec that “most pawnbrokers in Montreal violated the criminal interest rate provision” and other regulations). See also *R v Duzan*, 1993 CanLII 6603 (SKCA).

express exclusion for pawnshops.¹¹⁶ The court also rejected the appellants' argument that section 347(1)(a) was unconstitutional because it allowed for a conviction without *mens rea*. The court held that the mental element requires that the accused committed the prohibited act intentionally, not that they knew that an interest rate above sixty per cent was unlawful.¹¹⁷

In *Marsy*, the court held that the receipt offence should be broadly construed.¹¹⁸ Two borrowers in financial straits entered contracts with the accused at an effective annual interest rate of 1,281.416% and 207,981%. Investigations began after the two borrowers complained to the Better Business Bureau, Alberta Consumer and Corporate Affairs and the Calgary Police Service. The court affirmed the decision in *McRobb* that *mens rea* requires intentionally entering into an agreement to receive a criminal rate of interest, regardless of whether the accused was aware that it was illegal.¹¹⁹ The court found that the accused knew what he was doing based on his testimony that his business would not be viable at a rate of five per cent per month, which is an effective annual rate of sixty per cent.¹²⁰

In *R v Bullen* the accused pled guilty to charging two borrowers effective annual interest rates from just over sixty per cent to 373 per cent.¹²¹ The court distinguished the facts from the loan sharking cases, such as *Chan*, where the facts were much more severe in terms of the scale of the operation. In *Bullen*, there were no threats or physical extortion, the borrowers did not realize that they were paying high rates and believed that they were being treated well.¹²² The court sentenced the accused to six months total, three per offence. His corporation was also fined.

c. *Civil cases*

As noted above, the plain wording of section 347 does not require proof of dishonesty—only an intention to charge or collect interest above an effective annual rate of sixty per cent. The consent of the borrower is not a defence. The definition of “interest” in the section is very broad, excluding fees payable to a government authority to perfect security, overdraft fees and the cost of insurance. Following *Dimerman*, section 347 applies to all loans not expressly exempted. Although criminal conviction is a very distant to non-existent possibility for commercial lenders, these aspects of the criminal rate of interest and the possibility of the common law defence

116. *Dimerman*, *supra* note 108 at para 22.

117. *Ibid* at para 15.

118. *Marsy*, *supra* note 93 at para 37.

119. *Ibid*.

120. *Ibid* at para 40.

121. *R v Bullen*, 2018 ONCJ 745 at para 29.

122. *Ibid* at paras 27-29.

of illegality create problems for enforcing commercial loan agreements.¹²³ These civil disputes represent the only section 347 cases to have reached the Supreme Court of Canada.¹²⁴

In *Garland*, the Court acknowledged that section 347 has had a much larger reach than the intended purpose of preventing loan sharking. Despite the complications this creates for commercial parties, the Court concluded that “the plain terms must govern its application” and only Parliament can take action to achieve a “more directed focus.”¹²⁵ In applying the common law doctrine of illegality in civil cases, however, the Court held in *TNAE* that when violations of section 347 do not fall within loan sharking, but instead involve “a commercial transaction engaged in by experienced and independently advised commercial parties” the appropriate remedy is to read down the interest rate to sixty per cent.¹²⁶

Civil cases raise further issues regarding the potential for equity investments to be caught by the provision. While an investment of equity alone does not engage section 347, an investment of debt and equity where the “dominant feature” of the transaction is to lend money may be subject to the restrictions of section 347.¹²⁷ For example, high-risk businesses, such as start-ups, may provide discounted or nominal cost shares in exchange for a loan.¹²⁸ The equity can provide the lender with a significant profit if the venture is successful and calculating the equity as interest often results in a violation of section 347.¹²⁹ In *Bimman*, the Court fell short of holding that shares are categorically excluded from the definition of interest, instead following *Boyd* that each case must be decided on the facts.¹³⁰ In *Bimman*, the Court held that the issuance of shares below fair market did not constitute a “charge or expense” incurred by the borrower because the cost “was borne by the shareholders, not the company [i.e. the

123. *Garland*, *supra* note 94 at para 25; *Boyd v International Utility Structures Inc*, 2002 BCCA 438 at para 1 [*Boyd*].

124. Jennifer Babe, “Bill S-19: A Solution That Creates Problems” (2006) 21:2 Banking & Finance L Rev 303 at 305-306; *Degelder*, *supra* note 93; *Garland*, *supra* note 94 at para 25; *TNAE*, *supra* note 89.

125. *Garland*, *supra* note 94 at para 52.

126. *TNAE*, *supra* note 89 at para 43, 47.

127. Uniform Law Conference of Canada (ULCC), *Report of the Criminal Section Working Group Criminal Interest Rate: A Discussion Paper: Section 347 of the Criminal Code In Need of Reform*, 2008 (Ottawa: Canadian Electronic Library, 2013) at 8, online (pdf): <ulcc-ehlc.ca> [perma.cc/V65C-BDKW] [ULCC “Working Group”]; Babe, *supra* note 124 at 306-307; Boyd, *supra* note 123 at para 25.

128. Babe, *supra* note 124 at 305.

129. ULCC, “Working Group,” *supra* note 127.

130. *Bimman v Neiman*, 2015 ONSC 2313 at para 195 [*Bimman* 2015]. The trial judge’s holding on section 347 was not pursued on appeal. See *Bimman v Neiman*, 2017 ONCA 264 at 20.

debtor] itself.”¹³¹ This decision deals with the issuance of shares connected to shareholder loans; however, some argue that the holding should apply equally to arm’s length lending.¹³²

These issues for commercial lenders highlighted in the civil cases are present at an effective annual rate of sixty per cent and form the basis of commercial lenders’ arguments for the repeal of section 347. They also have been raised in response to previous attempts to lower the criminal rate of interest on the ground that lowering the rate will exacerbate these problems. These previous attempts to lower the criminal rate are discussed in the next section.

IV. *Previous attempts to lower the criminal rate of interest*

The small number of reported criminal cases in the four decades section 347 has been in force suggests that police are not relying on the provision to combat organized crime, nor are they rigorously enforcing it to protect vulnerable borrowers. As detailed above, there is a growing market of AFS providers who charge interest rates that go right up to the criminal interest rate. Market competition is not ensuring that borrowers pushed into this segment of the consumer credit market pay reasonable rates of interest.

Prior to the decision in the 2023 federal budget and Bill C-47, several attempts were made to amend section 347 of the *Criminal Code*, with the goal of curtailing predatory lending which occurred under the sixty per cent cap. It was often argued that the rate set in 1981 is arbitrary and outdated compared to the Bank of Canada’s overnight rate, which remains significantly lower than it was forty years ago despite its recent rapid rise.

1. *Bill S-19*

The first attempt to amend section 347 was in 2004.¹³³ Bill S-19 proposed lowering the rate to thirty-five per cent plus the overnight rate, which was 2.5 per cent at the time.¹³⁴ Senator Madeleine Plamondon chose thirty-five per cent because it was realistic, fair, and had proven success in Québec.¹³⁵ Insurance charges were also added to the rate of interest calculation. One

131. *Bimman* 2015, *supra* note 130 at paras 195-198; *Criminal Code*, *supra* note 11 at s 347(2); Simon Williams & Irfan Kara, “Criminal Interest Revisited: Apparent Immunity for Equity Kickers” (2016) 31 *Banking & Finance L Rev* 621 at 624, online (pdf): <torys.com> [perma.cc/GR25-VD7U].

132. Williams & Kara, *supra* note 131 at 625.

133. Bill S-19, *An Act to amend the Criminal Code (criminal interest rate)*, 1st Sess, 38th Parl, 2004, cl 1(1) (as passed by the Senate 28 June 2005), online: <parl.ca> [perma.cc/YK9X-WQDB].

134. *Ibid* at cl (9); Senate, Standing Senate Committee on Banking, Trade and Commerce, *Minutes of the Proceedings and Evidence*, 38-1, No 5 (2 February 2005), online: <sencanada.ca> [perma.cc/G87X-WP57].

135. Senate, *Debates of the Senate*, 38-1, Vol 142, No 15 (17 November 2004) at 288 (Hon M Plamondon), online (pdf): <sencanada.ca> [perma.cc/U6ED-QH3A].

reason to include insurance charges is that even when provided by a third party, lenders likely earn commission on the sale of these products.¹³⁶

In response to concerns regarding the effect of the Bill on commercial loans, Senator Plamondon proposed an amendment to exclude loans above \$100,000.¹³⁷ Despite some misgivings, the Senate passed Bill S-19 in 2005, with the amendment limiting the application of section 347 to agreements of \$100,000 or less.¹³⁸ The Bill stalled after its First Reading in the House of Commons due to a change in government.

2. *Bill S-210*

In 2013, Bill S-210, sponsored by Senator Pierette Ringuette, proposed to reduce the criminal rate of interest from sixty per cent to twenty per cent plus the overnight rate on credit advanced for personal, family and household purposes.¹³⁹ At the time, the overnight rate was one per cent.¹⁴⁰ The criminal rate for credit advanced for business or commercial purposes would stay at sixty per cent but would have exempted business agreements where the credit advanced equalled or exceeded one million dollars.¹⁴¹ She cited US state legislation which imposed caps varying from five per cent to twenty-four percent to support the proposed rate. The rate also received support on the basis that it would have little effect on the credit card industry, although submissions in response to subsequent attempts disputed this.¹⁴² The purpose of Bill S-210 was to prevent the worsening of personal financial difficulties through unsustainable interest payments. The Bill lapsed after the Second Reading.

3. *Bill S-237*

In 2017, Senator Ringuette introduced Bill S-237, which also proposed a rate of twenty per cent plus the overnight rate for personal, family and household purposes.¹⁴³ At the time, the overnight rate was 0.5 per cent.¹⁴⁴

136. Goeasy, "2021 Annual Report," *supra* note 17 at 41.

137. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 38-1, No 15 (22 June 2005) online: <senCanada.ca> [perma.cc/9XAL-7YZ9] [S-19 Evidence].

138. Bill S-19, *supra* note 133.

139. Bill S-210, *An Act to amend the Criminal Code (criminal interest rate)*, 2nd Sess, 41st Parl, 2013, cl 1(1)(b) (first reading 20 November 2013), online: <parl.ca> [perma.cc/MTN7-S398].

140. Senate, *Debates of the Senate*, 41-2, Vol 149 No18 (26 November 2013) at 521 (Hon P Ringuette), online (pdf): <senCanada.ca> [perma.cc/R7J5-Z3XC].

141. Bill S-210, *supra* note 139 at 1(1)(a).

142. Senate, Standing Senate Committee on Banking, Trade and Commerce, *Minutes of the Proceedings and Evidence*, 41-2, No 28 (6 May 2015), online: <senCanada.ca> [perma.cc/N8XW-2VFB]; Chris Robinson, "Comments on Bill S-237, *An Act to amend the Criminal Code (criminal interest rate)*" (2017) at 1, online (pdf): <senCanada.ca> [perma.cc/CK3Z-LQB8].

143. Bill S-237, *An Act to amend the Criminal Code (criminal interest rate)*, 1st Sess, 42nd Parl, 2017, cl 1(1)(b) (first reading 9 March 2017), online: <parl.ca> [perma.cc/3C6K-2RSA].

144. Senate, *Debates of the Senate*, 42-1, Vol 150 No 121 (16 May 2017) at 3067 (Hon P Ringuette),

Senator Ringuette argued that anchoring the criminal rate of interest to the overnight rate would create a rate that is “flexible to the changing economy and monetary policy.”¹⁴⁵ Commercial loans under one million dollars would not be subject to any limits.¹⁴⁶ Commercial loans over one million dollars would remain subject to the original rate of sixty per cent.¹⁴⁷

One of the Bill’s objectives was to promote the well-being of Canadian families and households by using the criminal rate of interest as a tool to preserve consumers’ financial well-being.¹⁴⁸ However, the Bill was criticized for its potential effect on pawnshops and other small lenders, who might stop offering small, short-term loans, pushing consumers to exempted payday loans.¹⁴⁹

In response to these concerns, Senator Tannas suggested amending the Bill to cap interest at forty-five per cent.¹⁵⁰ Senators supported this motion on the basis that twenty per cent was too low and forty-five per cent had a better chance of being passed by the House of Commons. A sub-amendment requiring the rate of interest to be reviewed every three years by a committee of the Senate or House of Commons was also made.

At third reading, Senator Ringuette proposed an amendment to lower the rate to thirty-five per cent plus the overnight rate for the next three years.¹⁵¹ Again, she pointed to the experience of Québec with its thirty-five per cent cap and to US research. Senator Tannas, in rebuttal, noted that the Bill is intended to act as a “blunt tool,” rather than a finely tuned regulation.¹⁵² He argued that lowering the rate any further risked dislocating consumers from access to credit. Before reaching an agreement, the Bill lapsed.

4. *Bills C-274, C-213, S-233 and S-239*

On 11 March 2021, in response to the financial effects of the pandemic, NDP MP Peter Julian tabled Bill C-274.¹⁵³ The Bill would have lowered

online (pdf): <sencanada.ca> [perma.cc/QLA8-Q6BT].

145. *Ibid.*

146. S-237, *supra* note 143 at cl (9).

147. *Ibid* at cl (1)(1)(a).

148. Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 33 (7 February 2018), online: <sencanada.ca> [perma.cc/N6VH-ARLG].

149. Robinson, *supra* note 142 at 1.

150. Senate, Standing Senate Committee on Banking, Trade and Commerce, *Minutes of the Proceedings and Evidence*, 42-1, No 33 (8 February 2018), online: <sencanada.ca> [perma.cc/94C7-4T26].

151. Senate, *Debates of the Senate*, 42-1, Vol 150, No 223 (19 June 2018) at 6184 (Hon P Ringuette), online (pdf): <sencanada.ca> [perma.cc/SQ3H-FMLW].

152. Senate, *Debates of the Senate*, 42-1, Vol 150, No 223 (19 June 2018) at 6186 (Hon S Tannas), online (pdf): <sencanada.ca> [perma.cc/SQ3H-FMLW].

153. Bill C-274, *An Act to amend the Criminal Code (criminal interest rate)*, 43rd Parl, 2nd Sess,

the rate to thirty per cent above the overnight rate on the day the agreement was entered into or renewed. This Bill would have repealed the payday loan exemption. Following the federal election, Julian introduced Bill C-213 on 14 December 2021, proposing the same amendments as Bill C-274.¹⁵⁴

On 4 May 2021, Senator Ringuette introduced Bill S-233 to reduce the criminal rate to the overnight rate plus twenty per cent.¹⁵⁵ This Bill also lapsed after its second reading in the Senate due to the 2021 federal election.

Finally, on 1 March 2022, Senator Ringuette introduced Bill S-239, proposing the same amendments as Bill S-233.¹⁵⁶ Again, she advocated for a rate tied to the bank rate to ensure that the limit would move with general interest rates and “remain relevant to current markets as they change over time.”¹⁵⁷ She argued that twenty per cent plus the overnight rate would leave most financial transactions alone but target instalment loans and predatory lines of credit. On the possibility that lowering the rate will limit access to credit, she replied that “it isn’t a good thing for the vulnerable to have access to loans that they cannot pay back.”¹⁵⁸ She pointed to low-cost lenders like Borrowell, which have an average APR of eleven to twelve per cent, and a pilot project between Canada Post and TD Bank, offering borrowers with no or low credit ratings in rural and unbanked areas small dollar loans at rates between 6.33 per cent and 16.03 per cent.¹⁵⁹ She emphasized the need to respond to the issue of growing consumer debt in Canada. The Bill was debated in the Senate at its second reading on 20 April 2023.¹⁶⁰ These unsuccessful attempts to lower the criminal rate

(first reading 11 March 2021), online: <parl.ca> [perma.cc/E9BR-5LHZ].

154. Bill C-213, *An Act to amend the Criminal Code (criminal interest rate)*, 44th Parl, 1st Sess, 2021, cl 1 (first reading 14 December 2021), online: <parl.ca> [perma.cc/79MG-6J2V].

155. Bill S-233, *An Act to amend the Criminal Code (criminal interest rate)*, 2nd Sess, 43rd Parl, 2021 (first reading 4 May 2021), online: <parl.ca> [perma.cc/8ZM2-YQWS].

156. Bill S-239, *An Act to amend the Criminal Code (criminal interest rate)*, 1st Sess, 44th Parl, 2022, cl 1(1) (first reading 1 March 2022; second reading 22 March 2022), online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-239/first-reading>.

157. Senate, *Debates of the Senate*, 44-1, Vol 153, Issue 26 (22 March 2022), online: <sencanada.ca> [perma.cc/F63Q-HT6Z].

158. *Ibid.*

159. *Ibid.* The TD-Canada Post loan was briefly expanded nationally, before being permanently paused in November 2022. Holly McKenzie-Sutter, “TD Bank pauses Canada Post loan program weeks after national expansion,” *Bloomberg* (25 Nov 2022), online: <bnnbloomberg.ca> [perma.cc/CZT7-LPEK].

160. Senate, *Debates of the Senate*, 44-1, Vol 153, No 114 (20 April 2023), online: <sencanada.ca> [perma.cc/Y6AH-EPMW].

were opposed by the commercial lending bar.¹⁶¹ The next section explains commercial lenders' concerns with section 347.

5. *Commercial lenders' concerns*

Commercial lenders consistently criticized section 347 for its failure to distinguish between loans to individuals and loans between sophisticated commercial parties.¹⁶² Ideally, commercial lenders would like to see the section repealed altogether.¹⁶³ Commercial lenders argue that section 347 is not meeting its stated legislative objective, given the low number of loan sharking convictions and high number of civil cases in which commercial borrowers have invoked section 347.¹⁶⁴

In the forty years since its enactment, commercial lenders have mostly succeeded in complying with the cap. The main objection to lowering the criminal rate without otherwise altering the wording of the section is that it will exacerbate concerns with the existing provision.¹⁶⁵ These concerns include the broad definition of interest, the requirement that interest is an effective annual rate, which affects short-term loans, and the uncertainty created by the "wait and see" approach to the receipt offence, which particularly affects commercial loans with an equity component.¹⁶⁶ The section may also cause additional litigation costs when a borrower raises section 347 "to attempt on technical grounds to avoid performance of an important business obligation."¹⁶⁷

One specific problem for commercial lenders is uncertainty around the inclusion of equity in the definition of interest. These issues have been identified and discussed in civil cases, including *Bimman* and *Boyd*. To eliminate the uncertainty created by these cases, counsel for commercial lenders have advocated for the explicit exception of equity components of loans from the provision, as was done in Florida.¹⁶⁸ The next section examines recent attempts to impose a national interest rate cap in the

161. S-19 Evidence, *supra* note 137; Senate, Standing Senate Committee on Banking, Trade and Commerce, *Minutes of the Proceedings and Evidence*, 38-1, No 5 (3 February 2005), online: <senCanada.ca> [perma.cc/GQ2L-99FG] [Bill S-19 BTC *Proceedings*].

162. Bill S-19 BTC *Proceedings*, *supra* note 161; Ziegel, "Time," *supra* note 84. Draft regulations enacted under the revisions to section 347 will finally make this distinction. See Conclusion Part VI.1, below.

163. Mary Anne Waldron, "What is to Be Done with Section 347" (2003) 38:3 Can Bus LJ 367 at 377 [Waldron, "What is to Be Done"].

164. ULCC "Working Group," *supra* note 127 at 16.

165. Bill S-19 BTC *Proceedings*, *supra* note 161.

166. Waldron, "What is to Be Done," *supra* note 163 at 367.

167. *Ibid* at 368.

168. Barry Tarshis, "Is Equity A Crime? Equity as Interest under Section 347 of the Criminal Code" (2006) 21:3 Banking & Finance L Rev 505 at 527.

US and the judicially-imposed thirty-five per cent interest rate cap on consumer loans in Québec.

V. *Interest rate caps in the US and Québec.*

1. *US*

Historically, the US has not imposed a national interest rate ceiling, with each state setting its own limits.¹⁶⁹ The explosion of the high-cost credit industry, specifically payday lending, has led to a push for a national interest rate cap of thirty-six per cent APR, based on the cap imposed by the *Military Lending Act* and accompanying department of defence regulations on all consumer loans to active duty service members and their immediate family members.¹⁷⁰ Interest is broadly defined and, unlike the definition in section 347, includes credit insurance premiums.¹⁷¹

The *Veterans and Consumers Fair Credit Act* (“VCFCA”) would have extended this cap to all consumers and to most unsecured consumer loans.¹⁷² There were carve outs for certain non-periodic credit card fees, provided these did not exceed twenty-five per cent of the credit limit in the first year the card is issued.¹⁷³ Identical bills were introduced in the House and the Senate.¹⁷⁴ The bill had a Republican co-sponsor in the House.¹⁷⁵ Senate hearings on the bill were held in September 2022, but the bill was not passed before the end of the 117 Congress.¹⁷⁶

Consumer, civil rights, veterans and servicemember organizations and advocates have widely endorsed a national thirty-six per cent cap.

169. National Consumer Law Center (NCLC), Press Release, “NCLC Advocates Applaud 36% National Rate Cap Bill to Curb High-Cost, Predatory Loans Across the Nation” (29 July 2021), online: NCLC <nclc.org> [perma.cc/LF5P-N7NA] [NCLC, Press Release].

170. Pete Schroeder, “U.S. Senate banking chair plans interest-rate cap bill as he turns up heat on lenders” (25 May 2021), online: <www.reuters.com/business/finance/us-senate-banking-chair-plans-interest-rate-cap-bill-he-turns-up-heat-lenders-2021-05-25>; *Military Lending Act*, 10 USC 987; Paul E Kantwill and Christopher L Peterson, “American Usury Law and the Military Lending Act” (2019) 31 *Loyola Consumer LR* 3.

171. Kantwill & Peterson, *supra* note 170.

172. US, Bill HR 5050, *Veterans and Consumers Fair Credit Act*, 116th Cong, 2019; United States Senate Committee, “U.S. Senators Seek to Cap Consumer Loans at 36%” (28 July 2021), online: <banking.senate.gov> [perma.cc/VT2N-SN3D].

173. *Veterans and Consumers Fair Credit Act*, *supra* note 172 at 140B; *Credit Card Accountability Responsibility and Disclosure Act*, 16 USC 1637 at 127(n).

174. United States, Senate, Banking, Housing and Urban Affairs, *S.2508 - Veterans and Consumers Fair Credit Act*, online: <congress.gov/bill/117th-congress/senate-bill/2508/related-bills>.

175. United States, House, Financial Services, *H.R.5974 - Veterans and Consumers Fair Credit Act*, online: <congress.gov/bill/117th-congress/house-bill/5974/cosponsors>.

176. United States, Senate, Banking, Housing and Urban Affairs, *S.2508—Veterans and Consumers Fair Credit Act*, online: <https://www.congress.gov/bill/117th-congress/senate-bill/2508/all-actions>; United States, House, Financial Services, *H.R.5974—Veterans and Consumers Fair Credit Act*, online: <congress.gov/bill/117th-congress/house-bill/5974/all-actions>.

It is also supported by the American Fintech Council, a trade association representing the financial technology industry in the US, and has general popular support among Americans.¹⁷⁷ Kantwill and Peterson note that because of its current application to active military members, the thirty-six per cent cap is the country's most vetted interest rate cap.¹⁷⁸

A thirty-six per cent cap on non-bank loans has been implemented in several states to combat instalment loans and payday loans.¹⁷⁹ The effect of imposing a thirty-six per cent cap on payday loans has been to eliminate payday lenders from these states.¹⁸⁰ The impact of this cap on consumers is discussed further in Part VI below.

2. Québec

In Québec, section 8 of the *Consumer Protection Act (CPA)* and section 1437 of the *Civil Code of Québec* allow borrowers to ask the court to nullify or reduce their obligations where the benefits and risks of the contract are significantly disproportionate in favour of the lender.¹⁸¹ Decision makers in multiple cases have ruled that an annual interest rate above thirty-five per cent is disproportionate and reduced the amount owed by the borrower accordingly.¹⁸² Based on these decisions, the Office de la protection du consommateur issued a directive that they may refuse to issue or renew a licence to any lender charging an annual rate of interest, including specified fees, above thirty-five per cent, effectively imposing an interest rate cap of thirty-five per cent.¹⁸³

177. American Fintech Council, "Our Policy Goals," online: <web.archive.org/web/20231113034024/https://fintechcouncil.org/what-we-do> [<https://perma.cc/K6KM-L8WV>]; Kantwill & Peterson, *supra* note 170 at 533.

178. Kantwill & Peterson, *supra* note 170 at 535.

179. Carolyn Carter, "Predatory Instalment Lending in the States: How Well Do the States Protect Consumers Against High-Cost Instalment Loans?" *NCLC* (28 June 2022), online: <www.nclc.org/perma.cc/S75A-AASV>; Megan Leonhardt, "Nebraska becomes the latest state to cap payday loan interest rates" *CNBC* (4 November 2020), online: <cnbc.com/perma.cc/GG6E-U8NG>.

180. See, e.g. Martha Stoddard, "Payday lenders disappeared from Nebraska after interest rates capped at 36%" *Omaha World-Herald* (13 September 2022), online: <omaha.com/perma.cc/ZHP4-E9CA>.

181. *La loi sur la protection du consommateur*, RLRQ, c P-40.1, s 8; *Code civil du Québec*, CCQ 1991, s 1437.

182. Claude Masse, *Loi sur la protection du consommateur: analyse et commentaires* (Cowansville: Les Éditions Yvon Blais, 1999) at 134, 141, citing *Trans-Canada Crédit Limited c Frey*, in which the court held that a 35.08 per cent interest rate was usurious and abusive and reduced the rate to twelve per cent. See also *Bénéficial Canada Inc c Sirois*, 2000 CanLII 6366 (CQ); and *Corp. Crédit Trans-Canada c Bélanger*, 2003 CanLII 15217 (CQ).

183. Marc Vigneault, "Le crédit au consommateur et les nouvelles dispositions de la LPC," Office de la protection du consommateur, online (presentation): <cdn.opc.gouv.qc.ca/media/documents/a-propos/AccesInformation/2019/344001133_Document_5.pdf> [perma.cc/RB8X-TTWN]; OPC, "Prêteurs d'argent," online (website): <opc.gouv.qc.ca/perma.cc/2Z8E-92T3>. Fees that must be included in the calculation are administration and storage fees.

The factors for determining whether a loan agreement is disproportionate include market and consumer conditions.¹⁸⁴ For example, a borrower could bring evidence of the lender's profits relative to other financial institutions and the borrower's level of sophistication and financial situation.¹⁸⁵ The risk being assumed by the lender is also a relevant factor.¹⁸⁶ This approach potentially raises the criticism that where the market as a whole is high-cost, the contract will be upheld.¹⁸⁷ Québec courts, however, have acknowledged that the fact that all lenders are charging the same high rate does not preclude consumer exploitation within the meaning of the *CPA*.¹⁸⁸ Courts have consistently upheld rates below thirty-five per cent, suggesting that in most circumstances, rates below this threshold are not disproportionate or unconscionable.¹⁸⁹

The jurisprudential consensus in Québec around a thirty-five per cent cap and the push for a national cap of thirty-six per cent in the US suggest that charging consumers interest above this rate should be considered predatory. The next part considers policy options for protecting consumers of high-cost credit, starting with lowering the criminal rate of interest. Beyond other typical financial consumer protection measures, such as mandatory disclosure and regulating collection practices, which are not discussed here, we also consider alternative or complementary approaches, including the re-introduction of a federal *Small Loans Act*, and requiring or encouraging mainstream banks to offer affordable credit.

VI. Policy options for protecting consumers of high-cost credit

1. Lowering the criminal rate of interest

Bill C-47, once in force, will lower the criminal rate of interest from sixty per cent effective annual interest, or forty-seven per cent APR, to thirty-five per cent APR.¹⁹⁰ Subject to compliance and enforcement, lowering the criminal rate of interest has the immediate effect of lowering the cost of instalment loans in provinces other than Québec. Lowering the rate to thirty-five per cent is in line with previous proposals to lower the rate, the judicial cap in Québec, the thirty-six per cent cap in the US *Military*

184. *Compagnie de finance Household du Canada c Robillard*, [2002] RJQ 521, 2001 CanLII 10346 (CQ) at para 36.

185. *Ibid* at para 39.

186. Masse, *supra* note 182 at 144, citing *Crédit Trans-Canada Ltée c Côté*, in which the court upheld a 33.79 per cent interest rate on this basis.

187. Abdul Karim Aldohni, "Loan Sharks v Short-term Lenders: How Do the Law and Regulators Draw the Line?" (2013) 40:3 JL & Soc'y 420 at 441.

188. *Riendeau c Cie de la Baie d'Hudson*, [2001] JQ No 599, 2000 CanLII 9262 (CA) at para 44.

189. *Riendeau c Comiepagne de la Baie d'Hudson*, 2004 CanLII 40323 (QC CS)

190. Bill C-47, *supra* note 23 and accompanying text.

Lending Act and the cap in many US states. As discussed above, previous attempts to lower the criminal rate of interest, including Bills C-213 and S-239, would set the rate in relation to the Bank of Canada's overnight lending rate. Québec jurisprudence and the growing consensus in the US suggest, however, that there is an absolute cap above which interest rates are "predatory" under any prevailing market conditions. Again, this cap appears to be thirty-five per cent APR.

As a consumer protection tool, interest rate caps that cover the nominal interest rate and non-interest fees and charges, as the criminal rate does through its broad definition of interest, are effective at lowering the cost of borrowing by limiting lenders' ability to impose costs on consumers in other ways.¹⁹¹ As the Associate Director of the US National Consumer Law Center has argued, "[i]nterest rate limits are the simplest, most effective way to stop predatory lending and to ensure that lenders make responsible loans that people can afford to repay without getting caught in a debt trap."¹⁹² Lowering the criminal rate of interest also leaves unaffected provincial consumer protection legislation, such as the high-cost credit regulations in place in four provinces, leaving it open to the provinces to impose more stringent requirements on lenders. However, it raises two primary concerns, one for commercial lenders and one for consumers.

As discussed above, commercial lenders have long opposed section 347 as unnecessary interference in loan agreements between sophisticated parties. Given the problems with the existing criminal rate of interest for commercial lending, lowering the rate requires some exemption for commercial loans to avoid exacerbating these problems. The amendments to section 347 provide for exempting specified agreements or arrangements through regulations.¹⁹³ Accepting that one continuing purpose of section 347 is to combat loan sharking, a broad exemption for all commercial loans would incorrectly assume that commercial lending is immune from criminal activity.¹⁹⁴ Draft regulations propose exempting all commercial loans above \$500,000 and commercial loans greater than \$10,000 and up to \$500,000 with an interest rate that does not exceed forty-eight per cent APR.¹⁹⁵ Commercial loans above \$500,000 would not be subject to any cap. Commercial loans of \$10,000 or less would be subject to the new criminal rate of thirty-five per cent APR. Commercial loans are defined

191. Aurora Ferrari, Oliver Masetti & Jiemin Ren, "Interest Rate Caps: The Theory and Practice" (2018) World Bank Pol'y Research Working Paper 8398 at 36 at 3.

192. NCLC, Press Release, *supra* note 169.

193. Bill C-47, *supra* note 23, s 611.

194. Waldron, "What is to Be Done," *supra* note 163 at 381.

195. Canada Gazette Part I, Vol. 157, No. 51 at 4132.

as loans for a business or commercial purpose made with a borrower who is not a natural person. The draft regulations do not amend the definition of “interest” to make it clear that it does not apply to mixed debt/equity transactions, as recommended by Professor Waldron, the Canadian Bankers Association (“CBA”), Uniform Law Conference of Canada (“ULCC”), and the Canadian Venture Capital & Private Equity Association (“CVCA”).¹⁹⁶ It seems likely, however, that the total exemption for commercial loans above \$500,000 will resolve this issue.

For consumers, the concern with lowering the criminal rate of interest is that it will limit access to credit for borrowers with low credit scores or no credit history in Canada.¹⁹⁷ The industry argues that interest rate caps prevent lenders from tying interest rates to the borrower’s risk level, which will cut an estimated 4.8 million consumers out of the market for instalment loans, driving them to higher cost payday loans or even out of the legal market altogether.¹⁹⁸ Some communities, such as immigrant communities, may be vulnerable to criminal loan sharks.¹⁹⁹ It may also limit access to “bricks and mortar” storefronts, which is likely to have a greater impact on borrowers with limited internet access or low digital literacy.²⁰⁰ Draft regulations provide an exemption for pawn loans under \$1,000 when the interest rate does not exceed forty-eight per cent APR and the lender’s only recourse for default is to seize the pawned property.²⁰¹

Although the 2023 budget promised future consultations on the exemption for payday lenders and Bill C-47 will impose a new national

196. ULCC, “Section 347 of the Criminal Code of Canada: Business Law Problems Remain,” (Paper delivered at the Uniform Law Conference of Canada, Charlottetown, PEI, September, 2007), online (pdf): <ulcc.chlc.ca> [perma.cc/6YKU-Q8BH]; Canadian Venture Capital and Private Equity Association (CVC), “Submission to the Consultation on Fighting Predatory Lending by Lowering the Criminal Rate of Interest,” online (pdf): <cvca.ca> [perma.cc/JW4L-WWQY].

197. Atkinson, *supra* note 7 at 1117.

198. Christine Dobby, “The government is finally lowering the maximum interest rate on loans—to 35%—and the alternative loan industry isn’t happy,” *Toronto Star* (30 March 2023), online: <thestar.com/business/2023/03/30/finally-theyre-listening-to-us-activists-hail-federal-budget-move-to-cut-interest-rate-on-predatory-loans.html> [perma.cc/7T2E-BT7M]; See also Michael Staten, *The Impact of Credit Price and Term Regulations on Credit Supply* (Boston: Joint Center for Housing Studies of Harvard University, 2008) online (pdf): <jchs.harvard.edu/sites/default/files/media/imp/ucc08-8_staten.pdf> [https://perma.cc/WDG7-XRE9]; Kantwill & Peterson, *supra* note 170 at 526; Micheline Gleixner, “Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency,” in Janis Sarra, ed, *Annual Review of Insolvency Law 2013* (Thomson Reuters, 2014) 586 at 602 (if the cap is set too low) [Gleixner, “Financial Literacy”].

199. Regina Austin, “Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions,” *American University L Rev* (2004) 53 *Amer* 1217 at 1238. See also *Chan, supra* note 114 and accompanying text (a loan-sharking operation which targeted the Chinese community in Toronto).

200. Ferrari, Masetti & Ren, *supra* note 191 at 3.

201. *Canada Gazette Part I*, Vol. 157, No. 51 at 4132.

maximum price, the exemption for payday loans remains in place, as does the exemption for tax rebate discounters. Rent-to-own retail stores have not complied with the criminal interest rate with respect to the difference between renting-to-own and paying for the goods outright, on the basis that the agreement is a “lease” and not a loan.²⁰² Although leaving these lenders unaffected by a lower criminal rate of interest might alleviate concerns about restricting access to credit, it raises the concern that more vulnerable consumers will now be less protected than borrowers who can access instalment loans. The limited access to credit might be exacerbated if other lenders retreat from the AFS market rather than trying to compete with exempted lenders. The argument for exempting payday lenders from a thirty-five per cent interest rate cap is that it would drive them out of Canada and force these borrowers to criminal loan sharks.²⁰³

The claim that interest rate caps cut borrowers deemed high-risk out of legal credit markets is somewhat difficult to measure. “Most consumers forced from the legal market to loan sharks are not represented in any statistical samples and their pay rates are unreported and undisclosed.”²⁰⁴ Even at a criminal interest rate of sixty per cent, some borrowers turn to loan sharks, as evidenced by the cases discussed above. Survey research shows that this does not appear to be a significant risk of lowering interest rate caps. For example, the UK Financial Conduct Authority conducted research on the impact of high-cost, short-term credit interest rate caps on consumers, including whether the cap drove consumers to illegal lenders as they became ineligible for other forms of borrowing.²⁰⁵ Two individuals out of 1,553 surveyed said they would approach an illegal money lender if they could not receive a payday loan. Instead, these borrowers are more likely to turn to informal credit markets, i.e. friends and family.²⁰⁶

In the US, the thirty-six per cent interest rate cap imposed by the *Military Lending Act* “has not dried up access to credit for military service members.”²⁰⁷ Research from US states which have imposed a thirty-six per cent interest rate cap, effectively eliminating payday lenders, has not found that consumers were forced to seek credit from loan sharks; however,

202. Gail E Henderson & Lauren Malatesta, “Protecting Low Income Consumers: The Regulation of Rent-to-Own Stores” (2019) 61 Can Bus LJ 354 at 76.

203. Alberta, Legislative Assembly, *Alberta Hansard*, 29-2 (19 May 2016) at 1064, online: <docs.assembly.ab.ca> [perma.cc/DW6Z-C3J3].

204. United States, *Report of the National Commission on Consumer Finance*, Consumer Credit in the United States (Washington, DC: 1972) at 105.

205. Critical Research, *Price Cap Research Summary Report* (London, UK: Financial Conduct Authority, 2017) at 2, online: <fca.org.uk> [perma.cc/WU2P-N7D5].

206. *Ibid* at 71. See also Buckland & Spotton Visano, *supra* note 37 at 74, 76.

207. Kantwill & Peterson, *supra* note 170 at 501.

some, temporarily at least, turned to online lenders, which may not comply with local laws.²⁰⁸ But this is currently a problem in Canada, even without a thirty-five per cent cap.²⁰⁹ Borrowers also found lower cost alternatives, including loans from credit unions or non-profit organizations, using credit cards, borrowing money from friends and family, or working more hours.²¹⁰ In these states, instalment loans may still be an option; in Nebraska, one of the states which imposed a thirty-six per cent cap on payday loans, the cap on instalment loans is twenty-four per cent up to \$1,000 borrowed and twenty-one per cent after that.²¹¹ A survey of Arkansas consumers found that twelve per cent of respondents thought they were worse off because it was harder to make ends meet, and they were forced to pawn items when they needed money.²¹²

In Canada, ACORN's survey on consumers' experiences with high-cost credit asked respondents who they would approach first for money needed in an emergency.²¹³ The greatest percentage of respondents, thirty-five per cent, said they would approach family or a friend.²¹⁴ This is not an option for all affected consumers since it relies on family and friends having sufficient assets to lend.²¹⁵ Amounts that can be borrowed from friends and family are likely to be small and require borrowers to give up the privacy and anonymity offered by alternative lenders.²¹⁶ Fourteen per cent said they would not take out a loan, and ten per cent said they would work more for the extra money. Charitable organizations are also a source for financial support.²¹⁷ In some cases, consumers can delay incurring an expense until they have saved enough to cover it without borrowing. Even in situations in which consumers incur fees or penalties for delaying a bill payment, it is difficult to see how paying a total amount in interest and other charges greater than the principal received from the lender (not

208. Leonhardt, *supra* note 179.

209. Erica Alini and Irene Galea, "The rise of illicit online payday lenders," *The Globe and Mail* (29 May 2023), online: <theglobeandmail.com> [perma.cc/AP2J-PBK6].

210. Leonhardt, *supra* note 179; Meredith Covington & Jennifer Johnson, *Into the Light: A Survey of Arkansas Borrowers Seven Years after State Supreme Court Bans Usurious Payday Lending Rates* (Southern Bancorp Community Partners Policy Points, 2016), online: <banksouthern.com> [perma.cc/VQ77-5GBY]; Robin Howarth, Delvin Davis & Sarah Wolf, *Shark-free Waters: States are Better Off without Payday Lending* (Center for Responsible Lending, 2016), online: <responsiblelending.org> [perma.cc/GP2M-XFM9].

211. Leonhardt, *supra* note 179.

212. Covington & Johnson, *supra* note 210.

213. ACORN, "Study," *supra* note 19.

214. See also Uppal, *supra* note 43 at 9.

215. Austin, *supra* note 199 at 1235-36.

216. *Ibid* at 1235.

217. Uppal, *supra* note 43 at 12.

uncommon with instalment loans) leaves the consumer better off than they would have been without the loan.²¹⁸

This survey evidence suggests that even if the application of the criminal rate of interest was extended to payday loans and rent-to-own stores, most borrowers deemed high-risk and cut out of the consumer credit market would turn to other options before illegal loan sharks. Although it is likely that lowering the criminal rate of interest will limit some consumers' access to instalment loans, this will not necessarily make them worse off, given the very high cost of these loans.²¹⁹ For some individuals, debt at any interest rate will create a financial burden that cannot be repaid.²²⁰ For this group, policy-makers need to look beyond credit regulation to improving incomes.

There is some evidence that AFS providers in Canada will adjust to a lower criminal rate of interest. Goeasy Ltd, the parent company of instalment loan provider easyfinancial, told shareholders in its 2022 annual report that it has reduced its weighted average interest rate from forty-five per cent to thirty per cent, and that although the decision to lower the criminal rate of interest will cut some consumers out of the market for its loans, this decision will benefit companies with "scale" in the long term.²²¹ Interest rate caps can induce lenders to find operational efficiencies to lower their costs.²²²

Debates about interest rate caps on consumer credit often revolve around these questions of continuing access and lender profitability. The problem with this starting point is that it leaves the use of credit as a solution to persistent gaps between expenses and incomes unquestioned.²²³ As noted above, too many Canadians, including those employed full-time, access high-cost credit to cover regular, recurring expenses, including basic needs. Tailoring consumer credit regulation to ensure continued access to high-cost credit is not the answer to this problem, and should not be the basis for drawing the line between reasonable and predatory interest rates.

For an interest rate cap to be effective in protecting consumers, it needs to be actively enforced. Notwithstanding the small number of convictions of pawnshop owners, as discussed above, section 347 has not

218. See e.g. Dobby, "Crushed by Credit," *supra* note 35. But see Buckland & Spotton Visano, *supra* note 37 at 134 (noting that a payday loan may be cheaper than hydro reconnection fees).

219. Kantwill & Peterson, *supra* note 170 at 526-27.

220. Atkinson, *supra* note 7 at 1148.

221. Goeasy, *2022 Annual Report*, at 35, online: <<https://investors.goeasy.com/static-files/412abde3-e96b-41b9-b684-f3a800b91314>>.

222. Ferrari, Masetti & Ren, *supra* note 191 at 36.

223. Atkinson, *supra* note 7 at 1154.

been widely used to regulate AFS providers such as pawnshops.²²⁴ For example, although police regularly monitor pawnshops to ensure they are not selling stolen goods, they do not monitor compliance with section 347, seeing the latter as outside their mandate.²²⁵ Instead, it is up to the patron to file a complaint.²²⁶ Borrowers are left with little protection as they are unlikely to litigate, even if they know their rights.²²⁷ This approach may have been justified by the original purpose of section 347 to combat loan sharking. The government's express objective in lowering the criminal rate of interest to thirty-five per cent APR is "cracking down on predatory lending."²²⁸ Meeting this objective will require a more robust, proactive approach to enforcement.

In sum, lowering the criminal rate of interest will lower costs to borrowers still eligible for instalment loans without unduly harming those no longer considered eligible by lenders. Amending the definition of interest to exclude equity in most cases and adding an exemption for commercial loans would help to make the provision workable for commercial borrowers and lenders. Criminal law, however, is not an ideal way to regulate consumer credit. It is impossible to tailor rates to the size and length of the loan, which has been used to make small, short-term loans viable for lenders. Even a thirty-five per cent interest rate cap is very high for many consumer loans. These shortcomings suggest it might be time to re-introduce the *Small Loans Act*.

2. *A new Small Loans Act*

In the past, framing the regulation of high-cost credit as a consumer protection problem allowed the federal government to retreat and point to provincial regulation as the solution.²²⁹ Framing the consultation on lowering the criminal rate of interest as a response to predatory lending, and introducing a national cap on the cost of payday loans indicate a willingness to step back into this area. With respect to the division of powers, Gleixner argues that, collectively, the heads of federal power related to economic stability and banking, as well as the criminal law power, give Parliament broad powers to enact uniform national consumer credit regulation.²³⁰

224. Jerry Buckland, *Hard Choices*, *supra* note 55 at 40.

225. Martin, Curran & Lapierre, *supra* note 104 at 351.

226. *Ibid* at 348; Manitoba Public Utilities Board, *supra* note 104.

227. Edward Veitch, "The Law O'the Brass Balls or the Regulation of the Pawn" (1992) 21 Can Bus LJ 49 at 55.

228. Government of Canada, "Budget 2023," *supra* note 12.

229. Buckland, *Hard Choices*, *supra* note 55 at 50-51.

230. Micheline Gleixner, "Reconsidering Legislative Competence over Consumer Credit in Canada"

There are several arguments in favour of federal regulation of high-cost credit, which would benefit both consumers and providers. Provincial regulation creates disparities among consumers based on province of residence and type of credit product.²³¹ Provincial payday loan legislation requires these AFS providers to be licenced and to comply with regulations governing disclosure and other practices. Four provinces have similar requirements for other types of high-cost credit.²³² As discussed above, Québec imposes an interest rate cap of thirty-five per cent on all consumer credit. Legislation in British Columbia provides for the possibility of a cap other than the criminal rate of interest, but it has not used this authority.²³³ The bifurcation of the credit market also creates regulatory disparities between customers of federally regulated banks, protected by recently enhanced consumer protection rules in the *Bank Act*, and customers of provincially regulated AFS providers.²³⁴

On the provider side, federal regulation would benefit lenders by harmonizing rules across provinces.²³⁵ Consolidation in the high-cost credit industry means that most lenders operate nationally, not provincially.²³⁶ A new *SLA* would also allow for tailored regulation based on loan size and length, allowing for rate caps appropriate to small, short-term payday loans. The use of tailored interest rates can help mitigate the effect of rate caps on access to credit.²³⁷

A new *SLA* might also include “responsible lending” rules, which require lenders to assess a borrower’s ability to repay the loan and refuse a credit product to a consumer if it is not suitable to their personal financial circumstances. The idea is to prevent lenders from taking on as much risk as the *lender* can afford through charging very high rates of interest.²³⁸ Lenders can be incentivized to comply by tying the amount they are required to contribute to financing the regulator to their proportion of the

in Janis Sarra, ed, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters, 2017) 153 at 167, 274.

231. Gleixner, “Consumer Credit,” *supra* note 7 at 751.

232. Government of Ontario, *supra* note 1 at 9. See, e.g. *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 112.,21, 142-143.

233. See *Business Practices and Consumer Protection Act*, *supra* note 232, s 112.17.

234. *Bank Act*, SC 1991, c 46, Part XII.2.

235. Ontario, Ministry of Government Services, *Consumer Protection in the Payday Lending Sector* (Toronto: 2007) at 2.

236. Gleixner, “Consumer Credit,” *supra* note 7 at 759.

237. Ferrari, Masetti and Ren, *supra* note 191 at 14.

238. Gleixner, “Consumer Credit,” *supra* note 7 at 756 (citing Jacob Ziegel, “Consumer Insolvencies, Consumer Credit and Responsible Lending” in Janis Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Thomson Reuters, 2010) at 372).

volume of consumer lending (as is done in the UK) or to their portion of the total consumer lending portfolio in default (as is done in Belgium).²³⁹

Like the criminal rate of interest, federal high-cost credit legislation is only effective if it is enforced. Gleixner notes the relatively limited resources allocated to the Financial Consumer Agency of Canada compared to the UK Financial Conduct Authority.²⁴⁰ Although prosecutions for violating the criminal rate of interest are rare, it seems possible that the threat of criminal sanction creates a greater incentive for at least the larger and more visible licensed lenders to comply with this cap.

Even with stricter enforcement, regulating consumer credit often resembles a game of “whack-a-mole.” Tighter regulation and lower fee caps for payday loans have caused AFS providers to shift to promoting instalment loans, which ultimately increase consumers’ overall debt loads because they are for larger amounts and longer durations. Breaking this cycle of regulation and regulatory avoidance may require policies aimed at reducing the demand for high-cost credit in the first place by expanding access to basic banking regulations to include credit products.

3. *Requiring banks to provide affordable credit*

One reason consumers turn to instalment and payday loans, despite their very high cost, is because these loans are tailored to the needs of low- and moderate-income consumers, in terms of amounts and duration. A lower level of financial literacy around credit products is also frequently blamed, but improving financial literacy can have little effect on behaviour unless consumers have access to credit products appropriate to their financial situation.²⁴¹

Mainstream banks tend not to provide products appropriate to the financial situation of low- and moderate-income consumers, focusing instead on the needs of middle- and high-income consumers. In Senate debates on the exemption from the criminal rate of interest for payday lenders, the Senate Standing Committee on Banking, Trade and Commerce voiced its concern over mainstream banks’ absence from this market and urged them to start providing this type of loan.²⁴² A voluntary move by mainstream banks into this market seems unlikely. AFS provider goeasy expects mainstream banks to continue their retreat from serving the non-

239. Gleixner, “Financial Literacy,” *supra* note 198 at 629-630, 632.

240. *Ibid* at 597.

241. *Ibid*, at 605-606; FCAC, “Market Trends,” *supra* note 47 at 12.

242. Kodar, *supra* note 16 at 454.

prime market, although banks do act as investors in and lenders to AFS providers.²⁴³

Consumer advocates have recommended requiring mainstream financial institutions to provide appropriate products and services for consumers living on a low income, such as affordable loans backstopped by the Government of Canada, an idea originally proposed during debates on legislation to address loan sharking, which eventually led to the enactment of section 347.²⁴⁴ The federal government could expand the definition of basic banking services to include overdraft protection and small, short-term loans.²⁴⁵ The increased availability of mainstream options may impact whether consumers turn to alternative financial services.²⁴⁶ It also may help those who might lose access to instalment loans under a lower criminal rate of interest.

Research on affordable loan products in the US shows that they can be profitable.²⁴⁷ The Federal Deposit Insurance Corporation in the US piloted a “small dollar loan” program in 2009 which revealed that a 90-day loan term at thirty-six per cent APR could be viable.²⁴⁸ In 2012, KeyBank experimented with an unsecured credit line called the KeyBasic Credit Line at 19.99 per cent interest, plus a \$25 annual fee and \$10 charge for drawing on the line. Consumers had up to five years to pay back the loan. The credit line was commended at a US Senate hearing for serving low-income consumers. Few consumers took all five years, so the product was profitable for the bank. As of 2022, the KeyBasic Credit Line is available for consumer loans ranging from \$250 to \$5,000 at an annual rate of 11.99 per cent to 20.49 per cent, depending on one’s creditworthiness.²⁴⁹

Although there are several credit unions offering lower-cost alternatives to instalment and payday loans, these institutions lack the

243. Goeasy, “2021 Annual Report,” *supra* note 17 at 32, 85; “Loan sharks,” *supra* note 77.

244. Ricardo Tranjan, *Swimming with the Sharks: Poverty, Pandemics and Payday Lending* (Canada: Canadian Centre for Policy Alternatives, 2020) at 13, online: <policyalternatives.ca> [perma.cc/D4X5-NVS9]; Buckland & Spotton Visano, *supra* note 37 at 165; ACORN, “Revising,” *supra* note 18 at 4; “Loan sharks,” *supra* note 77.

245. *Bank Act*, *supra* note 234, part XII.2, division 2, ss 627.17-627.27.

246. Sue Lott & Michael Gran, *Fringe Lending and “Alternative” Banking: The Consumer Experience* (Ottawa: Public Interest Advocacy Centre, 2002) at 67, online: <piac.ca> [https://perma.cc/73RZ-33T3]; Austin, *supra* note 199 at 1256.

247. The Pew Charitable Trust, *From Payday Loans to Instalment Loans* (2016) at 11, online (pdf): <pewtrusts.org> [perma.cc/6UGQ-4UET].

248. Jeff Horwitz, “KeyBank’s Small Loan Formula Avoids Payday Problems” *American Banker* (3 July 2012); Federal Deposit Insurance Corporation (FDIC), “A Template for Success: The FDIC’s Small Dollar Loan Pilot Program” (2010) 4:2 FDIC Quarterly, online (pdf): <fdic.gov> [perma.cc/R7AY-UD7Q].

249. The rate listed is for the state of New York; rates may vary by state.

geographic reach of the mainstream banks.²⁵⁰ An experiment in offering lower-cost loans through Canada Post was short-lived.²⁵¹ Postal banking is one possible response to the lack of lower-cost credit, but it does not address the bifurcation of the Canadian credit market, which may prevent vulnerable consumers from accessing other banking services. Federal legislation mandating that mainstream banks provide safe and affordable credit to vulnerable consumers, potentially by expanding the scope of the access to basic banking regulations in the *Bank Act*, could decrease demand for high-cost credit from AFS providers and to bring vulnerable consumers back into the mainstream financial market. Ideally, this would be accompanied by training for bank staff at all levels on the distinct financial needs and experiences of customers living on a low or moderate income.

Conclusion

A lower criminal rate of interest will reduce the cost of instalment loans across Canada. Despite protests from the high-cost credit industry,²⁵² as argued above, it seems unlikely that this will drive consumers to criminal or underground loan sharks. It also seems unlikely that lowering the criminal rate will affect the ability of police to crack down on such activities, given the tiny number of prosecutions for loan sharking. Other, often accompanying, offences, such as extortion, are unaffected by a reduction in the criminal rate of interest.

But the decision to lower the criminal rate of interest to thirty-five per cent APR is not the end of the debate. One concern with taking this step is that lowering the criminal rate without making other adjustments to section 347 will have substantial effects on commercial lenders and borrowers. Proposed draft regulations essentially keeping the previous criminal rate for commercial loans above \$10,000 up to \$500,000 and a total exemption for commercial loans above \$500,000 should address this concern. Again, it is unlikely that this will affect the ability of law enforcement to pursue criminal loan sharking, given the likelihood of other accompanying offences.

Another concern is that some consumers will no longer have access to instalment loans, making payday loans their only option. The existing

250. ACORN, "Fair Banking," *supra* note 7 at 18.

251. Holly McKenzie-Sutter, "TD Bank pauses Canada Post loan program weeks after national expansion," *Bloomberg* (25 Nov 2022), online: <bnnbloomberg.ca> [perma.cc/CZT7-LPEK].

252. Nivedita Balu, "Canada's plan to cap top lending rates could spur criminal activity, study shows" *Globe and Mail* (5 Feb 2024), <<https://www.theglobeandmail.com/business/article-canadas-plan-to-cap-top-lending-rates-could-spur-criminal-activity/>> [perma.cc/S9MN-WJJK].

exemption for provincially regulated payday loans, which was not the subject of the recent federal consultation, means that the cost of these loans in Canada will remain at over 350%. A new *SLA* would help to eliminate disparities in financial consumer protection rules applicable to high-cost credit across Canada.

A new *SLA* will not, however, eliminate disparities between mainstream bank customers and those currently limited to alternative financial services. Parliament should take the further step of mandating federally regulated mainstream banks to provide credit products appropriate to consumers living on low and moderate incomes.

These reforms leave untouched the increasing reliance on credit to supplement incomes which are too low to cover the rising cost of daily living. The solutions to this underlying problem are beyond the scope of a paper focused on the use of interest rate caps to regulate instalment loans, but they are not irrelevant to the debate. As argued above, the overarching objective of consumer credit regulation should be to protect consumers from predatory practices, not to ensure access to credit as a substitute for increasing social assistance and government benefits for low-income workers.