

# The Attorney-General for Ontario v. Barfried Enterprises Limited

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## I. Introduction

According to Section 91 sub-section 19 of the *British North America Act*, the Parliament of Canada has exclusive legislative authority in all matters coming within the field of Interest. Nevertheless, the legislatures of the Provinces of Ontario and Quebec, with a view to protecting borrowers within their respective Provinces from undue exploitation at the hands of lenders, have enacted measures whereby the Courts may reduce, alter or annul obligations of debtors to reimburse their creditors where, having regard to the risk and circumstances, it is found that the "cost of the loan is excessive" and the transaction is "harsh and unconscionable".<sup>1</sup> In view of Section 91 (19) of the B.N.A. Act, is the provincial legislation valid?

This problem came before the Supreme Court of Canada in the recent case of *Attorney-General for Ontario v. Barfried Enterprises Limited*<sup>2</sup> in respect of the validity of an Ontario statute, *The Unconscionable Transactions Relief Act*<sup>3</sup>, the relevant provisions of which are as follows:

1. In this Act,
  - (a) 'cost of a loan' means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges . . .
  - (e) 'money lent' includes money advanced on account of any person in any transaction that, what-ever its form may be, is substantially one of money-lending or securing the repayment of money so advanced and includes and has always included a mortgage within the meaning of *The Mortgages Act*.
2. Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,

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<sup>1</sup> Ontario — *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410. Quebec — *Bill 48 — An Act to protect borrowers against certain abuses and lenders against certain privileges*, 13 Elizabeth II, 1964.

<sup>2</sup> [1963] S.C.R. 570.

<sup>3</sup> *Supra*, note 1, ss. 1 and 2

- (a) re-open the transaction and take an account between the creditor and the debtor;
- (b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
- (c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;
- (d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

## II. The Facts

In this case a mortgage was entered into between R. D. Sampson as mortgagor and Barfried Enterprises Limited as mortgagee for a face amount of \$2,250 with interest at 7 percent annually. The sum actually advanced by Barfried Enterprises to Sampson was \$1,500 less a commission of \$67.50. The difference between the \$1,500 and the face amount of \$2,250 was made up of a bonus<sup>4</sup> and other charges. Pursuant to an application under *The Unconscionable Transactions Relief Act*, an Ontario County Court Judge set aside the mortgage in part and revised it to provide for payment of a principal sum of \$1,500 with annual interest at 11 percent.

Barfried Enterprises appealed this ruling to the Ontario Court of Appeal<sup>5</sup> where it raised the question of the constitutional validity of the Ontario statute. The Court held unanimously that the Act was *ultra vires* of the Legislature of the Province of Ontario on grounds that it was legislation in relation to Interest, its essential purpose being to afford a remedy to borrowers to have contracts of loan modified by having interest "in the broad sense of the term as compensation for the loan", reduced. It was therefore an infringement of the exclusive authority given to Parliament in Section 91(19) of the B.N.A. Act to legislate in relation to Interest. The Court also held the Act *ultra vires* on the ground that it was in direct conflict with Section 2 of the federal *Interest Act*<sup>6</sup> which provides that:

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<sup>4</sup> A bonus is an amount of money deducted from the principal sum before it is advanced to the borrower who pays interest on the amount advanced plus the bonus.

<sup>5</sup> [1962] O.R. 1103.

<sup>6</sup> *Interest Act*, R.S.C. 1952, c. 156.

2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon.

On appeal before the Supreme Court of Canada, the Attorney-General for Ontario, supported by the Attorney-General of Quebec as Intervenant, contended that the *Act* was within provincial competence on grounds that, first, it was legislation in relation to a matter coming within the head of Property and Civil Rights in the Province (s. 92(13) of the B.N.A. Act), the subject matter being rescission and reformation of a contract of loan under the conditions defined by the Act. Secondly, the Appellant argued that the Act of the provincial legislature affected only incidentally, if at all, any matter coming within the classes of subjects assigned to the exclusive legislative authority of the Parliament of Canada; and that consequently there was no conflict or repugnancy between the provisions of the Act and any validly enacted federal legislation.

### III. The Issue

The legal problem before the Supreme Court was well stated by Mr. Justice Judson at page 577 of his judgment :

The issue in this appeal is to determine the true nature and character of the Act in question and, in particular of s. 2 above quoted.

### IV. The Judgment

The Supreme Court of Canada, with two dissenting opinions, maintained the appeal and upheld the validity of the Ontario *Unconscionable Transactions Relief Act*. Mr. Justice Judson, with whom Taschereau C.J., Fauteux and Hall J.J. concurred, accepted the contentions of the Attorney-General for Ontario. The learned Judge stated that in his opinion it was essential to Interest that it accrue *de die in diem*, and since a bonus lacked this characteristic, it could not be called Interest. His Lordship further stated :

In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act...

Under the Ontario statute an exercise of judicial power necessarily involves the nullity or setting aside of the contract and the substitution of a new contractual obligation based upon what the Court deems it reasonable to write within the statutory limitations. Legislation such as this should not be characterized as legislation in relation to interest. I would hold that it was validly enacted, that no question of conflict arises.<sup>7</sup>

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<sup>7</sup> [1963] S.C.R. 570 at 577 and 578.

Mr. Justice Cartwright, who agreed with the result reached by Judson J., held the Ontario legislation *intra vires* of the Province on grounds that it related to property and civil rights in the province (s. 92(13) B.N.A. Act) and to the administration of justice in the province (s. 92(14) B.N.A. Act). The learned Judge stated :

Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject matter of Interest specified in head 19 of s. 91 of the British North America Act.<sup>8</sup>

In a dissenting judgment, Mr. Justice Martland, speaking for himself and Mr. Justice Ritchie, held the Ontario Act to be beyond the legislative competence of the Provincial Legislature. He pointed out that :

Whether or not this contention (i.e. that the Act related to property and civil rights in the province) could be maintained successfully, in the absence of legislation by the Parliament of Canada in the same field, it is unnecessary for me to consider, since I have reached the conclusion that the provisions of the Act under consideration come into conflict directly with the provisions of s. 2 of the *Interest Act*, R.S.C. 1952, c. 156, ...<sup>9</sup>

Martland J. concluded, according to jurisprudential authority, that in a case of conflict between the enactments of the Canadian Parliament and the legislature of one of the provinces, the Dominion legislation, validly enacted, must prevail.

### V. Jurisprudence

The general procedure adopted by the courts in resolving questions concerning the distribution of legislative authority between the Dominion and Provincial Legislatures under ss. 91 and 92 of the B.N.A. Act, was enunciated by the Privy Council in *Citizens Insurance Company v. Parsons*<sup>10</sup> and in *Russell v. The Queen*.<sup>11</sup> Lord Haldane stated it succinctly in *Toronto Electric Commissioners v. Snider*:<sup>12</sup>

When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it.

The classes of subjects distributed under the enumerated heads of ss. 91 and 92 of the B.N.A. Act are not mutually exclusive.

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<sup>8</sup> [1963] S.C.R. 570 at 579.

<sup>9</sup> [1963] S.C.R. 570 at 582.

<sup>10</sup> (1881) 7 A.C. 96.

<sup>11</sup> (1882) 7 A.C. 829.

<sup>12</sup> [1925] A.C. 396 at 406.

Some overlapping is inevitable, for example, the subject "marriage and divorce" (s. 91(26)) is among the exclusive heads of federal power, yet "solemnization of marriage in the province" (s. 92(12)) is listed and recognized to be among the exclusive heads of provincial legislative jurisdiction. In the case under consideration the overlapping, if any, appears to be between s. 91(19), which gives the Dominion Parliament exclusive authority to legislate in relation to Interest, and s. 92(13), which gives the provincial legislatures exclusive jurisdiction over property and civil rights in the province — including, it would seem, the power to legislate as to the conditions of annulment, alteration, or reformation of contracts of loan.

In such cases established authorities direct the court to examine the legislation in question and to reach a conclusion as to what head of either s. 91 or s. 92 it really falls under in "pith and substance".<sup>13</sup> As Viscount Caldecote L. C. stated in *Lethbridge Northern Irrigation District v. Independent Order of Foresters* :<sup>14</sup>

... an inquiry must first be made as to the 'true nature and character of the enactments in question' (*Citizens Insurance Co. v. Parsons* (15)), or to use Lord Watson's words in delivering the judgment of the Judicial Committee in *Union Colliery v. Bryden* (16), as to their 'pith and substance'.

The problem then is to determine the true nature, character, pith and substance of *The Unconscionable Transactions Relief Act* and whether it deals primarily with Interest or with property and civil rights in the province.

The majority opinion in the Supreme Court in the *Barfried* Case was that the Act neither related to nor incidentally affected the field of Interest. This conclusion was based on the view that the bonus provided for in the mortgage was not to be considered as interest. The majority therefore adopted a restrictive interpretation of the word "Interest" in s. 91(19) of the B.N.A. Act rather than its ordinary meaning. There is considerable authority to the contrary. In the *Saskatchewan Farm Securities Act Reference*, Mr. Justice Rand of the Supreme Court of Canada defined Interest as :

... in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money belonging to, in a colloquial sense, or owed to another.<sup>17</sup>

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<sup>13</sup> The pith and substance test has been applied in determining the validity of provincial legislation in *Day v. Victoria* [1938] 4 D.L.R. 345, *A.-G. Alta. v. A.-G. Can.* [1939] A.C. 117, *Ladore v. Bennett* [1939] A.C. 468, and *A.-G. Can. v. A.-G. Que.* [1947] A.C. 33.

<sup>14</sup> [1940] A.C. 513 at 529.

<sup>15</sup> *Supra*, note 10.

<sup>16</sup> [1899] A.C. 580.

<sup>17</sup> [1947] S.C.R. 394 at 411.

This is the type of general definition of Interest given by most standard dictionaries; it is this kind of definition which Rand J. felt was adequate for legal purposes. It is evident that such a definition is broad enough to encompass what the Ontario statute calls "the cost of the loan", and that consequently all the items listed in s. 1(a) of the Ontario Act that relate directly to the cost of a loan, including "bonus", would be considered interest under this definition. Viscount Caldecote L. C. in the *Lethbridge Case* noted that :

Their Lordships are of opinion that, so far from supporting the argument for a restricted interpretation of head 19 of s. 91 in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt any exhaustive definition of 'interest'. The word itself is in common use and is well understood.<sup>18</sup>

It was held in the Ontario Court of Appeal in *Singer v. Goldhar*<sup>19</sup> that :

...the difference between the principal stated in the mortgage and the amount advanced, usually called a bonus, is interest within the meaning of the *Interest Act*, R.S.C. 1906, c. 120.

Mr. Justice Judson, speaking for the majority in the *Barfried Case*, considered that *Singer v. Goldhard* had been overruled in *London Loan and Savings Company of Canada v. Meagher*<sup>20</sup>, and that :

...considering s. 6 of the *Interest Act*, a bonus is not interest.<sup>21</sup>

Section 6 of the *Interest Act* deals with certain formalities, such as express stipulation of the rate of interest, which must be observed in order that interest be recoverable upon principal sums secured by mortgages of real estate. It appears that the *Meagher Case* only restricts the generality of, but does not overrule, the proposition in *Singer v. Goldhar* that a bonus is to be considered as interest. This was recognized by Mr. Justice Kellock in *Asconi Building Corporation v. Vocisano*, where he stated :

In *Meagher's case* the court was not called upon to decide a case such as was involved in *Singer's case*, ... I think therefore that the statement in the judgment (i.e. in *Meagher's case*) with respect to the mortgage in *Singer's case* must be regarded as obiter.<sup>22</sup>

In his decision in the *Barfried Case* Judson J. cited no authority to support the proposition that the *Act* in question related to property and civil rights in the province, as he held it did. The learned Judge did, however, distinguish two important decisions in the *Leth-*

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<sup>18</sup> *Supra*, note 14 at 531.

<sup>19</sup> [1924] 2 D.L.R. 141.

<sup>20</sup> [1930] S.C.R. 378.

<sup>21</sup> [1963] S.C.R. 570 at 576.

<sup>22</sup> [1947] S.C.R. 358 at 376.

bridge Northern Irrigation Case<sup>23</sup> and the Saskatchewan Farm Security Case<sup>24</sup> holding that provincial legislation in relation to Interest was *ultra vires*. Judson J. dismissed these decisions as of no application because, as he reasoned :

This legislation was concerned with interest in its simplest sense and nothing more . . .<sup>25</sup>

The learned Judge apparently meant to point out, in distinguishing the above decisions, that the case in point concerned a bonus and therefore was not dealing with "interest in its simplest sense". It has been seen, however, that there is strong authority for maintaining a general definition of the word "Interest" as it appears in s. 91(19) of the B.N.A. Act, one which includes a bonus within its purview.

The two cases distinguished by Judson J., it is submitted, are good authorities against the majority opinion. The *Lethbridge* Case held invalid provincial legislation reducing interest rates on provincial or provincially-guaranteed debentures. The *Saskatchewan* Case held *ultra vires* a provincial enactment providing that in case of crop failure, the principal payable by a mortgagor or farm purchaser would be reduced by 4 percent in that year, but that interest would be payable as if the principal had not been reduced. The latter decision reveals to what extent the Court will look to the true nature and "pith and substance" of legislation. Here was a case where interest was clearly involved, even though no one would dispute that the principal of a loan or mortgage is not interest. This case, similar in principle to the present case, illustrates also one instance where the Court has refused to allow colourable legislation of one level of jurisdiction as defined in the B.N.A. Act to encroach upon the other level of jurisdiction. Lord Atkin's dictum in *Ladore v. Bennett*<sup>26</sup> applies equally, it is submitted, to both the *Saskatchewan* case and the present case :

It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail.

Judson J. referred to *Day v. Victoria*<sup>27</sup> and *Ladore v. Bennett*<sup>28</sup> in support of the majority view in the *Barfried* Case. These decisions

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<sup>23</sup> *Supra*, note 14.

<sup>24</sup> *Supra*, note 22.

<sup>25</sup> [1963] S.C.R. 570 at 576.

<sup>26</sup> *Supra*, note 13, at 482.

<sup>27</sup> *Supra*, note 13.

<sup>28</sup> *Supra*, note 13.

held valid provincial legislation altering interest rates of municipal debentures. It is submitted that these cases should have been distinguished from the present case because, in the first place, the legislation dealt with reconstitution of the entire debt structure of a municipality in one case, and with amalgamation of four municipalities in the other; hence it was held valid as relating to municipal institutions in the province (s. 92(8) of the B.N.A. Act) despite the fact that the Court recognized that it had an incidental effect upon interest.<sup>29</sup> Secondly, there was no question in these cases, as in the present case, of a conflict between the provincial statutes and a federal statute such as the *Interest Act*.

Provided that the Ontario statute in the present case could be shown to conflict with the federal *Interest Act*, the question whether the former legislation was or was not within provincial competence would be precluded, for as Mr. Justice Martland pointed out in his dissenting opinion, whenever there is a conflict, validly enacted Dominion legislation prevails over a provincial enactment. This principle was enunciated by Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia* :

There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.<sup>30</sup>

## VI. Critique of the Judgment

A majority of the Supreme Court in the *Barfried* Case upheld the validity of the Ontario *Unconscionable Transactions Relief Act*. This view does not seem to accord with jurisprudential authority as regards the question of legislation in relation to Interest. On the contrary, it appears to contradict the principle of several previous decisions; and it can be argued that Judson J., for the majority, wrongly distinguished two cases on the point while relying upon two other cases that are clearly distinguishable (see *supra*).

To accept the distinction between "bonus" and "interest" put forward in the majority decision, would be, it is submitted, to unduly

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<sup>29</sup> Another reason for doubting the authority of these cases is that while the so-called "ancillary doctrine" has been invoked to justify federal legislation falling *prima facie* within an exclusively provincial head, on grounds that it is necessary to effective legislation under a Dominion head, there are doubts as to the validity of the application of this reasoning in favour of provincial legislation. Cf. Laskin, *Canadian Constitutional Law*, 2 ed., pp. 92-95.

<sup>30</sup> [1930] A.C. 111 at 118. See also *G.T.R. v. A.-G. Can.* [1907] A.C. 65.

restrict the meaning of the term "interest" as employed in s. 91 of the B.N.A. Act, in s. 2 of the *Interest Act*, and in ordinary usage. Moreover, the majority view would in large part negate the very purpose of the Ontario statute because, by setting up a distinction between interest and bonus, it constitutes an admission that interest as distinct from bonus is under federal authority and thereby is removed from provincial power to control.<sup>31</sup>

As regards the first ground of appeal that the *Act* in question was legislation in relation to property and civil rights in the province, neither Judson nor Cartwright JJ. cited any directly relevant authority for their agreement with this contention. However, Judson J. reached the conclusion that the true nature of the *Act* was not to be found in its concern with interest, but with :

... whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor.<sup>32</sup>

The learned Judge pointed out that in his opinion such legislation related to annulment or reformation of contract in cases where in the circumstances the debtor could not be said to have given a free and valid consent. He considered that from the viewpoint of the English law the *Act* "might be classified as an extension of the doctrine of undue influence;" from the Civil law viewpoint "as an extension of the doctrine of lesion dealt with in Articles 1001 to 1012 of the *Civil Code*". It is difficult, in the first place, to understand why the Judge took the trouble earlier to distinguish between bonus and interest (*supra*, and see Note 31) if he believed that the *Act* clearly related to property and civil rights in the province. As has been seen, the "raison d'être" of this distinction seems to be to show that whereas interest may be federal, a bonus is not.

Furthermore, the opinion of the majority, plausible as it seems, is actually an unnecessary extension of the words of the *Act* based upon an interpretation of the motives of the Ontario Legislature in enacting it. Nowhere in the relevant provisions of the *Act* (cited *supra*, section I) is mention made of undue influence or of consent not freely and validly given. The *Act* speaks only of what action a

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<sup>31</sup> Having distinguished between interest and bonus, it can be presumed that Judson J., for the majority, had in mind that interest as he would define it, fell under federal jurisdiction; for if he did not hold this view, he would not have troubled to make the distinction. Not once, however, did the majority indicate that it considered the possibility of severability in regard to the word "interest" in s. 1 (a) of the Ontario Act. Surely, since interest is under the exclusive legislative power of Parliament, the word "interest", if no other word in s. 1 (a), can have no place in the provincial statute.

<sup>32</sup> [1963] S.C.R. 570 at 577.

court may take if in the circumstances it finds the cost of a loan excessive. From a Civil law standpoint, it should be noted that defects of consent in contracts due to error, fraud, violence or fear are dealt with in Articles 992 to 1000 of the Quebec *Civil Code*. Moreover the doctrine of lesion in the Civil law holds that persons of the age of majority are not entitled to relief from their contracts for cause of lesion only (1012 C.C.). It is submitted that mere inference as to the motives underlying the Ontario Act would not be sufficient, in view of the express terms of Article 1012 C.C., to justify extending the benefit of lesion in the manner suggested by the learned Judge.<sup>33</sup>

Cartwright J., who agreed with the majority position, took the view that the "primary purpose and effect" of the *Act* were to enlarge the equitable jurisdiction to give relief against unconscionable bargains which had been long exercised by the courts. On this basis the learned Judge was prepared to hold the *Act intra vires* in relation to the administration of justice in the province. This reasoning, it is submitted, confuses purpose and effect with motive. While one of the motives of the Ontario Legislature in bringing forth the *Act* may have been to enlarge the scope of equitable jurisdiction of Provincial Courts with regard to contracts in general, the primary purpose and effect of the legislation was undoubtedly to empower Provincial Courts to alter interest payments, in the broad sense, in contracts of loan under certain conditions. Even if the enlargement of equitable jurisdiction of Provincial Courts can properly be called a "purpose" or "effect", it is secondary and not primary. This argument is suggested in the dissenting opinions of Martland and Ritchie JJ., where at page 582 the former stated:

The power of the Court to act under this Act arises only if it has found that the cost of the loan is excessive. It is true that it must also find the transaction to be harsh and unconscionable, but it may happen, as did in the present case, that the judge who hears the case decides that the transaction is harsh and unconscionable because of the excessive cost of the loan. The result is that the very Court to which a creditor must resort in order to enforce payment of the interest or discount which the *Interest Act* says he may exact is, by the Provincial legislation, empowered to decide whether that interest or discount is in all circumstances excessive . . . and thus is in a position to relieve him from the payment of an obligation which the Parliament of Canada has stated the creditor is entitled to exact from him.

In these circumstances there is a direct conflict between the two statutes and, that being so, the legislation of the Canadian Parliament, validly enacted, must prevail.

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<sup>33</sup> Re validity of Quebec legislation similar in principal to the Ontario Act, see Section VII, *infra*.

## VII. Conclusions — The Case in Quebec

If Interest is given its ordinary interpretation and meaning, it is difficult to avoid the conclusion that in pith and substance the Ontario *Unconscionable Transactions Relief Act*, and especially s. 2 thereof, is legislation in relation to interest, and consequently is *ultra vires* of the Provincial Legislature. Furthermore, even if such an enactment by a provincial legislature could be justified by reason of the "aspect" or "ancillary" doctrines as being legislation in a provincial aspect or valid provincial legislation only incidentally affecting the Dominion interest field, it would have to give way in cases of conflict to the paramountcy of validly enacted federal legislation occupying the same field.

The field of Interest has been occupied by the Dominion Parliament. The *Interest Act*, s. 2 of which conflicts with s. 2 of the Ontario statute, provides for a standard interest rate of 5 percent annually where no rate is otherwise specified (s. 3) and obliges express stipulation of yearly or bi-annual rates of interest in contracts of loan (s. 4) where the rate exceeds 5 percent per annum, and in all mortgages (ss. 6-9). The *Small Loans Act*<sup>34</sup> provides similar protection for borrowers of sums not exceeding \$1,500.

In February, 1964, the Quebec Legislative Assembly amended the *Civil Code* by adding Articles 1040a to 1040e to Article 1040. Article 1040c provides:

1040c. The monetary obligations under a loan of money may be reduced or annulled by a court so far as it finds that, having regard to the risk and to all the circumstances, they make the cost of the loan excessive and the operation harsh and unconscionable.

For such purpose, the court must consider all the obligations resulting from the loan in relation to the sum actually advanced by the lender notwithstanding any settlement of account, novation or transaction.

Proof of the sum actually advanced may be made by testimony in opposition to the deed, except against a transferee in good faith, saving recourse, in such case, against the lender.<sup>35</sup>

This provision, enacted in the light of the decision of the Supreme Court in the *Barfried* case, is more generally phrased than, but in effect very similar to, its Ontario counterpart. This writer would apply to the Quebec enactment the same considerations as have been discussed with respect to the Ontario statute. As the Article stands, it appears to conflict directly with s. 2 of the *Interest Act*, except insofar as the term "monetary obligations" may be taken to mean obligations

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<sup>34</sup> R.S.C. 1952, c. 251, amended by 1956 Stat. Can., c. 46.

<sup>35</sup> *Supra*, note 1.

other than those comprised in the payment of interest, in the ordinary meaning of that word, by a debtor to his creditor.

The field of legislation concerning Interest is one in which an underlying conflict between two necessities in our Canadian federal system is brought to the fore. On the one hand, the provinces want and need a policy of equitable court jurisdiction with respect to interest rates in general in order to prevent abuses in this area. On the other hand, all legislation in Canada must be able to pass the test of constitutional validity, and we are faced with the fact that the B.N.A. Act assigns Interest to the exclusive legislative domain of the Parliament of the Dominion. While it is given power over the subject of Interest, the Parliament of Canada is not granted jurisdiction over private law contracts, including money-lending contracts. On the other side of the coin, the provincial legislatures have jurisdiction over private law contracts insofar as they relate to civil rights in the province, but do not possess authority to legislate on matters relating to Interest.

There is clearly a need for legislation such as the Ontario *Unconscionable Transactions Relief Act*. It is vital to the economy of the country as a whole to assure adequate protection to the borrower and mortgagor, and especially to the consumer-borrower, who has proved particularly vulnerable to victimization by lenders.<sup>36</sup> The fact that the B.N.A. Act distributes legislative competence between federal and provincial legislatures in such a way as to make possible areas of overlapping is not a bar to valid and effective laws allowing courts to alter interest rates out of equity. If nothing else, the totality of legislative competence conferred in the B.N.A. Act guarantees ample scope for the achievement of this aim. Several solutions may be suggested.

Provincial enactments such as the Ontario Act may be sanctioned on grounds that such legislation does not relate to Interest but to property and civil rights in the province. This is the view of the majority of the Supreme Court in the *Barfried* case. This writer, on the basis of the analysis presented above, concludes, with the minority in the Supreme Court and the unanimous opinion in the Court of Appeal for Ontario, that on the contrary, such enactments clearly

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<sup>36</sup> Measures to protect the consumer-borrower have appeared in the Common law provinces in the form of Instalment Sales Acts and in Quebec by means of Articles 1561a to 1561j of the Civil Code. These provisions, however, have for the most part been restricted to small loans (sales) where the danger of abuse is least. (Quaere: whether in view of the present discussion Article 1561d of the *Civil Code*, which regulates within fixed limits the interest payable in instalment sales, is *intra vires* of the Quebec Legislature?)

fall within the exclusive power of the Parliament of Canada to legislate in relation to Interest; and would add that any effect upon provincial civil rights of such Dominion legislation is "necessarily incidental". Another possible solution is to look upon interest rates in contracts of money-lending as being subject to both federal and provincial legislative power, the constitutional validity of a particular enactment depending upon the "aspect" or purpose with which the legislation is put forth.

Whatever view is taken, however, the desirability of closer co-operation between the federal and provincial levels of government in this area is evident. Without this co-operation conflicts are inevitable. In the Supreme Court both dissenting judges reserved opinion upon what jurisdiction was in fact competent to enact the *Unconscionable Transactions Relief Act* and invalidated the provincial statute on the ground of its obvious conflict with a validly enacted federal statute. It is submitted that this reasoning, which was shared by the Court of Appeal for Ontario, is, under the circumstances, irrefutable. The Appeal Court held also that the Ontario legislation related primarily to interest in the ordinary sense of that word, a view shared by this writer. For these reasons the conclusion appears inevitable that the majority decision of the Supreme Court in the *Barfried* case is in error and that given the present state of our law, it would appear that appropriate federal legislation is the only means to achieve a policy of equitable jurisdiction of the courts with respect to interest rates governing contracts of money-lending in a manner consistent with the distribution of legislative powers between the federal and provincial law-making bodies in our federal system.