

POST-JUDGMENT INTEREST — AVOIDING THE CANADA INTEREST ACT — UNCONSTITUTIONAL

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This case comment is more in the nature of a news item than an analysis, there being on the one hand no need to rewrite what has already been written in these pages,¹ but on the other hand there being a need for the Alberta Law Review to provide a current update on a matter of practical importance to practitioners in Alberta.

In a comment published in 1984² the writer noted, based on six recent Alberta decisions, how the Canada Interest Act 5% maximum interest on judgments³ could be contracted out of by appropriate drafting and suggested an appropriate clause. A further comment⁴ in the same year noted five more-recently available Alberta decisions taking the same view, but also commenting on a then just-released Alberta Court of Appeal decision⁵ proscribing post-judgment interest clauses (beyond 5%) entirely.

Both comments took the view that as s. 13 of the Canada Interest Act (by virtue of s. 12 of same) applies only to the four western provinces and the territories, it was only a matter of time before that section was challenged on the basis of s. 15(1) of the Canadian Charter of Rights and Freedoms: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination".

That time has now come. In a decision released in February 1986 the Alberta Court of Queen's Bench Masters' Chambers⁶ held, in granting a \$2,000,000 plus summary judgment application, with interest running at 16%, that:⁷

. . . section 13 of the Interest Act can no longer stand in light of section 15 of the Charter. Section 13 is indefensible discriminatory legislation based solely on accidents of history.

What relevance does this have for practitioners? Ensure in any contract to pay money that there is a post-judgment interest clause. Even if the Alberta decision should eventually be overturned on appeal(s), whether in Alberta or in Ottawa, one has lost nothing — and if upheld, is that much further ahead.

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1. Dr. E. Meehan, "Post-Judgment Interest — Avoiding the Canada Interest Act", (1984) 22 *Alta. L. Rev.* 270. Dr. E. Meehan, "Post-Judgment Interest — Avoiding the Canada Interest Act — Not Any More — For Now", (1984) 22 *Alta. L. Rev.* 469.

2. *Id.*

3. Section 13, "Every judgment debt shall bear interest at the rate of five percent per annum until satisfied", R.S.C. 1970, c. I-18.

4. *Supra*, n. 1.

5. *Canada Permanent Trust Company v. King Art Development Ltd. et al.* (1984) 32 *Alta. L.R.* (2d) 1 (*Alta. C.A.*).

6. *The Board of Trustees of Fort McMurray Roman Catholic School District No. 32 v. The Board of Trustees of Fort McMurray School District No. 2833* (unreported, 18 Feb. 1986, *Alta. Q.B., M.C.*, action no. 8303 26095). Counsel informs the author that no notice of appeal has yet been filed (judgment had not been entered as of the date of writing), though an appeal is anticipated.

7. *Id.*, at 8, *per* Master Funduk.

Ontario, for example, has taken advantage of not being bound by the Canada Interest Act 5% limitation by enacting legislation providing for calculation of post-judgment interest based on the prime rate.⁸

A basic clause, to be modified as appropriate, might be the following:⁹

The borrower agrees that:

1. the covenant to pay interest does not merge in a judgment or judgments for principal, interest, or principal and interest;
2. the taking of a judgment or judgments does not operate as a merger of any covenants herein or affect the obligation to pay interest at the rate and time aforesaid;
3. the covenant to pay interest at the rate set out in this agreement is to run on a judgment or judgments and continues so long as any principal, interest, or principal and interest, remains due on the covenant, judgment or judgments whether:
 - (a) due before and after default;
 - (b) due before and after maturity; or
 - (c) due before and after judgment or judgments, until said judgment or judgments have been fully paid and satisfied.
4. Section 13 of the Canada Interest Act is inapplicable to this agreement and is hereby waived.

8. Judicature Act R.S.O. 1980, c. 223, ss. 36, 37.

9. For mortgages on commercial property, see *supra* n. 1, at 272, n. 9.