

What's criminal? Lenders beware – amendments to Criminal Code under Bill C-274

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An Act to amend the Criminal Code Bill-C-274 (the Bill) entered first reading in the House of Commons on May 11, 2021. The Bill would amend^[1] the definitions of “criminal rate” and “interest” in subsection 347(2) of the *Criminal Code*, while also repealing section 347.1, which had allowed certain exceptions for payday loans.

The Bill will be of interest to lenders, especially payday lenders and other non-traditional lenders, as the amendments proposed would lower the criminal rate at which interest charged or received is under the *Criminal Code* from 60% to 30%.

Moreover, the Bill would repeal section 347.1 of the *Criminal Code*. Consequently, payday lenders will no longer have certain exemptions from the criminal rate of interest set out under section 347. Moving forward, any lender, including a payday lender or other lending entity, that is found to charge or receive interest exceeding the criminal rate may be guilty of either an indictable offence, liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction, liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than two years less a day, or to both.

Many credit agreements and debt instruments currently contain provisions reallocating any payment of interest in excess of the amount permitted by law to the repayment of the outstanding debt obligation. In practice these provisions are not often applied, given the high rate of criminal interest that currently applies under the *Criminal Code* (60%). However, given the substantial decrease in the amount of interest permitted under the *Criminal Code*, these provisions may become subject to further negotiation as there would be a greater likelihood that they would become operative.

Effects of Bill C-274

Lowering of maximum criminal interest rate

The present criminal rate is an annual interest rate that exceeds 60%. The Bill notably lowers the “criminal rate” to the annual rate of interest “that, on the day on which the agreement or arrangement is entered into or renewed, exceeds by thirty percentage points or more the Bank of Canada’s overnight rate on that day.”^[2] Assuming a continued central bank rate of interest at 0.25%, criminal interest would then be any annual rate of interest that exceeded 30.25%.

In calculating the rate of interest, the *Criminal Code* requires that any fines, fees,

commissions and penalties paid as part of the extension of credit be included, irrespective of who pays any such charges. Thus, for purposes of the *Criminal Code*, the rate of "interest" may be greater than the nominal rate as set out in a particular loan agreement.

The Bill would also amend the section 347(2) definition pertaining to the calculation of interest to include "insurance charges", which can be thought of as the cost of insuring the risk assumed by the lender. The amount of such insurance typically should not exceed the amount of credit advanced.

Removal of exemption – section 347.1

Currently, section 347.1 forbids entering "into an agreement or arrangement to receive interest at a criminal rate or receive[s] a payment or partial payment of interest at a criminal rate."

Historically, section 347.1 served as an exemption to the restraints imposed by section 347. The section 347.1 exemption removed the prohibition on charging interest above the criminal rate for payday loan loans if they were for a maximum term of 62 days, the loan is \$1,500 or less, the lender is provincially licensed and the federal government has determined the provinces have legal protections to limit the total cost of borrowing.

The Bill would remove this exemption. Payday and similar lenders will consequently be subject to the same criminal interest provisions as other lenders. Further, payday and similar loans will likely be subject to section 2 of the *Interest Act* (Canada) given the repeal of the section 347.1 exemption.

^[1] Bill- C-274 [House of Commons of Canada]

(1) The definitions criminal rate and interest in subsection 347(2) of the Criminal Code are replaced by the following:

"criminal rate" means an effective annual rate of interest on the credit advanced under an agreement or arrangement, calculated in accordance with generally accepted actuarial practices and principles, that, on the day on which the agreement or arrangement is entered into or renewed, exceeds by thirty percentage points or more the Bank of Canada's overnight rate on that day;

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission, insurance charge or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

(2) Section 347.1 of the Act is repealed.

The Existing Criminal Interest Framework—Section 347

