CONSUMER CREDIT REFORM: THE CASE FOR A RENEWED FEDERAL INITIATIVE

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I. INTRODUCTION

The subject of consumer credit reform has been occupying the attention of many common law countries during the last five years. [1] It would appear from a 1970 Speech from the Throne [2] that the federal government intends to revise its credit legislation (the Interest Act, [3] Small Loans Act, [4] and Pawnbrokers Act [5]) and therefore, it is of some relevance to consider what kind of law reform is necessary and desirable in the consumer credit field. [6]

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[1] *See generally,* for Canada, REPORT OF THE ROYAL COMMISSION ON BANKING AND FINANCE (1964) (hereinafter referred to as the PORTER COMMISSION); REPORT ON CONSUMER CREDIT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS ON CONSUMER CREDIT AND COST OF LIVING (1967) (hereinafter referred to as the JOINT COMMITTEE). *See generally* for the United States, REPORT OF THE SPECIAL COMMITTEE ON RETAIL INSTALLMENT SALES, CONSUMER CREDIT, SMALL LOANS AND USURY, OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1965), (this report advocated the adoption by the United States of a Uniform Consumer Credit Code [hereinafter referred to as the *U.C.C.C.*] which is attached to the report as an appendix); National Consumer Act (Draft-1970, available from Boston College Law School, Consumer Centre, Brighton, Mass.). For commentary on the related topic of the *U.C.C.C.* see Jordan & Warren, *The Uniform Consumer Credit Code,* 68 COLUM. L. REV. 387 (1968); Ziegel, *The Uniform Consumer Credit Code—A Canadian Consumer Oriented View,* 68 COLUM. L. REV. 488 (1968); *Symposium—Consumer Credit,* 33 LAW & CONTEMP. PROB. 639 (1968); *Consumer Protection Symposium,* 29 OHIO STATE L.J. 593 (1968); *Symposium—Consumer Protection of the Poor,* 37 GEO. WASH. L. REV. 1013 (1968); *Symposium—Consumer Credit Reform,* 44 N.Y.U. L. REV. Nos. I & II (1969); *Symposium—The Uniform Consumer Credit Code,* 49 NEBRASKA L. REV. 724 (1970); Shay, *The Uniform Consumer Credit Code: An Economist's View,* 54 CORNELL L. REV. 491 (1969); *Symposium—Consumer Credit in the 70's,* 26 BUS. LAWYER 753 (1971); *Criticism of the Uniform Commercial Code,* (J. Ebrecht ed. 1971). *See generally,* for Australia, REPORT TO THE STANDING COMMITTEE OF STATE AND COMMONWEALTH ATTORNEYS-GENERAL ON THE LAW RELATING TO CONSUMER CREDIT AND MONEYLENDING (1969); *see* on this report, Trebilcock, *Reform of the Law Relating to Consumer Credit,* 7 MELBOURNE UNIV. L. REV. 315 (1969-70). *See generally,* for England, REPORT OF THE COMMITTEE ON CONSUMER CREDIT (hereinafter referred to as the CROWTHER COMMITTEE) CMD. No. 4596 (1971). *See generally,* for South Africa, a non-common law country, REPORT OF THE COMMITTEE OF INQUIRY INTO THE USURY ACT OF SOUTH AFRICA (1967).

[2] 1 H.C. DEB. 1-3 (Oct. 8, 1970).

[3] CAN. REV. STAT. c. I-18 (1970).

[4] CAN. REV. STAT. c. S-11 (1970).

[5] CAN. REV. STAT. c. P-5 (1970).

[6] For a bibliography of legal materials on consumer credit see, H. KRIPE, CONSUMER CREDIT (1970), 21 RECORD (N.Y. B. Ass'n 1962); 24 RECORD 174 (N.Y. B. Ass'n 1969).

II. Present Inadequacies

The subject of the inadequacies in Canadian consumer credit legislation has been extensively dealt with [7] and therefore, only some of the important conclusions need be restated here.

Canada has never really had a usury statute. [8] The Interest Act operates as a disclosure statute. It contains antiquated provisions which apply only to certain complicated mortgage arrangements. The Small Loans Act, enacted in 1939, has only been amended once. [9] It is totally inadequate. The dollar ceiling is totally out of line with the increases in the cost of living since 1956. The interest ceiling is unrealistic, and its rate structure has produced some unexpected consequences. [10] The Small Loans Act was originally designed to protect the necessitous borrower in an age when consumer credit was considered an immoral and unhealthy practice. [11] However, today consumer credit is an integral part of our consumption society. Its use has expanded to all levels of society, yet only a very small portion of the consumer credit industry is regulated. [12]

III. Lack of Uniformity of Provincial Legislation

In the absence of a federal initiative to deal with the growing problems of consumer credit, the provinces felt it necessary to meet the public demand for adequate consumer protection. Provincial disclosure provisions contained in a variety of Acts, [13] attempt to deal with the requirement of disclosure of

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[7] *See generally* Joint Committee (1967); Proceedings of a Conference on Consumer Credit (J. Ziegel & R. Olley ed. 1966) (especially Chapter 3).

[8] An Act Respecting Money-Lenders, Can. Stat. 1906 c. 32, was enacted but never clearly defined interest; for that reason it proved unworkable and was repealed in 1956, Can. Stat. 1956 c. 46, § 8.

[9] Can. Stat. 1956 c. 46. In this Act the monetary limit was raised to $1500 and a graduated scale of interest rate ceilings was introduced.

[10] The portion of the loan from $1000 to $1500 is regulated at 6%. As a result of this unrealistic rate, companies encourage borrowers to accept smaller loans at higher rates, or larger loans at unregulated rates. See: *Canadian Consumer Credit Legistlation*, 8 B.C. Trade and Commerce R.R. 201, at 209 (1967), and Porter Commission 382.

[11] For a review of the background to the development of the Uniform Small Loans Act in the United States (upon which our act is based) see, *The Uniform Small Loans Law*, 42 Harv. L. Rev. 689 (1929); *Symposium—Combatting The Loan Shark*, 8 Law & Contemp. Prob. 1-206 (1941); Hulacher, *The Drift Toward a Consumer Credit Code*, 16 U. Chi. L. Rev. 609 (1949); *Symposium—The Loan Shark Problem Today*, 19 Law & Contemp. Prob. 1-158 (1954); B. Curran, Consumer Credit Legislation, (1965).

[12] The Small Loans Act does not apply to sales finance companies nor to loans over $1500.

[13] For provincial legislation in the field of consumer credit, *see* for Alberta, The Credit and Loans Act, Alta. Rev. Stat. c. 73 (1970), and see relating to this act, Alta. Reg. 310/67, Alta. Reg. 407/67, Alta. Reg. 153/69, Alta. Reg. 324/69, and Alta. Reg. 374/69. *See* for British Columbia, The Consumer Protection Act, B.C. Stat. 1967 c. 14, and see relating to this act. B.C. Reg. 219/67, B.C. Reg. 251/67, B.C. Reg. 15/68, B.C. Reg. 112/68 and B.C. Reg. 143/69. *See* for Manitoba, The Consumer Protection Act, Man. Rev. Stat. c. C200 (1970), and see relating to this act, Man. Reg.

the cost of consumer credit. As can be expected such legislation has been developed with no real attempt to ensure uniformity. Thus, for example, the advertising provisions differ from province to province both in terms of *when* certain credit information must be set out in a credit advertisement and also in terms of *what* information must be contained in the advertisement. [14]

The enforcement provisions further illustrate this lack of uniformity. The penal sanctions, for example, vary from province to province. [15] With regard to civil remedies, the provinces vary in their attempts to restrict the lender's right to collect the finance charge if the lender has failed to comply with the disclosure requirements of the particular statute. Some provinces allow the lender to collect only that charge actually disclosed whether or not the disclosure is correct. [16] Others distinguish between bona fide and non bona fide mistakes, allowing the lender to collect that portion of the charge calculated on the basis of the nominal annual percentage rate if the mistake is bona fide, [17] but restricting the right of collection to the principal sum alone [18] or the principal sum plus legal interest [19] if the mistake is not bona fide.

31/70. *See* for New Brunswick, The Cost of Credit Disclosures Act, N.B. Stat. 1967 c. 6, and see relating to this act, N.B. Reg. 63/375. *See* for Newfoundland, The Consumer Protection Act, Nfld. Stat. 1969 No. 36, and see relating to this act, Nfld. Reg. 139/70. *See* for Nova Scotia, The Consumer Protection Act, N.S. REV. STAT. c. 53 (1967) and see relating to this act, Order in Council (N.S., Nov. 8, 1966). *See* for Quebec, The Consumer Protection Act, Que. Stat. c. 43 (1971). *See* for Ontario, The Consumer Protection Act, ONT. REV. STAT. c. 82 (1970) and see relating to this act, Ont. Reg. 207/67, Ont. Reg. 265/67 and Ont. Reg. 446/68. *See* for Prince Edward Island, The Consumer Protection Act, P.E.I. Stat. 1967 c. 16, and see relating to this act Order in Council (P.E.I., May 15, 1968). *See* for Saskatchewan, The Cost of Credit Disclosure Act, Sask. Stat. 1967 c. 85, and see relating to this act, Sask. Reg. 237/67, Sask. Reg. 357/67 and Sask. Reg. 174/68. *See also* for information pertaining to the above legislation, REPORT OF THE ROYAL COMMISSION ON CONSUMER CREDIT (Nova Scotia, 1966), and for a commentary on this report see, Charles, *Consumer Credit Legislation in Nova Scotia*, 17 U. TORONTO L. REV. 110 (1967); FINAL REPORT OF THE SELECT COMMITTEE OF THE ONTARIO LEGISLATURE ON CONSUMER CREDIT (1966).

[14] In New Brunswick and Ontario, information outlining the *full cost of borrowing* must be set out in an advertisement when there is any mention of a *charge for credit*. (Ontario also requires the advertisement to set out an example of the calculation of a typical charge.) In Nova Scotia, Prince Edward Island and Saskatchewan, only the annual percentage rate need be disclosed. (Saskatchewan allows even the percentage rate to be omitted if the dealer indicates in the advertisement that he has "a credit plan at usual rates." Manitoba requires the disclosure of the annual percentage rate in an advertisement that refers to the "monthly payment."

[15] British Columbia, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Ontario provide a $2000 fine or one year imprisonment or both, for a violation of the act by a person and $25,000 for a corporation. Alberta provides a $500 fine for a person, $1000 for a corporation; Saskatchewan provides a $1000 fine for a person and $5000 fine for a corporation and Manitoba, a $1000 fine for a person and $2000 for a corporation.

[16] New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island.

[17] British Columbia and Saskatchewan.

[18] British Columbia and Saskatchewan.

[19] Manitoba.

IV. Inadequacy of Provincial Disclosure Requirements

Most provincial statutes fail to deal adequately with many of the issues involved in disclosure. None include *all* of the costs in the calculation of the "cost of borrowing." [20] Only four provinces license moneylenders and credit vendors. [21] No statute includes provisions designed to encourage debtors to enforce the statute (debtors' remedies). [22] The penal provisions of most provincial consumer protection statutes are inadequate to provide an effective means of deterrence.

V. Objectives of the Federal Statute

What is urgently required, therefore, is a federal statute which will establish a uniform effective standard of disclosure of the cost of consumer credit. In 1967 the federal government attempted to deal with this problem in its revisions to the Bank Act [23] which introduced disclosure provisions applicable to the banks. [24] These provisions are inadequate even when compared to provincial statutes. The Bank Act amendments and the regulations thereto do not require that banks deliver the loan contract to the borrower before advancing the monies loaned; they do not provide for rebates in the event of the prepayment of the loan and do not require that the loan contract disclose the method of calculation of default penalties. The penal sanctions are weak [25] and there are no provisions limiting the lender's right to recover the finance charge in the event of a violation of the disclosure provisions.

The second objective of the proposed act should be to provide protection for consumers who are charged excessive interest rates. As will be indicated, this objective should be achieved through rate regulation.

VI. Outline of a Consumer Credit Statute

A. *General Principles*

(1) *Lender Credit and Vendor Credit*

The Interest Act and Small Loans Act apply only to moneylending transactions. Provincial disclosure legislation applies both to such trans-

[20] All provincial statutes exclude official fees and insurance fees from the calculations of the cost of borrowing because it is argued that they are not received by the lender but by third parties. Two points should be made here. Firstly, the total cost of the loan should be disclosed as one unit so that the borrower can determine whether to borrow or pay cash. Secondly, in the insurance area, it is not uncommon for the lender to receive rebates on insurance (especially in the auto sales field). *See*, Neilson, *The Responsibility for Consumer Protection*, in A Conference on Consumer Protection (T. Ison ed. 1968).

[21] Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island.

[22] For an anlysis of the value of private enforcement of disclosure and interest ceiling statutes see, Felsenfield, *Ruminations about Remedies in Consumer Credit*, 8 B.C. Ind. & Com. L. Rev. 320 (1967); Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U. L. Rev. 80 (1969); *Inadequate Remedies under the UCCC* 57 Geo. L.J. 38 (1969).

[23] Can. Stat. 1967 c. 87 §§ 91, 92, and *see* Can. Reg. 67-504 (1967).

[24] For an examination of the drawbacks of the Bank Act see W. Neilson, *supra* note 20.

[25] That is, providing only for a fine up to $1000.

actions (called lender credit) and to transactions involving the sale of goods or services on time (vendor credit). It is essential that the act be extended to apply to vendor credit because, given the fact that vendor credit today comprises approximately one-third of all consumer credit, to limit the act to lender credit alone would result in the shifting of financial resources out of the regulated area (lender credit) and into the unregulated area (vendor credit).

(2) *Finance Charge*

The act should apply to that portion of the credit transaction involving the *total cost* of the loan as in the Small Loans Act (cost of the loan) and the Provincial disclosure legislation (cost of borrowing).

(3) *Application of the Disclosure Regulation*

Logically, a consumer credit statute should apply only to consumer credit transactions. [26] This is basically the position that the provinces have taken. However, the Interest Act applies to real property mortgage transactions and to business transactions. It would be politically difficult to eliminate these areas from the act unless they were adequately dealt with in other federal acts.

B. *Disclosure Obligations* [27]

The provisions should require the disclosure of all the costs of borrowing [28] to be expressed both as a dollar figure and as an annual percentage rate.

The Bank Act, the Uniform Consumer Credit Code (hereinafter referred to as the U.C.C.C.), and all provincial legislation exempt transactions which are considered too small to warrant disclosure on the basis that it is the dollar value of these goods, not the credit terms, which the consumer is interested in. [29] However, the consumer should be entitled to disclosure in all cases, without such a value judgment being made for him.

(1) *Advertising*

The disclosure provisions should require the disclosure of the annual percentage rate in all advertisements, if in an advertisement, the availability

[26] Goode, *Legal Regulation of Lending in Instalment Credit* in R. GOODE, INSTALMENT CREDIT (1970).

[27] For a discussion of issues involved in disclosure, *see generally*, Felsenfield, *Consumer Interest Rates, A Public Learning Process*, 23 BUS. LAW. 931 (1968); Jordan & Warren, *Disclosure of Financial Charges, A Rationale*, 64 MICH. L. REV. 1294 (1968); *Finance Charge Ceilings and Disclosure Provisions on the Uniform Consumer Credit Code*, 2 J. OF CONSUMER AFFAIRS 74 (1968); *Truth and Lending: The Impossible Dream*, 22 CASE W. RES. L. REV. 89 (1970); R. W. JOHNSON, METHODS OF STATING CONSUMER FINANCE CHARGES (1961); THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION (Chapman & Shay ed. 1967).

[28] Including insurance and official fees.

[29] British Columbia, New Brunswick, Prince Edward Island, and Ontario exempt transactions where the sale or loan is less than fifty dollars; Alberta, Manitoba and Prince Edward Island exempt transactions where the cost of borrowing is less than ten dollars. The Bank Act and the Consumer Credit Protection Act exempt transactions where the cost of borrowing does not exceed five dollars.

of credit is referred to in any manner. [30] In light of studies [31] which indicate that where such requirements are imposed advertisers simply omit in their advertisements any mention of credit, perhaps more positive requirements should be imposed. In order for the consumer to be able to shop for credit, he must know the annual percentage interest rate well in advance of the moment he signs the contract. [32] One suggestion would be to have all lenders and credit vendors disclose their annual percentage rate in their advertisements, even if they do not mention credit at all. [33] Alternatively, if such an approach is politically unpalatable, perhaps the regulatory agency would be responsible for publicizing the annual rates in the mass media on the basis of information which would be required to be supplied by the industry.

(2) *Enforcement*

The penal provisions must be effective. It has been suggested that the penalties in the Consumer Credit Protection Act (hereinafter referred to as the C.C.P.A.) and U.C.C.C. be adopted. [34] Companies extending loans which are governed by the interest ceiling provisions would be licensed. Private remedies would be included in the statute to encourage the private enforcement of the statute. The provinces merely restrict the right of the lender to collect a portion of the finance charge. However, in order to encourage the buyer to bring an action, civil penalties must be provided. [35] To encourage private enforcement of the statute, class actions would have to be allowed. Private remedies have been incorporated in the U.C.C.C., although not in respect to misleading advertising. The argument apparently is that since there are two stages of disclosure (advertising and contract stages), encouraging private remedies (by the borrower or buyer) at the second stage is considered sufficient protection for the consumer. As well, the cease and desist order is an adequate tool to deal effectively with incidents of misleading credit advertising.

VII. Interest Rate Regulation [36]

A. *Disclosure Inadequate*

Disclosure legislation is, by itself, an inadequate response to the problems faced by consumers in the consumer credit area. The basic rationale

[30] All provincial legislation provides, in one way or another, for the disclosure of this annual percentage only if a "charge for credit" is referred to, as distinct from the mention of a "term of credit." This distinction is unclear and nowhere defined in the legislation.

[31] See two studies, in Massachusetts, Pullen, The Impact of Truth in Lending Legislation: The Massachusetts Experience (1968); and in Illinois, Angell, *Some Effects of the Truth-in-Lending Legislation*, 44 J. Bus. 78 (1971).

[32] Without adequate advertising requirements, provincial legislation only requires disclosure at the moment before the contract is signed.

[33] Analogous to the requirement that all cigarette packages made in the U.S. contain specified words relating to harmful nature of cigarettes.

[34] $5000 fine or one year imprisonment or both for "person" violations and $25,000 fines for corporate offenders.

[35] Treble damage suits, for example.

[36] For an exposition of the economic arguments concerning the necessity of an interest rate ceiling see, *for* regulation: Yntenma, *The Market for Consumer Credit, A*

behind disclosure legislation rests on the assumption that once a consumer is made fully aware of the cost of credit in terms which he understands and in terms which are comparable, then, armed with this information the consumer is able to shop for credit in the market place and through this shopping function force interest rates to become competitive.

However, it has long been recognized, by even the free-enterprise diehards, that the shopping function does not take place regarding the *low-income* consumer.[37] This type of consumer is not mobile and not able to explore the credit terms of institutions far from his neighbourhood. Furthermore, never earning a sufficient income to buy many goods for cash, the low-income consumer requires credit for most purchases, including the purchase of necessaries. Therefore, the low-income consumer is little interested in the cost of credit and is only concerned with the size of the monthly payments. The possibilities for victimization are apparent. Indeed, it was partially in recognition of this problem that the Small Loans Act was introduced. It established a rate structure to govern the cost of credit in respect of loans of $300 (subsequently increased to $1500 in 1956). This was the amount that it was expected the low-income consumer would normally seek. As indicated above, the $1500 limit is out of date and has failed to reflect increases in the consumer price index. If that figure was brought up to date with 1971 prices, it would probably be $2200.

B. *Regulating the Entire Field of Consumer Credit*

There are several important reasons for the extension of regulation of the entire field of consumer credit, not just to an amount of $2200 (the needy borrower limit).

Firstly, the above mentioned Massachussetts and Illinois studies[38] have indicated that even with the disclosure of the cost of credit, most consumers do not shop for credit but continue to be interested only in the size of the monthly payment. Credit is considered to be an incidental cost of the goods themselves. Our materialistic society indeed encourages the consumption of

Case in Imperfect Competition, 196 ANNALS 79 (1938); Phelps *Monopolistic and Imperfect Competition in Consumer Loans*, 8 J. MARKETING 382 (1944); *against* regulation: Mors, *Regulation in the Field of Consumer Credit*, 51 J. BUS. 51, 124 (1943); JUSTER & SHAY, CONSUMER SENSITIVITY OF FINANCE CHARGES: AN IMPERIAL AND ANALYTICAL INVESTIGATION (1964); and see the leading article on this point, Johnson, *Regulation of Finance Charges on Consumer Instalment Credit*, 66 MICH. L. REV. 81 (1968).

[37] For an analysis of the drawbacks to the "disclosure" approach with respect to low income consumers see, CAPLOVITZ, THE POOR PAY MORE (2d ed. 1967); *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); Kripe, *A Consumer Credit Regulation: A Creditor Orientated Viewpoint*, 68 COLUM. L. REV. 444 (1968); Testimony of Judge Brown, and the testimony of the Consumer Federation of America, before the House Sub-Committee on Consumer Affairs in, *Hearings on Consumer Credit Regulations Before the Sub-Committee on Consumer Affairs of the House Banking and Currency Committee*, 91st Cong. 1st Sess., pt. I (1969); Kawaja, *The Case Against Regulating Consumer Credit Charges*, 5 A. BUS. L.J. 319 (1969); Goudzwood, *Price Ceilings & Credit Rationing*, 23 J. OF FIN. 177 (1968); Goudzwood, *Consumer Credit Charges*, 35 So. ECO. J. 214 (1969).

[38] *Supra* note 31.

the products and de-emphasizes such unpleasant considerations as cost, for example.

Secondly, the finance industry has remained in an oligopolistic state. Price competition is discouraged. Advertising stresses the aesthetic virtues of bank-plan loans. In fact, since the advent of disclosure legislation by the provinces, rates have risen, to a greater degree than increases in the cost of money would warrant.

Economists, relying on the competition argument, maintain that the consumer credit industry is as competitive as other areas of the economy and therefore the application of government rates and ceilings would constitute discrimination. Furthermore, these proponents point out the disrupting effects of government attempts to replace the market as an allocator of resources and prices. Finally, they point out the fact that setting rates would be of assistance only to a marginal group. Those now able to obtain credit at rates below the set rate would then probably find themselves charged the statutory rate. Those who can only obtain credit at rates well above the set rate would continue to be denied credit. Only those paying interest at a rate slightly above the statutory rate would benefit because they would then probably obtain credit at the statutory rate. Is rate regulation warranted for this limited group? It has been acknowledged, however, that the consumer finance industry, even with freedom of entry, will remain oligopolistic and consumers will continue to remain insensitive to interest rates. Consequently, it is unlikely that interest rates will be reduced through competition.

Given the need for interest rate ceilings, are these ceilings to be set at a high level to cut off unconscionable transactions and allow the market to set the legal rates, or, alternatively, are the ceilings to be set with a view to replacing competition as a means of ensuring low cost consumer credit? The U.C.C.C. adopts the former approach while the arguments explored above would tend to favour the latter approach. The supplementary issue involved in setting ceilings is the realization that setting a low ceiling level will result in a greater denial of credit to consumers whose credit position is such as to discourage lenders from lending them money at the ceiling rates. [39]

It is expected that the dollar ceiling will be raised from the present $1500 to $5000 [40] or $7500. [41] Again, this is in accord with the critical view of competition as a method of ensuring the availability of low cost credit. [42]

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[39] For that reason a low income government program would be necessary to ensure these consumers are able to obtain low cost credit (to be discussed further in this article).

[40] This is the recommendation of both the PORTER COMMISSION and the JOINT COMMITTEE.

[41] This is the recommendation of the Canadian Consumer Council; *see* REPORT TO THE MINISTER OF CONSUMER AND CORPORATE AFFAIRS ON CONSUMER CREDIT (1969).

[42] As indicated earlier, the free-enterprise advocate would probably agree, albeit reluctantly, to raising the ceiling from $1500 to $2500 to reflect the increase in the cost of living.

The statute should introduce a mechanism for establishing initial interest rate ceilings and for adjusting both the dollar ceiling [43] and interest rate ceilings [44] to take into account the changes in the economy. These adjustments can be made automatically through the statute, by the Cabinet through regulations or through the establishment of an independent commission with statutory guidelines to assist the commission in its tasks.

VIII. Government Insured Loans

It has been estimated that over one-half of all applicants for loans are refused loans by licensed lenders. [45] If rate regulation is extended to loans and credit sales of $5000, then it is likely that the number of low-income consumers denied credit will increase. Such rejection, however, will do little to deter the consumer from desiring consumer goods and therefore, in all likelihood, the rejected consumer will turn to the loanshark to obtain credit. In order to prevent this from happening, it has been proposed that a government insured loan program be established. [46]

There are various types of government credit assistance programs which may be adopted. Indeed there is ample precedent for such programs to be found in federal government assistance schemes designed to aid fishermen, businessmen, farmers and students. [47]

Two types of credit assistance programs which were suggested by the Joint Committee of the Senate and the House of Commons on Consumer Credit were, firstly, government insured loans and, secondly, government guaranteed loans. Basic to both schemes are the following principles: (1) The schemes would be voluntary, that is, a lending institution would be able to choose whether to grant an insured loan. (2) The scheme would be operated by existing financial institutions. (3) The government would only enter the picture upon the default of the loan and would pay the lender the amount of the default. (4) The program would be available for low-income consumers below the poverty line and the loans to be guaranteed or insured would be in small amounts (perhaps no more than twenty-five hundred dollars). It would be desirable to avoid the imposition of limitations on the use of the loan because such limitations would be unenforceable, and they would appear overly paternalistic.

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[43] The dollar ceiling could be adjusted through the use of the consumer price index to reflect the increases in the cost of living.

[44] The interest rates should be adjusted (upwards or down) to reflect increases or decreases in the cost structure of the consumer credit industry. Since a main ingredient of the cost structure, is the cost of money, a standard based on the bank ceiling rate or yield on government short term bonds, might be workable.

[45] Joint Committee.

[46] This was the recommendation of the Joint Committee and the Canadian Consumer Council in its 1969 Report, *supra* note 41.

[47] *See* Fisheries Improvement Loans Act, Can. Rev. Stat. c. F-22 (1970); Farm Credit Act, Can. Rev. Stat. c. F-2 (1970); Farm Improvement Loans Act, Can. Rev. Stat. c. F-3 (1970); Canada Student Loans Act, Can. Rev. Stat. c. S-17 (1970); Small Business Loans Act, Can. Rev. Stat. c. S-10 (1970).

Some will no doubt argue that an insured loan program is intended to attack basically a poverty, as distinct from a consumer credit, problem and further that other anti-poverty programs (for example, a guaranteed annual income) represent more effective means of combatting that poverty problem. However, an insured loan program is not aimed at the same objectives as an anti-poverty program.

In the first place even if anti-poverty programs are fully developed and especially along the lines of a guaranteed annual income, low-income consumers will still not be able to afford to make cash payments for consumer products such as automobiles and appliances. They will still require low cost credit. More important, the insured loan program is aimed at the low-income consumer whose financial position is sufficiently sound so that he is in a position and is willing to repay the loan. Consumers who default in their payments of any insured loan would not be granted another. However, many impoverished consumers are already in an over-extended credit position. They cannot afford another loan. They require direct anti-poverty program assistance.

It is submitted that an *insured* loan program is superior to a *guarantee* program on the basis of cost. The insurance premiums paid by the borrower to a government fund (and invested) can be used to pay defaulted loan payments without the need for taxation revenues. It is expected that the availability of government insurance will ensure that the consumer will obtain the loan at a considerably lower finance charge than would otherwise be possible.

IX. Constitutional Jurisdiction [48]

Federal jurisdiction in the field of consumer credit rests on the interest power [49] and criminal law power [50] and the power to regulate trade and commerce. [51]

A. *The Interest Power*

The interest power represents the *main* head of jurisdiction to justify federal consumer credit legislation. Superficially, it would appear that a jurisdiction over interest would entitle the federal government to enact legislation regulating the interest rate and requiring the disclosure of the interest. However, there is considerable argument as to whether the federal government, under the interest power, can regulate all the cost components of a consumer credit transaction and, even if such is the case, whether under that power, it can regulate *all types* of consumer credit transactions.

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[48] *See* Proceedings of a Conference on Consumer Credit (J. Ziegel & R. Olley ed. 1966).

[49] B.N.A. Act, § 91(2).

[50] B.N.A. Act, § 91(19).

[51] B.N.A. Act, § 91(27).

(1) *Regulating All the Cost Components of a Consumer Credit Transaction: Defining "Interest"*

Whether the federal government can, in the exercise of its jurisdiction over interest, encompass all the costs of a loan depends in part upon how the term interest is defined.

Until recently, judicial pronouncements had defined the constitutional term 'interest' in broad terms equating it, in effect, with all the costs of a loan. Thus, for example, Mr. Justice Rand in a leading case 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." [52] In 1963, [53] however, the Supreme Court in upholding the constitutional validity of the Ontario Unconscionable Transactions Relief Act [54] provided a more limited definition of interest, "[i]nterest accrues *de die in diem* even if payable only at intervals, and is, therefore, apportionable in point of time between persons entitled in succession to the principal." [55]

The Court distinguished various components of the cost of the loan (the term employed in the Unconscionable Transactions Relief Act) and especially interest and bonuses.

In his testimony before the Joint Committee of the Senate and House of Commons on Consumer Credit, K. R. MacGregor, the former Superintendent of Insurance (responsible for the administration of the Small Loans Act), adopted an interpretation of the case which has since become popularized by provincial ministers in charge of consumer protection bureaus. [56] Basically, he argued that the Court had defined the interest power as something less than the entire cost of the loan; in particular the Court held that the term interest did not include other costs such as bonuses. Therefore, he argued that the federal government exercising jurisdiction under the interest power was limited to regulating that portion of the loan restrictively defined as interest. It can be readily observed that, in order to defeat the purpose of such federal legislation, a lender need only classify the components of the cost of the loan in terms other than interest.

It is questionable as to whether the definition of interest is involved in the ratio decidendi of the case. The Court merely held that on the basis of the property and civil rights power, the Unconscionable Transactions Relief

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[52] In the matter of a reference as to the validity of section 6 of the Farm Security Act, 1944, of the Province of Saskatchewan, [1947] Sup. Ct. 394, at 411. *See also* Board of Trustees of the Lethbridge Northern Irrigation District v. Independent Order of Foresters, [1940] A.C. 513.

[53] Attorney-General for Ontario v. Barfield Enterprises, [1963] Sup. Ct. 570. For comments on the case see: Waterman, *In Defence of the Unconscionable Transactions Relief Act*, 21 U. TORONTO FAC. L. REV. 117 (1963); Comment, 11 McGILL L.J. 131 (1965); Note, 3 ALTA. L. REV. 312 (1964).

[54] ONT. REV. STAT. c. 410 (1960).

[55] *Supra* note 53 at 575 (Judson J.).

[56] *See*, PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CONSUMER CREDIT 42-69 (Nov. 1964).

Act was a valid exercise of provincial jurisdiction.[57] Furthermore, even if one adopts this narrow interpretation of the scope of the term interest (constitutionally), the conclusion arrived at above need not be valid. If a federal statute based on the interest power will be circumvented because lenders will classify their costs as bonuses rather than interest, then the federal government can legislate, incidentally, to cover these other areas. As Professor Jacob Ziegel pointed out in his November 10, 1964 testimony to the Joint Committee: "... the federal government has admitted jurisdiction over the so called interest element in loans—whatever the term 'interest' means in this context—it has also incidental jurisdiction to cover other charges so as to prevent evasion of the regulation of the interest element."[58]

(2) *Can the Legislation, Based on the Interest Power, Be Extended to All Consumer Credit Transactions? The Time-Price Doctrine*

It has been suggested by Professor Ziegel, in his testimony[59] that the federal government may not be able to legislate with respect to credit sales (vendor credit) because of the existence of the time-price doctrine.

In the United States and England the courts have developed the time-price doctrine to exempt from the operation of the usury statutes, conditional sale contracts and other forms of credit sales. The rationale for this exemption is, briefly, that in the credit sale situation, there exists two types of prices: a cash price and a time-price. The latter price is not considered to be a loan and therefore is not subject to usury legislation but is defined as the consideration paid for a time sale. Constitutionally the significance of this doctrine is that if a credit sale is a sale rather than a loan, the finance charge is considered not interest on a loan but a time-price. Therefore, under the interest power, the federal authority over interest would not extend to the regulation of credit sales transactions.[60]

The time-price doctrine is an economic absurdity.[61] The time-price in all cases is simply the result of adding the finance charge to the cash price. The reason for the development of the time-price doctrine was to avoid the operation of the usury statutes which were designed to protect the necessitous borrower. At the time when the time-price doctrine was established credit purchases were considered luxury-buying practices and from that perspective little warranted the same protection afforded by the usury statute. More

[57] It cannot really be said (as some have argued) that section 2 of the Interest Act constitutes the federal government's occupancy of the field, constitutionally. That section merely entitles parties to charge what interest they wish. The provincial Unconscionable Transactions Relief Act states that if the cost of the loan is excessive and the terms harsh and unconscionable, then (notwithstanding section 2) the contract can be remedied. The field would have been occupied if a federal Unconscionable Transactions Relief Act had been in existence.

[58] *Supra* note 56, at 371. In a case following the *Barfried* decision, the Manitoba Court of Appeals upheld the Small Loans Act: *see* R. v. Exchange Realty 42 D.L.R.2d 682 (1964).

[59] *Id.*

[60] Thus, Prof. Ziegel is of the opinion that this doctrine may constitutionally limit federal authority under the interest power. *Supra* note 56 at 372, and Appendix L.

[61] *Retail Instalment Sales Legislation*, 58 COLUM. L. REV. 854, at 859-60 (1958).

important, the prevailing usury statutes in the United States and the Moneylenders Act in England prescribed unreasonably low rates. Had these statutes applied to the budding sales finance industry in the early period of the twentieth century, it would have resulted in its immediate demise. The time-price doctrine was the court's method of resolving the problem.

Would the time-price doctrine prevail in our courts? The doctrine was never dealt with in our courts [62] and if dealt with, would not face a usury statute spelling out unreasonable interest rate prohibitions.

While it is true that the time-price doctrine continues to prevail in the United States and in England, [63] there has been some judicial refusal to continue recognizing the doctrine. In Nebraska [64] and Arkansas, [65] the courts have rejected the time-price doctrine. In England, the Crowther Committee has recommended the abolition of the time-price doctrine. It is therefore suggested that in light of these current trends, and in the absence of a restrictive usury statute, a Canadian court might be willing to reject the time-price doctrine and with this rejection, the only impediment facing the federal regulation of credit sales would be removed.

B. *The Criminal Power* [66]

At one time, courts attempted to take a restrictive attitude towards the criminal law power, limiting federal criminal power to matters inherently criminal. [67] Thus, in *Re Reciprocal Insurance Legislation* [68] the Privy Council declared the Federal Insurance Act unconstitutional and rejected attempts to classify such regulatory legislation as criminal legislation.

However, modern definitions, established by Lord Atkin [69] and Mr. Justice Rand, [70] give some hope that the consumer credit field can be

[62] Except in a case of little significance; *see* Igloo Refrigeration Co. v. Industrial Acceptance Corp. [1943] Ont. W.N. 604 (High Ct.) (Lennox, Assistant Master).

[63] The time-price doctrine was established in England. See *In Re* George Inglefield, [1933] Ch. 1 (C.A.); Olds Discount Co. v. John Playfair Ltd., [1938] 3 All E.R. 275 (K.B.); Transport and General Credit Corp. v. Morgan, [1939] 2 All E.R. 17 (Ch.) *appl'd in* Chan Young Hang v. Choang Fah Rubber Manufactory, [1961] 3 All E.R. 1163 (P.C.) and also applied in Premar Ltd. v. Shaw Brothers, [1964] 2 All E.R. 583 (C.A.).

[64] Elder v. Doerr, 122 N.W.2d 528 (Neb. sup. Ct. 1963). See B. CURRAN, CONSUMER CREDIT LEGISLATION (1965).

[65] Hare v. General Contract Purchase, 249 S.W.2d 973 (Ark. Sup. St. 1952), and Sloan v. Sears Roebuck and Co., 308 S.W.2d 802 (Ark. Sup. Ct. 1957).

[66] For an examination of the constitutional scope of the criminal power *see: Symposium—Criminal Law,* 15 U. OF TORONTO FAC. L. REV. 1 (1955-6); Leigh, *The Criminal Law Power: A Move Towards Functional Concurrency,* 5 ALTA. L. REV. 237 (1967).

[67] *In Re* Board of Commerce Act, 1919, [1922] 1 A.C. 191 (P.C.) (Lord Haldane).

[68] [1924] 1 D.L.R. 789 (P.C.).

[69] Proprietary Articles Trade Ass'n v. Attorney-General for Canada, [1931] A.C. 310 (Lord Atkin) and *see* Reference *Re* section 498A of the Criminal Code [1937] 1 D.L.R. 688 (Lord Atkin).

[70] Reference *Re* Validity of Section 5 (a) of The Dairy Industry Act, [1949] 1 D.L.R. 433 (Sup. Ct.) *appr'd* in [1951] A.C. 179 (P.C.).

regulated under the criminal law power. Lord Atkin was prepared to accede to any federal jurisdiction based on the criminal law power as long as the legislation was enforced by a penal sanction and did not represent a colourable attempt to invade provincial jurisdiction. [71]

The definition offered by Mr. Justice Rand offers some guidance: "Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law. . . ." [72] Under this definition, the courts have upheld the misleading labeling provisions and "adultering" provisions, [73] of the Food and Drug Act, the conspiracy provisions of the combines legislation, [74] the resale price maintenance provisions of the combines legislation [75] and the Criminal Code provisions dealing with securities fraud. [76]

Federal disclosure legislation could be justified on the basis of criminal law on grounds analogous to the securities fraud legislation provisions in the Criminal Code and the basic criminal prohibitions against fraud in general contained therein. Certainly a misleading credit advertising provision could be so justified. The federal statute under consideration would go further by imposing the obligation to disclose certain specific information in a loan contract especially the percentage rate. An argument can be made that the consumer is indeed misled *unless* he is told the annual percentage rate in a credit transaction and to mislead by such an omission would be criminal fraud. On this basis, consumer credit disclosure provisions could be justified as a valid exercise of the criminal law power. [77]

Could the criminal law power be employed to justify the imposition of statutory finance charge rates? In one sense this legislation, especially if combined with licensing provisions, is designed to regulate trade and prices rather than prohibit an activity which is considered a public evil. However, in another sense, such an imposition of interest ceilings is a form of a usury statute and, as has been pointed out, [78] for centuries usury was considered a crime and a social evil. This would be the distinguishing feature which might uphold the legislation. It should be mentioned that one drawback to the legislation being based on the criminal law jurisdiction is that the legis-

[71] *Supra* note 69, at 282, and see Reference *Re* section 498A of the Criminal Code, [1937] 1 D.L.R. 688, at 690.

[72] *Supra* note 70, at 473.

[73] Standard Sausage Company v. Lee [1933] 4 D.L.R. 501 and [1934] 1 D.L.R. 707 (addendum) (B.C.); Rex v. Perfection Creameries Ltd., [1939] 3 D.L.R. 185 (Man.).

[74] *Supra* note 69.

[75] Regina v. Campbell, 46 D.L.R.2d 83 (Ont. 1964).

[76] Smith v. The Queen, [1960] Sup. Ct. 776; 25 D.L.R.2d 255.

[77] It should be kept in mind, however, that the criminal law power cannot be used to regulate an industry or to protect an industry from competition by another. In the Reference *Re* Validity of Section 5(a) of The Dairy Industry Act, *supra* note 70. criminal law prohibiting margarine was struck down because the Supreme Court held that the alleged criminal legislation was in reality designed as a measure of trade protection.

[78] *See* Johnson, *The Realities of Maximum Ceilings on Interest and Finance Charges*, in CONFERENCE ON PERSONAL FINANCE LAW (1969).

lation could not license lenders. This type of enforcement provision would probably place the legislation in constitutional jeopardy.

C. *Trade and Commerce*

The federal government's jurisdiction in relation to consumer credit could be justified under the trade and commerce power. The trade and commerce power, at one time, was interpreted narrowly so that federal legislation based upon it could not regulate specific contracts and trades under the guise of legislation aimed at inter-provincial trade and commerce. [79]

The development of the modern trend in considering the operation of trade and commerce gives some hope that this clause could be used to justify consumer credit legislation. [80] The cases establishing this modern trend have indicated a willingness on the part of the Supreme Court to examine a transaction to determine whether it has a valid inter-provincial aspect. [81] In the event that the transaction meets this test, then the fact that the legislation affects purely inter-provincial matters [82] will not prove constitutionally fatal to the scheme. One writer has suggested that in light of these modern developments, the combines legislation could now be sustained under the trade and commerce power. [83]

Is the regulation of consumer credit a regulation of inter-provincial trade and commerce? Unfortunately, the insurance cases dealing with the federal regulation of the insurance industry indicate that the courts would be likely to consider consumer credit legislation as the regulation of a particular trade and interference with contracts (property and civil rights). [84] However, there are some aspects of the consumer credit field which are inter-provincial in nature. Consumer credit in Canada can be seen as the economic

[79] The development of the trade and commerce power is fully set out in SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES (1963) and MACKINNON, COMPARATIVE FEDERALISM: A STUDY IN JUDICIAL INTERPRETATION (1964).

[80] See for a modern trend, Ballem, *The Trade and Commerce Power*, 34 CAN. B. REV. 482 (1956); Laskin, *Revival of the Trade and Commerce Power*, 37 CAN. B. REV. 630 (1959); note, *Concepts of Interstate Commerce*, 10 C. DE D. (1969). *Cf.* two cases illustrating judicial caution at extending the modern approach, Carnation Co. v. Quebec Agricultural Marketing Bd., [1968] Sup. Ct. 238, and Caloil Inc. v. Attorney-General for Canada (No. 1), 15 D.L.R.3d 164 (1971).

[81] *See* In the Matter of a Reference respecting The Farm Products Marketing Act, R.S.O. 1950, Chapter 131, as amended, [1957] Sup. Ct. 198; Murphy v. C.P.R., [1958] Sup. Ct. 626 (regarding the validity of the Canadian Wheat Board Act, CAN. REV. STAT. c. 44 (1952); Regina v. Klassen, 20 D.L.R.2d 406 (Man. 1959) (also dealing with above-indicated Wheat Board Act).

[82] In the Klassen case, the Canadian Wheat Board Act was upheld notwithstanding that the act prohibited *intra*-provincial wheat sales, *supra* note 73, at 413 (Tritschler J.).

[83] GOSSE, THE LAW OF COMPETITION IN CANADA at 252-56 (1962).

[84] The insurance cases constituted unsuccessful federal government attempts to regulate the insurance industry through licensing. In every case, the Privy Council struck down the legislation as unconstitutional. *See* In the Matter of Sections Four and Seventy of the Canadian "Insurance Act, 1910", 48 Sup. Ct. 260 (1912); and *see* Attorney-General for Ontario v. Attorney-General for Canada, [1916] A.C. 598; Attorney-General for Ontario v. Reciprocal Insurers, [1924] A.C. 328. *See also, In re* The Insurance Act of Canada, [1931] A.C. 41. See MacDonald, *The Regulation of Insurance in Canada*, 24 CAN. B. REV. 257 (1946); Pedoe, *Federal Versus State Supervision of Insurance—A Canadian View*, 15 LAW & CONTEMP. PROB. 575 (1950).

flow of capital across provincial boundaries from the capital sources in the east to the various provincial distribution centres. Unfortunately, notwithstanding this inter-provincial nature of consumer credit, what is in fact regulated is the end product of the transaction, that is, the federal loan on sale. [85]

X. Additional Points Warranting Constitutional Consideration

A. *Government Low-Income Loan Insurance Programs*

A government insured (or guaranteed) loan program can be justified as an exercise of the federal spending power. [86]

The present federal insurance and guarantee schemes, conditional grants, grants-in-aid and other similar schemes are generally considered to be constitutionally supportable on the grounds that these schemes are a legitimate exercise of the federal spending power. That federal spending power has been justified upon the following grounds:

(1) *Crown Prerogative*

According to this argument the federal power to spend money rests upon the Crown prerogative and the common law. The Crown is subject to no limitations: "The Crown is a person capable of making gifts or contracts like any other person, to whomsoever it chooses to benefit. . . . Moreover, the Crown may attach conditions to the gift, failure to observe which will cause its discontinuance . . . . [this power derives] from the doctrines of the Royal Prerogative. . . ." [87]

The federal grant being a gift avoids any problems arising from the distribution of powers under the BNA Act: "making a gift is not the same as making a law. Because one type of government alone has jurisdiction over a class of subject under the BNA Act, does not mean that the other may not make gifts to persons whose activities fall within that class." [88]

While this argument has been used by one Canadian Prime Minister to justify the federal conditional grant approach to federalism, [89] it is unlikely

[85] *Anti-inflationary* consumer credit measures, on the other hand, would involve the regulation of trades in general and affect individual transactions incidentally. The trade and commerce power, however, would be a valuable secondary head of jurisdiction. Its presentation before a court would at least allow the introduction of economic arguments which would tend to show the necessity of dealing with consumer credit on a national basis.

[86] The federal government might be entitled to establish an insurance or guarantee scheme to provide low cost loans to consumers as an incidental aspect of its jurisdiction over interest. The scheme would be justified not so much as a low-income welfare assistance plan but as a consumer credit regulatory scheme. However, there might be considerable difficulty in persuading a court that this legislation is related to interest rather than to the general welfare of the poor (a matter of provincial legislative competence).

[87] Scott, *The Constitutional Background of Taxation Agreements*, 2 McGill L.J. 1, at 6 (1955).

[88] *Id.* at 7

[89] The Right Honorable Louis St. Laurent quoted in, Smilley, *Conditional Grants and Canadian Federalism*, in 32 Canadian Taxation Papers (1963), and also in Hansen, *The Constitutionality of Grant Legislation*, 2 Man. L.J. 194 (1967).

that, standing alone, this doctrine would be overwhelmingly persuasive in court. As Professor Gerald LaForrest has pointed out, the federal prerogative traditionally follows the federal legislative power and it is this latter power which is more important. [90]

(2) *Public Debt and Property*

It is the federal jurisdiction over public debt and property which has been generally acknowledged to be the appropriate justification for the federal spending power. Professors Scott, Smilley and LaForrest [91] have all concurred in their opinion that the power under section 91(1A) justified federal conditional grant programs. This was also the conclusion of the report to the Royal Commission on Dominion-Provincial Relations (1940). [92] The leading case on point, *The Unemployment and Social Insurance Act Reference* [93] stands for the proposition that, in areas where the federal government does not have jurisdiction, [94] Parliament can gift monies to organizations and individuals but it cannot, through a system of conditional grants or otherwise, *regulate* the activities of the recipients. [95] The line between what constitutes conditions and regulations is a difficult line to draw. One of the prime factors in determining the validity of a program is whether it is voluntary or not. Perhaps this was the fatal ingredient to the 1937 unemployment social insurance scheme. [96]

XI. Constitutionality of Civil Remedies

If the legislation is based on the interest power, then the provisions in the act allowing a borrower the right to recover a penalty damage in the event that the lender violates the act are probably constitutionally supportable. In the only case directly on point, [97] the Ontario Court of Appeal upheld the provisions of the Dominion Elections Act which authorized a citizen to bring a penalty-suit against anyone in breach of that act. The Court held that the penalty-suit was constitutionally supportable as an incidental method of enforcing the statute. [98]

The answer becomes more uncertain if constitutional jurisdiction is shifted from the interest power to the criminal law power. In theory, if a matter is sufficiently criminal to justify its being legislated against under the criminal law power, then the fact that civil remedies are included should not be fatal. However, if one factor in determining whether the matter is suffi-

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[90] La Forest, *The Federal Power of Taxation*, 46 Can. Tax. Papers (1967).

[91] *Id.*

[92] Gowen & Claxton, Legislative Expedients & Devices Adopted by the Dominion and the Provinces.

[93] [1936] Sup. Ct. 477, *aff'd* [1937] A.C. 355.

[94] And the area of insured loans would probably be one.

[95] *Supra* note 93, at 457 (Sup. Ct. 1936) (Kerwin J.).

[96] *Supra* note 93.

[97] Doyle v. Bell, 11 Ont. A.R. 326 (1884).

[98] *See also*, S&S Industries v. Rowell, [1966] Sup. Ct. 419 where the Court upheld a trademark infringement damage action on the basis that the defendant had violated § 7(*a*) of the Trademark Act, Can. Stat. 1952-53 c. 49.

ciently criminal is the type of enforcement measures provided in the act, then the act may itself be declared unconstitutional.

The issue has been considered by the courts with respect to combines legislation. Combines legislation is silent on the subject of civil remedies. While some courts have denied plaintiffs the right of a civil action on the basis of a violation of the Combines Act, [99] Mr. Justice Judson of the Supreme Court has implied that such civil actions may not be justified if the Combines Act is silent but could be justified if the act were revised to include same. [100] The new combines amendments provide for double damage suits. There is no reason why this could not be done in the consumer credit area. As in the case of the combines amendments, a civil penalty in the Consumer Credit Code would be included not so much for the purpose of ensuring recompensation of a defrauded buyer but for the purpose of encouraging the private enforcement of the act.

XII. Conclusion

The disclosure provisions of the proposed Consumer Credit Act are necessary because of the lack of uniformity and inadequacy of the provincial disclosure rules contained in the provincial consumer protection statutes. Notwithstanding these inadequacies, it may be politically undersirable to apply the federal disclosure rules unless a province so requests as the provinces have no rate regulation statutes, the federal rate regulation provinsions could be applied immediately. The introduction of a "local option" clause, similar in technique to Part X of the Bankruptcy Act provides a method of constitutional flexibility and recognizes the political reality that the provinces were first to act to meet the need for consumer protection.

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[99] *See, e.g.*, Transport Oil Ltd. v. Imperial Oil Ltd., [1935] 2 D.L.R. 500; Philco v. Thermonees, [1941] Sup. Ct. 501.

[100] *See* Direct Lumber v. Western Plywood, [1962] Sup. Ct. 646-48.