

**Canadian Association of Private Lenders**  
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Submitted electronically  
via [consultationconsumeraffairs.consultationconsommation@fin.gc.ca](mailto:consultationconsumeraffairs.consultationconsommation@fin.gc.ca)

Re: Predatory Lending Consultation: Proposed Exemptions to the Criminal Rate of Interest Prohibition

We write on behalf of the Canadian Association of Private Lenders, which represents the interests of private mortgage lenders, investors and administrators across Canada. In particular, we are writing to propose specific exemptions which will apply to section 347 of the Criminal Code. Section 347 is slated to be amended by dropping the criminal interest rate from an effective annual rate of 60% (which generally equates to a nominal rate of 48%) to a rate which is equivalent to an annual rate of 35%. We note that the Federal Government has indicated that further reductions of the criminal rate will be contemplated, and sound exemptions from the application of section 347 are therefore critical to the lending industry and the borrowers who benefit from it.

We propose the following exemptions:

Loans Regulated under Provincial Regimes

As the Department of Financing is likely aware, the regulation of professions is a provincial matter under section 97 of the *Constitution Act, 1867*. This section assigns the authority to legislate on matters relating to property and civil rights to the provincial legislature and not the federal parliament. The Supreme Court of Canada has further determined that the regulation of professions is a matter coming under the provincial property and civil rights bucket of powers. Accordingly, many of the provinces have passed legislation governing lending, which includes the creation of licensing regimes for payday lenders, high cost credit lenders, mortgage lenders and mortgage brokers. Some of these regimes create specified interest rate ceilings or flexible alternatives to ceilings, such as British Columbia's *Business Practices and Consumer Protection Act* (BPCPA). Section 8(3) contained in Part 2 of the BPCPA makes it an unconscionable practice to offer a service or product, such as a loan, at a price that grossly exceeds the cost of other comparable services or products or is so extraordinarily high, and there is no prospect of repayment.

Provincial lender licensing regimes seek to regulate legitimate financial activity by creating standards, licensing qualifications, disclosure requirements, enforcement options and prohibited conduct for the purposes of consumer protection. This regulatory

approach is balanced in that it seeks to permit commercial lending activity while controlling its industry participants and their conduct. It represents a wholly different consumer protection approach from that of the criminal justice system.

The purpose of criminal law, as set out by the Uniform Law Conference of Canada, in its report on the need to reform section 347, is to: “contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society. At its core, the criminal law is a limitation on freedom. It limits the freedom of all citizens by prohibiting certain prescribed conduct punishable through a variety of means including incarceration. The criminal law has also been described as a “blunt and costly instrument.” The report appropriately admonishes parliamentarians to utilize criminal law sparingly and only when necessary by adopting the key principles of “restraint, the prevention of harm, retribution, proportionality, deterrence, denunciation and an insistence that new laws are crafted with clarity and apply equally to all.” An incontrovertible conclusion is that the regulation of ordinary lending activity through the criminal law is improper. There is no other regulated industry in Canada that we are aware of where government seeks to enlist the blunt instrument of the *Criminal Code* to regulate industry members. This point is underscored by the fact that licensing regimes already exist to regulate those industries, and that criminal prosecutions under section 347 are extremely scarce.

CAPL therefore proposes that the current exemptions in section 347.1 of the *Criminal Code*, which apply to payday lending, be expanded to include other provincial lender licensing regimes, in which lender activity is highly regulated. Such an exemption would serve a number of purposes, including:

- Eliminating the potential constitutional invalidity of regulating lender activity through the *Criminal Code*, and thereby ensuring that a lowered criminal interest ceiling established through the *Criminal Code* can stick;
- Enabling provincial legislatures to consider local borrower needs and risks by establishing their own standards for loan interest rates, as contemplated by the *Constitution Act, 1867*;
- Removing confusion between competing provincial and federal regimes, and thereby creating more certainty of lending prohibitions;
- Acknowledging that the current overburdened criminal justice system fails to prosecute potential breaches of section 347 of the *Criminal Code*, and providing a rational solution to appropriately regulate lending activity.

### Short Term and Bridge Loans

CAPL has heard from many sectors which desire a section 347 exemption for short term or bridge loans, which are loans needed for a temporary, usually short interim period. The short term length coupled with loan closing costs, such as lawyer’s fees, can readily catapult the effective annual interest rate of a loan into criminal territory. For instance, a friend who lends another friend the sum of \$10 and receives repayment of

\$11 the following week is actually engaging in criminal conduct, as the loan APR is over 500%. In another example, a 90 day bridge mortgage for \$20,000 with standard appraisal fees (\$500), loan fees (\$1,000) and conveyancing fees (\$3,000) without any contractual interest (0.0%) being charged, results in an APR of well over 100%.

Lowering the criminal interest rate will have profound implications on the ability of some distressed consumers to access short term and bridge loans, which may be vital to save the consumer from the potential catastrophic consequences of not having access to interim financing. A real estate buyer who may have purchased a home without having sold an existing home might be such a consumer; the lack of access to a bridge loan might cause the consumer to be unable to complete on their new home purchase and thereby cause serious financial loss.

CAPL therefore urges the government to consider an exemption from section 347 for short term and bridge loans.

Small, Lower Principal Loans

Another challenge to borrowers accessing financing caused by lowering the section 347 interest rate threshold, is in accessing lower principal loans, as closing costs can escalate the effective annual interest rate for a lower principal transaction. One member provided CAPL with the following two loan examples with differing principal amounts but similar closing costs :

<b><u>Mortgage Example 1:</u></b>	<b><u>Mortgage Example 1:</u></b>
Priority: 2nd	Priority: 2nd
Loan Amount: \$20,000	Loan Amount: \$200,000
Rate: 12.99%	Rate: 12.99%
Term: 1 Year	Term: 1 Year
Lender Fee: \$1,250	Lender Fee: \$4,000 (using a smaller fee %)
Brokerage Fee: \$1,250	Brokerage Fee: \$3,500 (using a smaller fee %)
Lawyer Fee: \$2,000	Lawyer Fee: \$2,000
Appraisal Fee: \$500.00	Appraisal Fee: \$500.00
Borrower's lawyer: \$1,000	Borrower's Lawyer: \$1,000
= 42.99% APR.	= 18.49% APR

In these two example, the consumer is borrowing for the same purposes with the same fixed costs. However, example 1 just happens to apply to a higher home value, higher 1st mortgage balance, and requires \$200,000 as opposed to just \$20,000. The Criminal Code should not prohibit one transaction, yet permit another, simply because the principal amounts differ.

CAPL therefore recommends that the government adopt an exemption from the application of section 365 for all loans with *reasonable* fixed costs, fees and contractual interest rates.

### Commercial, Non-Consumer Loans

A consistent and universal tenet of all consumer protection legislation is that highly prescriptive protection regimes should only apply to personal consumers who transact for personal, family or household purposes. Corporate consumers and business transactions are excluded from these regimes as they generally possess sufficient resources, including access to sophisticated legal advice, and business savvy to negotiate appropriate loan terms which serve their corporate or business needs. Consumer protection measures, such as interest rate rules embedded within the *Criminal Code*, should likewise contain the same narrow focus on personal consumers and exclusions for corporations and businesses. CAPL views the regulation of lending activity within the Criminal Code as inappropriate – nevertheless, the housing of lender regulation within the criminal law, should not be used as an impediment to making good, sound consumer protection regulation, which contains standard and appropriate exemptions based on non-consumer purposes. Accordingly, CAPL urges the government to enact exemptions from the application of section 347 for non-consumer loans and corporate borrowers.

### Conclusion

In summary, CAPL recommends that exemptions from the application of section 347 be passed for:

- 1) loans that are regulated by a provincial lender licensing regimes;
- 2) short term and bridge loans;
- 3) loans with lower principal amounts and reasonable contractual interest rates, with fixed costs which trip the criminal rate threshold; and
- 4) loans with corporate borrowers and for non-consumer purposes.

Thank you for the opportunity to provide input on the exemptions for the criminal interest rate prohibition. Please know that CAPL is available to provide further clarification or answer questions on this matter.

Yours truly,



Samantha Gale  
CAPL CEO