

LAW REFORM COMMISSION



MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT
ON
PREJUDGMENT COMPENSATION ON MONEY AWARDS:
ALTERNATIVES TO INTEREST

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I. INTRODUCTION

In October, 1981, the Manitoba Law Reform Commission published a *Draft Report on Prejudgment Compensation on Money Awards: Alternatives to Interest* for limited circulation to practising lawyers, legal scholars knowledgeable in this field, the judiciary and members of the business community. The respondents who commented on the general principles contained in the Draft Report, did so favourably. The Commission, however, has modified some of its earlier proposals following suggestions for change on a few of its tentative recommendations. These variations are not significant; indeed, the general principles recommended in this Report are almost identical to those proposed earlier.

This Report is the culmination of a two-year study. In October, 1980 the Commission issued a *Draft Report on Interest on Court Awarded Damages* for criticism and comment, and received several helpful submissions as a result. The Commission was also assisted by the fact that one of its members attended the annual meeting of the Uniform Law Conference of Canada in August, 1980. During the course of those proceedings, principles proposed by the Saskatchewan Commissioners were presented and debated. As a result of those deliberations, a *Draft Uniform Prejudgment Interest Act* was tabled by the Saskatchewan Commissioners during the course of the 1981 proceedings of the Conference. This *Draft Uniform Act* is considered by the Commission, along with other Canadian legislation, in Chapter IV of this Report.

The Commission wishes to acknowledge the assistance given to it during the course of its study. In particular, it wishes to thank those who took the opportunity to read and comment on the Commission's draft reports. This provided

invaluable assistance to the Commission in formulating the recommendations adopted in this final Report.

These recommendations are based on the theory that the law of prejudgment interest should be reformed so that it conforms to principles similar to those which have traditionally determined the extent of compensation for other forms of loss. The Commission hopes that its approach will ensure that every plaintiff receives adequate compensation for the loss which prejudgment interest attempts to redress: that is, the loss which results from the postponement in payment of a money award prior to judgment.

The principle by which the Commission has attempted to be governed in preparing this Report was ably described by a jurist over a century ago and recently quoted with approval by the Supreme Court of Canada in *Lewis v. Todd*:¹

. . . in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.

The Commission refers to this principle throughout its Report as the restoration principle of compensation. It is also known as *restitutio in integrum*, meaning, "restoration or restitution to the previous condition",² but strictly speaking this term should only be used in reference to the law of torts.^{2a}

II. THE LAW OF INTEREST IN MANITOBA

A. Introduction

Historically, the common law courts of England expressed reluctance to allow interest, even where its provision was sanctioned by agreement between parties. By the 19th century, however, the English courts permitted interest where a right to it was expressly created between the parties to a contract or implied by the custom of the trade.³ With the advent of sections 28 and 29 of the *Civil Procedure Act 1833*, (3 & 4 William IV cap. 42), more commonly known as *Lord Tenterden's Act*,⁴ interest was allowed (1) where the claim was for a sum certain, subject to certain conditions, (2) in actions for conversion of goods, and (3) in claims under policies of insurance⁵ (see Appendix B for a copy of those sections). In brief, English law which Manitoba received in 1870 allowed interest to be awarded in only a very limited number of actions.

Until 1931, Manitoba courts applied the said sections of the *Civil Procedure Act 1833* and English case law which interpreted those sections.⁶ In 1931, the Legislature amended "*The King's Bench Act*" by introducing sections 70 and 71,⁷ now sections 71 and 72 of "*The Queen's Bench Act*", C.C.S.M. c. C280. Forty years later, two identical sections were enacted in "*The County Courts Act*", thereby granting another court in Manitoba the statutory authority to award interest on a similar basis as the Court of Queen's Bench.⁸ The provisions are now contained in sections 78 and 79 of "*The County Courts Act*", C.C.S.M. c. C260.

In introducing what is now section 71 of "*The Queen's Bench Act*" (and for that matter section 78 of

"The County Courts Act") the Legislature adopted the wording of an Ontario section passed in the early 19th century.⁹ The law in Ontario as to interest was not the same as in England and the variation of language in its legislation reflected the fact that interest was allowed in a more extensive number of claims.¹⁰ However, as will be seen, it was not until less than a decade ago that a Manitoba reported judgment applied Ontario jurisprudence and thereby allowed judicial reform in the law of interest to take place.

B. "The Queen's Bench Act" provisions

1. Section 71

Section 71 of "The Queen's Bench Act" provides:

Interest is payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it.

It is the closing phrase ". . . or in which it has been usual for a jury to allow it" which owes its origin to Ontario legislation and which eventually extended the scope for interest beyond that allowed by the *Civil Procedure Act* 1833. In Ontario, in actions for a just debt improperly withheld, this portion of the section granted courts the authority to award interest in the form of damages. The basis of this authority was that it had been the practice of the Ontario courts ". . . to leave it to the discretion of the jury to give interest when the payment of a just debt had been withheld".¹¹ Consequently, the authority to grant interest on this ground was interpreted by the Ontario courts to be implicitly authorized by statute.

This special approach to awarding interest was approved by the Privy Council in *Toronto Railway Company v. Corporation of the City of Toronto*¹² in 1906. Therein, Lord MacNaghten detailed the more liberal Ontario principle as follows:¹³

[I]n all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

The principle was generally applied in early Ontario case law to allow interest in accounts after the proper time of payment had elapsed, notwithstanding the fact that interest had not been agreed to.¹⁴ Later, it was applied to other types of debts.¹⁵ The amount had to be ascertainable for the principle to apply;¹⁶ otherwise, it was not, in fact, a "debt".

Although the Ontario principle applies to "just debts improperly withheld", this does not mean ". . . that the liability is in any way dependent on improper conduct" ¹⁷ or on ". . . moral turpitude".¹⁸ The term only means that there has been a

. . . withholding of payment of a just debt at the time it would have been proper to pay it
The fact that a defendant acted honestly and fairly should be no bar to the plaintiff's right to interest if he is entitled to it otherwise.¹⁹

Although the "just debt" principle enlarged the class of actions to which interest attached, it carried with it certain characteristics restricting its application. First, as previously explained, the claim had to be ascertainable before interest could apply. In addition, although the cases do not explicitly state this, it would appear that the fact that interest was confined to "just debts" pointed to

the necessity of showing the conclusiveness of the debtor's default. It may be said that this Ontario principle rationalized the awarding of interest as a penalty to the defendant more than as a recompense to the plaintiff. This statement is supported by the Ontario Commissioners to the 1978 Uniform Law Conference who concluded in their report on prejudgment interest that Ontario law awarded interest as ". . . a form of punishment to a defendant for wrongfully delaying the payment of a debt".²⁰

Although, as mentioned earlier, the final phrase of section 71 of "*The Queen's Bench Act*" of Manitoba owes its origin to an Ontario statute, it was not until 1975 that a reported judgment from Manitoba applied Ontario case law to enlarge the scope of actions to which interest attached under section 71. In the decision of *St. Vital Flooring Co. Ltd. v. Inducon Construction of Canada Ltd.*, the Court of Queen's Bench referred to Lord MacNaghten's summary of the special category of "just debts" to which interest attached in Ontario as quoted in a later Supreme Court of Canada judgment.²¹ The Court awarded the plaintiff interest on this basis. This new approach was sanctioned by the Court of Appeal a year later in the case of *Chambers v. Leech*.²² Approximately ten Manitoba cases have now pursued the "just debt" principle in determining whether interest should be awarded on debts improperly withheld.²³

Rates of interest awarded recently under section 71 have ranged from 5%²⁴ to 14 1/2%²⁵. The legal rate of interest,²⁶ the rate claimed on a plaintiff's overdue account,²⁷ and even the rate of interest pursuant to the plaintiff's cost of borrowing have each been applied.²⁸ Interest has been calculated from the date of demand,²⁹ the issue of the statement of claim,³⁰ delivery of goods,³¹ date of proof of loss in an insurance claim,³² and even from the date of filing in a mechanics' lien action.³³

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As in Ontario, the application of interest to this category of claims has been restricted to sums certain.³⁴ In addition, the courts restrict its entitlement so that it is allowed only where such compensation is seen as just and equitable in the discretion of the court. Equitable principles guide the exercise of judicial discretion so that, for instance, unjust enrichment of the defendant may prompt an award,³⁵ or, to use another illustration, unwarranted delay on the part of the plaintiff may shorten the period and reduce the rate of the ultimate interest calculated.³⁶

2. Section 72(1)

Section 72(1) of "*The Queen's Bench Act*" provides:

On the trial of an issue, or an assessment of damages, upon a debt or sum certain, payable by virtue of a written instrument at a time certain, interest may be allowed from the time when the debt or sum became payable.

The subsection is a paraphrase of part of section 28 of the *Civil Procedure Act*. It was enacted in 1833 to extend the common law. The section addresses a very narrow point. Where a debt certain is owing under a written instrument, the court is given statutory authority to imply a term of interest despite the absence of any reference to interest in that instrument.

Notwithstanding the fact the section extended the common law in 1833, its effect is narrow in scope. That is, like section 71, it is confined to remedy only those claims involving a sum certain. In this manner, it may be said that

this legislation reflects a like philosophy to section 71 in that interest is granted more as a penalty to the defendant than as a recompense to the plaintiff. Unlike section 71, however, its application is further restricted to debts created by written instrument.

3. Section 72(2)

Section 72(2) of "*The Queen's Bench Act*" provides:

Where such a debt or sum is payable otherwise than by virtue of a written instrument at a time certain, interest may be allowed from the time when a demand of payment was made in writing, informing the debtor that interest would be claimed from the date of the demand.

Like section 72(1), this subsection is derived from section 28 of the 1833 Act. It gives the court authority to award interest on a debt, payable otherwise than by virtue of a written instrument, where a creditor has declared in writing that (s)he claims this right.

The fact that a plaintiff has issued a written notice of intention to demand interest is not conclusive of the right to collect interest. "It is merely one circumstance from which an agreement to pay interest may be implied, but the court is entitled to look at all the circumstances."³⁷ The subsection has not been as widely used as it might be; where a plaintiff has issued a declaration that (s)he claims interest, Canadian courts have applied the "just debt wrongfully withheld" principle under section 71 rather than specifically applying this subsection³⁸ or its counterpart in another province.³⁹

4. Section 72(3)

Section 72(3) of "*The Queen's Bench Act*" provides as follows:

In actions for the conversion of goods or for trespass *de bonis asportatis*, the jury, or the judge if the case is tried without a jury, may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon.

This subsection is a paraphrase of section 29 of the *Civil Procedure Act* 1833.

The first part of this subsection provides for prejudgment interest in two tort actions. A *conversion of goods* is "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another . . .".⁴⁰ *Trespass de bonis asportatis* may be translated as "trespass for goods carried away".⁴¹ Accordingly, this section authorizes the court to award interest where chattels, rather than funds, are improperly withheld from their rightful owner. The chattels are appraised, normally at the date of the conversion,⁴² and interest is calculated as against that sum. Interest may be calculated from the date of conversion,⁴³ but, in one instance, it commenced when the defendant became aware that the conversion had taken place.⁴⁴

The second part of this subsection allows for interest to be recovered on moneys owing under insurance policies. Generally, interest will not be allowed to accumulate until some time after the claimant has supplied the

proof of loss to the insurer.⁴⁵ Most reported cases pertain to claims involving damaged property. The equivalent section in "*The County Courts Act*", C.C.S.M. C260, has been recently applied by the Manitoba Court of Appeal in *Lesko v. M.P.I.C.*^{45a} Most courts, however, have awarded interest on insurance claims pursuant to the "just debt wrongfully withheld" principle under section 71 of the Act.⁴⁶

5. Section 72(4)

Section 72(4) provides as follows:

Unless otherwise ordered by the court, a verdict or judgment bears interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment has been suspended by any proceeding in the action, including an appeal; and in cases where there is an agreement between the parties that a special rate of interest shall be secured by the judgment, the judgment, if it so provides, shall bear interest at the rate so agreed.

The first part of this subsection essentially restates section 14 of the *Interest Act*, R.S.C. 1970 c. I-18. It recites the rule that interest will be awarded on a judgment notwithstanding a party has appealed the decision, unless the court otherwise orders. The second part provides the court with the

. . . jurisdiction to increase the interest rate in the judgment above the 5 per cent interest provided for in the *Interest Act* if the parties expressly agree between themselves that such increased rate is to be included in the judgment.⁴⁷

In Manitoba, the Court of Queen's Bench has applied this part of the subsection to award post-judgment interest at 11 1/4% per annum pursuant to an express provision in a mortgage agreement.⁴⁸

C. Further provisions pertaining to interest

1. Statutes

In addition to the cited provisions of "*The Queen's Bench Act*", various federal and provincial statutes expressly provide for a right to claim interest in certain instances. For example, section 35 of "*The Expropriation Act*", C.C.S.M. c. E190, provides for mandatory payment of interest on unpaid compensation for land expropriated. So too "*The Landlord and Tenant Act*", C.C.S.M. c. L70, which requires a landlord, in returning a security deposit, to include a payment of interest therewith. Recently, "*The Marital Property Act*" was amended to authorize the court to award interest where a spouse unreasonably delays the satisfaction of a claim pursuant to a division of assets under that Act.⁴⁹ The federal *Bills of Exchange Act*, R.S.C. 1970 c. B-5, provides that, where a bill is dishonoured, the measure of damages includes interest on the amount of the bill.⁵⁰

The federal *Interest Act*, R.S.C. 1970 c. I-18, is, of course, the major statutory provision pertaining to interest. The Act is essentially divided into three parts. The first provides that a 5% legal rate will apply to parties where there is no rate fixed ". . .by agreement or by law" or where the rate is fixed by agreement but is not expressed on a per annum basis. The second part of the Act makes provision for special rules regarding *interest on moneys secured by mortgage on real estate*. The third part of the legislation, like the first, is more important insofar as this Report is concerned. It states that in the western provinces and the two territories, judgment debts bear interest at 5% per annum until satisfied.

The fact that the third part of the *Interest Act* legislates a 5% interest rate to apply to judgment debts appears, quite conclusively, to preclude the western provinces and territories, from legislating in this area. The Commission has been informed, however, that officials in the federal Department of Justice are considering the repeal of the third part of the *Interest Act*. The question which would then become relevant is whether the Legislature would have the authority to enact statutory provisions within this subject area. The question is a particularly probing one, given that section 91(19) of the *British North America Act, 1867* grants Parliament exclusive legislative authority over interest. The Commission examines the many facets of this issue in Chapter V of this Report.

The question concerning the constitutional validity of prejudgment interest is more certain. It is the view of this Commission that prejudgment interest legislation is not, in pith and substance, part of the subject matter of interest. Instead, it is part of a money award which allows a court the ability to fulfil the common law principle of restoration, as set forth in Chapter I. This will become particularly evident when the recommendations for reform of this Commission, as set forth in Chapter V, are explained.

Moreover, the constitutional validity of prejudgment interest legislation has been addressed by courts in other provinces. The validity of section 38 of "*The Judicature Act*", S.O. 1977, c. 51, s. 3(1) (which provides for prejudgment interest at the *prime rate*) was challenged in *Minister of State of the Principality of Monaco v. Project Planning Associates (Int'l) Ltd.*⁵¹ Therein, the Divisional Court expressed the view that, "[a]lthough s. 38 incidentally

deals with interest, . . . its pith and substance is the administration of justice in the Province and within the scope of the provincial legislation".⁵² It is noteworthy that the Ontario Court of Appeal dismissed the defendant's appeal "[f]or the reasons given by the Divisional Court . . . " and that leave to appeal to the Supreme Court of Canada was refused.⁵³ In a more recent case, the British Columbia Supreme Court has found their prejudgment interest legislation, the *Court Order Interest Act*, R.S.B.C. 1979 c. 76, to be constitutionally valid.⁵⁴

It is also clear that the 5% legal rate prescribed by the first part of the *Interest Act* does not apply, so as to create a ceiling on the rate allowed in prejudgment interest legislation.⁵⁵ The courts have taken this view on the basis that the wording of section 3 only legislates the legal rate to apply where, *inter alia*, no rate is fixed ". . . by law". Consequently, ". . . it is within the purview of the province's jurisdiction to establish a rate of interest in prejudgment interest legislation", to adopt the wording used by the Saskatchewan Commissioners in their report to the 1980 Uniform Law Conference of Canada.⁵⁶

2. Equitable Claims

The Courts of Equity allowed interest to be awarded in a number of actions involving equitable relief, quite apart from any legislative enactments. For example, in an action for rescission, based upon fraudulent misrepresentation, a plaintiff may become entitled to interest as damages where such relief is necessary to restore the plaintiff to his or her previous position.⁵⁷

Courts of Equity also allowed interest where, in certain instances, ". . . the purchaser obtains possession of the subject matter of the contract before the payment of the purchase-price . . .".⁵⁸ Interest will be calculated from the date of possession to date of payment on the basis that it ". . . would be inequitable . . . to have the benefit of possession of the subject-matter of the contract and also of the purchase-money".⁵⁹

One who stands in a fiduciary relation to another, and profits thereby, may also be required to pay interest to the party so harmed. In such an action, compound interest may be awarded. The basis for such an award is summarized, as follows:⁶⁰

[T]he court does not proceed against an accounting party by way of punishing him for making use of the Plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made . . . compound interest

Equitable remedies arise in only limited circumstances. Hence, the more flexible application of compensation principles which characterizes this branch of the law has not been imported in any general way to all areas of the common law. The hybrid character of the section 71 extensions under the *Toronto Railway* ratio does, however, illustrate the way in which equitable principles have found application to guide the court's discretion in awarding prejudgment interest on some claims for debts at common law.

D. Conclusion

To summarize the law of interest in Manitoba, it can be said that interest may be awarded if:

- (1) The parties have expressly agreed to such an obligation;
- (2) The provisions of sections 71 and 72 of "*The Queen's Bench Act*" apply. If so, the court has the discretion to allow interest only when the claim is ascertainable at the commencement of a suit. The philosophy for these sections appears, at least in part, to reflect the concept that interest is a penalty against the debtor for wrongfully withholding the plaintiff's money. Interest under these provisions need not be the subject of express agreement. That is, the court may impose a rate (section 71 and section 72(1)) or allow interest where there is a clear demand for same (section 72(2)).
- (3) A statute gives rise to such a right; or
- (4) Special equitable remedies are available to the plaintiff on the facts of the case.

"*The Queen's Bench Act*" confines the court's discretion to award interest on claims where the sum is liquidated. There is no provision under the Act for awarding interest to compensate for losses prior to judgment on money awards involving unascertainable sums. Consequently, save for the two narrow exceptions in section 72(3) of "*The Queen's Bench Act*", prejudgment interest is not available in tort actions. The Manitoba Court of Appeal in *Kernsted v. Desorcy* stated that the fact that prejudgment interest had never been awarded in personal injury awards was ". . . one for consideration by the legislature".⁶¹ In addition, prejudgment interest is not obtainable where the cause of action is based in contract or quasi-contract and damages are unliquidated. Finally, prejudgment interest is not allowed in several instances where the cause of action is statutorily based: for example, an action under "*The Fatal Accidents Act*", C.C.S.M. c. F50.

The question which needs to be resolved is whether the law should be reformed to allow for prejudgment interest in the foregoing categories of actions. To address this question, the Commission returns to the guiding principle of compensation by which it has attempted to be governed in this Report. The objective is to get at that sum of money which will restore the plaintiff to the same position (s)he would have held had no cause of action arisen.

In order to ascertain how prejudgment interest connects with the compensation principle it is necessary to examine the commercial and economic character of interest. In Chapter III of this Report, the Commission provides a concise economic analysis of interest. In its view, an understanding of the economic features of interest is essential to effective reform or extension of the law of prejudgment compensation.

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III. INTEREST AS A COMPENSATION DEVICE

A. Interest as a Measure of Compensation in a Pre-inflationary Economy

The Commission indicated in Chapter I of this Report that prejudgment interest attempts to redress the loss which arises from a postponement in payment of a money award prior to judgment. In non-inflationary times, a plaintiff's loss from that delay is the lack of opportunity to use the money award. As explained in Chapter II, the courts have historically allowed compensation for the deprivation of use of a money award prior to judgment in certain narrowly-defined instances. Interest was adopted as the appropriate measure of that compensation.

The essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.⁶²

In short, the theory was that a plaintiff with money in hand could have invested the sum, and obtained a return or benefit equivalent to current rates of interest.

In times past, the courts shared the comfort of a stable economy with economists who viewed interest as the price for deferred consumption. Classical economists could once say:

. . . interest can be regarded as the reward for abstinence or waiting, the price needed to overcome this natural human impatience to consume now and not in the future.⁶³

To invest money is to deny oneself the right of immediate use. Interest was the simple charge for this inconvenience and temporary deprivation.

Until very recently, rates of interest were relatively constant, and by today's standards, exceedingly low. A review of the Bank of Canada *Bank Rate* which is a major determinant of all Canadian interest rates discloses the usual range of 2-4% for the years 1935-1967. At the end of 1967 the *Bank Rate* reached 6% and has generally risen from there.⁶⁴ March 1935 to November 1967 saw the high of 6% reached only on three occasions and then only for a total of six weeks. By contrast, the *Bank Rate* was actually less than 2% for 7 1/2 of the 32 years between 1935 and 1967. In September of 1960, the *Bank Rate* dipped to 1.93% as the final display of that extreme. (See Appendix C for a summary of the *Bank Rate* from 1935 to present.)

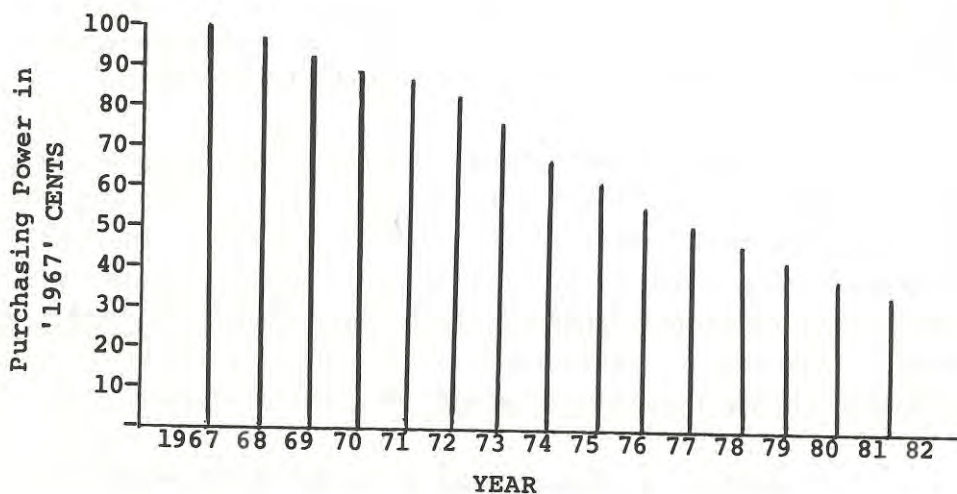
The conclusion which may be drawn is that interest rates in non-inflationary times afforded a modest and stable compensation measure for loss of use arising prior to judgment.

B. Inflation and Prejudgment Losses

"The past decade has witnessed a dramatic increase in the rate of inflation in Canada."⁶⁵ No doubt the problem in inflation has been exacerbated by such matters as the OPEC cartel and world wide crop failures, to name but two events contributing to double-digit levels in the *Consumer Price Index for Canada*.⁶⁶ However, to some economists "[t]he ultimate cause of sustained inflation is a prolonged rate of

increase in the money supply in excess of the rate of growth of potential output".⁶⁷

The pace of inflation is charted by various statistical scales, or indices, and with it the devaluation of Canadian dollars. Using the *Consumer Price Index for Canada*, and beginning with the year 1967, the following graph illustrates annual and cumulative erosion of one dollar's purchasing power.



Purchasing power of a 1967 Dollar: 1967-1981
Calculated from Annual Average Percentage Change
in the Consumer Price Index for Canada All-items
(Not Seasonally Adjusted)

Year by year deductions for the annual average rate of inflation reduced the 1967 dollar to approximately one-third of its original value. By June 1, 1981 that dollar had a relative purchasing power of just 33.7 cents.

Not only is the inflationary state of the economy persistent, but it is escalating. Prejudgment losses associated with delay in payment of money claims have taken on a new proportion. To illustrate, consider a debt of one thousand dollars (\$1000) due to a plaintiff on June 1, 1978. If payment of one thousand dollars (\$1000) was ordered on June 1, 1981 without any regard to the diminished purchasing power of 1981 dollars, the plaintiff would receive the equivalent of six hundred and forty-seven dollars and sixty-three cents in 1978 dollars (\$647.63). In other words, the value of the Canadian dollar deflated by 35.23% over the given period.⁶⁸ To recover the lost value of the original debt, one thousand three hundred and fifty-two dollars and thirty-seven cents (\$1,352.37) in 1981 dollars would have to be ordered.

Compare three hundred and fifty-two dollars and thirty-seven cents (\$352.37) in loss of value resulting from inflation in this decade to the loss of use which would have accrued on one thousand dollars (\$1000) outstanding in, say, 1958, when investment interest rates were running at about 3%. Simple interest over three years,²⁰ some years ago would have resulted in a pre-trial adjustment of ninety dollars (\$90).

Inflation accounts for the urgency attached to demands for reform of prejudgment interest provisions.

C. Interest Rates and Inflation

Economists no longer define interest as the simple price of deferred consumption. Instead interest rates are understood to have two major components⁶⁹ which seek to accommodate not only loss of use, but also the loss of value associated with inflation.

. . . one must differentiate between *real* rates of interest and *money* rates of interest Essentially the real rate of interest is that which would prevail in bond markets if the rate of inflation were zero. The money rate of interest must, in addition, reflect the expected rate of inflation - ie: the money rate equals the real interest rate plus the expected rate of inflation.⁷⁰ (emphasis added)

To prosper, investors must necessarily seek to obtain a real return on lent funds. However, preserving the basic profit function for interest rates necessitates forecasting and offsetting inflation for the period during which the funds are out-of-hand. Consequently, interest rates now reflect a charge for the loss of value expected to result from a temporary deprivation of funds, in addition to a charge which arises for the loss of use.

The impact of inflation on interest rates has been subject to considerable study by economists.

One should also note in passing that the studies universally indicate that variations in the expected rate of inflation have been the source of most of the variation in market rates of interest in both Canada and the United States since the mid-1960s.⁷¹

The mixed success with which market forces have predicted recent inflation to the effect of preserving a real return factor in rates of interest is illustrated by the table at Appendix D.

D. Selected Canadian Interest Rates

It may be instructive to note and describe three Canadian interest rates which, *inter alia*, are commonly referred to in readings on the subject of interest. These are:

the *Bank Rate*, the *Prime Rate* and the rate for *Chartered Bank Non-chequable Savings Deposits*.

The *Bank Rate* is defined in the *Bank of Canada Review* as ". . .the minimum rate at which the Bank of Canada makes short-term advances to the chartered banks. . .".⁷² Currently the *Bank Rate* is reviewed every Thursday. Since March 13, 1980, it has been set at 1/2 of 1% above the weekly average tender rate on 91-day treasury bills.⁷³ The auctioning of treasury bills is the arena in which market forces come into play. Inflation expectations for 91-day periods are injected into Canada's bank interest rate structure at this point in the process. Or at least that is the state of affairs until there is a change in Bank of Canada interest rate policy.

Prime Rate is the interest rate charged to the most credit-worthy borrowers of chartered banks. Typically the *Prime Rate* follows the *Bank Rate* with a "spread" or increase of 1 - 2%. For example, in January, 1981 when the *Bank Rate* was 17.0%, the chartered bank *Prime Rate* was 18.25%. Chartered banks lend money on terms exceeding the *Prime Rate* where greater risk attaches to the borrower.

Savings or investment rates at chartered banks are naturally lower than bank lending rates. Usually the officially reported rate for *Chartered Bank Non-chequable Savings Deposits* is 2 to 3 percentage points below the *Bank Rate*. There are, of course, a variety of investment rates determined outside the banking system.

Interest rates have been called volatile. With

almost weekly fluctuations in the *Bank Rate*, this comment is currently well justified.

E. Conclusion

Delay in payment of money awards prior to judgment gives rise to two potential kinds of financial loss:

1. Loss of use;
2. Loss of value.

In a pre-inflationary economy (which prevailed generally until the 1960s), interest rates reflected the price or charge for the temporary deprivation of the use of funds. The courts could apply an interest rate to quantify the loss which arose from the delay in payment of money as a reliable measure for the loss of use. As well, interest rates were fairly constant so that determining the appropriate rate to apply was not an important issue.

In an inflationary economy, like the present one, interest rates are calculated to buffer the effects of inflation. Consequently they now reflect a charge for the loss of value which is anticipated from a temporary deprivation of funds, in addition to a charge which arises from the loss of their use.

The fact that interest rates now fluctuate weekly and anticipate inflation levels causes this Commission to raise serious questions concerning their suitability as a measure for determining compensation for the postponement in payment of money awards. This concern is expressed in the succeeding Chapter where the Commission considers legislation pertaining to prejudgment interest in other jurisdictions.

IV. PREJUDGMENT INTEREST LEGISLATION IN OTHER PROVINCES

New Brunswick was the first common law province to reform its law regarding prejudgment interest.⁷⁴ In 1974, British Columbia enacted legislation requiring courts to award prejudgment interest on "pecuniary judgments".⁷⁵ This followed a report issued by their Law Reform Commission the preceding year.⁷⁶ Since then, both Ontario and Nova Scotia have amended their respective Judicature Acts to allow more extensively for the awarding of prejudgment interest.⁷⁷ From 1976 onward, the matter has been discussed at several proceedings of the Uniform Law Conference of Canada.⁷⁸ In 1981, a *Draft Uniform Prejudgment Interest Act* ("*Draft Uniform Act*") was presented by the Saskatchewan Commissioners. This was drafted in accordance with principles adopted by the Conference at its August 1980 annual meeting. A copy of the *Draft Uniform Act* is attached as Appendix A.

The principles which have guided legislative reform have been two-fold. Attention has been given consistently to the principle that prejudgment interest reform is essential to compensate fully the plaintiff ". . . for the loss of use of money".⁷⁹ Conversely, reformers have underlined the profits earned by unsuccessful defendants by having the use of money prior to judgment. Observers have noted that this ". . . make[s] it extremely profitable for a defendant to delay judgment".⁸⁰ These dual concerns have been cited repeatedly in the call for legislative intervention.

The Commission shares the conclusion that legislation is needed to provide courts with the authority to award full compensation for the loss which results from a postponement

in payment of a money award prior to judgment. This is in conformity with the restoration principle, cited in Chapter I of this Report. As to the second principle, the Commission is of the view that parties may be more likely to settle their disputes promptly when neither benefits financially from delay. However, the aim of reform of prejudgment interest law is to allow for more just compensation principles. This may in turn provide for an improvement in the administration of justice.

As with most laws, it is desirable that provincial legislation regarding prejudgment interest be as uniform as possible. The Commission adopts the view that, unless there is just cause for departure, commendable legislation in other jurisdictions should be closely followed. Consequently, in this Chapter it analyzes some of the major features of other enactments, giving particular attention to the interest rates chosen by these various legislators.

A. The Choice of Rate

In Ontario, the *Prime Rate* is used as the instrument for assessing loss arising from a postponement of money payments prior to judgment. Neither the New Brunswick nor the Nova Scotia provisions list the appropriate rate to apply; the rate is left to the discretion of their courts. The legislators in British Columbia have granted their courts a like discretion, with a proviso that the rate shall not be less than that allowed on judgments under the federal *Interest Act* (5%).⁸¹

In 1980, the Saskatchewan Commissioners to the Uniform Law Conference of Canada proposed a provision which would

closely follow that of Ontario's. That is, it would provide for *Prime Rate* as the measure for assessing prejudgment loss. As yet, however, no decision on the appropriate rate has been taken by the Uniform Law Conference, ". . . although discussion [has] centered on the Bank of Canada prime rate".⁸²

The Commission is of the view that, in principle, legislation should clearly establish an applicable rate of interest. Such a measure would allow sufficient certainty in the law and would not hinder parties from settling their differences outside of court adjudication. However, the Commission has concluded that the *Prime Rate* is an inadequate measure with which to calculate compensation for prejudgment loss. It reaches this conclusion for principally two reasons.

As explained in Chapter III, the *Prime Rate* is a borrower's rate of interest rather than an investor's rate. The use of a borrower's rate to calculate compensation presumes that the damage which prejudgment interest seeks to address flows from the cost of replacing funds rather than from the deprivation of their use. In other words, there is an assumption that the plaintiff repaired his or her own losses by borrowing money at the time of loss rather than having the court in hindsight address the problem. This presupposition runs counter to general compensation principles which seek to identify that sum of money which will put the plaintiff in the same position (s)he would have held had no cause of action arisen.

The law should, however, allow the borrower's rate of interest to be recoverable where a plaintiff sustains damage for which the defendant is liable, and repairs that

damage through funds necessarily borrowed for that purpose. It should also allow recovery at the borrower's rate where a plaintiff must borrow money because of the defendant's wrong and the loss is not found to be too remote in accordance with common law damage principles. Some jurisprudence is developing so as to allow for special compensation in these two areas.⁸³ The recovery of borrowing costs in these special cases is explored further by the Commission in Chapter V of this Report.

The second reason for rejecting the *Prime Rate* centers on the Commission's earlier conclusion that prejudgment reform may foster a more prompt resolution of legal disputes involving money awards. *Prime Rate* exceeds the rate a plaintiff would receive on bank deposits and on money paid into court pursuant to "*The Suitors' Moneys Act*", C.C.S.M. c. S220.⁸⁴ Consequently, it might become profitable for a plaintiff to delay judgment, a converse of the earlier situation.

The Commission concludes, therefore, that the *Prime Rate* is an inappropriate measure with which to calculate compensation for prejudgment loss. A better rate would provide the plaintiff with appropriate compensation for loss sustained and ensure neither party benefits financially by delay.

B. The Inaccuracy of a Constant Rate

The *Prime Rate* which applies in Ontario is that "existing for the month preceding the month in which the action was commenced".⁸⁵ In liquidated claims, this rate is calculated from the date the cause of action arose to

date of judgment. In unliquidated claims (that is, those claims which ". . . are not yet reduced to a certainty in respect of amount"⁸⁶) calculations commence the date the defendant receives written notice of the claim. In 1980, the Saskatchewan Commissioners to the Uniform Law Conference proposed the *Prime Rate* which exists on the date the cause of action arose. They proposed no distinction between liquidated and unliquidated claims; calculations would commence in both instances as of the date the cause of action arose.

The Commission has concluded that the use of a constant rate of interest may result in an inaccurate assessment of the loss which prejudgment interest attempts to repair. In Chapter III of this Report, the Commission stated that the *Bank Rate*, by which the *Prime Rate* is determined, is calculated to include an adjustment for inflation based upon a 91 day forecast. The fact that the forecast is based upon a short-term period raises serious questions about its long-term applicability. Given the fluctuation and the acceleration of Canada's inflation rate, a constant prejudgment interest rate fixed throughout the duration of a legal dispute will not necessarily accommodate the actual decline in the value of money from the date loss was incurred to the date of judgment, a period of time which may extend to several years.⁸⁷

Moreover, a constant rate may actually result in over-compensation to the plaintiff, thereby unduly penalizing the defendant. Consider an action for a debt in Ontario commenced in September 1981. The applicable *Prime Rate* for the preceding month was 21.03%. This rate would apply constantly throughout the prejudgment period, notwithstanding that the *Prime Rate* was lower prior to, and indeed declined subsequent to that date. Consequently, a constant rate

may distort the restoration principle, by penalizing the defendant in some instances, the plaintiff in others.

The Commission's criticism of a constant rate was voiced by a majority of the delegates to the 1980 Uniform Law Conference. Accordingly, it was decided that the appropriate rate to apply in the *Draft Uniform Act* would become an average of the interest rates in effect from the date the cause of action arose to the day of judgment. It is unclear whether this calculation is to be determined on a *pro rata* basis or by a mere averaging of rates in effect during that period. Certainly the former would be a more accurate calculation although it might require a technical ability not usually found among lawyers or court officials.

The solution adopted in the *Draft Uniform Act* is a positive measure which serves to accommodate better the depreciation in the value of money. However, it is still dependent upon the accuracy of the inflation prediction built into a current commercial interest rate. As indicated in the preceding Chapter, the success with which market forces have predicted inflation, to the extent of preserving a real return factor, has indeed been mixed. A review of the "earning rates" shown in Appendix D to this Report supports this finding.

C. The Possibility of Overcompensation

Thus far, the Commission's analysis has concentrated on the legislation enacted by Ontario and, in part, that drafted by the Uniform Law Conference of Canada. However,

all of the reforming legislation provides for the application of a current interest rate to measure prejudgment loss, whether that rate be established by the Legislature or by the courts. In this manner, each Act presupposes that a standard type of prejudgment loss attaches to every money claim.

In the previous Chapter, the Commission discussed the types of loss which potentially arise from a temporary deprivation of funds in an inflationary economy. To repeat, they are loss of use and loss of value. It has also been previously explained that preserving the basic return for loss of use in interest rates necessitates forecasting and offsetting inflation for the period in which funds are out-of-hand. An inflation factor is added to the basic or real interest rate to allow for the anticipated loss of value on funds invested. Consequently, use of a current interest rate to calculate the loss arising from a postponement in payment of a money award will compensate for loss of use and loss of value.

A current interest rate will work relatively well for damages which are liquidated amounts, such as an action for a debt, as these typically give rise to both types of loss. That is, the debt is fixed at the date of the cause of action and consequently, as of the date of judgment, there has been a loss of value on that amount, in addition to a loss of use. However, in the instance of unliquidated damages loss is measured at trial. The quantification of damage will often include, although normally quite implicitly, an adjustment for inflation. This adjustment will take place by means of two separate approaches to loss assessment.

The first arises in personal injury cases, where

courts usually include, although normally quite implicitly, an adjustment for inflation by assessing non-pecuniary loss in present dollar value. This was expressly admitted by the English Court of Appeal in *Mitchell v. Mulholland (No. 2)* where Lord Justice Widgery stated as follows:⁸⁸

No one doubts that an award of damages must reflect the value of a pound sterling at the date of the award and conventional sums attributed to, say, the loss of an eye, have been adjusted upwards in recent years on that account. Inflation which has reduced the value of money at the date of the award must, thus, be taken into account.

That inflation is also taken into account by Canadian courts is supported by personal injury cases decided since the Supreme Court of Canada rendered its judgment on the famous trilogy.⁸⁹ In *Andrews v. Grand & Toy Alberta Ltd.*,⁹⁰ the Court established one hundred thousand dollars (\$100,000) as an approximate limit for non-pecuniary loss, subject to, *inter alia*, "changing economic conditions".⁹¹ Lower courts have since awarded one hundred thirty-five thousand dollars (\$135,000)⁹² and one hundred fifty thousand dollars (\$150,000)⁹³ citing inflation as a ". . . changing economic condition" for exceeding the conventional figure. Earlier Manitoba judgments⁹⁴ also support the fact that the ". . . depreciation in the value of money . . ." will be considered in assessing damages.⁹⁵

In a recent Supreme Court of Canada decision, *Lindal v. Lindal*,^{95a} the Court reaffirmed that its rough upper limit for non-pecuniary loss established in the trilogy, ". . . must be viewed flexibly in recognition of, *inter alia*, 'changing economic conditions'" (p. 14). In particular, Mr. Justice Dickson, speaking for the Court states (p. 17):

Account may be taken of inflation in awarding damages and it is not suggested that the figure of \$100,000 should not vary in response to economic conditions, in particular, the debasement of purchasing power as a result of inflation.

It is interesting to note that the Court applied the date of its judgments in the trilogy (January, 1978) as the starting point by which to determine whether there had been a "measurable increase in inflation" in *Lindal* to warrant an award in excess of \$100,000. In deciding against any inflationary adjustment, it used the same date of departure preferred by the British Columbia Court of Appeal in *Hatton v. Henderson*.^{95b}

The second means by which inflation is accounted for is where a court departs from the traditional rule that damage is normally assessed at the date the cause of action arose. These departures commonly arise where the court awards damages in lieu of specific performance.⁹⁶ However, the exceptions now include contract cases where the defendant owes the plaintiff money in foreign currency⁹⁷ and those cases where repair to the plaintiff's property is necessitated by the defendant's damage,⁹⁸ amongst others.⁹⁹ Where loss is assessed at a date subsequent to the cause of action, inflation is indirectly accounted for up to the date the court crystallizes that loss.

Thus, inflation may be taken into account in an unliquidated damage award, either directly, as in the case of personal injury awards, or indirectly, as where loss is crystallized subsequent to the date the cause of action arose. In either instance the awarding of any current commercial rate will lead to an exaggerated calculation for loss of

value. That is, it will allow for loss of value for the prejudgment period when, in many instances (such as those just cited), loss of value has not arisen at all, or arises at some point subsequent to the date of the cause of action, when damage is crystallized. Such a feature again leads to a distortion of the restoration principle by overcompensating the plaintiff for the prejudgment loss actually sustained.

D. Conclusion

Although it is desirable that provincial legislation be as uniform as possible, the Commission would prefer to recommend reforming legislation which reflects better the restoration principle. The use of *Prime Rate* is contrary to basic principles pertaining to the law of damages and the plaintiff may profit from settlement delay. A constant interest rate overcompensates plaintiffs in some instances and penalizes them in others. Finally, the use of a current interest rate allows recovery for loss of value for the prejudgment period when, in many instances, plaintiffs have sustained no loss of value. The Commission proposes reforming legislation which it hopes will mirror the plaintiff's actual prejudgment loss. These recommendations are specified in the succeeding Chapter.

V. RECOMMENDATIONS FOR REFORM

In Chapter IV of this Report, the Commission stated that it shared the conclusion of the legislators in the other provinces that prejudgment interest legislation needs to be reformed. The basis for this view is that the present sections of "The Queen's Bench Act" make provision for prejudgment interest to be awarded only where a claim is fixed and certain at the commencement of a suit. There is no legislation allowing interest to be awarded to compensate for loss arising from a postponement in payment of money awards involving unliquidated sums. It is the Commission's view that legislation is needed to fulfil the common law principle of restoration, so that compensation for the postponement in payment of a money award may be achieved regardless of whether an award involves an unliquidated sum. The Commission therefore recommends:

1. *That legislation pertaining to prejudgment interest be reformed.*
2. *That the legal principle governing reform legislation be to award that sum of money which will restore, as nearly as possible, the plaintiff to the position (s)he would have held had no cause of action arisen.*

It is the Commission's view that the adoption of the restoration principle of compensation necessitates the abandonment of interest as the mechanism for assessing loss arising from delay in payment of money awards. Although there will be exceptions to this rule (which are discussed later in this Chapter), generally an accurate determination

of the loss will require separate calculations for loss of use and loss of value. The Commission designates the mechanism for determining compensation for loss of use to be the *real interest rate*. The tool to assess compensation for loss of value is called the *inflation rate*.

The Commission recommends:

3. *That the legislation provide that the court be given authority to award compensation where a plaintiff has sustained loss of use of a money award prior to the date of judgment.*
4. *That the mechanism measuring this loss be called the "real interest rate".*
5. *That the legislation provide that the court be given authority to award compensation where a plaintiff has sustained loss of value on a money award prior to the date of judgment.*
6. *That the mechanism measuring this loss be called the "inflation rate".*

The details pertaining to the *real interest rate* and *inflation rate* are set forth under the next two headings.

A. Compensation for Loss of Use: the *Real Interest Rate*

1. The rate to apply

The primary issue to be resolved is whether legislation should specify the *real interest rate* to apply where loss of use has arisen and, if so, what rate that should be. The *real interest rate* has been the subject of extensive judicial consideration since the Supreme Court of Canada rendered judgments in January 1978 on the famous trilogy of cases involving damage awards for future pecuniary loss.¹⁰⁰

In calculating that loss the court considered it necessary to apply a *capitalization* rate by which awards for future pecuniary loss (cost of future care and loss of future earnings) could be discounted for future increments from investment. To obtain a real interest rate, the court extracted the predicted inflation factor from the 10% interest rate then available for long-term investments. In accordance with evidence received,¹⁰¹ the court applied a real rate of return of 7% to discount for future real investment gain.¹⁰²

Since the Supreme Court of Canada rendered its judgments on the trilogy, there has been considerable criticism of the evidence from which the 7% real interest rate derived.¹⁰³ What is generally agreed upon however, is that "the real rate of interest that has prevailed over long periods in the past offers the best guide to future long-term real rates of return."¹⁰⁴

In Appendix D, the Commission has reproduced a table adapted by Professor Dale Gibson, which the Commission has since updated.¹⁰⁵ The table samples real interest rates from 1965 to present. The conclusions which may be drawn from an analysis of that table are:

1. That the average annual real interest rate from 1965 to June, 1981 is 1.86%;
2. That this rate approaches a 2% average despite the severe rate of inflation during the mid-1970's when investors lost money under interest rates which failed to protect their capital from inflationary erosion;
3. That interest rates have since 1980 been calculated to include an adequate factor for inflation with the average real interest rate for 1980 approaching 3%.

In 1978 before the recent increase in real interest rates occurred, Professor Gibson offered the following analysis:¹⁰⁶

The average real interest rate over the 13 year period surveyed was only 1.79 per cent. This figure is distorted, of course, by the extraordinary fact that inflation soared above investment income during two of the years surveyed. But even if we ignore recent abnormalities and consider only the years 1965-1972, the average spread between interest and inflation was only 3.01 per cent. The highest differential in the entire 13 year period was only 4.22 per cent.

Other scholars have concluded that 2 - 3% adequately reflects the historical trend in real interest rates in Canada.¹⁰⁷ Recently, the rules to "*The Judicature Act*"¹⁰⁸ in Ontario were amended to allow for a discount factor of 2 1/2 per cent.¹⁰⁹ In British Columbia, a general discount rate of 3 1/2% has been prescribed.¹¹⁰ In 1980, the Uniform Conference of Commissioners on Uniform State Laws approved a *Model Periodic Payment of Judgments Act* which provides for a discount factor of 3%.¹¹¹

Trial courts are now rendering judgments which involve expert evidence on the long-term real interest rates. Expert opinion evidence in a trial before Mr. Justice Kroft in the Manitoba Court of Queen's Bench was given to the effect that "... a 3-4% real interest rate is more realistic [and]... this trend is likely to persist for some time".¹¹² More recently, Mr. Justice Hewak applied a discount rate of 3% to a personal injury claim.¹¹³ In Ontario, Mr. Justice Holland concluded from evidence that the appropriate rate of return, ". . . more than fair to the defence. . . " was 3%.¹¹⁴ Mr. Justice Bouck of the British Columbia Supreme Court received expert testimony on the real interest rate, from which he concluded:¹¹⁵

Upon reviewing all of the evidence the most optimistic figure I can ascertain which favours the plaintiff is 2 per cent, and that which favours the defendants is 4 per cent. Therefore, I intend to compromise, at a rate of 3 per cent.

In view of the foregoing, it can be said that a real interest rate of 3% would provide a fair and adequate rate of return to the plaintiff who has suffered loss of use from postponement in payment of a money award.

The Commission is in favour of specifying in legislation a real interest rate to apply where recovery is given for loss of use. This view is supported by the following reasons:

1. There is a need to avoid the cost of expert testimony in every case;
2. A set rate would avoid the need for interlocutory judgment in those undefended claims coming under Queen's Bench Rule 34, where the plaintiff is allowed to proceed to final judgment.
3. "The real return . . . is relatively constant"¹¹⁶ and "[e]conomists see no reason for the future real return to deviate from past levels".¹¹⁷ Consequently, real interest lends itself to a fixed statutory rate.
4. A fixed statutory rate would result in consistency in the calculation of money awards.¹¹⁸
5. A reasonable certainty in the law encourages parties to settle their differences without the need for court intervention.

The Commission accordingly recommends:

7. *That the measure of compensation for the loss of use of money be that amount which the plaintiff would have gained had there been no loss of use of money and the plaintiff had invested that sum and received a real rate of interest thereon.*
8. *That the legislation provide for a real interest rate of 3%.*

With respect to recommendation 8, the Commission is of the view that, to facilitate its application, the 3% real interest rate should be constant. It recommends there be

no variation for subjective factors whereby it is claimed that a plaintiff who is an investment consultant, or a prodigal for that matter, should earn a different rate of real interest than 3%. It is therefore recommended:

9. *That the legislation specify that the real interest rate of 3% apply uniformly to all parties who are awarded compensation for loss of use of money arising prejudgetment.*

2. Compound or simple interest

A further issue arises on the computation of the real interest rate; that is, whether the 3% real interest rate should be compounded. Most jurisdictions which have enacted legislation have taken the position that simple interest provides sufficient compensation for being denied the use of money.¹¹⁹ The Commission has carefully considered the arguments which favour and oppose compound interest.¹²⁰ It has concluded that the real interest rate of 3% should be compounded on an annual basis for the period during which loss of use is sustained.

The Commission's view is grounded on the restoration principle. Adequate compensation should reflect this theory's objective which is to put the plaintiff in the position (s)he would have held had no cause of action arisen. Given the fact that even interest on *Chartered Bank Non-chequable Savings Deposits* is compounded semi-annually, it follows that the adoption of a 3% real interest rate, compounded annually, is a reasonable reflection of a plaintiff's loss. It represents neither maximum nor minimum yield, but, like the 3% real interest rate, is indicative of a fair and adequate return, based upon economic and commercial reality.

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It has been argued that a compound interest provision would amount to a formidable deterrent which might serve to deprive a defendant of the right to put forward a reasonable defence.¹²¹ There is substance to this allegation where a current commercial interest rate is chosen as the measure of prejudgment loss. For instance, a claim of \$20,000 would double in less than four years, if it was compounded annually at a *Prime Rate* of 20%. The argument becomes considerably weakened in its application to the Commission's recommendation. Using the previous example, it would take 23.45 years for a \$20,000 damage award to double at a 3% real interest rate, compounded annually. It remains possible, therefore, to apply the commercial characteristic of compounding without imposing an unduly harsh burden on the defendant, when a real interest rate of 3% is employed. In Appendix F to this Report, the Commission illustrates in Example 3 how loss of use would be calculated, using an annual compound rate of 3%.

The Commission recommends:

10. *That the legislation provide that the real interest rate of 3% be compounded annually.*

3. *The date of commencement*

An integral question arises concerning compensation for loss of use: that is, from what date loss of use should be calculated. The Commission is of the view that compensation for loss of use should be calculated from the date damage or loss is first sustained. In contract disputes this is normally the date of the breach of the contract. In an action framed in tort, damage is usually sustained at the time of the commission of the tort. Although in most instances damage occurrence will be synonymous with the date the cause

of action arose, the Commission would prefer not to use this terminology as a commencement date in the legislation. This is because of the difficulties associated with its application.¹²²

Later in this Report the Commission addresses the question of the accumulation of special damages and proposes a distinct rule in determining compensation for loss of use and loss of value for this type of damage. But, quite apart from special damages, there may be specific instances where damage arising from an action will be sustained at several intervals. For example, consider the case of a contract to pay \$10,000 in two half-yearly installments. Should the payor default in both installments, loss would arise when each installment became due. In fact, the law interprets each default to be a separate cause of action.¹²³ Consider a further illustration, in tort, where a single act gives rise to damage on separate occasions. This is less common, but there are reported cases narrating this fact situation.¹²⁴ Accuracy will require that in these circumstances, the commencement date for determining compensation for loss of use be the date each damage or loss to be compensated is first sustained.

The Commission recommends:

11. *That the legislation provide that the commencement date for determining compensation for loss of use be the date each damage or loss to be compensated is first sustained.*

B. Compensation for Loss of Value: the Inflation Rate

1. The date of commencement

Normally, the date of commencement for loss of value will be, as in the instance of loss of use, when damage or loss is first sustained. Accordingly, in the case of an action on a debt, calculation for loss of use will commence when payment became due and owing. It is at that date that the value became crystallized or fixed in value. So too, where a plaintiff seeks damages for non-acceptance of goods. Section 41(3) of "*The Sale of Goods Act*", C.C.S.M. c. S10, prescribes the measure of damages for this breach to be the difference between the contract price and the market price at the time of the refusal, in the absence of an agreement to the contrary. These form but two examples of the general rule on the date of commencement.

The Commission stated in Chapter III that inflation may be taken into account in an unliquidated damage award, either directly, as in the case of non-pecuniary loss, or indirectly, as where loss assessment occurs subsequent to the date of the cause of action. Where the first category applies, so that depreciation in the value of money is accounted for to date of trial, no loss of value will arise. Consequently, there need be no rule on a commencement date here. Nor need there be any commencement date where the court crystallizes loss at the date of trial, as inflation has been completely accounted for, and thus, no loss of value has arisen.

Instead a departure from the general rule will be required where loss is crystallized at a date between the time loss was first sustained and the date of trial. So, for instance, in *Schweichardt v. Thorne*¹²⁵ the court assessed loss four months before the time of trial, when the plaintiffs became aware that their claim for specific performance would fail. In *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*,¹²⁶ the Supreme Court of Canada crystallized damage at a "reasonable time" (7 years) after the defendant's breach of a contract of bailment. In *Ogle v. Earle Vane*,¹²⁷ a similar reference

point for damage assessment was chosen. In these types of cases, the commencement date for loss of value will not be synonymous with the date that loss was first sustained. Instead, the starting point for calculation will be that chosen by the court as the appropriate date for assessment of damages.

The Commission therefore recommends:

12. *That the legislation provide that the commencement date for determining compensation for loss of value be when each damage or loss to be compensated is first sustained, except where the court chooses a later date to measure such damage or loss, in which case that shall be the appropriate commencement date.*
13. *That the measure of compensation for loss of value be that sum of money which, when added to the principal sum, will allow the amount awarded at the time of trial to be equivalent in purchasing power to the amount that would have been awarded if reparation had taken place at the commencement date, as defined in recommendation 12.*

2. The Inflation Rate to apply

In Chapter IV of this Report, the Commission questioned the accuracy of the inflation prediction built into current commercial interest rates as a measure for loss of value. It cited in support the earning rates set forth in Appendix D where in the mid-70's negative returns were sustained by investors. Given the mixed success rate, it is the view of this Commission that if there is a retrospective measure for loss of value, or inflation, it would be preferable to a measure based on prediction.

There are two widely publicized indicators of overall price change in Canada. The *Implicit Price Index*, more technically called the *GNE deflator* is a Statistics Canada index which measures price increases with reference to the *Gross National Product*. This measure is commonly used by national income accountants.¹²⁸ The Commission is of the view that this index is not the more appropriate measure for calculating prejudgment loss of value. First, it is based upon economic conditions of national and international scale.¹²⁹ Among other items, it ". . . reflects export and wholesale prices - factors of little direct application to the average Canadian".¹³⁰ Finally, it is subject to unofficial publication, which means that quarterly announcements of this index are always subject to possible revision.¹³¹

The alternative measure for price change or inflation which this Commission recommends, is the *Consumer Price Index*. This measure is recommended for three reasons. It is better known than the *Implicit Price Index* because of its wide application in labour contracts, income tax exemptions and social security benefits.¹³² It is commonly used by experts to extract the real interest rate from the nominal rate. It is published monthly on specific release dates and is final on publication. It is not without its critics but, ". . . even though it is imperfect, the CPI is probably the best inflation index in the world".¹³³

The Commission recommends the broadest form of CPI, called the *Consumer Price Index for Canada, All-items*, over various sub-indices which exclude certain items from the statistical base, or which have city rather than national significance. This choice ensures that the index chosen will have equal applicability to all parties so that a uniform rate may be applied notwithstanding differences in residency

or spending patterns. The *not seasonally adjusted rate* is considered more accurate in assessing inflation during specific time frames than the *seasonally adjusted rate*, which is suitable for trend analysis.

The Commission recommends:

14. *That the measure for loss of value be determined at the time of trial with reference to the Consumer Price Index for Canada, All-items (Not Seasonally Adjusted) table, published on a monthly basis by Statistics Canada.*

3. Exceptions to this statistical measure of inflation

There may be instances where a more appropriate measure for loss of value applies. Statistics Canada does prepare indices with reference to specific industries and commodities. It describes those indices as follows:¹³⁴

There are . . . a range of manufacturers' selling price indexes as well as wholesale price indexes available in considerable detail; there are contractors selling price indexes, machinery and equipment indexes and farm input price indexes, to name a few.

It may be that, on the facts of an exceptional case, reference to one of these indices would result in a more accurate determination of loss of value. The Commission is of the view that there may be very special instances where a party should be able to tender evidence in support of a more accurate index than the one presumed. However, it wishes to restrict the availability of such an index so that leave of the court must be obtained prior to trial for evidence supporting a different rate to be admissible. It therefore recommends:

15. That the legislation provide that the measure for determining loss of value be calculated by reference to the Consumer Price Index for Canada, All-items (Not Seasonally Adjusted) table, except in those very special circumstances where the court is satisfied that there is an alternative index which more accurately reflects the plaintiff's loss of value and it grants leave prior to trial to allow evidence in support of that alternative index.

4. The method of proof

The legislation should provide a means by which the establishment of the *inflation rate* pursuant to the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* table can be easily admitted in evidence. A provision in the Ontario prejudgment interest legislation furnishes a simple measure by which the *Prime Rate* can be easily admitted.¹³⁵ It states as follows:

For the purposes of establishing the prime rate, the periodic publication entitled the Bank of Canada Review purporting to be published by the Bank of Canada is admissible in evidence as conclusive proof of the prime rate as set out therein, without further proof of the authenticity of the publication.

The Commission endorses the purpose of this provision and recommends:

16. That the legislation provide, that for the purposes of establishing the "inflation rate" the monthly publication entitled "The consumer price index", purporting to be published by Statistics Canada be admissible in evidence as conclusive proof of the Consumer Price Index for Canada, All-items (Not Seasonally Adjusted) as set out therein, without further proof of the authenticity of the publication.

5. The method of calculation

(i) loss of value

Where a plaintiff sustains loss of value but not loss of use of a money award, the method of calculating loss of value is as follows. First, one must take the point change in the *Consumer Price Index, All-items (Not Seasonally Adjusted)* from the commencement date (as defined in recommendation 12) to the date of trial and convert that point change to a percentage figure. Step two involves multiplying this percentage figure by the principal sum.

In Appendix E, the Commission has reproduced an excerpt from a Statistics Canada publication on the Consumer Price Index, showing the method for converting a point change in the CPI to a percentage figure. Appendix F (example 1) illustrates the application of the percentage figure to the principal sum comprising step two above. Should further assistance be required, user advisory services are available through regional offices of Statistics Canada.¹³⁶ As well, the Commission has attached, as Appendix G to this Report, a table from the monthly publication *The consumer price index* (November, 1981) showing the "Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)" since 1966.

The Commission recommends:

17. *That where a plaintiff sustains loss of value on a money award, but not loss of use, loss of value*

be determined by calculating the point change in the Consumer Price Index for Canada, All-items (Not Seasonally Adjusted) from the commencement date (as defined in recommendation 12) to the date of trial, and by converting that point change to a percentage figure which is then applied to the principal sum, as shown in Appendices E and F of this Report.

This method of calculating loss of value is confined to those instances where loss of value is compensated but not loss of use. The Commission next examines the manner of calculating loss of value where loss of use is also awarded.

(ii) loss of value and loss of use

This topic concerns the interrelationship between loss of use and loss of value calculations. In its Draft Report the Commission had recommended that, in the interest of simplicity, loss of use and loss of value be calculated independently of one another. This would mean, in effect, that the 3% *real interest rate* would apply to the principal sum awarded, prior to adjustment being made on that sum for loss of value. There would be no distinction drawn between calculating loss of use and loss of value where both forms of loss are compensated and calculating compensation where only one type of loss is awarded. In both instances, calculations for each would be determined as if the other were not recoverable.

The Commission has given further consideration to this question. Although the proposal adopted in its Draft Report is a simple solution, the Commission is concerned with its lack of accuracy. The effect of this proposal is that the plaintiff would be undercompensated for his or her loss. A more exact method of calculation would

require loss of use and loss of value to be calculated annually for the prejudgment period, where both forms of loss arise. This manner of determining compensation reflects more accurately the plaintiff's actual loss and thus accords more closely with the restoration principle.

A final option would be to apply the 3% *real interest rate* to the principal sum after it has been adjusted for loss of value. This has the advantage of treating consistently debts and unliquidated damages, as in both cases the 3% rate would be applied to a sum which is expressed in contemporary dollar value. However, it overcompensates the plaintiff for loss sustained. This deficiency cannot be remedied where inflation has been accounted for in the damage award. It would be too serious an intervention into common law damage principles to require courts to fix compensation for all actions as of the date the loss was sustained. However, to the degree that legislation on prejudgment compensation can provide for accurate compensation, it should do so. The Commission therefore recommends:

18. *That, where a plaintiff sustains loss of use and loss of value on a money award, loss of value be determined by calculating each annual point change in the Consumer Price Index for Canada, All-items (Not Seasonally Adjusted) from the commencement date (as defined in recommendation 12) to the date of trial, and by converting that annual point change to a percentage figure which, when added to the 3% real interest rate, is applied to the principal sum and compounded annually, as shown in Appendices E and F to this Report.*

C. The Application of the Compensation Formulae

In this portion of the Chapter, the Commission examines the court's authority to award compensation for loss of use and loss of value. Part 1 addresses the subject of judicial discretion. Part 2 identifies special categories of money claims where it will become imperative, for a variety of reasons, to disallow compensation for loss of use and loss of value.

1. Judicial discretion

The Commission proposes that the court be granted some limited judicial discretion in the application of compensation for loss of use and loss of value. The details of that discretion are now provided:

(i) loss of use

The courts should have the authority to deny a claim for loss of use and to reduce the amount of a claim by allowing compensation for only part of the prejudgment period. However, this discretion should only operate where, for exceptional reasons, it would be unfair and inequitable to allow recovery for loss of use. The Commission proposes that, apart from this narrow exception, recovery for loss of use be awarded in all instances where such compensation is claimed or pleaded.

The Commission recommends:

19. That a plaintiff be awarded compensation for loss of use where it is claimed or pleaded, unless the court is satisfied that, for exceptional reasons, it would be unfair and inequitable to award such compensation, in which case, the court may either

(i) disallow the claim for loss of use, or

(ii) reduce the claim for loss of use by allowing compensation for only part of the prejudgment period.

(ii) loss of value

Loss of value arises where a liquidated sum, such as a debt, is claimed which no longer reflects its original purchasing power. It will also arise in a claim where damage is crystallized at some occurrence between the date loss is first sustained and the date of judgment as stated previously. However, in its broadest sense, loss of value arises in any case where a damage award is not expressed to reflect its present dollar value.

A court should examine the principal sum awarded and allow additional recovery for loss of value where that sum is not expressed to reflect contemporary dollar value. Conduct should not be a determinant factor of recovery. If conduct is in issue, it should influence loss assessment before any inflationary adjustments are made.

Nor should mitigation play any role in determining recovery: ¹³⁷

The purpose of the doctrine of mitigation is to eliminate "avoidable loss".¹³⁸ Inflation takes place irrespective of the plaintiff's activities. To require the plaintiff to mitigate is not to avoid loss but to place the burden of it on the plaintiff. The doctrine of mitigation¹³⁹ is largely attributable to a desire on the part of the law to encourage the husbanding of resources and to discourage economically wasteful activity or inactivity. The doctrine reduces the overall cost to the community of legally compensatable injuries. None of these considerations applies in relation to inflation and therefore it is submitted that the duty to mitigate is inoperative with respect to inflationary increases in damages.

Consequently, the Commission is of the view that, unlike compensation for loss of use, the court should have no discretion to disallow or reduce recovery for loss of value where such loss is sustained, and pleaded or claimed in the prayer for relief. Neither conduct nor mitigation principles should affect recovery. Once the principal sum awarded is adjudged not to be reflective of contemporary dollar value, the *inflation rate* should be applied to that sum in accordance with the preceding recommendations.

The Commission accordingly recommends:

20. *That, if the court is satisfied that the principal sum awarded no longer equals its original purchasing power, a plaintiff be awarded compensation for loss of value where it is claimed or pleaded.*

2. Exclusions

The Commission sets forth six categories of claims where, for reasons which will become apparent, the court should not award compensation for loss of use and loss of value.

- (i) where adequate prejudgment compensation derives from other bases in law

Compensation for equitable claims is often determined by factors other than those which govern damage claims in the common law. This was pointed out by the Commission in Chapter II where the Commission summarized the law of interest in the event equitable relief is claimed. Where interest is awarded under the court's equitable jurisdiction, no compensation for loss of use and loss of value should be awarded.

21. *That the court not award compensation for loss of use and loss of value where adequate prejudgment compensation derives from other bases in law.*

- (ii) on exemplary or punitive damages

Exemplary damages are not awarded to compensate the plaintiff for the harm done; they are awarded ". . . to punish the defendant for his conduct in inflicting that harm".¹⁴⁰ The Commission agrees with those jurisdictions which have excluded exemplary damages from any prejudgment compensation.¹⁴¹

In its view, it would be inappropriate to award such compensation when exemplary damages are not grounded on the restoration principle repeated throughout this Report.

22. *That the court not award compensation for loss of use and loss of value on exemplary or punitive damages.*

(iii) where there is an existing valid agreement respecting interest between the parties

Section 2 of the federal *Interest Act*, R.S.C. 1970 c. I-18 provides that:

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 whatever, any rate of interest or discount that is agreed upon.

There are numerous instances where parties agree upon a specific nominal interest rate to apply. Bills of exchange, loans and contracts containing interest provisions on overdue accounts are but three common examples.

Normally, the court will enforce an agreement respecting interest between the parties. However, there are exceptional instances where it will not sanction its contractual terms. For example, a court may set aside a term of interest pursuant to "*The Unconscionable Transactions Relief Act*", C.C.S.M. c. U20. So too where it finds the defendant guilty of a fundamental breach so that the contract is automatically brought to an end.¹⁴² In these exceptional instances, an agreement respecting interest may be set aside.

Consequently, the legislation should provide that compensation for loss of use and loss of value be excluded only where there is an existing valid agreement respecting interest between the parties.

The Commission recommends:

23. *That the court not award compensation for loss of use and loss of value where there is an existing valid agreement respecting interest between the parties.*

(iv) where interest is payable by another statute

In Chapter II of this Report, the Commission described instances where, apart from "The Queen's Bench Act" provisions, the recovery of interest is authorized by statute. Section 35 of "The Expropriation Act", C.C.S.M. c. E190 was cited as an illustration. Where statute law makes allowance for the recovery of interest, no additional compensation for loss of use and loss of value should be awarded.

The Commission therefore recommends:

24. *That the court not award compensation for loss of use and loss of value where interest is payable by another statute.*

(v) where money is borrowed to replace funds outstanding

In Chapter IV, the Commission expressed the view that the law should allow for the recovery of borrowing costs in certain special instances. It referred to the fact that some jurisprudence is evolving on this

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issue.¹⁴³ Specifically, the law has allowed for the recovery of borrowing costs in essentially two instances.

The first is where the plaintiff sustains damage for which a defendant is liable, and repairs that damage through funds necessarily borrowed for that purpose. The Commission agrees with those courts which have allowed for recovery of these borrowing costs. Indeed, such recovery accords with one of the general principles of mitigation, stated as follows:¹⁴⁴

[W]here the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing. . . . Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

However, it also follows that the borrowing costs should themselves be subject to mitigation principles. A plaintiff should ". . . not [be] entitled to charge the defendant by way of damages with any greater sum than that which [s]he reasonably needs to expend for the purpose of making good the loss".¹⁴⁵ Consequently, the borrowing should not only be reasonable, but the terms of borrowing as well.

The second category of allowable loss is where a plaintiff is forced to borrow money because a defendant has breached the terms of a contract. Here, it appears that the law will allow the plaintiff's loss, provided it is not too remote. That is, for it

to be recoverable, it must come within that category of loss which a reasonable person, in the defendant's position, would have contemplated at the formation of the contract.¹⁴⁶ Therefore, the specific test to determine whether the borrowing rate of interest should be granted in contract claims is whether a reasonable person in the defendant's position could have foreseen at the formation of the contract that it would be necessary for the plaintiff to borrow money, if the contract was breached by the defendant. This was essentially the test applied by the English Court of Appeal in *Wadsworth v. Lydall*.¹⁴⁷

In its Draft Report, the Commission proposed that borrowing costs be recoverable "where a plaintiff has borrowed money to redress the loss sustained. . . ". There appears to be several problems arising from this proposal. One respondent pointed out that a corporate plaintiff with either a revolving credit line or blanket borrowing rights could always assert, under this provision, that it incurred special borrowing costs and thus should be entitled to recover interest at its borrowing rates. Another respondent pointed out that, it would not only foster litigation, but it would also burden a defendant with a plaintiff's impecuniosity. A further criticism which could be advanced is that the provision might encourage wealthy plaintiffs to borrow money so that they could invest their own money at a higher rate of return than 3% and, consequently, reap a more extensive reward on their investment than the Commission has recommended. As a final argument, it could be said that the courts are just beginning to develop rules of law respecting

this question. Would it not be premature to suggest legislative intervention at this stage?

The Commission has carefully examined these arguments. It has concluded that prejudgment compensation legislation should allow for the continuing development of jurisprudence with respect to borrowing costs. However, the actual principles of recovery should continue to be developed by the courts in accordance with the limits placed on compensatory damages in the common law. On balance, there is little justification for, and a good deal of potential harm which could result from, legislative interference on this subject.

In order to allow for the continuing development of this special damage, the Commission recommends that the legislation specify that it will replace compensation for loss of use and loss of value. Specifically, where a plaintiff borrows money immediately following the date loss was first sustained, the borrowing cost should replace compensation for loss of use and loss of value. Where, however, a period of time lapses between the commencement date for determining compensation (see recommendations 11 and 12) and the time of borrowing, some adjustment is required. The plaintiff should recover compensation for loss of use and loss of value to the time (s)he receives those borrowed funds. Thereafter, the plaintiff should recover only the cost of borrowing, having made good the loss.

25. *That, where a plaintiff is entitled to judgment for the borrowing of money and interest thereon, the court not award any compensation for loss of use and loss of value on that amount from the date of borrowing.*

(vi) on damages expressly identified by a finding of the court as compensation for pecuniary loss arising after the date of judgment

A plaintiff will sustain no loss of use or loss of value on that part of an award which represents future pecuniary loss. In fact, the plaintiff receives compensation in advance of actual loss. Hence the need for a capitalization rate by which awards for future pecuniary loss are discounted to adjust for future increments from investment.

It follows that there should be no prejudgment compensation on damages expressly identified as compensation for future pecuniary loss. However, post-judgment compensation in the nature of damages may be awarded by the court, depending upon the character of the actuarial evidence received.¹⁴⁸

The Commission recommends:

26. *That the court not award any compensation for loss of use and loss of value on damages expressly identified by a finding of the court as compensation for pecuniary loss arising after the date of judgment.*

D. Special Matters of Concern

1. Judge or jury

In the Commission's 1975 Report on *The Administration of Justice in Manitoba: Part II - A review of the jury system*, it was recommended that the civil jury be retained in Manitoba.¹⁴⁹ Provision for civil juries is found in section 66 of "*The Queen's Bench Act*". Aside from s. 66(1), which grants a right to trial by jury in six kinds of actions, leave must be obtained.

The Commission is of the view that the issue of who should determine the question of compensation for loss of use and loss of value should be addressed. The Commission sees no reason to depart from the principle that "[t]hey [the jury] must determine all issues of fact, and, if they are in favour of the plaintiff, they must also assess the damages".¹⁵⁰ In the instructions to the jury, the judge would, of course, make clear the method by which compensation is to be determined, as set forth in this Report.

The Commission recommends:

27. *That where an action for a money award is tried by a judge and jury, compensation for loss of use and loss of value be assessed by the jury.*

2. Payments into court

The Queen's Bench Rules provide that a defendant is entitled to pay into court, upon notice to the plaintiff "a sum of money in satisfaction of the claim".¹⁵¹ The plaintiff

has the right to accept the money or proceed with the action in hopes of achieving a greater award. If the plaintiff leaves the money in court and proceeds to trial (s)he runs the risk of losing the case and recovering nothing or recovering less than was paid into court. The normal consequences of recovering judgment for less than the money in court is that the plaintiff must bear the costs of the action from the date of payment into court.¹⁵² The important question to consider is whether the allowance of compensation for loss of use and loss of value prior to judgment should affect or be affected by a payment into court.

The Commission is of the view that payments into court should take into account loss of use and loss of value which arise up to the date of payment in. It therefore recommends:

28. *That a payment into court in satisfaction of a claim include any loss of use and loss of value to which the plaintiff is entitled, up to the date of payment in.*

A further issue to resolve is whether the defendant should be required to pay any compensation for loss of use and loss of value arising after the date of payment into court when the amount recovered at trial is less than or equal to the payment in. The Commission is of the view that parties should be encouraged to settle claims. It therefore recommends:

29. *Where the plaintiff elects to proceed to trial rather than accept a payment into court, and the amount of the judgment awarded (including any loss of use and loss of value to the date of payment in) is equal to or less than the amount paid in, no loss of use or loss of value should be recoverable by the plaintiff for any period after the date on which (s)he received notice that a payment into court was made.*

A judge must not be informed of whether a defendant has made a payment into court or the amount of that payment in until the issues of liability and quantum have been determined. Similarly, a ". . . jury must not be informed that any money has been paid into court".¹⁵³ These principles of practice are set forth in Queen's Bench Rule 280. It provides, *inter alia*, that, ". . . no statement of fact that money has been paid into court . . . shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided. . . ".

The rule is a sensible one, given that a knowledge of payment in could conceivably prejudice the question of liability while its amount might affect the issue of quantum. Consequently, the rule should be preserved. In order to ensure its continuance, yet reconcile it with the preceding recommendation, the Commission recommends that the issues of compensation for loss of use and loss of value be addressed by a judge or jury separately, after the questions of liability and quantum of the principal sum have been resolved.

30. *That compensation for loss of use and loss of value be determined and calculated by a judge or jury after all questions of liability and the amount of the principal sum of the award have been decided.*

3. Special damages

The issue of whether there should be any particular rules with respect to special damages must be dealt with. The problem here is that expenses are incurred and income

is lost at several different stages throughout the prejudgment period. It may not be feasible to award compensation for loss of use or loss of value from the date it was incurred. It is for this reason that the Winn Committee on Personal Injury Litigation recommended that interest accrue on the basis of six month totals.¹⁵⁴

The Commission proposes a similar recommendation to solve the computation of loss of use and loss of value. That is, it proposes that special damages be totalled every six months commencing from the date loss or damage was first sustained. At the end of the first six months, loss of use and loss of value would be calculated as if each loss was incurred at that precise time. Assessment for subsequent special damage would be calculated on a like basis, until date of trial. The calculations for each six month period would be non-cumulative.

The Commission recommends:

31. *That compensation for loss of use and loss of value in respect of special damages be calculated on six month totals commencing from the date loss or damage was first sustained.*

There are a number of meanings attached to the term "special damages". McGregor lists four.¹⁵⁵ In the interests of clarity, the Commission recommends that the reforming legislation define this term to mean expenses incurred or income lost prior to the date of trial. This follows the definition found in section 5(2) of the *Draft Uniform Act*, a copy of which is attached as Appendix A.

The Commission recommends:

32. That, for the purpose of recommendation 31, "special damages" be defined as expenses incurred or income lost prior to the date of trial.

4. The Crown

The Commission is of the view that the Crown should be in no better position than a private person with respect to liability to pay prejudgment compensation. Given that section 15 of *"The Interpretation Act"*, C.C.S.M. c. 180, provides that "[n]o enactment is binding on Her Majesty . . . unless it is expressly stated therein that Her Majesty is bound . . .," there should be a specific provision in the reforming legislation expressly binding the Crown.¹⁵⁶

The Commission recommends:

33. That the reforming legislation specifically provide that the Crown is bound thereby.

E. Mechanics of Reform

1. The reforming legislation

The Commission recommends that its recommendations be introduced into legislation via separate statute to be entitled, *An Act to Provide for Prejudgment Compensation on Money Awards*. This will involve the repeal of section 71 and subsections 72(1), (2) and (3) of *"The Queen's Bench Act"*. Subsection 72(4) should be retained as it is a provision relating to post-judgment interest. Comparable provisions in *"The County Courts Act"* should be similarly treated. The Commission recommends:

34. That section 71 and section 72(1), (2) and (3) of "The Queen's Bench Act" be repealed along with the comparable sections of "The County Courts Act" (those being, section 78 and section 79(1), (2) and (3) of that Act) and that recommendations 1 to 38 of this Report be introduced via separate statute to be entitled "An Act to Provide for Prejudgment Compensation on Money Awards".

2. The courts

The Act should authorize the Court of Queen's Bench and the County Courts to award prejudgment compensation based upon the Commission's recommendations. With respect to the County Courts, that authority should extend to claims under Part II of that Act ("small claims court"). Although litigants are not normally legally represented in claims under Part II, the Commission perceives no problems in applying its recommendations to these small claims. Indeed, to recommend otherwise would prejudice plaintiffs who bring their claims under this Part of the Act. However, in order to accommodate its recommendations, the Commission recommends that the claim for prejudgment compensation be printed directly onto the prescribed forms which are used for claims instituted under this Part. This will ensure that a defendant is aware of the full nature of the plaintiff's case but not prejudice plaintiffs who are not legally represented. This recommendation then will allow for recommendations 19 and 20 to be implemented at the small claims level. It will be recalled these recommended that a plaintiff be awarded compensation for loss of use and loss of value where, *inter alia*, such compensation is claimed or pleaded. The Commission has been informed that a similar proposal is being considered by the Ministry of the Attorney-General in Ontario.

The Commission recommends:

35. *That the Act authorize the Court of Queen's Bench and the County Courts to award prejudgment compensation in accordance with the Commission's recommendations in this Report.*
36. *That in order to ensure that recommendations 19 and 20 of this Report are applied to claims under Part II of "The County Courts Act", a claim for compensation for loss of use and loss of value be printed directly onto the prescribed claim form.*

The monetary jurisdiction of the County Courts is established at \$10,000 (ten thousand dollars) where jurisdiction is disputed under Part I, and at \$1,000 (one thousand dollars) for small claims under Part II of "The County Courts Act" (see sections 27 and 80 of the Continuing Consolidation of Manitoba Statutes, c. C260). In order to provide certainty, the Commission is of the view that compensation for loss of use and loss of value should be excluded in determining whether a court established under that Act has jurisdiction. It recommends:

37. *That compensation for loss of use and loss of value be excluded in determining whether the County Courts have jurisdiction to hear an action under Part I or Part II of "The County Courts Act".*

3. The transition period

In its Draft Report, the Commission recommended that the authority to award prejudgment compensation extend to plaintiffs who have commenced action prior to the date the legislation comes into force, but that compensation be confined to loss owing after that effective date. One respondent submitted that, as the legislation is truly compensatory, a plaintiff should be entitled to full compensation provided

judgment was filed after the effective date. The Commission has considered but rejected this submission. It views its earlier proposal a more reasonable one for it balances the plaintiff's right of compensation against the defendant's right not to be prejudiced by statutory law until its effective date. Indeed, the Commission's proposal rebuts the statutory provision that litigation pending at the time of an enactment is not so affected by it, unless otherwise stated.¹⁵⁷ The recommendation follows that adopted in Ontario.¹⁵⁸ The *Draft Uniform Act*¹⁵⁹ and the British Columbia legislation¹⁶⁰ only affect causes of action arising subsequent to the effective date.

The Commission therefore recommends:

38. *That the authority to award prejudgment compensation extend to plaintiffs who have commenced action prior to the effective date of the legislation but that compensation be confined to that loss of use and loss of value which arises after the effective date.*

F. Post-judgment Compensation

The Commission referred in Chapter II to section 91(19) of the *British North America Act, 1867*, which grants Parliament exclusive legislative authority over interest. Notwithstanding this federal head of jurisdiction, the Commission concluded that the province has the authority to legislate in respect of prejudgment interest. The Commission also referred to the fact that it has learned that officials in the federal Department of Justice are considering the possible repeal of the third part of the *Interest Act* (that is, sections 12 to 15) related to interest on judgment debts. The question

there raised and addressed here is whether a vacuum in the federal sphere would allow the Legislature to enact provincial legislation on the subject.

Ontario has initiated reform on post-judgment interest by passing legislation providing for the prime rate of interest to apply on judgment debts.¹⁶¹ The Commission has been informed that, thus far, there have been no judgments rendered on the question of its constitutional validity.¹⁶² Those in favour of that validity, however, could contend that case law supporting provincial authority for prejudgment interest, under the head of administration of justice, lends credence to their view. However, the arguments supporting prejudgment interest may be inapplicable to the issue of provincial jurisdiction over interest on judgment debts.

First, it could be argued that, while prejudgment compensation is essentially part of a damage award, the allowance of an interest rate on a judgment debt is truly *interest* legislation. This argument gains validity when one examines the definition of "interest" applied by the Supreme Court of Canada in *The Saskatchewan Farm Security Reference*:¹⁶³

Interest is, 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. (emphasis added)

In that case, legislation which provided for a reduction in principal owed by a mortgagor or purchaser of farmland who sustained crop failure was held unconstitutional. This conclusion was met, notwithstanding the fact the legislation provided that interest should continue to be payable as if no reduction in principal had taken place.

The strongest argument in Manitoba opposing provincial authority over judgment debts is a 1914 case from the then Court of King's Bench known as *Case v. Godin*.¹⁶⁴ Therein, the Court examined s. 714 of "*The King's Bench Act*", R.S.M. 1913, c. 46, which provided for interest to be levied on a writ of execution. (The section is now found in amended form in Queen's Bench Rule 498.) The Court held the provision was *ultra vires* of the Legislature as it ". . . provides for interest upon the amount of the judgment *qua* interest . . .".¹⁶⁵ In its stead, the Court applied *The Judgments Act* 1838, 1 & 2 Vic. c. 110, to allow for an interest rate of 4% on the judgment debt. Three years subsequent to the decision, Manitoba was added as a jurisdiction in section 12 of the federal *Interest Act* so that its final part (relating to judgment debts) would apply.¹⁶⁶

In the absence of countervailing authority, the Commission is of the view that the *Godin* case provides strong support against provincial authority over post-judgment interest. However, the *Godin* case was decided prior to such constitutional principles as the doctrine of ancillary power and its corollary, that of the unoccupied field, proposed by Lord Tomlin in 1930.¹⁶⁷ Those principles were recently described by Mr. Justice Pigeon in *Tomell Investments Limited v. East Marstock Lands Limited*,¹⁶⁸ where the Supreme Court of Canada upheld the constitutional validity of s. 8 of the federal *Interest Act*:¹⁶⁹

Although in principle the abstention by the federal Parliament to exercise its exclusive legislative power does not enable the provincial legislatures to enact legislation on the subject, this is true only of what may be called the federal primary power. With respect to matters which are not strictly within such primary power but can be dealt with ancillary, provincial jurisdiction over property and civil rights and over matters of a local nature remains unimpaired until such time as the field is occupied.

Moreover, the federal head of "interest" seems to have been interpreted more restrictively since the Supreme Court of Canada rendered its decision on the *Saskatchewan Farm Security* reference, mentioned earlier. In *Attorney-General for Ontario v. Barfried Enterprises Ltd.*,¹⁷⁰ the validity of "The Unconscionable Transactions Relief Act" was upheld. In *Tomell Investments*, Pigeon, J. offered the following interpretation of the Court's finding in *Barfried*:¹⁷¹

This conclusion was based on the view that the subject of interest assigned to the Federal Parliament was not to be equated with the cost of money, in other words with interest in the widest sense. This view of the limited scope of this federal power is consonant with the view taken in earlier cases that federal jurisdiction over interest does not extend to interest on all kinds of debts or claims, but only on contractual obligations. (emphasis added)

No doubt, the ancillary power doctrine and the most recent interpretation of the federal interest power in *Tomell Investments* weaken the *Godin* precedent in Manitoba.

The final argument in favour of provincial authority over legislation on post-judgment compensation addresses the question of its true character. Earlier it was suggested that the allowance of an interest rate on a judgment debt was truly interest legislation, at least according to the expansive interpretation given to this federal head in the *Farm Security Reference* case. However, as a reply to that argument, it could be contended that post-judgment interest, like its prejudgment counterpart, is really a corollary to a damage award. That is, like prejudgment compensation, it attempts to redress the loss of use and loss of value which result from a postponement in payment of a money award.

As such, it could indeed be said that legislation re post-judgment compensation should not be characterized as interest legislation, but rather as part of a damage award under the provincial head of administration of justice. This argument is a convincing one, given the previous remarks pertaining to the ancillary power doctrine and the restrictive interpretation of the federal head of interest in *Barfried Enterprises*.

Although the question of legislative authority over post-judgment interest by no means elicits a clear response, the Commission is of the view that there is, on balance, a strong argument to support provincial authority in this field. Consequently, it recommends that, should sections 12 to 15 of the *Interest Act* be repealed, the Legislature enact provisions on post-judgment compensation. Such provisions should aim at legislation which will allow post-judgment compensation to be more consistent with the recommendations proposed in this Report.

Consistency in principle cannot, however, be served by consistency in form. Post-judgment compensation can best be provided through a current commercial interest rate which aims at predicting short-term inflation rates and seeks to provide a reasonable rate of real return. The reported rate for *Chartered Bank Non-chequable Savings Deposits*, described in Chapter III, would provide such a return.

The Commission recommends:

39. *That, should sections 12 to 15 of the Interest Act (Canada) be repealed, legislation pertaining to post-judgment interest be introduced in Manitoba to allow interest on judgment debts to accrue at the reported rate for Chartered Bank Non-chequable Savings Deposits in effect at the date of judgment, until fully satisfied.*

The reported rate for *Chartered Bank Non-chequable Savings Deposits* is published by the Bank of Canada in two sources. The first is the *Bank of Canada Review*, published on a monthly basis. The second source is the *Bank of Canada Weekly Financial Statistics*, prepared on Wednesday of each week. The rate for *Chartered Bank Non-chequable Savings Deposits* is relatively constant in comparison with the *Bank Rate* or the *Prime Rate*. Consequently, the Commission is of the view that the rate published in the *Bank of Canada Review* ("Review") would provide a satisfactory source for determining the appropriate rate to apply in assessing post-judgment compensation.

The rate published in the Review is the rate reported as of the last week of the preceding month. Unlike the rate released in the *Weekly Financial Statistics*, which is a typical posted rate, the Review publishes the actual rate given by chartered banks to holders of *Non-chequable Savings Deposits*. Normally, all of the chartered banks post the same rate. Occasionally, however, there is a disparity between the rates offered by chartered banks, in which case the Review will publish the range of rates so offered. This disparity between rates has only been witnessed three times since January 1977 and the widest spread occurred in March 1978 when the variation was reported to be .5%.¹⁷² Notwithstanding its infrequency, the Commission is of the view that there should be a determination of the appropriate rate to apply where the Review reports a range of rates posted by chartered banks. To provide certainty, the Commission finally recommends:

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40. That for the purpose of establishing the reported rate for Chartered Bank Non-chequable Savings Deposits, reference shall be made to the highest rate of interest quoted by chartered banks to holders of Non-chequable Savings Deposits, as determined and published by the Bank of Canada in the periodic publication entitled the Bank of Canada Review.

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With respect to the interrelationship between prejudgment and post-judgment interest, reference should be made to s. 72(4) of "The Queen's Bench Act" and to s. 79(4) of "The County Courts Act". It will be recalled that these subsections make provision, *inter alia*, for the giving of a judgment, notwithstanding the filing of an appeal. Recommendation 34, as previously set forth, proposed the retention of these two subsections.

VI. SUMMARY OF RECOMMENDATIONS

General Principles

1. That legislation pertaining to prejudgment interest be reformed. (p. 34)
2. That the legal principle governing reform legislation be to award that sum of money which will restore, as nearly as possible, the plaintiff to the position (s)he would have held had no cause of action arisen. (p. 34)
3. That the legislation provide that the court be given authority to award compensation where a plaintiff has sustained loss of use of a money award prior to the date of judgment. (p. 35)
4. That the mechanism measuring this loss be called the "real interest rate". (p. 35)
5. That the legislation provide that the court be given authority to award compensation where a plaintiff has sustained loss of value on a money award prior to the date of judgment. (p. 35)
6. That the mechanism measuring this loss be called the "inflation rate". (p. 35)

Compensation for Loss of Use

7. That the measure of compensation for the loss of use of money be that amount which the plaintiff would have gained had there been no loss of use of money and the plaintiff had invested that sum and received a real rate of interest thereon. (p. 38)
8. That the legislation provide for a *real interest rate* of 3%. (p. 38)
9. That the legislation specify that the *real interest rate* of 3% apply uniformly to all parties who are awarded compensation for loss of use of money arising prejudgment. (p. 39)
10. That the legislation provide that the *real interest rate* of 3% be compounded annually. (p. 40)

11. That the legislation provide that the commencement date for determining compensation for loss of use be the date each damage or loss to be compensated is first sustained. (p. 41)

Compensation for Loss of Value

12. That the legislation provide that the commencement date for determining compensation for loss of value be when each damage or loss to be compensated is first sustained, except where the court chooses a later date to measure such damage or loss, in which case that shall be the appropriate commencement date. (p. 43)
13. That the measure of compensation for loss of value be that sum of money which, when added to the principal sum, will allow the amount awarded at the time of trial to be equivalent in purchasing power to the amount that would have been awarded if reparation had taken place at the commencement date, as defined in recommendation 12. (p. 43)
14. That the measure for loss of value be determined at the time of trial with reference to the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* table, published on a monthly basis by Statistics Canada. (p. 45)
15. That the legislation provide that the measure for determining loss of value be calculated by reference to the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* table, except in those very special circumstances where the court is satisfied that there is an alternative index which more accurately reflects the plaintiff's loss of value and it grants leave prior to trial to allow evidence in support of that alternative index. (p. 46)
16. That the legislation provide that for the purposes of establishing the "inflation rate" the monthly publication entitled "*The consumer price index*", purporting to be published by Statistics Canada be admissible in evidence as conclusive proof of the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* as set out therein, without further proof of the authenticity of the publication. (p. 46)
17. That where a plaintiff sustains loss of value on a money award, but not loss of use, loss of value

be determined by calculating the point change in the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* from the commencement date (as defined in recommendation 12) to the date of trial, and by converting that point change to a percentage figure which is then applied to the principal sum, as shown in Appendices E and F of this Report. (p. 48)

18. That, where a plaintiff sustains loss of use and loss of value on a money award, loss of value be determined by calculating each annual point change in the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* from the commencement date (as defined in recommendation 12) to the date of trial, and by converting that annual point change to a percentage figure which, when added to the 3% *real interest rate*, is applied to the principal sum and compounded annually, as shown in Appendices E and F to this Report. (p. 49)

Judicial Discretion

19. That a plaintiff be awarded compensation for loss of use where it is claimed or pleaded, unless the court is satisfied that, for exceptional reasons, it would be unfair and inequitable to award such compensation, in which case, the court may either
- (i) disallow the claim for loss of use, or
 - (ii) reduce the claim for loss of use by allowing compensation for only part of the prejudgment period. (p. 51)
20. That, if the court is satisfied that the principal sum awarded no longer equals its original purchasing power, a plaintiff be awarded compensation for loss of value where it is claimed or pleaded. (p. 52)

Exclusions

21. That the court not award compensation for loss of use and loss of value where adequate prejudgment compensation derives from other bases in law. (p. 53)
22. That the court not award compensation for loss of use and loss of value on exemplary or punitive damages. (p. 54)

23. That the court not award compensation for loss of use and loss of value where there is an existing valid agreement respecting interest between the parties. (p. 55)
24. That the court not award compensation for loss of use and loss of value where interest is payable by another statute. (p. 55)
25. That, where a plaintiff is entitled to judgment for the borrowing of money and interest thereon, the court not award any compensation for loss of use and loss of value on that amount from the date of borrowing. (p. 59)
26. That the court not award any compensation for loss of use and loss of value on damages expressly identified by a finding of the court as compensation for pecuniary loss arising after the date of judgment. (p. 59)

Special Matters of Concern

27. That where an action for a money award is tried by a judge and jury, compensation for loss of use and loss of value be assessed by the jury. (p. 60)
28. That a payment into court in satisfaction of a claim include any loss of use and loss of value to which the plaintiff is entitled, up to the date of payment in. (p.61)
29. Where the plaintiff elects to proceed to trial rather than accept a payment into court, and the amount of the judgment awarded (including any loss of use and loss of value to the date of payment in) is equal to or less than the amount paid in, no loss of use or loss of value should be recoverable by the plaintiff for any period after the date on which (s)he received notice that a payment into court was made. (p. 61)
30. That compensation for loss of use and loss of value be determined and calculated by a judge or jury after all questions of liability and the amount of the principal sum of the award have been decided. (p. 62)
31. That compensation for loss of use and loss of value in respect of special damages be calculated on six month totals commencing from the date loss or damage was first sustained. (p. 63)
32. That, for the purpose of recommendation 31, "special damages" be defined as expenses incurred or income lost prior to the date of trial. (p. 64)
33. That the reforming legislation specifically provide that the Crown is bound thereby. (p. 64)

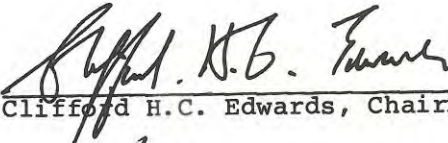
Mechanics of Reform

34. That section 71 and section 72(1), (2) and (3) of "The Queen's Bench Act" be repealed along with the comparable sections of "The County Courts Act" (those being section 78 and section 79(1), (2) and (3) of that Act) and that recommendations 1 to 38 of this Report be introduced via separate statute to be entitled "An Act to Provide for Prejudgment Compensation on Money Awards". (p. 65)
35. That the Act authorize the Court of Queen's Bench and the County Courts to award prejudgment compensation in accordance with the Commission's recommendations in this Report. (p. 66)
36. That in order to ensure that recommendations 19 and 20 of this Report are applied to claims under Part II of "The County Courts Act", a claim for compensation for loss of use and loss of value be printed directly onto the prescribed claim form. (p.66)
37. That compensation for loss of use and loss of value be excluded in determining whether the County Courts have jurisdiction to hear an action under Part I or Part II of "The County Courts Act". (p. 66)
38. That the authority to award prejudgment compensation extend to plaintiffs who have commenced action prior to the effective date of the legislation but that compensation be confined to that loss of use and loss of value which arises after the effective date. (p. 67)

Post-judgment Compensation

39. That, should sections 12 to 15 of the *Interest Act* (Canada) be repealed, legislation pertaining to post-judgment interest be introduced in Manitoba to allow interest on judgment debts to accrue at the reported rate for *Chartered Bank Non-chequable Savings Deposits* in effect at the date of judgment, until fully satisfied. (p. 71)
40. That for the purpose of establishing the reported rate for *Chartered Bank Non-chequable Savings Deposits*, reference shall be made to the highest rate of interest quoted by chartered banks to holders of *Non-chequable Savings Deposits*, as determined and published by the Bank of Canada in the periodic publication entitled the *Bank of Canada Review*. (p. 73)

This is a Report pursuant to section 5(2) of
"The Law Reform Commission Act", signed this 4th day of
January, 1982.


Clifford H.C. Edwards, Chairman


Patricia G. Ritchie, Commissioner


David G. Newman, Commissioner


Knox B. Foster, Commissioner


Beverly Ann Scott, Commissioner


Victor Rosenman, Commissioner


D. Trevor Anderson, Commissioner

NOTES

1. (1981) 115 D.L.R. (3d) 247 at 270, 14 C.C.L.T. 294 at 312, quoting from a judgment of Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 4 App. Cas. 25, also repeated by the S.C.C. in *Andrews et al v. Grand & Toy Alta. Ltd. et al* [1978] 2 S.C.R. 229 at 241, (1978) 83 D.L.R. (3d) 452 at 462.
2. *Black's Law Dictionary* (5th ed.) at 1180.
- 2a. *McGregor on Damages* (14th ed.) at 10.
3. See *Page v. Newman* (1829), 9 B. & C. 378, 109 E.R. 140, per Lord Tenterden; and see Great Britain Law Revision Committee, *Second Interim Report* Cmd. 4546 (1936) at 7.
4. The sections are known as *Lord Tenterden's Act* for they, in part, codified the law of interest as summarized by Lord Tenterden in *Page v. Newman*, *supra* n. 3.
5. This was also the interpretation of the Great Britain Law Revision Committee in their *Second Interim Report*, *supra* n. 3.
6. See *Re Commercial Bank of Manitoba* (1894) 10 Man. R. 187 where the Act was formally acknowledged as having application in Manitoba as a reception statute. For a complete summary of cases pre-1931 see R.B. MacInnes, K.C., "An Annotation (Western) of Sections 70 and 71 of *The King's Bench Act*", (1933) 5 No. 7 *Man. B. News* 1, and (1933) 5 No. 9 *Man. B. News* 1.
7. S.M. 1931, c. 6, s. 70 and s. 71.
8. The sections were enacted in 1971. See S.M. 1971, c. 77, s. 1.
9. The provision was introduced as s. 20 of 7 Wm. 4 (1837) c. 3, of Upper Canada.
10. See *McCullough v. Newlove* (1896) 27 O.R. 627 and *McCullough v. Clemow* (1895) 26 O.R. 467 as examples of early judgments emphasizing the broader approach to interest adopted by Ontario courts as compared to the English.
11. *Toronto Railway Company v. Corp. of the City of Toronto* [1906] A.C. 117 (P.C.) at 120, citing the case of *Michie v. Reynolds* (1865) 24 U.C.R. 303 as authority for this statement.

12. *Ibid.*
13. *Id.*, at 121.
14. See, for example, *Smart v. Niagara and Detroit Rivers R.W. Co.* (1862) 12 C.P. 404, and *Blaney v. Hendricks*, 2 W.Bl. 781, 3 Wils. 205.
15. See, for example, *The Custodian v. Blucher* [1927] S.C.R. 420, [1927] 3 D.L.R. 40 where interest was awarded on dividends of shares, pursuant to this principle, and *Popular Industries Ltd. v. Frank Stollery Ltd.* (1973) 40 D.L.R. (3d) 356, 1 O.R. (2d) 372 (C.A.) where interest was awarded on damages for breach of contract arising from the wrongful refusal of goods.
16. See, for example, *McCullough v. Clemow*, *supra* n. 10, where interest was denied on the basis that the amount of the damages was not ascertainable.
17. *Ottawa v. Ottawa Electric Ry. Co.* [1936] O.R. 547 at 552, 46 C.R.C. 113, [1936] 4 D.L.R. 539; *aff'd* [1937] O.R. 358, 46 C.R.C. 398, [1937] 2 D.L.R. 534 (C.A.), *ref'd Chambers v. Leech* [1976] 4 W.W.R. 568 (Man. C.A.) at 478.
18. *Id.*, at 553.
19. *Ibid.*
20. Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting* (August, 1978) at 244.
21. (1975) 56 D.L.R. (3d) 601 (Man. Q.B.). The Supreme Court of Canada judgment is *The Custodian v. Blucher*, *supra* n. 15. Lord MacNaghten's summary was also quoted with approval by the S.C.C. in *Prince Albert Pulp Co. et al v. Foundation Company of Canada* [1976] 4 W.W.R. 586.
22. *Supra* n. 17.
23. See *St. Vital Flooring Co. Ltd. v. Inducon Construction of Canada Ltd.*, *supra* n. 21; *Chambers v. Leech*, *supra* n. 17; *Western Engine Ltd. v. C.N.R. and Bradley Air Services Ltd.* (unreported) June 8, 1976, Man. Q.B., Dewar, C.J.Q.B.; *Air Canada v. Province of Man.* [1978] 2 W.W.R. 694 (Man. C.A.); *Qualico Developments Ltd. v. Madill* (1979) 97 D.L.R. (3d) 26 (Man. Q.B.), *var'd* (1981) 109 D.L.R. (3d) 208 (C.A.); *Erin Iron Works Ltd.*

v. Fleetwood Homes Ltd. [1980] 3 W.W.R. 140 (Man. Co. Ct.);
Rockwood Enterprises Ltd. v. Grain Ins. and Guar. Co.
(1981) 6 M.R. (2d) 299 (Q.B.); *Loewen Enterprises Ltd. v. Mackie*
(unreported) February 9, 1981, Man. Co. Ct., Kennedy, C.C.J.

24. See *Chambers v. Leech*, supra n. 17; *Western Engine Ltd. v. C.N.R. and Bradley Air Services Ltd.*, supra n. 23; *Erin Iron Works Ltd. v. Fleetwood Homes Ltd.*, supra n. 23.
25. *Rockwood Enterprises Ltd. v. Grain Ins. and Guar. Co.*, supra n. 23.
26. Supra n. 24.
27. *St. Vital Flooring Co. Ltd. v. Inducon Construction of Canada Ltd.*, supra n. 21.
28. Supra n. 25.
29. *Erin Iron Works Ltd. v. Fleetwood*, supra n. 23.
30. Supra n. 22.
31. *Western Engine Ltd. v. C.N.R. and Bradley Air Services*, supra n. 23.
32. *Qualico Developments Ltd. v. Madill, and Rockwood Enterprises Ltd. v. Grain Ins. and Guar. Co.*, supra n. 23.
33. *Loewen Enterprises Ltd. v. Mackie*, supra n. 23.
34. See n. 23 where only liquidated claims were at issue in all cases cited.
35. *Air Canada v. Prov. of Man.*, supra n. 23.
36. *Chambers v. Leech*, supra n. 17.
37. *Kenton v. Archibald* (1954) 13 W.W.R. (N.S.) 594 (Man. Q.B.) at 603, per Freedman, J. (as he then was).
38. *St. Vital Flooring Co. Ltd. v. Inducon*, supra n. 21.
39. *Youngberg v. McGirr* [1920] 1 W.W.R. 146 (Sask. C.A.) and *Krienke v. Schafter* [1919] 1 W.W.R. 990 (Sask. C.A.), app'd *Chambers v. Leech*, supra n. 17.
40. *Black's Law Dictionary* (5th Ed.) at 300.
41. *Id.*, at 1347.

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42. See *The Peruvian Guano Co. Limited v. Dreyfus Brothers & Co.* [1892] A.C. 166 (H.L.) and *Canadian Laboratory Supplies Ltd. v. Englehard Industries of Canada Ltd.* (1975), 12 O.R. (2d) 113 (H.C.).
 43. See, for example, *The Peruvian v. Dreyfus*, *ibid.*
 44. *Canadian Laboratory*, *supra* n. 42.
 45. In *Green v. Manitoba Assurance Co.* (1901) 13 Man. R. 395, interest was allowed from the time the insured sent in an acceptable proof of loss. In *Robinson v. Midland Fire Ins. Co.* (1916) 26 Man. R. 398, the Court awarded interest 30 days after completion of proof of loss (when insured's right of action accrued, according to the policy) while in *Dumoulin Hotel Ltd. v. Western Assurance Co.* (unreported) June 2, 1977, the Manitoba Court of Appeal allowed interest 60 days after filing the proof of loss claims.
 - 45a. (unreported) December 15, 1981 (Man.C.A.); var'ing (unreported) April 15, 1981 (Co. Ct.).
 46. See *Qualico Developments Ltd. v. Madill*, *supra* n. 23; *Rockwood Enterprises Ltd. v. Grain Ins. and Guar. Co.*, *supra* n. 23; and see *Tserghanos v. Guardian Insurance Company of Canada* (unreported) October 26, 1979, Man. Q.B., Solomon J. aff'd September 26, 1980 (Man. C.A.) and see the judgment of the Manitoba Court of Appeal (unreported) May 9, 1980 where interest at a rate of 13% from date of trial judgment to date of final determination of the appeal was awarded.
 47. *Chin Si-Thoo v. Berry* [1978] 2 W.W.R. 641 (Man. Q.B.) at 643, per Solomon, J.
 48. *Ibid.*
 49. S.M. 1980 c. 54 s. 11.
 50. Section 134 of the *Bills of Exchange Act*, R.S.C. 1970 c. B-5 reads as follows:
 134. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, are
 - (a) the amount of the bill;
 - (b) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case; and
 - (c) the expenses of noting and protest.

51. (1980) 32 O.R.(2d) 438(D.C.).
52. *Id.* at 441, per Labrosse, J.
53. *Id.* at 438.
54. See *United Grain Growers Limited v. Mott Electric et al* (unreported), May 27, 1981 (B.C.S.C.) No. 1438/75.
55. See *Prince Albert Paper Co. Ltd. v. Foundation Company* [1976] 4 W.W.R. 586 (S.C.C.) and *The Minister of Highways and Public Works v. British Pacific Properties Ltd.* [1980] 2 S.C.R. 283 at 288.
56. Uniform Law Conference of Canada, *Proceedings of the Sixty-second Annual Meeting* (August, 1980) 230 at 241.
57. *Morden v. Armitage* [1949] 4 D.L.R. 222 at 224 (B.C.S.C.).
58. *International Railway Company v. Niagara Parks Commission* [1941] A.C. 328 at 345, [1941] 3 D.L.R. 385, [1941] 2 All E.R. 456, [1941] 2 W.W.R. 338 (P.C.) distinguished in *Fred Morton Holdings Ltd. v. Davis* (1979) 97 D.L.R. (3d) 273, [1979] 1 W.W.R. 549 (S.C.C.), *rev'ing* (1978) 79 D.L.R. (3d) 641 (Man. C.A.).
59. *Ibid.*
60. *Busdick v. Garrick* (1869-70) 5 Ch. App. 233 at 243, per Gifford, L.J. See also: *Attorney-General v. Alford*, 4 D.M. & G. 843 and *Wallersteiner v. Mair* [1975] Q.B. 393 (C.A.) at 388.
61. [1979] 1 W.W.R. 512 at 513. See also the resolution of the Manitoba Bar Association of June, 1980 in which the Association ". . . endorse[d] the principle that the Government of Manitoba adopt legislation providing for prejudgment interest on personal injury claims".
62. *Riches v. Westminster Bank Limited* [1947] A.C. 390 (H.L.) at 400, per Lord Wright.
63. Paul A. Samuelson, "Money, Interest Rates, and Economic Activity: Their Interrelationship in a Market Economy" William E. Gibson, George Kaufman, *Monetary Economics: Readings on Current Issues* (1971) at 51.
64. The federal *Bank Act*, prior to the *Bank Act*, S.C. 1966-67, c. 87, contained a provision limiting the rate of interest chartered banks could attach to loans. From 1934 to 1944, the maximum interest rate which banks could recover by law was 7% (S.C. 1934 c. 24 s. 91). From

1944 to 1966, the maximum rate was 6% (S.C. 1944-45 c. 30 s. 91). In 1966, Parliament removed the maximum statutory rate, subject to certain transition rules (S.C. 1966-69 c. 87, s. 91). Since then there has been no maximum rate set forth by that Act. See R.S.C. 1970 c. B01, s. 91.

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65. James E. Pesando, *The Impact of Inflation on Financial Markets in Canada* (C.D. Howe Research Institute, 1977) at xi of Preface.
66. *Id.* at 4.
67. *Id.* at 5.
68. CPI for Canada, All-Items (Not Seasonally Adjusted) for June 1978 was 175.1 and for June 1981, 236.8 for a point change of 61.7 over the three year period.

$$\frac{61.7}{175.1} \times 100 = 35.23\% \text{ change.}$$

69. Economic analysts also note two minor cost factors which feature in calculation of interest rates. That is, administrative costs and risk factors influence interest rates. See Richard A. Posner *Economic Analysis of Law* (1977) at 147.
70. Thomas J. Courchene, *Money, Inflation, and the Bank of Canada: An Analysis of Canadian Monetary Policy from 1970 to Early 1975* (C.D. Howe Research Institute, 1976) at 20.
71. *Supra* n. 65, at 21.
72. See: *Bank of Canada Review*, June, 1981 at S139
73. *Ibid.*
74. *Judicature Act* R.S.N.B. 1973, c. J2, ss. 45, 46.
75. In 1974, the *Prejudgment Interest Act* S.B.C. 1974, c. 65 was enacted. See now the *Court Order Interest Act* R.S.B.C. 1979, c. 76, which renames and amends the previous legislation.

76. Law Reform Commission of British Columbia Report on Pre-Judgment Interest (LRC 12, 1973)
77. See *Judicature Act* R.S.O. 1970, c. 228, s. 38, amended S.O. 1977, c. 51, s. 3 and the *Judicature Act* C.S.N.S. 1980, c. J3, s. 38.
78. See Uniform Law Conference of Canada, *Proceedings of the Fifty-eighth Annual Meeting* (August, 1976) at 216; *Proceedings of the Sixtieth Annual Meeting* (August, 1978) at 239; *Proceedings of the Sixty-second Annual Meeting* (August, 1980) at 230.
79. *Id.* (August, 1978) at 244, quoting from the Ontario Memorandum to the U.L.C.C.
80. *Id.* at 241.
81. *Supra* n. 75, s. 1(1).
82. Quoting p.2 of the Report prepared by the Saskatchewan Commissioners for the sixty-third annual meeting of the Uniform Law Conference of Canada (August, 1981), the proceedings of which have not yet been published.
83. See *Leslie R. Fairn & Associates v. Colchester Developments Limited* (1975) 11 N.S.R. (2d) 389 (N.S.C.A.); *Municipal Spraying & Contracting Ltd. v. J. Harris & Sons Ltd.* (1979), 35 N.S.R. (2d) 237 (N.S.S.C.); and *Atlantic Salvage Ltd. v. City of Halifax* (1978) 94 D.L.R. (3d) 513 (N.S.C.A.) where interest at the commercial rate was allowed as a 'special damage' award. See also *Wadsworth v. Lydall* [1981] 1 W.L.R. 598; [1981] 2 All E.R. 401 (C.A.)
84. By Order-in-Council 235/81, the appropriate interest rate under this Act was fixed at 14.50%.
85. *Supra* n. 77, s. S.O. 1977, c. 51, s.3(1)
86. *Supra* n. 40 at 354.
87. See also Peter H. Harris, "Awards of Interest - What is the Proper Rate?" (1979) Vol. 2 No. 1 *Advocates' Quarterly* 119, where the author addresses, in part, this problem and whether the Ontario prejudgment interest provisions resolve this problem by s. 38(6) of *The Judicature Act, R.S.O. 1970, c. 228, amended by S.O. 1977, c. 51, s. 3(1)*.
88. [1971] 2 W.L.R. 1271 (C.A.) at 1284.

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89. *Andrews et al v. Grand & Toy Alta. Ltd. et al, supra n. 1; Arnold v. Teno; J.B. Jackson Ltd. v. Teno; Teno v. Arnold* [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1, 3 C.C.L.T. 272; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607, (1977-78) 3 C.C.L.T. 272 (S.C.C.).
90. *Supra n. 1.*
91. *Id.*, at 263.
92. *Hattan v. Henderson* [1981] 5 W.W.R. 624. See also *Fenn v. City of Peterborough* (1980) 25 O.R. 399, where the Ontario Court of Appeal awarded \$125,000 for non-pecuniary loss, citing, *inter alia*, the ". . . appreciable erosion in the value of money", as a factor for increasing the award from that assessed in *Andrews*.
93. *MacDonald v. Alderson et al* (1981) 8 M.R. (2d) 202 (Q.B.) at 229. And see *Stein v. Sobczak and City of Winnipeg* (1981) 9 M.R. (2d) 49 (C.A.) at 70 where Mr. Justice Huband states, "I have read no judicial pronouncement which suggests that damages are to be held constant, while payment is to be made in dollars of ever-diminishing value".
94. See *Pash v. Registrar of Motor Vehicles* [1949] 1 W.W.R. 225, 304, 57 Man. R. 130 and *Rodzinski v. Modern Dairies Limited* [1949] 4 D.L.R. 438, [1949] 2 W.W.R. 456.
95. *Rodzinski, id.* at 457.
- 95a. (Unreported) December 17, 1981, aff'g (1981) 25 B.C.L.R. 381 (C.A.), which reversed [1978] 4 W.W.R. 592 (B.C.S.C.).
- 95b. *Supra n. 92.*
96. See *Schweichardt v. Thorne* [1976] 4 W.W.R. 249, where in an action for specific performance, the British Columbia Supreme Court allowed damages to be assessed at the date the plaintiffs became aware that their claim for specific performance would fail, three or four months before the date of the trial. See, also, *Wroth v. Tyler* [1973] 1 All E.R. 897, [1973] 2 W.L.R. 405; *Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd.* [1973] 3 O.R. 629, 37 D.L.R. (3d) 649, aff'd 9 O.R. (2d) 375, 60 D.L.R. (3d) 431 (C.A.); *Horsnail v. Shute* [1921] 3 W.W.R. 270, 30 B.C.R. 189, 62 D.L.R. 199.
97. See *Miliangos v. George Frank (Textiles) Limited* [1976] A.C. 433 (H.L.).
98. See *Dodd Properties Ltd. v. Canterbury City Council* [1980] 1 W.L.R. 433 and *Cormier Enterprises Ltd. v. Costello* (1980) 108 D.L.R. (3d) 472 (N.B. App. D.).

99. See *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp. et al* [1979] S.C.R. 633, (1979) 89 D.L.R. (3d) 1, [1978] 6 W.W.R. 301 (S.C.C.) where the Court crystallized damage assessment at a "reasonable time" after the defendant's breach arising out of a contract of bailment. For a concise summary of departures from the traditional rules governing damage assessment, see S.M. Waddams, "The Date for the Assessment of Damages" (1981) 97 Law Q. Rev. 445.
100. *Supra* n. 89.
101. The Court accepted evidence of a long term inflation forecast of 3-1/2% which apparently emanated from the late Dr. John Deutsch, head of the Economic Council of Canada. This "Deutsch forecast" was introduced as evidence by a Doris Dader, a home economist appearing before the Supreme Court of Alberta in *Andrews supra* n. 1. See Albert J. Dexter, John D. Murray, Richard W. Pollay, "Inflation, Interest Rates and Indemnity: the Economic Realities of Compensation Awards" 13 U.B.C.L. Rev. No. 2, 298 at 304. There is still some uncertainty as to whether he ever did forecast a 3-1/2% per annum inflation. See *Lan v. Wu* [1979] 2 W.W.R. 122 (B.C.S.C.) at 128, and Samuel A. Rea Jr., "Inflation, Taxation and Damage Assessment" (1980) 43 Can. B. Rev. 280 at 284.
102. See *Thornston, supra* n. 89, 83 D.L.R. (3d) at 487; *Andrews, supra* n. 1, 83 D.L.R. (3d) at 474; *Teno, supra* n. 89, 83 D.L.R. (3d) at 635.
103. See, for example Dale Gibson, "Repairing the Law of Damages", (1978) 8 Man. L.R. No. 4, 637; Albert S. Dexter, *supra* n. 101; Samuel A. Rea Jr., *supra* n. 101.
104. Rea, *supra* n. 101 at 297.
105. Professor Gibson's table analyzed the years 1965-77 while the Commission's adaptation continues to June, 1981.
106. Gibson, *supra* 103 at 650.
107. See Rea, *supra* n. 101 at 285; Dexter, Murray, Pollay, *supra* n. 101 at 306; J.B. Patterson, "Effective Presentation of Actuarial Evidence in Permanent Disability Cases" (1979) 37 *The Advocate* 13; and see *Winnipeg Free Press*, Friday, July 31, 1981 at p. 15, "Big Money Supply blamed for inflation", where Dr. Michael Walker, director of the Fraser Institute, is quoted as saying ". . . you have to add some reward for saving and historically that's been about three per cent".

See also the *Report to the Committee of the Supreme Court of Ontario on Fixing Capitalization Rates on Damage Actions* (February 14, 1980) where the authors of the report state (at p. 5) that, "The real rate of interest in Canada (i.e., the excess of the rate of interest on long term Government of Canada bonds over the long term rate of price increases) will be in the range of 2% to 3% per year for the foreseeable future." Dr. Clarence Barber of the Department of Economics submitted a report on the case of *McLeod v. Palardy* (1980) 4 Man. R. (2d) 218 (Q.B.); var'd (1981) 17 C.C.L.T. 62 (C.A.), showing the historical real rate to be 3-4%.

108. See *The Judicature Amendment Act, 1979*, S.O. c. 65, s. 6(5) which granted the Rules Committee the authority to pass rules prescribing the rate of interest to be used in determining the capitalized value of an award in respect of future damages.
109. R. 267a of *The Ontario Annual Practice, 1981* provides as follows:
- Rule 267a*
The rate of interest to be used in determining the capitalized value of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2-1/2 per cent per annum. [New, O. Reg. 379/80, s. 3]
110. See Regulation 352/81, pursuant to section 30 of *The Attorney General Statute Amendment Act, 1981* S.B.C. 1981, c. 10.
111. Section 10 of the *Model Periodic Payment of Judgments Act* states that, ". . .the court shall apply a discount factor of 3 per cent, compounded annually" and see the official commentary on this section in the Model Act. See also Richard A. Posner, *Economic Analysis of Law* (2d ed. 1977) at 147 where he states, "[a] reasonable estimate of the real, riskless cost of capital is 3 per cent . . .".
112. *McLeod v. Palardy* (1980) 4 Man. R. (2d) 218 (Q.B.) at 246; var'd (1981) 17 C.C.L.T. 62 (C.A.), but not on this point.

113. *Supra* n. 93 at 249.
114. *Yepremian et al v. Scarborough General Hospital* (1978-79) 6 C.C.L.T. 81 (Ont. S.C.) at 119, var'd 28 O.R. (2d) 494 (C.A.) but not on this point. See, also, *Fenn v. City of Peterborough*, *supra* n. 92, where the Ontario Court of Appeal affirmed the 3% discount rate applied by Mr. Justice Holland at trial, 14 O.R. (2d) 137, 73 D.L.R. (3d) 177.
115. *Lan v. Wu et al supra* n. 101 at 130. The Court of Appeal affirmed the 3% discount rate applied by Mr. Justice Bouck. See (1980) 21 B.C.L.R. 216 (B.C.C.A.).
116. *Rea, supra* n. 101 at 285.
117. *Ibid.*
118. This was cited by Mr. Justice Huband in *Sonsie v. McIntyre et al* (1981) 6 M.R. (2d) 277 (C.A.) at 290, as a rationale for setting forth the discount rate in Ontario *supra* n. 102 and see *McLeod v. Palardy* (unreported) May 22, 1981, Man. C.A. where Monnin, J.A. at p. 11 of judgment recommends a statutory discount rate to avoid the inconsistency between cases.
119. Section 2 of the British Columbia Act, *supra* n. 75; s. 38(5) of the Ontario provisions, *supra* n. 77 and s. 3(1) of the English legislation, the *Law Reform (Miscellaneous) Act, 1934*, expressly state that no interest shall be awarded on interest.
120. See *Minister of Highways & Public Works v. British Pacific Properties Ltd.* [1978] 5 W.W.R. 536 (B.C.S.C.) at pp. 542-543; var'd [1980] 2 W.W.R. 525 (B.C.C.A.); rev'd [1980] 2 S.C.R. 283 (S.C.C.) and the *Saskatchewan Report to the 1980 Uniform Law Conference of Canada*, *supra* n. 78 at pp. 243-244 for a summary of those arguments.
121. *Ibid.*
122. See O.L.R.C. *Report on Limitations of Actions* (1969) at 92 and Uniform Law Conference of Canada, *Proceedings of the Fiftieth Annual Meeting* (August, 1968) at 68-75 for the Report of the Alberta Commissioners on the "Limitation of Actions".
123. See *National Coal Board v. Galley* [1958] 1 W.L.R. 16 (C.A.) at 24.
124. See, for example, *Darley Main Colliery Co. v. Mitchell* (1886) 11 App. Cas. 127 (H.L.).

125. *Supra* n. 96.
126. *Supra* n. 99.
127. (1867) L.R. 2 Q.B. 275; 3 Q.B. 272.
128. Dolan/Vogt, *Basic Economics* (1980) at 101.
129. *Ibid.*
130. Peter Meyers, "Finding flaws in the CPI as the 'right' measure" (1980) vol. 22. No. 10, Exec. 44 at 48.
131. The *Implicit Price Index* is reported by Statistics Canada in catalogue 13-001 entitled *National Income and Expenditure Accounts. System of National Accounts*, a quarterly publication.
132. *Your Guide to the Consumer Price Index*, Statistics Canada Publication, at 1.
133. Jack Clark Francis, *Investments: Analysis and Management*, (1980) at 226.
134. *Supra* n. 132 at 12.
135. S. 38(2) of *The Judicature Act*, R.S.O. 1970 c. 228, amended by S.O. 1977 c. 41, s. 3.
136. Statistics Canada, User Advisory Services, Room 602, General Post Office, 266 Graham Avenue, Winnipeg, Man., R3C 0K4.
137. David Feldman, D.F. Libling, "Inflation and the Duty to Mitigate", (1979) 95 *Law Q. Rev.* 270 at 282.
138. Citing: *Payzu Ltd. v. Saunders* [1919] 2 K.B. 581; Ogus: *The Law of Damages*, (1973) at 85.
139. Citing: *McCormick: Handbook on the Law of Damages*, (1935) at 127; Williston: *Contracts* (3d ed.), para 1303; Ogus: *The Law of Damages*, (1973) at 85.
140. *McGregor on Damages* (14th ed.) at 226.
141. See s. 38(5) of *The Judicature Act*, R.S.A. 1970, c. 228, amended by S.O. 1977 c. 51 section 3, and s. 7(c) the draft *Uniform Prejudgment Interest Act*, (Appendix A to this Report). But see the *Court Order Interest Act*, *supra* n. 75 and *Robitaille Ltd. v. Vancouver Hockey Club* (1979) 19 B.C.L.R. 158 (S.C.) at 184 where prejudgment interest was allowed, *inter alia*, on a \$35,000 exemplary damage award.

142. See *Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd.* [1970] 1 All E.R. 225 (C.A.). But see *Suisse Atlantique* case [1962] 2 All E.R. 61 and *Photo Productions Ltd. v. Securicor Transport Ltd.* [1980] 2 W.L.R. 283 (H.L.).
143. *Supra* n. 83.
144. *Supra* n. 140 at 150.
145. *Darbishire v. Warran* [1963] 1 W.L.R. 1067 (C.A.) at 1075, per Pearson, L.J.
146. This was essentially the principle applied by the English Court of Appeal in *Wadsworth v. Lydall* *supra* n. 83.
147. *Ibid.*
148. See *Lewis v. Todd* *supra* n. 1; *Fenn v. City of Peterborough* (1980) 25 O.R. (2d) 399 (C.A.); *Julian v. Northern & Central Corp. Ltd.* (1981) 118 D.L.R. (3d) 458 (Ont. C.A.); *Blackstock v. Patterson* [1981] B.C.D. Civ. 3574 - 01 (February 18, 1981) (B.C.S.C.); *Alpine Veneers Ltd. v. Reed Lumber Co. Ltd.* [1981] B.C.D. Civ. 969 - 10 (May 1, 1981) (B.C.S.C.); *Van der Est v. Albert Insurance Corp. of B.C.* [1981] 9 A.C.W.S. (2d) 152 (May 13, 1981) (B.C.S.C.); *McLeod v. Palary* *supra* n. 107.
149. (1975) M.L.R.C., Report 19, at 47-48.
150. *Odgers' Principles of Pleading and Practice* (21st ed. 1975) at 291.
151. The Queen's Bench Rules, Man. Reg. 1978 R. 275(1).
152. *Id.*, at R280; *Klaus v. Beck* 56 W.W.R. 504 (Man. Q.B.); *Cannon v. Int'l Associated Hairdressers* (1959) 29 W.W.R. 229 (Man. Q.B.); *Porteous v. Garnett* [1932] 1 W.W.R. 478 (Q.B.).
153. *Supra* n. 150.
154. Cmnd. 3691, paras. 324 and 325 (1968). This approach was adopted in Ontario (see s. 38(4) of *The Judicature Act*, R.S.O. 1970, c. 228, amended S.O. 1977 c. 51, s. 3) and British Columbia (see s. 1(3) of the *Court Order Interest Act*, *supra* n. 76).
155. *Supra* n. 140 at 13-16.
156. See also the Report of the Law Reform Commission of British Columbia, *supra* n. 76, where at p. 27 the Commission expresses the view that "[t]he Crown should be in no better position than the subject with respect to liability to pay pre-judgment interest". Section 2 of the *Draft Uniform Act* (Appendix A) allows for a similar provision.

157. *The Interpretation Act*, C.C.S.M. c. 180, s. 10.
158. Section 3(2) of *The Judicature Amendment Act*, 1977 S.O. 1977, c. 51.
159. See s. 10 of the *Uniform Draft Act*, attached as Appendix A.
160. *Supra* n. 75, s. 6.
161. Section 40 of *The Judicature Act*, R.S.O. 1970, c. 228, amended S.O. 1979, c. 65, s. 4.
162. This advice was received by the Ontario Ministry of the Attorney-General.
163. [1947] S.C.R. 394 at 411, [1947] 3 D.L.R. 689; aff'd [1949] A.C. 110, [1949] 2 D.L.R. 145 [1949] 1 W.W.R. 742.
164. [1914] 7 W.W.R. 396.
165. *Ibid.*
166. See S.C. 1917 c. 17, 7-8 Geo. V. amending R.S.C. 1906 c. 120, Section 12.
167. *Attorney General for Canada v. Attorney-General for British Columbia* [1930] A.C. 111 (P.C.) at 118.
168. [1978] 1 S.C.R. 974.
169. *Id.* at 986.
170. [1963] S.C.R. 570, 42 D.L.R. (2d) 137.
171. *Supra* n. 168 at 985.
172. In March, 1978, the reported rate for *Chartered Bank Non-chequable Savings Deposits* was 5.75 - 6.25.

APPENDIX A

Draft Uniform Prejudgment Interest Act

- Interpretation 1. In this Act
- (a) "judgment" includes order;
 - (b) "pecuniary loss" does not include pain and suffering, loss of amenities and of expectation of life, physical inconvenience and discomfort, social discredit, injury to reputation, mental suffering, injury to feelings or loss of society of spouse or child;
 - (c) "prejudgment interest rate" means the rate of interest published in the Gazette as required in section 4.
- Application 2. Her Majesty is bound by this Act.
- Award of interest 3. Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court or, in the case of a default judgment, the registrar of the court, shall add on the judgment an award of interest calculated in accordance with section 5.
- Prejudgment interest rates 4. The (fill in title of appropriate official) shall determine and publish in the Gazette prejudgment interest rates in accordance with the regulations.
- General damages calculation 5. (1) Interest under this Act shall be calculated from the day the cause of action arises to the day of judgment at the rate determined by averaging the prejudgment interest rates in effect during that period.
- Special damages calculation (2) Notwithstanding subsection (1), interest in respect of damages for expenses incurred or income lost shall be calculated on the total of those damages as at the end of each three-month period from the day the cause of action arose to the day of judgment at the prejudgment interest rate that is in effect on the last day of the three-month period in which the damages are incurred.

Payment into
court

(3) Notwithstanding subsection (1), where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains a judgment for an amount less than or equal to the amount paid into court, the court shall add on to the judgment

(a) an award of interest calculated in accordance with this Act from the day the cause of action arose to the day of payment into court; and

(b) an award of interest in an amount equal to the actual interest earned on the portion of the money paid to court that is equal to the amount of the judgment from the day of payment into court to the day of judgment.

Discretion
in court

6. Where a court considers it to be just to do so in all the circumstances, it may, with respect to the whole or any part of the amount for which judgment is given,

(a) disallow interest under this Act;

(b) award interest under this Act at a rate other than by reference to the prejudgment interest rate;

(c) award interest under this Act for a period other than that described in section 5.

Exceptions
to awards
of interest

7. No interest shall be awarded under this Act

(a) on that part of a judgment that represents pecuniary loss arising after the day of judgment and that is identified by the court;

(b) on interest awarded under this Act;

(c) on exemplary or punitive damages;

(d) on an award of costs;

(e) where the judgment is given on consent, unless agreed to by the parties;

(f) where there is an agreement between the parties respecting interest or where interest is payable by another rule of law;

(g) on money and interest on money that is borrowed by a party who receives judgment in respect of damages described in subsection 5(2); or

(h) on money that is paid into court and accepted in satisfaction of a claim.

Interest deemed
part of judgment

8. For the purpose of enforcing a judgment, interest added on to the judgment shall be deemed to be included in the judgment.

Regulations

9. The Lieutenant Governor in Council may make regulations respecting the method of determining and publishing prejudgment interest rates.

Transitional

10. This Act does not apply to a cause of action that arises before the coming into force of this Act.

APPENDIX B

Sections 28 and 29 of the *Civil Procedure Act* 1833,
3 & 4 William IV, cap. 42, more commonly known as
Lord Tenterden's Act

XXVIII. And be it further enacted, That upon all Debts or Sums certain, payable at a certain Time or otherwise, the Jury on the Trial of any Issue, or on any Inquisition of Damages, may, if they shall think fit, allow Interest to the Creditor at a Rate not exceeding the current Rate of Interest from the Time when such Debts or Sums certain were payable, if such Debts or Sums be payable by virtue of some written Instrument at a certain Time, or if payable otherwise, then from the Time when Demand of Payment shall have been made in Writing, so as such Demand shall give Notice to the Debtor that Interest will be claimed from the Date of such Demand until the Term of Payment; provided that Interest shall be payable in all Cases in which it is now payable by Law.

XXIX. And be it further enacted, That the Jury on the Trial of any Issue, or on any Inquisition of Damages, may, if they shall think fit, give Damages in the Nature of Interest, over and above the Value of the Goods at the Time of the Conversion or Seizure, in all Actions of Trover or Trespass de bonis asportatis, and over and above the Money recoverable in all Actions on Policies of Assurance made after the passing of this Act.

APPENDIX C

BANK OF CANADA BANK RATE

Source: Bank of Canada, Department of Monetary and Financial Analysis

The Bank Rate, which was set at 2 1/2% in 1935 was changed to:

1 1/2%	February 8, 1944
2%	October 17, 1950
1 1/2%	February 14, 1955
2%	August 5, 1955
2 1/4%	October 12, 1955
2 3/4%	November 18, 1955
3%	April 4, 1956
3 1/4%	August 9, 1956
and 3 1/2%	October 17, 1956

From November 1, 1956 to June 24, 1962 the Bank Rate was 1/4 of 1% above the weekly average tender rate of 91-day treasury bills. The rate was subsequently set at:

6%	June 24, 1962
5 1/2%	September 7, 1962
5%	October 12, 1962
4%	November 13, 1962
3 1/2%	May 6, 1963
4%	August 11, 1963
4 1/4%	November 24, 1964
4 3/4%	December 6, 1965
5 1/4%	March 14, 1966
5%	January 30, 1967
4 1/2%	April 7, 1967
5%	September 27, 1967
6%	November 20, 1967
7%	January 22, 1968
7 1/2%	March 15, 1968
7%	July 2, 1968
6 1/2%	July 29, 1968
6%	September 3, 1968
6 1/2%	December 18, 1968
7%	March 3, 1969
7 1/2%	June 11, 1969

8%	July 16, 1969
7 1/2%	May 12, 1970
7%	June 1, 1970
6 1/2%	September 1, 1970
6%	November 12, 1970
5 3/4%	February 15, 1971
5 1/4%	February 24, 1971
4 3/4%	October 25, 1971
5 1/4%	April 9, 1973
5 3/4%	May 14, 1973
6 1/4%	June 11, 1973
6 3/4%	August 7, 1973
7 1/4%	September 13, 1973
8 1/4%	April 15, 1974
8 3/4%	May 13, 1974
9 1/4%	July 24, 1974
8 3/4%	November 18, 1974
8 1/4%	January 13, 1975
9%	September 3, 1975
9 1/2%	March 8, 1976
9%	November 22, 1976
8 1/2%	December 22, 1976
8%	February 1, 1977
7 1/2%	May 9, 1977
8%	March 9, 1978
8 1/2%	April 4, 1978
9%	July 26, 1978
9 1/2%	September 12, 1978
10 1/4%	October 16, 1978
10 3/4%	November 6, 1978
11 1/4%	January 4, 1979
11 3/4%	July 23, 1979
12 1/4%	September 10, 1979
13%	October 9, 1979
and 14%	October 25, 1979

Since March 13, 1980, the Bank Rate was 1/4 of 1% above the weekly average tender rate of 91-day treasury bills.

APPENDIX D

Interest Rates and Inflation in Canada, 1965-75⁵¹

Year and Quarter	Interest Rates					Average	Inflation Year Over Year % Change in Consumer Price Index	Earning Rate % Excess of Average Annual Interest Rate over Average Annual Inflation
	90 Day Commercial Paper	3 5 Year Government Bonds	10 Year and Over Government Bonds	McLeod Young Reit Industrials	Average			
1965 1	4.43	4.62	5.06	5.50	4.90		2.0	
1965 2	4.81	4.87	5.16	5.64	5.12		2.3	
1965 3	5.22	5.09	5.32	5.83	5.37		2.5	
1965 4	6.09	5.23	5.40	6.05	5.69		2.9	
1965						5.27	2.43	2.84
1966 1	6.07	5.37	5.54	6.22	5.81		3.4	
1966 2	6.28	5.39	5.66	6.30	5.91		3.8	
1966 3	6.40	5.76	5.75	6.83	6.19		3.9	
1966 4	6.63	5.58	5.76	6.83	6.20		3.9	
1966						6.03	3.75	2.28
1967 1	5.39	4.76	5.44	6.65	5.57		3.0	
1967 2	5.54	5.68	5.87	7.07	6.04		3.3	
1967 3	5.95	6.10	6.19	7.43	6.42		4.0	
1967 4	6.57	6.48	6.54	7.59	6.80		3.8	
1967						6.21	3.53	2.88
1968 1	7.39	7.12	6.91	7.93	7.34		4.5	
1968 2	7.20	6.79	6.62	8.05	7.17		4.1	
1968 3	8.19	6.25	6.60	7.82	6.72		3.6	
1968 4	6.65	7.06	7.27	8.18	7.29		4.2	
1968						7.13	4.10	3.03
1969 1	7.04	7.27	7.22	8.43	7.49		3.8	
1969 2	7.82	7.62	7.50	8.89	7.96		4.8	
1969 3	8.43	8.06	7.81	8.91	8.30		4.9	
1969 4	9.17	8.29	8.33	9.29	8.77		4.5	
1969						8.13	4.50	3.63
1970 1	7.89	7.32	7.93	9.24	8.10		4.7	
1970 2	7.31	7.07	8.09	9.24	7.93		3.7	
1970 3	6.68	7.12	7.88	9.19	7.72		3.0	
1970 4	5.58	5.42	6.99	8.83	6.71		2.2	
1970						7.62	3.40	4.22
1971 1	3.53	5.19	6.76	8.37	5.96		1.7	
1971 2	3.98	6.02	7.30	8.52	6.46		2.2	
1971 3	4.99	5.63	6.97	8.32	6.48		3.2	
1971 4	4.32	5.09	6.56	8.24	6.05		4.2	
1971						6.24	2.83	3.41
1972 1	5.15	6.29	7.74	8.24	6.73		4.8	
1972 2	5.16	6.68	7.45	8.34	6.91		4.3	
1972 3	5.01	6.57	7.46	8.46	6.88		4.8	
1972 4	5.15	6.00	7.12	8.15	6.61		5.2	
1972						6.78	4.78	2.01
1973 1	5.24	6.50	7.30	8.22	6.82		5.8	
1973 2	7.40	7.19	7.74	8.40	7.68		7.3	
1973 3	8.95	7.25	7.72	8.62	8.14		8.2	
1973 4	10.25	7.25	7.70	8.81	8.50		9.0	
1973						7.79	7.58	2.1
1974 1	9.20	7.57	8.19	9.26	8.56		9.7	
1974 2	11.70	9.24	9.36	10.45	10.21		10.8	
1974 3	11.04	8.89	9.67	10.99	10.15		11.0	
1974 4	10.25	8.96	8.77	10.72	9.18		12.0	
1974						9.53	10.88	1.35
1975 1	8.86	8.71	8.47	10.15	8.05		11.7	
1975 2	7.25	7.44	8.88	10.57	8.55		10.5	
1975 3	8.94	8.86	9.70	11.40	9.73		10.9	
1975 4	9.34	8.39	9.45	11.06	9.54		10.2	
1975						8.97	10.83	1.86
1976 1	9.99	8.55	9.09	10.82	9.69		9.3	
1976 2	9.20	8.47	9.45	10.74	9.44		8.5	
1976 3	9.47	8.40	9.16	10.33	9.34		6.5	
1976 4	8.16	7.57	8.47	9.83	8.51		5.9	
1976						9.25	7.55	1.70
1977 1	7.77	7.78	8.83	9.88	8.57		6.8	
1977 2	6.99	7.64	8.72	9.63	8.25		7.6	
1977 3	7.25	7.81	8.63	9.55	8.31		8.4	
1977 4	7.23	8.10	8.77	9.71	8.45		9.1	
1977						8.40	7.98	4.2

Average for total period surveyed 1965-1977

51. Adaptation of table in J.E. Pesando, *The Impact of Inflation on Financial Markets in Canada (1977)* 7-8, based on information provided by the Bank of Canada Review.

Excerpted from: Dale Gibson, "Repairing the Law of Damages", (1978) 8 Man. L.J. 637 at 650. See p. 101 for Update.

APPENDIX D UPDATE - INTEREST RATES AND INFLATION IN CANADA

Year and Quarter	90-Day Commercial Paper	Interest Rates			McLeod* Young Weir Industrials	Average	Inflation Year over Year & Change in Consumer Price Index	Earning Rate & Excess of Average Annual Interest Rate over Average Annual Inflation
		3-5 Year Government Bonds	10 Year and over Government Bonds					
1978:1	7.85	8.96	9.17	9.95	8.91	8.8		
1978:2	8.32	8.86	9.23	9.95	9.09	8.9		
1978:3	9.41	8.96	9.15	9.93	9.36	9.3		
1978:4	10.78	9.92	9.68	10.34	10.18	8.6		
1978					9.38	8.90	.48	
1979:1	11.31	9.89	9.91	10.46	10.39	9.1		
1979:2	11.15	9.73	9.73	10.34	10.23	9.3		
1979:3	12.00	10.89	10.38	11.09	11.09	8.7		
1979:4	14.20	11.68	11.32	12.07	12.31	9.5		
1979					11.00	9.15	1.85	
1980:1	15.25	13.86	13.45	13.89	14.11	9.4		
1980:2	11.50	10.48	11.29	12.15	11.35	9.6		
1980:3	10.90	12.86	12.98	13.74	12.62	10.5		
1980:4	17.75	12.47	12.67	13.62	14.12	11.1		
1980					13.05	10.15	2.90	
1981:1	17.00	13.83	13.48	14.41	14.68	12.2		
1981:2	19.20	15.52	15.03	15.93	16.42	12.4		
1981:3								
1981:4								
1981:2					15.55	12.3	3.25	
<u>1965-1981:2 AVERAGE</u>						<u>1.86</u>		

* McLeod Young Weir Industrials Lines B14016 was dropped from Table 20, July 1981 Issue, Bank of Canada Review. The rate for 1981:2 was obtained from the Ottawa Branch of Monetary and Financial Analysis, Bank of Canada.

APPENDIX E

Excerpt from a Statistics Canada publication entitled Your Guide to the Consumer Price Index showing how to convert a point change in the CPI to a percentage figure

Table C
Point Change vs. Percentage change

Consumer Price Index for Canada (1971 = 100)

September 1975	141.5	April 1976	146.8
October 1975	142.8	May 1976	148.0
November 1975	144.1	June 1976	148.7
December 1975	144.3	July 1976	149.3
January 1976	145.1	August 1976	150.0
February 1976	145.6	September 1976	150.7
March 1976	146.2		

Example 1 Price movement from 1971 to Sept. 1976

Point Change = 50.7 points
(150.7 - 100.0 = 50.7 points)

Percentage Change = 50.7%
 $\left(\frac{150.7 - 100.0}{100.0}\right) \times 100 = \frac{50.7}{100.0} \times 100 = 50.7\%$

Example 2 Price movement from Sept. 1975 to Sept. 1976

Point Change = 9.2 points
(150.7 - 141.5 = 9.2 points)

Percentage Change = 6.5%
 $\left(\frac{150.7 - 141.5}{141.5}\right) \times 100 = \frac{9.2}{141.5} \times 100 = 6.5\%$

Example 3 Price movement from Aug. 1976 to Sept. 1976

Point Change = 0.7 points
(150.7 - 150.0 = 0.7 points)

Percentage Change = 0.5%
 $\left(\frac{150.7 - 150.0}{150.0}\right) \times 100 = \frac{0.7}{150.0} \times 100 = 0.5\%$

APPENDIX F

Three examples of the application of loss of use and loss of value compensation to actions based in tort and contract

Causes of action based in contract

Example 1

A and B enter into a contract. B agrees to pay A five thousand dollars (\$5,000) on March 1, 1979 in exchange for certain goods to be supplied. A supplies the goods; B wrongfully withholds payment.

A sues B and claims as damages the five thousand dollars (\$5,000). He also includes in his prayer for relief a claim for interest.

To what amount of compensation is A entitled under the proposed legislation, assuming the date of judgment is June 1, 1981?

ANSWER: Assume the court disallows compensation for loss of use because it decides, for exceptional reasons, that it would be unfair and inequitable to award such compensation. Assume also that the court is satisfied that the principal sum (\$5,000) no longer equals its original purchasing power. Compensation would be calculated as follows:

Loss of value: in March, 1979, CPI = 186.6
 in June, 1981, CPI = 236.8

 point change = 50.2

 percentage change = $\frac{50.2}{186.6} \times 100 = 26.9\%$

26.9% x \$5,000 = \$1,345.12

Total award = \$5,000 + \$1,345.12 = \$6,345.12

Example 2

Assume the same facts as in Example 1 with one exception: here, the court decides to award compensation for loss of use and loss of value. Compensation would be calculated, as follows:

First year of prejudgment period:

loss of value: in March, 1979, CPI = 186.6
in March, 1980, CPI = 204.0

$$\begin{aligned} \text{point change} &= 17.4 \\ \text{percentage change} &= \frac{17.4}{186.6} \times 100 = 9.3\% \end{aligned}$$

loss of use = 3%

loss of use and loss of value = 12.3% (3% + 9.3%)

compensation = 12.3% x \$5,000 = \$615.00

Second year of prejudgment period:

loss of value: in March, 1980, CPI = 204.0
in March, 1981, CPI = 229.4

$$\begin{aligned} \text{point change} &= 25.4 \\ \text{percentage change} &= \frac{25.4}{204.0} \times 100 = 12.4\% \end{aligned}$$

loss of use = 3%

loss of use and loss of value = 15.4% (3% + 12.4%)

compensation = 15.4% x \$5,615 = \$864.71

Third year of prejudgment period:

loss of value: in March, 1981, CPI = 229.4
in June, 1981, CPI = 236.8

$$\begin{aligned} \text{point change} &= 7.4 \\ \text{percentage change} &= \frac{7.4}{229.4} \times 100 = 3.2\% \end{aligned}$$

loss of use: for 1 month $\frac{3\%}{12} = .25\%$

from March, 81 - June, 81 = .25% x 3 = .75%

loss of use and loss of value = 3.95% (.75% + 3.2%)

compensation = 3.95% x \$6,479.61 = \$255.94

Total compensation on \$5,000 = \$1,735.65

Total award: \$5,000 + \$1,735.65 = \$6,735.65

Cause of action based in tort

Example 3

On January 1, 1975, A stops his car at a pedestrian crosswalk to allow a pedestrian to cross. B negligently hits A's car from behind, causing A to suffer a whiplash injury.

A attends a chiropractor's office for a period of 6 weeks, commencing January 5, 1975, and ending February 9 of that year. In total, there are 6 sessions (January 5, 12, 19, 26 and February 2, 9) each costing \$25.00.

A is confined to bed for the first month and is unable to perform household duties. She pays a cleaning lady \$50 per week over the course of 4 weeks (January 5, 12, 19, 26).

A is unable to work for a six week period (January 5 to February 9). She suffers lost earnings of \$1,200 in total. She is usually paid \$400 each pay day through bi-weekly cheques. (January 5, 19 and February 9).

Assume that A is awarded non-pecuniary loss of \$3,000 for pain and suffering. Assume also that the \$3,000 represents present dollar value in that the court has already included an adjustment for inflation in assessing quantum. Her special damages amount to \$1,550 and this is included in her prayer for relief. To what amount of compensation would A be entitled under the proposed legislation assuming the date of judgment is June 1, 1981?

ANSWER:

STEP I: Compensation on \$3,000 general damages

There has been no loss of value on \$3,000. Assume the court awards loss of use. Compensation would be calculated as follows:

Loss of use:

Jan. 1975 - Jan. 1976:	\$3,000 x 3% =	90.00
Jan. 1976 - Jan. 1977:	\$3,090 x 3% =	92.70
Jan. 1977 - Jan. 1978:	\$3,182.70 x 3% =	\$ 95.48
Jan. 1978 - Jan. 1979:	\$3,278.18 x 3% =	98.34
Jan. 1979 - Jan. 1980:	\$3,376.52 x 3% =	101.29
Jan. 1980 - Jan. 1981:	\$3,477.81 x 3% =	104.33
Jan. 1981 - June 1981:	\$3,582.14 x 1 $\frac{1}{4}$ % =	<u>44.77</u>
		<u>\$626.91</u>

STEP 2: Compensation on \$1,550 special damages

Assume court awards loss of use and loss of value on the special damages. Recommendation 31 states that compensation on special damages would be calculated on six month totals commencing from the date loss or damage was first sustained. Compensation would be calculated as follows:

First year of prejudgment period

loss of value: in July, 1975, CPI = 139.8
in July, 1976, CPI = 149.3

$$\begin{aligned} \text{point change} &= 9.5 \\ \text{percentage change} &= \frac{9.5}{139.8} \times 100 = 6.8\% \end{aligned}$$

loss of use = 3%

loss of use and loss of value = 9.8% (6.8% + 3%)

compensation = 9.8% x \$1,550 = \$151.90

Second year of prejudgment period

loss of value: in July, 1976, CPI = 149.3
in July, 1977, CPI = 161.8

$$\begin{aligned} \text{point change} &= 12.5 \\ \text{percentage change} &= \frac{12.5}{149.3} \times 100 = 8.4\% \end{aligned}$$

loss of use = 3%

loss of use and loss of value = 11.4% (8.4% + 3%)

compensation = 11.4% x (1,550 + 151.90) = \$194.01

Third year of prejudgment period

loss of value: in July, 1977, CPI = 161.8
in July, 1978, CPI = 177.7

point change = 15.9
percentage change = $\frac{15.9}{161.8} \times 100 = 9.8\%$

loss of use = 3%

loss of use and loss of value = 12.8% (9.8% + 3%)

compensation = 12.8% x \$1,795.81 = \$242.67

Fourth, fifth, sixth and seventh years of prejudgment period

Following the same method of calculation, compensation would be \$237.38 (\$2,138.58 x 11.1%) for the fourth year; \$311.25 (\$2,375.96 x 13.1%) for the fifth year; \$427.26 (\$2,687.21 x 15.9%) for the sixth year; and \$457.82 (\$3,114.47 x 14.7%) for the final 11 months.

Total award:	General damages	\$3,000.00
	compensation on general	521.28
	special damages	1,550.00
	compensation on special	<u>1,528.87</u>
		<u>\$6,600.15</u>

APPENDIX G

The Consumer Price Index for Canada, All-items (Not Seasonally Adjusted), 1966-1981, 1971 = 100, an excerpt from *The Consumer price index* November 1981, a Statistics Canada publication

Indexes - Indices													
	January	February	March	April	May	June	July	August	September	October	November	December	Annual average
	Janvier	Février	Mars	Avril	Mai	Juin	Juillet	Août	Septembre	Octobre	Novembre	Décembre	Moyenne annuelle
1966	81.9	82.5	82.6	83.1	83.2	83.4	83.7	84.1	84.2	84.3	84.4	84.6	83.5
1967	84.7	84.8	85.0	85.8	85.9	86.4	87.2	87.6	87.4	87.3	87.6	88.1	86.5
1968	88.5	88.6	88.9	89.4	89.4	89.7	90.3	90.5	90.8	91.0	91.4	91.7	90.0
1969	91.9	91.9	92.4	93.4	93.6	94.4	94.8	95.1	94.9	95.1	95.5	95.9	94.1
1970	96.1	96.5	96.6	97.2	97.2	97.4	97.8	97.8	97.6	97.7	97.7	97.3	97.2
1971	97.7	98.1	98.4	99.1	99.5	99.7	100.5	101.2	101.0	101.1	101.5	102.2	100.0
1972	102.5	102.9	103.0	103.6	103.7	103.8	105.1	105.9	106.3	106.4	106.7	107.4	104.8
1973	108.3	108.9	109.2	110.4	111.2	112.2	113.2	114.7	115.4	115.7	116.6	117.2	112.7
1974	118.1	119.3	120.5	121.4	123.4	125.0	125.9	127.1	127.9	129.1	130.5	131.8	125.0
1975	132.4	133.4	134.1	134.8	135.9	137.9	139.8	141.2	141.5	142.8	144.1	144.3	138.5
1976	145.1	145.6	146.2	146.8	148.0	148.7	149.3	150.0	150.7	151.7	152.2	152.7	148.9
1977	154.0	155.4	157.0	157.9	159.2	160.3	161.8	162.5	163.4	165.0	166.1	167.2	160.8
1978	167.8	168.9	170.8	171.2	173.6	175.1	177.7	177.8	177.5	179.3	180.8	181.3	175.2
1979	182.7	184.4	186.6	187.9	189.7	190.6	192.1	192.8	194.5	195.9	197.8	199.0	191.2
1980	200.1	201.8	204.0	205.2	207.6	209.9	211.5	213.5	215.4	217.3	220.0	221.3	210.6
1981	224.1	226.4	229.4	231.1	233.2	236.8	238.9	240.6	242.4	244.8	246.9		