

## Proposed Changes to the Criminal Rate of Interest

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### Amendment to Criminal Rate of Interest

On June 22, 2023, the Government of Canada's Bill C-47, the *Budget Implementation Act, 2023, No. 1* (Bill C-47) received royal assent.<sup>1</sup> Bill C-47 proposes to, among other things, lower the current criminal rate of interest set out in Section 347 of the *Criminal Code* (the Code) from an effective annual rate (EAR) that exceeds 60% to an annual percentage rate (APR) that exceeds 35%.<sup>2</sup>

### Objective

The federal government's objective in making changes to the criminal rate of interest is to combat predatory lending practices and protect consumers to avoid Canadians trapped in a "cycle of debt."<sup>3</sup> However, because "credit advanced" and "interest" have been defined broadly in Canadian case law to encompass most charges and expenses,<sup>4</sup> the initial concern was that the proposed amendments to Section 347 of the Code were overly broad and could impact many commercial transactions with a lending component.

Bill C-47 provides that the Governor in Council has the authority to exempt certain prescribed agreements by regulation.<sup>5</sup>

### Proposed Exemptions

On December 23, 2023, the federal government proposed *Criminal Interest Rate Regulations* (the Regulations),<sup>6</sup> together with a *Regulatory Impact Analysis Statement* (Regulatory Analysis).<sup>7</sup> The proposed Regulations would exempt lending practices that fall outside the scope of the government's policy intention to address predatory lending from the criminal rate of interest.

The federal government identified two categories of loans that fall outside the objective and should therefore be exempt from the criminal rate of interest provisions: commercial loans and pawn loans. The proposed Regulations will also impose a federal limit on the cost of borrowing for payday loans across Canada.

A commercial loan is one where the borrower is not a natural person, and the agreement or arrangement is entered into for "business or commercial purposes."<sup>8</sup> Per the Regulatory Analysis, these transactions

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represent a level of sophistication that does not require protection and which do not affect economically vulnerable Canadians, and the proposed exemption will “avoid contractual frictions and ensure healthy and productive investments in areas of venture capital and private equity” and “present benefits to some limited forms of sophisticated transactions, such as venture capital financing and automotive floor financing.”<sup>9</sup> The proposed Regulations provide that Section 347 of the Code will not apply to commercial loans if one of the following situations apply:<sup>10</sup>

1. The amount of credit advanced is greater than \$10,000 and less than or equal to \$500,000 and the APR does not exceed 48%. Loans between \$10,000 and \$500,000 will remain subject to the current criminal rate of interest regime, although the “criminal rate” threshold will be adjusted to 48% APR. The Regulatory Analysis indicates that “this effectively ensures that some business borrowers, particularly small business borrowers, continue to benefit from a certain level of criminal protection, while being able to access credit that would not be provided at an interest rate of less than 35% APR”<sup>11</sup>; or
2. The amount of credit advanced is greater than \$500,000, which would be entirely exempt from the criminal rate of interest regime. This is a significant departure from the current legislation, under which non-payday loans (including those greater than \$500,000) are subject to the criminal rate of interest.

A commercial loan in an amount less than \$10,000 will be subject to the new lower criminal interest rate of 35% APR.

## Coming into Force

The sections of Bill C-47 that address the criminal rate of interest will come into force on a date fixed by order of the Governor in Council.<sup>12</sup>

The proposed Regulations will come into force three months following the publication of the final Regulations in the *Canada Gazette*. The three months are intended to allow lenders to adjust their operations to ensure compliance with the new provisions.<sup>13</sup>

In addition, Bill C-47 includes transitional provisions that will grandfather existing agreements or arrangements. Existing loans will continue to be governed by the prior criminal interest rate. This means that the new criminal rate of interest will only apply to agreements or arrangements entered into after the day on which the sections of Bill C-47 that address the criminal rate of interest come into force (unless they are exempt under the Regulations)<sup>14</sup>

The Government of Canada has invited comments on the proposed Regulations for 30 days (until the end of the day on January 22, 2024).<sup>15</sup>

## How Will this Affect the Canadian Market?

Typically, Canadian credit agreements or arrangements contain provisions relating to Section 347 of the Code to ensure that the rate of interest does not exceed the criminal rate of interest. Once the Regulations come into force and effect, the use of such provisions for loans over \$500,000 may no longer be required. Additionally, eliminating the criminal interest rate for loans over \$500,000 may make Canada a more desirable jurisdiction for credit agreements and arrangements exceeding \$500,000.

The Cassels Banking and Specialty Finance group will continue to monitor developments. If you have any questions about the sections of Bill C-47 that address the criminal rate of interest and the proposed Regulations and how it may impact your business, please reach out to any member of our team.

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<sup>1</sup> Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1<sup>st</sup> Sess, 44<sup>th</sup> Parl, 2023 (as assented to June 22, 2023).

<sup>2</sup> Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1<sup>st</sup> Sess, 44<sup>th</sup> Parl, 2023 (as assented to June 22, 2023), section 610.

<sup>3</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>4</sup> See *Garland v. Consumers' Gas Co.* for an interpretation of "interest" and *Hybrid Financial Ltd. v. Flow Capital*, a recent case reaffirming the broad interpretation of "interest."

<sup>5</sup> Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1<sup>st</sup> Sess, 44<sup>th</sup> Parl, 2023 (as assented to June 22, 2023), section 611.

<sup>6</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>7</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>8</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>9</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>10</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>11</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>12</sup> Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1<sup>st</sup> Sess, 44<sup>th</sup> Parl, 2023 (as assented to June 22, 2023), section 616.

<sup>13</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*

<sup>14</sup> Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1<sup>st</sup> Sess, 44<sup>th</sup> Parl, 2023 (as assented to June 22, 2023), section 614.

<sup>15</sup> *Canada Gazette, Part I, Volume 157, Number 51: Criminal Interest Rate Regulations.*