CONSTITUTIONAL LAW—DIVISION OF POWERS—INTEREST—REGULATION OF CONTRACTS

The recent case of *Attorney-General for Ontario* v. *Barfried Enterprises Ltd.*[1] has raised an interesting question as to the constitutional validity of the Ontario Unconscionable Transactions Relief Act.[2] In a majority judgment, the Supreme Court of Canada upheld the validity of the legislation on the ground that it related to contracts within the province and did not encroach upon the field of interest specifically assigned to the Dominion under section 91(19) of the British North America Act, 1867.

The relevant provisions of the Act are as follows:

1. In this Act,
   (a) 'cost of a loan' means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements made to a registrar of deeds, a master or local master of titles, a clerk of a county or district court, a sheriff or a treasurer of a municipality; . . .
   (e) 'money lent' includes money advanced on account of any person in any transaction that, whatever its form may be, is substantially one of money lending or securing the repayment of money so advanced and includes and has always included a mortgage within the meaning of The Mortgages Act.
2. Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,
   (a) re-open the transaction and take an account between the creditor and the debtor;
   (b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
   (c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;
   (d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

In this case a mortgage was entered into between R. D. Sampson as mortgagor and Barfried Enterprises Limited as mortgagees. Sampson received from Barfried Enterprises the sum of $1,432.50 representing $1,500 principal, less a commission of $67.50 calculated at the rate of 3% on $2,250. The latter amount was paid to Barfried Enterprises, the difference of $750 representing a bonus which Sampson had agreed to pay in a signed application for the loan in question. Pursuant to an application under The Unconscionable Transactions Relief Act,[3] Clark Co. Ct. J. of the County Court of the County of Wellington set aside the mortgage in part and revised it so that the principal of the mortgage would be $1,500 instead of $2,250 with interest at 11% *per annum*. Barfried Enterprises appealed to the Ontario Court of Appeal where the constitutionality of the enactment was first raised. The Court

1 (1963) 42 D.L.R. (2d) 137; [1963] S.C.R. 570.
2 R.S.O. 1960, c. 410.
3 *Ibid.*

unanimously held that the Act was *ultra vires* of the Legislature of the Province of Ontario, Schroeder, J.A., saying for the Court:

> The statute is applicable to only one kind of contract—a money-lending contract. Its essential purpose and object is to provide a remedy to a borrower to enable him to have the terms of such a contract modified. The end result of an application to the Court in accordance with its provisions, if the borrower is entitled to succeed, must be that the interest in the broad sense of that term, payable as compensation for the loan, will be reduced. It matters not, in my opinion, whether this result is achieved through the intervention of a Court order or through the operation of a provision in the Act itself fixing a stated rate or scale of interest. In either case it is unquestionably legislation in relation to interest under the pith and substance rule, and, in my opinion, clearly invalid as an infringement of the exclusive power committed to Parliament. Moreover, it is in direct conflict with the provisions of s. 2 of the Interest Act, R.S.C. 1952, c. 156. Accordingly, it is beyond the Province's legislative competence to enact.[4]

The order of the County Court Judge was therefore quashed. The Attorney-General for Ontario, as appellant, contended that the legislation was within the jurisdiction of the Province to enact, under heads 13 and 16 of section 92 of the British North America Act, as relating to "Property and Civil Rights in the Province" and to "Matters of a merely local or private nature in the Province". The second ground of appeal was that the Act affected only incidentally any matter coming within classes of subjects assigned to the exclusive legislative authority of the Parliament of Canada and there was no conflict or repugnancy between the provisions of the Act and any validly enacted Federal legislation.

In the Supreme Court of Canada Judson J. (Taschereau C.J.C., Fauteux, Hall, Cartwright, JJ. concurring) accepted both contentions of the Attorney-General for Ontario and held the Act was valid provincial legislation. His Lordship stated that an essential characteristic of interest is that it accrues from day to day and therefore a bonus is not interest. He stated:[5]

> In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, . . .
>
> Under the Ontario statute an exercise of judicial power necessarily involves the nullity or setting aside of the contract and the substitution of a new contractual obligation based upon what the court deems it reasonable to write within the statutory limitations. Legislation such as this should not be characterized as legislation in relation to interest. I would hold that it is validly enacted, that no question of conflict arises.

However, Martland J., with whom Ritchie J. concurred, was of the opinion that the legislation was *ultra vires* of the Ontario Legislature, He states:[5a]

> Whether or not this contention [i.e. that the Act related to Property and Civil Rights of the Province] could be maintained successfully, in the absence of legislation by the Parliament of Canada in the same field, it is unnecessary for me to consider, since I have reached the conclusion that the provisions of the Act under consideration come into conflict directly with the provisions of s. 2 of the Interest Act, R.S.C. 1952, c. 156, which provides as follows:
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> '2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow or exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon.'

The distribution of legislative powers between the Dominion Parliament and the provincial legislatures under sections 91 and 92 of the

4 (1962) 35 D.L.R. 449, 463; [1962] O.R. 1103, 1117.
5 *Supra* n. 1, at 147 (D.L.R.), 577 (S.C.R.).
5a *id.* at 141 (D.L.R.), 582 (S.C.R.)

British North America Act has led to the necessity of establishing certain constitutional principles to determine the validity of particular enactments. Whenever a court is faced with legislation which seems to touch or infringe upon some parts of both sections 91 and 92 of the British North America Act, established authorities command the court first to examine the legislation and arrive at a conclusion under what head of either section it really falls in pith and substance. As Viscount Caldecote, L.C. stated in *Lethbridge Northern Irrigation District* v. *Independant Order of Foresters*:[6]

> . . . an inquiry must first be made as to the 'true nature and character of the enactments in question' (*Citizens Insurance Co. of Canada* v. *Parsons*[7]), or, to use Lord Watson's words in delivering the judgment of the Judicial Committee in *Union Colliery* v. *Bryden*,[8] as to their 'pith and substance'.

It is necessary to have a pith and substance rule because the matters distributed under sections 91 and 92 are not mutually exclusive and there is an overlapping in the distribution under these sections.[9] In the instant case the overlapping occurs between section 91(19) which assigns authority to the Parliament of Canada to legislate with respect to interest and section 92(13) which assigns to the Provincial legislatures legislative authority over property and civil rights in the Province. The overlapping of powers was recognized in *A.-G. Sask.* v. *A.-G. Can.*[10] (hereafter referred to as the *Farm Security* case) where Kellock J. in the Supreme Court of Canada stated:[11]

> While the matter of conditions in contracts within the Province is no doubt a matter for the provincial Legislature: *Citizens Ins. Co.* v. *Parsons* [(1881)], 7 App. Cas. 96; . . . contractual interest is the subject-matter of exclusive Dominion legislative power under s. 91(19) of the B.N.A. Act; . . .

This judgment was affirmed on appeal to the Privy Council, where Viscount Simon stated:[12]

> Contractual rights are, generally speaking, one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to 'interest', the argument that the provincial legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject-matter of 'interest' to the Dominion legislature under head 19 of s. 91 of the British North America Act.

Other leading cases that indicate that the provincial legislation must in pith and substance be founded on one of the heads under section 92 are *A.-G. Alta.* v. *A.-G. Can.*,[13] *Ladore* v. *Bennett*,[14] *and A.-G. Can.* v. *A.-G. Que.*[15] The courts in each of these cases found that the legislation in question was not in pith and substance within provincial authority; they

6 (P.C. (Alta.)) [1940] A.C. 513, 529.
7 (P.C. (Can.) 1881) 7 App.Cas. 96.
8 (P.C. (B.C.)) [1899] A.C. 580.
9 Another purpose of the pith and substance rule is to see through a disguise which may be set up by the legislature. The rule is used to detect what is colourable and so to expose a subterfuge. In *Madden* v. *Nelson and Fort Sheppard Ry.* [1899] A.C. 626 the rule as to colourability was stated at page 627:
> ". . . it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly . . ."
The substance and not the form of the enactment in question must be regarded. A colourable device was discovered in the *Farm Security* case, n. 10 *infra*. That case dealt with the same two sub-sections or heads as we are here concerned with and Viscount Simon pointed out at page 124:
> "If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest."
10 [1949] A.C. 110.
11 [1947] S.C.R. 394, 418.
12 *Supra* n. 10, at 123.
13 (P.C. (Can.)) [1939] A.C. 117.
14 (P.C. (Ont.)) [1939] A.C. 468.
15 (P.C. (Que.)) [1947] A.C. 33.

were not therefore required to proceed to the next step of the analysis: whether there was a conflict of legislation in an area common to both the Dominion and the Province. That step involves the "occupied field" doctrine.

What then is the pith and substance, the true nature and effect of The Unconscionable Transactions Act? With what does it deal, what is its purpose and what is its effect? Does the statute deal primarily with interest? This is the question that the Privy Council refused to answer in the *Farm Security* case: [16]

> Their Lordships are not called on to discuss, and do not pronounce on, a case where a provincial enactment renders null and void the whole contract to repay the money with interest.

Clearly, in the *Barfried* case, if interest could be defined as the cost of a loan, then this Act relates to interest. There is considerable support for this argument. Unless a restricted interpretation is to be given to "interest" in section 91(19) instead of its ordinary meaning, it would appear that the pith and substance of the legislation here in question relates to interest. In the *Lethbridge* case[17] Viscount Caldecote L.C. noted:

> Their Lordships are of opinion that, so far from supporting the argument for a restricted interpretation of head 19 of s. 91 in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt any exhaustive definition of 'interest'. The word itself is in common use and is well understood.

The majority of the Supreme Court of Canada in the *Barfried* case found that the statute in question was neither in relation to, nor incidentally affecting, interest. They based this conclusion on the ground that the bonus in question in this case was in no way to be considered interest. The case of *Singer* v. *Goldhar* is authority to the contrary: [18]

> where in a mortgage no interest as such is stipulated for, but the mortgage provides for the repayment of a sum as principal greater than the amount advanced, the difference between the principal stated in the mortgage and the amount advanced, usually called a bonus, is interest within the meaning of the Interest Act, R.S.C. 1906, c. 120.

The majority of the Supreme Court of Canada held in the *Barfried* case that *London Loan & Savings Co.* v. *Meagher*[19] had overruled the *Singer* case. However, it is submitted that the *Meagher* case only limited the authority of the *Singer* case to a proposition involving a mortgage that falls within the description of the first part of section 6 of the Interest Act, so far as the *rate* of interest that must be indicated in the mortgage is concerned. The decision that a bonus is to be considered interest has not, it is submitted, been overruled. This was recognized by Kellock J. in *Asconi Building Corp.* v. *Vocisano,* where he stated:

> . . . and it therefore followed that no part of the $3,000 bonus, *even though it were regarded as interest* in the sense of compensation for money lent . . .[20]
> . . . the decision [*Singer* v. *Goldhar*] could have been put on the ground that there was no liability upon the mortgagor beyond the amount actually advanced. This, however, was not the ground of the decision but that the difference between the amount advanced and the face amount of the mortgage was interest and could not be recovered by the statute. In *Meagher's* case the court was not called upon to decide a case such as was involved in *Singer's* case, as in the latter

16 *Supra,* n. 10, per Viscount Simon at 126.
17 *Supra* n. 6 at 531.
18 (Ont. C.A.) [1924] 2 D.L.R. 141.
19 [1930] S.C.R. 378.
20 [1947] S.C.R. 358, 372.

> the liability of the mortgagor for bonus could not have been placed upon any basis outside the terms of the mortgage itself. I think therefore that the statement in the judgment with respect to the mortgage in *Singer's* case must be considered as *obiter*.[21] [emphasis added]

A valuable test to determine pith and substance was laid down in the *Alberta Bank Taxation* case,[21a] where the particularity or selectivity of the legislation indicated that it related to banks and banking rather than direct taxation in the Province. Here it should be noted that the statute is applicable to only one kind of contract—a money-lending contract. The essential purpose and effect is to provide a remedy where the cost of the loan is unconscionable. Here the label "bonus" was important but is not the pith and substance of the legislation in relation to interest in its ordinary meaning? The court must look beneath the label to determine the true essence of the legislation. To the argument that the essence of the legislation is contracts in the Province which are unconscionable, one could answer that that which makes the contracts unconscionable is the interest. The colourable devices, whether used in the legislation itself or in the terms of the contracts that the legislation refers to, *must* be exposed. If this is done it becomes obvious that the legislation *relates to* interest taken in its broad meaning and common usage.

The Attorney-General for Ontario argued in the *Barfried* case that the legislation, in pith and substance, was legislation in relation to contracts within the Province. If this was so, the legislation was *prima facie* valid even though it impinged on matters falling within section 91, but subject to a very important qualification: if provincial legislation thus *prima facie* valid is found to be in actual conflict with legislation of the Dominion which deals in pith and substance with a head under section 91, and is therefore valid, then the provincial legislation falls after all. This is the "occupied field" doctrine. Some matters may have a double aspect and by reason thereof occupy the same field as other validly enacted legislation. "The same measures may flow from distinct powers".[22] That subjects distributed under sections 91 and 92 may have a double aspect was early realized in *Hodge* v. *The Queen*:[23]

> . . . subjects which in one aspect and for one purpose fall within s. 92 may in another aspect and for another purpose fall within s. 91.

Lord Tomlin stated in *A.-G. Can.* v. *A.-G. B.C.*:[24]

> There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

The *Farm Security* case is directly on point:

> It is therefore clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest.[25]
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> But provincial legislation which alters a stipulated rate of interest would conflict with s. 2 of the Interest Act.[26]

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21 *id.* at 376.

21a *Supra* n. 13.

22 Marshall C.J. in *Gibbons* v. *Ogden* (S.C. U.S.A. 1824) 9 Wheat. 1, 204.

23 (1883) 9 App.Cas. 96, 130.

24 (P.C. (Can.)) [1930] A.C. 111, 118.

25 *Supra* n. 7, at 124.

26 id. at 125.

The Privy Council held in the *Farm Security* case that the legislation was in relation to interest. But as is shown above it also held that the field of interest was occupied by Federal legislation and a provincial statute was *ultra vires* if it attempted to change the interest provided in a contract.

An apparent authority on this point, *Ladore* v. *Bennett*[27] must be disregarded as the question of conflict with section 2 of the Interest Act was not there considered even though the Privy Council recognized that interest was incidentally affected. *Day* v. *Victoria*[28] may be omitted from consideration as well since it was based almost solely on *Ladore* v. *Bennett*. It is submitted that if section 2 of the Interest Act had been argued before or considered by their Lordships in the *Ladore* case, then the decision might well have gone the other way.

It is submitted that the matters dealt with by The Unconscionable Transactions Relief Act incidentally affect a field of law occupied by Federal legislation and in conflict with it. In the *Asconi* case Rand J. states:[29]

> "Now s. 6 of the Interest Act is not designed to protect a borrower against agreeing to pay any particular rate or amount of interest; in fact, under section 2 of the Act there is *complete freedom of action in a contract for interest*. The object of section 6 is quite different." [emphasis added]

The nature and effect of section 2 of the Interest Act is clearly to preserve the right of freedom of contract with regard to interest. Not only may the creditor stipulate for any amount of interest, but he is given the right and power to exact the same. The legislation as revealed in the *Barfried* case affects interest; it provides for annulment of the contract where the cost of the loan is excessive even though it is agreed upon by the parties. The terms "bonus", "dues", "commission", and "premium" are used to define "cost of the loan" in the impugned legislation but clearly come within the meaning of the word "interest" as used in section 2 of the Interest Act. This is well illustrated by the terms of the order here appealed from. The chambers Judge had substituted, under the powers granted by the Act, the new interest rate of 11% *per annum* on a principal of $1,500. Surely this cannot but be in conflict with section 2 of the Interest Act: "any person may . . . exact . . . any rate of interest or discount that is agreed upon".

One is irresistably led to the conclusion that, even if the legislation here in question is in pith and substance relating to contracts in the Province, it incidentally affects interest. As the field of interest has been occupied by the Dominion, the provisions of the Ontario Unconscionable Transactions Relief Act are in conflict with this valid Dominion legislation and appear to be invalid.

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27 *Supra* n. 14.
28 (B.C. C.A.) [1938] 4 D.L.R. 345.
29 *Supra* at 369.