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Backgrounder

LRC 90—Report on the Court Order Interest Act

Date: January 1987

The *Court Order Interest Act* requires courts in this province to add an amount of interest to every judgment for money. The rationale is to compensate the successful plaintiff for being deprived of its money for the period from which the claim arose until the judgment is finally rendered. The Act was enacted, primarily in response to a previous Law Reform Commission report, in the early 1970s. Since that time, developments in civil litigation and other event had largely overtaken the legislation. This report examines ways to reform the *Court Order Interest Act* in response to these developments.

The report begins by providing a brief overview of the *Court Order Interest Act* and an explanation as to why the time is now ripe for a re-examination of the Act. As a large number of changes are proposed a recommendation is made at the outset that the existing Act should be repealed and replaced with new legislation.

The first fundamental question addressed is whether the court should have discretion to withhold interest. Under the existing Act, there is no discretion to refuse prejudgment interest whereas some discretion does exist in other Canadian provinces. A number of arguments for having some form of discretion, such as unnecessary delay on the part of the claimant, are examined but the report takes the view that introducing discretion would result in uncertainty, confusion and complicated litigation. As such, it does not believe that courts should be given a general discretion.

The next issue looked at is the rate of interest. In British Columbia, the court has a wide discretion to set the rate at which prejudgment interest is to be paid, subject only to a floor of 5% per annum where as in other jurisdictions there is sometimes a maximum rate payable. The report reviews the case law dealing with the discretion to fix the interest rate and comes to the conclusion that the broad discretion should be abolished in favour of a fixed, conventional rate. This conclusion raises further questions as to whether there should be more than one rate, whether the rate should fluctuate, how it should be fixed and whether the interest should be simple or compound. The report considers these questions and recommends that the rate should be based on the prime-lending rate charged by banks on loans to its most creditworthy borrowers, and determined monthly. It also recommends

that interest should be compounded to reflect more accurately the operation of the marketplace.

The existing Act requires that interest on all claims, except for what are known as special damages, be calculated from the date on which the cause of action arose to the date of the court order pronouncing judgment. This rule has not been universally adopted and in many jurisdictions interest runs from some later point in time. The jurisprudence relating to the timing aspect is reviewed particularly with reference to those arguments advocating a later date but ultimately the report comes down in favour of preserving the status quo.

One of the more complex aspects involved with calculating prejudgment interest relates to the apportionment of pecuniary losses arising before and after judgment. To award prejudgment interest on losses arising after the date of judgment is inconsistent with the idea that a claimant be paid interest on losses which should have been paid to them prior to a judgment. The *Court Order Interest Act* adopts this view in part by stipulating that no prejudgment interest is to be paid on that part of an order representing pecuniary loss arising after the date of judgment. The Act does not however impose a similar restriction for non-pecuniary losses. The report examines some of the practices and difficulties faced by the courts in apportioning and allocating pecuniary losses before and after judgment but reaches the conclusion that there is no requirement for any major changes to the existing legislation. It recognizes however that there are some situations in which it is extremely difficult to apportion and allocate pecuniary losses particularly for a jury and recommends that judges have a greater role in assisting juries in this regard. It also suggests a set of presumptions that should be applied where it is impossible on the facts to apportion and allocate pecuniary losses.

The report also examines the issue of over-compensation for non-pecuniary losses where a claimant receives damages that are adjusted for inflation to the date of trial as well as interest on these damages from the date the cause of action arose. Two options for reform are considered. First, no prejudgment interest should be awarded on non-pecuniary losses. Second, an award of only nominal interest could be made on the past component of non-pecuniary loss to reflect the fact that the claimant has been deprived of its use. The report prefers the second option.

The mandatory addition of prejudgment interest to a pecuniary judgment removes the incentive that a defendant might have to delay a claim. It some cases it may even encourage a defendant to explore options for compromise through payments into court and offers to settle. Such payments raise several issues in relation to prejudgment interest, which are discussed in the report and recommendations made.

One of the most far-reaching changes advocated in the report relates to the procedure for calculating judgment interest. The report recognizes that its proposals would result in a calculation likely to overwhelm all but the most mathematically sophisticated. As a solution it puts forward a set of tables of pre-calculated multipliers which maybe used to ascertain the dollar value of a claim at the date of trial and at anytime after the date of judgment, inclusive of judgment interest. Examples are included which illustrate the manner in which

the tables can be used in a number of cases There is a also a chapter devoted to how the multiplier scheme would operate where interim or part payments have been made by a defendant. There is a review of how these payments are dealt with under the existing Act together with an explanation of how they would operate in the context of the multiplier scheme.

A number of other specific issues relating to the application of the Act are also considered. The Act only applies to a pecuniary judgment and this has raised questions as to what type of awards do or do not attract interest. What about certain types of declaratory orders or orders for costs, for example? The report also notes the ambiguity in the Act over who can award prejudgment interest. One interpretation of the legislation suggests that only the Supreme Court of British Columbia can make an award. It is recommended that the legislation should make it clear that any trial court also has authority. The report also touches on the issue of post judgment interest, in anticipation of it being brought within the jurisdiction of the province rather than being a federal matter. It recommends that post-judgment interest should be levied at the same rate and compounded in the same manner as prejudgment interest.

The last issue raised in the report concerns the transition from the existing law to the proposed new regime. It recommends that the new Act should apply to all existing claims that have not yet received judgment.

Further Developments

The report's recommendations have not been implemented by legislation.