

**SUPREME COURT OF CANADA**

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| **Citation:** Krayzel Corp. *v.* Equitable Trust Co., 2016 SCC 18, [2016] 1 S.C.R. 273 | **Appeal heard:** November 12, 2015  **Judgment rendered:** May 6, 2016  **Docket:** 36123 |

Between:

**Krayzel Corporation**

Appellant

and

**The Equitable Trust Company**

**(now continued as Equitable Bank)**

Respondent

**And Between:**

**Lougheed Block Inc., Neil John Richardson,**

**Hugh Daryl Richardson and Heritage Property Corporation**

Appellants

and

**The Equitable Trust Company**

**(now continued as Equitable Bank)**

Respondent

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 38)  **Dissenting Reasons:**  (paras. 39 to 61) | Brown J. (McLachlin C.J. and Cromwell, Karakatsanis, Wagner and Gascon JJ. concurring)  Côté J. (Abella and Moldaver JJ. concurring) |

Krayzel Corp. *v.* Equitable Trust Co., 2016 SCC 18, [2016] 1 S.C.R. 273

Krayzel Corporation Appellant

v.

The Equitable Trust Company

(now continued as Equitable Bank) Respondent

‑ and ‑

Lougheed Block Inc.,

Neil John Richardson,

Hugh Daryl Richardson and

Heritage Property Corporation Appellants

v.

The Equitable Trust Company

(now continued as Equitable Bank) Respondent

**Indexed as:**Krayzel Corp. ***v.*** Equitable Trust Co.

2016 SCC 18

File No.: 36123.

2015: November 12; 2016: May 6.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for alberta

*Mortgages — Interest — Rate of interest — Payments in arrears — Mortgage terms providing for discount — Legislation precluding mortgagee from imposing terms that have effect of charging higher rate of interest on money in arrears than that charged on principal money not in arrears — Whether legislation offended by terms of mortgage agreement imposing an “interest rate” that takes effect only where mortgagor falls into default by failing to make prescribed payments at lower “pay rate” of interest or by failing to pay out loan upon maturity — Whether there is distinction between (1) terms imposing, by way of penalty, a higher rate in event of default, and (2) terms reserving, by way of discount, a lower rate in event of no default — Interest Act, R.S.C. 1985, c. I‑15, ss. 2, 8.*

The mortgagor Lougheed Block Inc. (“Lougheed”) owned an office building and granted a mortgage to Equitable Trust, to secure a loan of $27 million. The prescribed interest rate was agreed at the prime interest rate plus 2.875 percent *per annum*. Lougheed was unable to pay out the mortgage when it matured on June 30, 2008. Equitable Trust agreed to extend the mortgage term by seven months. The resulting agreement (the “First Renewal Agreement”) was made effective August 1, 2008 and carried a *per annum* interest rate of the prime interest rate plus 3.125 percent over the first six months and then 25 percent over the seventh month.

When the First Renewal Agreement matured on March 1, 2009, Lougheed again failed to pay out. On April 28, 2009, it entered into a second mortgage amending agreement with Equitable Trust (the “Second Renewal Agreement”), made effective February 1, 2009 (that is, retroactive to a month prior to the expiration of the First Renewal Agreement). The Second Renewal Agreement provided the following: a *per annum* “interest rate” on the loan of 25 percent; Lougheed was required to make monthly interest payments at the “pay rate” of either 7.5 percent or at the prime interest rate plus 5.25 percent (whichever was greater); the difference between the amount payable at the stated interest rate of 25 percent and the amount payable by Lougheed at the lower rate would accrue to the loan; and if there were no default by Lougheed, the accrued interest would be forgiven.

On May 15, 2009, Lougheed defaulted and Equitable Trust demanded repayment of the loan at the stated rate of 25 percent. The master of the Court of Queen’s Bench found both renewal agreements offended s. 8 of the *Interest Act*. The chambers judge of the same court reversed the master’s decision, finding that both renewals complied with s. 8. The Court of Appeal was unanimous in finding that the First Renewal Agreement did not offend s. 8. A majority agreed with the chambers judge that the Second Renewal Agreement also complied with s. 8.

Held (Abella, Moldaver and Côté JJ. dissenting): The appeal should be allowed.

*Per* McLachlin C.J. and Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ.: Section 8 of the Act identifies three classes of charges — a fine, a penalty or a rate of interest — that shall not be stipulated for, taken, reserved or exacted, in a mortgage agreement, if the effectof doing so imposes a higher charge on arrears than that imposed on principal money not in arrears. Section 2 of the Act preserves a general right of freedom to contract for any rate of interest or discount, with the *caveat* that such freedom is subject to what is otherwise provided for by this Act.

The ordinary sense of the words that Parliament chose to include in s. 8, read together with s. 2 and considered in light of the Act’s objects, supports the conclusion that s. 8 applies both to discounts (incentives for performance) as well as penalties for non‑performance whenever their effect is to increase the charge on the arrears beyond the rate of interest payable on principal money not in arrears. By directing the inquiry to the effect of the impugned mortgage term, Parliament clearly intended that mortgage terms guised as a “bonus”, “discount” or “benefit” would not as such comply with s. 8. Substance, not form, is to prevail. What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended.

This appeal can be disposed of by considering the Second Renewal Agreement alone, since its operation was made retroactive to the date (February 1, 2009) on which the rate increase under the First Renewal Agreement took effect. It is clear however that an interest rate increase triggered by the mere passage of time (and not by default), such as that imposed under the First Renewal Agreement, does not offend s. 8.

With respect to the Second Renewal Agreement, its effect is to reserve a higher charge on arrears (25 percent) than that imposed on principal money not in arrears (7.5 percent, or the prime interest rate plus 5.25 percent). The labelling of one charge as an “interest rate” and the other as a “pay rate” is of no consequence, given s. 8’s explicit concern for substance over form. It follows that the 25 percent *per annum* rate of interest set by the Second Renewal Agreement is void. The interest rate in force under the Second Renewal Agreement as of February 1, 2009 shall be set at the higher of 7.5 percent and the prime interest rate plus 5.25 percent.

*Per* Abella, Moldaver and Côté JJ. (dissenting): The provisions of the Second Renewal Agreement are clear. The “rate of interest payable on principal money not in arrears” was set at 25 percent throughout the entire term of the agreement, and was to be applied consistently to both principal money not in arrears and principal money or interest in arrears. Interest charges were to be paid each month through actual disbursements and additional financing from the lender. In other words, interest charges calculated on the basis of the 25 percent rate were to be paid monthly, and not simply “taken, reserved or exacted” in the event of default. As a result, the Second Renewal Agreement cannot be said to have had the “effect” of increasing the charge on arrears, which means that s. 8 is not engaged.

Alternatively, the appeal could be dismissed on the basis that s. 8 of the *Interest Act* does not prohibit forgiving discounts — that is, a discount which provides the borrower with some relief from a rate of interest that is chargeable under an agreement, as is the case for the Second Renewal Agreement.

Section 8 sets out an exception to the foundational principle of freedom of contract by prohibiting increased charges on arrears. However, it does not expressly prohibit discounts. The absence of the term “discount” from s. 8 — and its corresponding presence in s. 2 — must inform the Court’s interpretation. Moreover, given that s. 8 establishes an exception to the general rule that discounts are permitted, it must be read narrowly and limited to what is necessary to fulfill its purpose. Not all discounts, viewed in their commercial context, will undermine the intended protection for struggling debtors. “Relieving” or “forgiving” interest rate discounts will generally make it easier for struggling mortgage debtors to meet their payment obligations. If s. 8 is interpreted as prohibiting discounts of this nature, lenders could in the future be discouraged from relieving the interest burden on struggling debtors, a disturbing irony given the purpose for which s. 8 was enacted. The British Columbia Court of Appeal concluded that such a discount does not offend s. 8 in *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* (1987), 15 B.C.L.R. (2d) 376, a decision the majority agrees was correctly decided.

In the instant case, the Second Renewal Agreement, viewed in light of the circumstances in which it was agreed upon, provided Lougheed with a less onerous path to fulfill its payment obligations that were then due under the First Renewal Agreement. Holding that the 25 percent interest rate provided for in the Second Renewal Agreement is invalid would not give effect to Parliament’s protective purpose; rather, it would reward Lougheed with an unmerited windfall, while Equitable Trust would be denied the interest charges due to it under its agreement even though it has not benefited from prompt payment.

**Cases Cited**

By Brown J.

**Distinguished:** *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* (1987), 15 B.C.L.R. (2d) 376; **referred to:** *Re Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce* (1981), 32 O.R. (2d) 183; *Dillingham Construction Ltd. v. Patrician Land Corp.*(1985), 37 Alta. L.R. (2d) 193; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610; *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685; *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 270 D.L.R. (4th) 717; *Thompson v. Hudson* (1869), L.R. 4 H.L. 1; *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108; *Immeubles Fournier Inc. v. Construction St‑Hilaire Ltée*, [1975] 2 S.C.R. 2; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974; *Beauchamp v. Timberland Investments Ltd.* (1983), 44 O.R. (2d) 512; *TD Trust Co. v. Guinness* (1995), 12 B.C.L.R. (3d) 102; *Langley Lo‑Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, 140 B.C.A.C. 182; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615.

By Côté J. (dissenting)

*Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388; *Inland Revenue Commissioners v. Hinchy*, [1960] A.C. 748; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *Apotex Inc. v. Merck & Co. Inc.*, 2009 FCA 187, [2010] 2 F.C.R. 389; *Montréal (City) v. 2952‑1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Bristol‑Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 270 D.L.R. (4th) 717; *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108; *Langley Lo‑Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, 140 B.C.A.C. 182; *York Ventures Ltd. v. 0775740 B.C. Ltd.*, 2015 BCSC 1105; *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* (1987), 15 B.C.L.R. (2d) 376; *Strode v. Parker* (1694), 2 Vern. 316, 23 E.R. 804; *Jory v. Cox* (1701), Prec. Ch. 160, 24 E.R. 77.

**Statutes and Regulations Cited**

*Act relating to Interest on moneys secured by Mortgage of Real Estate*, S.C. 1880, c. 42, s. 3.

*Canada Joint Stock Companies’ Act, 1877*, S.C. 1877, c. 43, s. 97.

*Interest Act*, R.S.C. 1985, c. I‑15, ss. 2, 8.

*Interpretation Act*, R.S.C. 1985, c. I‑21, s. 12.

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Waldron, Mary Anne. “The ‘Legitimate Commercial Purpose’ Test Revisited — Case Comment on *Reliant Capital Ltd. v. Silverdale Development Corporation*” (2008), 41 *U.B.C. L. Rev.* 101.

APPEAL from a judgment of the Alberta Court of Appeal (Hunt and Berger JJ.A. and Nation J. (*ad hoc*)), 2014 ABCA 234, 577 A.R. 179, 613 W.A.C. 179, 1 Alta. L.R. (6th) 68, 31 B.L.R. (5th) 1, 16 C.B.R. (6th) 121, 376 D.L.R. (4th) 539, 45 R.P.R. (5th) 187, [2014] 10 W.W.R. 705, [2014] A.J. No. 747 (QL), 2014 CarswellAlta 1180 (WL Can.), affirming a decision of Romaine J., 2012 ABQB 411, 550 A.R. 316, 70 Alta. L.R. (5th) 1, 5 B.L.R. (5th) 79, 95 C.B.R. (5th) 171, 25 R.P.R. (5th) 245, [2013] 2 W.W.R. 186, [2012] A.J. No. 1143 (QL), 2012 CarswellAlta 1876 (WL Can.), which set aside a decision of Master Hanebury, 2011 ABQB 193, 512 A.R. 136, 44 Alta. L.R. (5th) 35, 81 B.L.R. (4th) 333, 77 C.B.R. (5th) 198, [2011] 7 W.W.R. 773, [2011] A.J. No. 332 (QL), 2011 CarswellAlta 467 (WL Can.). Appeal allowed, Abella, Moldaver and Côté JJ. dissenting.

G. Scott Watson and *Megan V. Stoker*, for the appellants.

Francis Price, Q.C., and *Daina Young*, for the respondent.

The judgment of McLachlin C.J. and Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

Brown J. —

1. Introduction
2. Section 8 of the *Interest Act*, R.S.C. 1985, c. I-15, precludes a mortgagee from imposing terms that have the effect of charging a higher rate of interest on money in arrears than that charged on principal money not in arrears. This appeal requires the Court to consider, for the first time, whether this section is offended by terms of a mortgage agreement imposing an “interest rate” that takes effect only where the mortgagor falls into default by failing to make prescribed payments at a lower “pay rate” of interest or by failing to pay out the loan upon maturity. At stake is the significance, for s. 8’s purposes, of the putative distinction between (1) terms imposing, by way of penalty, a higher rate in the event of default, and (2) terms reserving, by way of discount, a lower rate in the event of no default. While the master in chambers concluded both sorts of arrangements offend s. 8, the chambers judge and the majority at the Court of Appeal of Alberta concluded that the latter sort of arrangement does not.
3. This appeal also invites the Court to consider whether mortgage terms providing for a higher interest rate triggered solely by the mere passage of time offend s. 8.
4. For the reasons that follow, I conclude that a rate increase triggered by the passage of time alone does not infringe s. 8. That said, a rate increase triggered by default does infringe s. 8, irrespective of whether the impugned term is cast as imposing a higher rate penalizing default, or as allowing a lower rate by way of a reward for the absence of default. I would therefore allow the appeal.
5. Overview of Facts and Proceedings
   1. Background
6. From 2003, the appellant Lougheed Block Inc. owned an office building in Calgary against which it had registered various mortgages, including mortgages granted to the appellant Krayzel Corporation and to Heritage Capital Corporation. Then, on November 8, 2006, Lougheed granted a mortgage to the respondent The Equitable Trust Company, through its agent Trez Capital Corporation, to secure a loan of $27 million. The prescribed interest rate was agreed at the prime interest rate plus 2.875 percent *per annum*.
7. Lougheed was unable to pay out the Equitable mortgage when it matured on June 30, 2008. Equitable agreed to extend the mortgage term by seven months. The resulting agreement, registered on title to the property (the “First Renewal Agreement”), was made effective August 1, 2008 and carried a *per annum* interest rate of the prime interest rate plus 3.125 percent over the first six months and then 25 percent over the seventh month. Both Krayzel and Heritage Capital agreed to postpone their rights under their respective mortgages in favour of Equitable’s interest under the First Renewal Agreement.
8. When the First Renewal Agreement matured on March 1, 2009, Lougheed again failed to pay out. On April 28, 2009, it entered into a second mortgage amending agreement with Equitable (the “Second Renewal Agreement”), made effective February 1, 2009 (that is, retroactive to a month prior to the expiration of the First Renewal Agreement). By its terms, the Second Renewal Agreement provided:
9. a *per annum* “interest rate” on the loan of 25 percent;
10. Lougheed was required to make monthly interest payments *not* at the stated *per annum* rate of 25 percent, but rather at the “pay rate” of either 7.5 percent or at the prime interest rate plus 5.25 percent (whichever was greater);
11. the difference between the amount payable at the stated interest rate of 25 percent and the amount payable by Lougheed at the lower rate would accrue to the loan; and
12. if there were no default by Lougheed (whether on monthly payments or on the principal and on any other outstanding costs and fees payable upon maturity), the accrued interest would be forgiven. In other words, were Lougheed to make all payments in full and on time and to pay out the loan when due, it would be excused from paying the amount representing the difference between interest payable at 25 percent and interest actually paid in accordance with the lower rate.
13. On May 15, 2009, Lougheed defaulted on the first payment due under the Second Renewal Agreement. Equitable demanded, *inter alia*, repayment of the loan at the stated rate of 25 percent.
    1. Statutory Provisions
14. The relevant provisions of the Act are:

**2** Except as otherwise provided by this Act or any other Act of Parliament, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on.

**8** **(1)** No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

**(2)** Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

* 1. Judicial History
     1. Court of Queen’s Bench of Alberta (Master Hanebury) — 2011 ABQB 193, 512 A.R. 136

1. While noting that a mortgage that on its face violates s. 8 could be saved if the transaction revealed a *bona fide* business reason for the increased rate (thereby invoking the “legitimate commercial purpose test”, to which I shall return below), the master found that both renewal agreements offended s. 8 of the Act. No legitimate commercial purpose justified the increased interest rate in either agreement. While Lougheed was a sophisticated borrower, it was in a vulnerable position, which was exacerbated by the renewal agreements. For the offending rate of 25 percent, the master substituted the “pay rate” of the greater of 7.5 percent and the prime interest rate plus 5.25 percent.
   * 1. Court of Queen’s Bench of Alberta (Romaine J.) — 2012 ABQB 411, 550 A.R. 316
2. The chambers judge reversed the master’s decision, finding that both renewals complied with s. 8. Unlike the master, she saw no relevance in the commercial purpose underlying the renewal agreements. In her view, being an exception to the general rule of freedom of contract preserved by s. 2, s. 8 ought to be “strict[ly] or narrow[ly]” construed so long as such an interpretation does not frustrate or impair the Act’s purpose (para. 45). Here, a sophisticated borrower chose to adhere to the renewal agreements, “gambling with the chance that it would be able to obtain alternative refinancing if given another year and a half to do so” (para. 59). This was not, she concluded, an instance of the sort of abusive lending practice which s. 8, strictly construed, is intended to capture.
3. With specific regard to the Second Renewal Agreement, the chambers judge also specifically rejected Heritage Capital’s submission, drawing from the decision of Henry J. in *Re* *Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce* (1981), 32 O.R. (2d) 183 (H.C.J.), that the enactment of s. 8 had abolished “the prior equitable rule” that prohibited penalties by way of increased interest rates on default, but allowed for discounts if the loan is paid punctually (para. 18). While s. 2 allows parties to negotiate any “rate of interest or discount” in a mortgage agreement, she observed that s. 8 is silent with respect to discounts. It followed, therefore, that s. 8 could not be used to strike out discounts freely agreed upon between the parties. The effect of the impugned provision of the Second Renewal Agreement was merely to allow Equitable to give a benefit to Lougheed in the event of debt repayment in accordance with the terms of their agreement, and not to penalize Lougheed in such a manner as to trigger the application of s. 8.
   * 1. Court of Appeal of Alberta (Hunt J.A. and Nation J. (*ad hoc*), and Berger J.A. (Dissenting)) — 2014 ABCA 234, 577 A.R. 179
4. The Court of Appeal was unanimous in finding that the First Renewal Agreement did not offend s. 8. It also agreed with the chambers judge that the lender’s motives and the borrower’s level of sophistication are irrelevant to determining whether a term offends s. 8.
5. Where the Court of Appeal diverged was on the Second Renewal Agreement. For the majority, Hunt J.A. agreed with the chambers judge that it complied with s. 8, considering herself bound by *Dillingham Construction Ltd. v. Patrician Land Corp.* (1985), 37 Alta. L.R. (2d) 193 (C.A.). As she read it, *Dillingham* confirmed that s. 8 is directed at penalties for non-performance, not at incentives for punctual payment. In the result, an agreement to reduce the amount owing by the difference between the stated *per annum* interest rate of 25 percent and the stated “pay rate” which the mortgagor was actually required to pay was a permissible incentive.
6. In dissent, Berger J.A. said that s. 8 prohibits non-penal as well as penal devices where their effect is to impose a rate of interest upon default that is greater than the rate payable over the term of the mortgage prior to default. *Dillingham*, he said, is distinguishable (since in that case *no* interest was payable except upon maturity and after default). And, while recognizing s. 2’s preservation of freedom of contract, the Second Renewal Agreement remained by s. 2’s very terms subject to what was otherwise provided by the Act (including s. 8) or any other Act of Parliament. On this understanding of s. 8’s scope and of its operation relative to s. 2, Berger J.A. concluded that, when Lougheed defaulted and Equitable called the loan, it relied on a term of the Second Renewal Agreement which had the effect of increasing the charge on the principal money in arrears beyond the rate of interest otherwise payable on principal money not in arrears. This, he held, “runs afoul” of s. 8 (para. 74).
7. Analysis
   1. Section 8 of the Interest Act
8. Statutory interpretation entails discerning Parliament’s intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute’s schemes and objects: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. Throughout, it must be borne in mind that every statute is deemed remedial and is to be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.
9. As to the purpose of s. 8, the appellants’ principal argument is that, by enacting the predecessor provision to s. 8 in 1880 (*An Act relating to Interest on moneys secured by Mortgage of Real Estate*, S.C. 1880, c. 42, s. 3), Parliament intended to abolish an equitable rule which allowed for discounts in the form of reduced interest rates for timely performance of a mortgagor’s obligations, but which also prohibited penalties in the form of increased interest rates in the event of default. The appellants say that s. 8 therefore precludes *both* discounts and penalties. The respondent says that this argument runs counter to the presumption, rebuttable only by statutory language of “irresistible clearness”, that Parliament does not intend to depart from established principles, policies or practices: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, citing *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614.
10. The equitable rule, which appears to have originated in the late 17th century (A. C. Meredith, “A Nicety in the Law of Mortgage” (1916), 32 *L.Q.R.* 420), was summarized by Lord Hatherley in *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685, at p. 702:

The other question which was much argued before your Lordships was the question of penalty. I apprehend that there again the case is quite clear. The illustration of the form adopted in mortgages is a very good illustration, I think, of what the true principle is. The form adopted long since — I do not know whether it is still continued or not — in mortgages, was when you wished to reserve in reality interest at 4 per cent., to reserve the interest by contract at 5 per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at 5 per cent. to be reduced, in the event of your punctual payment, to 4 per cent; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. [Emphasis added.]

1. Lord Hatherley’s observation of the rule resting upon “a fine distinction” suggests that its continuing validity was not unquestioned. As Finch C.J.B.C. explained in *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 270 D.L.R. (4th) 717, at paras. 38-39, the rule had already fallen into disfavour as early as 1802. While he also observed (at para. 39) that “[s]ubsequent cases . . . appear to have recognized the distinction previously described”, it appears that only one decision issued prior to the original enactment of s. 8 relied upon the rule: *Thompson v. Hudson* (1869), L.R. 4 H.L. 1.
2. This oscillating English caselaw seems a frail basis for finding that the equitable rule identified by the parties subsisted in Canadian law at the time of s. 8’s original enactment. Nor does s. 8’s legislative history or the jurisprudence clarify whether it applies to both penalties and discounts. As Professor M. A. Waldron has observed, “[l]ike many sections of the *Interest Act*, the primary purpose of section 8 is somewhat obscure”: *The Law of Interest in Canada* (1992), at p. 86. In *Reliant Capital* (at para. 48), Finch C.J.B.C. examined the parliamentary debates leading to s. 8’s enactment in 1880, and observed that its origins arose from a concern that farmers were at that time becoming “trapped” by loans carrying fines for arrears that were unknown or unclear.
3. This led Finch C.J.B.C. to state the purpose of s. 8 in these terms:

Parliament has singled out mortgages on real estate for special treatment, or at least treatment that differs from loans that are not secured on real property. I infer that at least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable. [Emphasis added.]

(*Reliant Capital*, at para. 53)

1. I agree with Finch C.J.B.C. that the purpose of s. 8 is to protect landowners from charges “that would make it impossible for [them] to redeem, or to protect their equity”. This understanding of s. 8’s purpose also conforms to the recent jurisprudence: *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108, at para. 51.
2. On its own, this purpose does not support drawing a distinction between a higher interest rate cast as a penalty for default, and a discounted interest rate for punctual payment. In both cases, the effect is to impose a higher rate of interest on arrears of interest or principal than that payable on principal money not in arrears, thereby making it more difficult for borrowers who are already in default to redeem or protect their equity.
3. Nor does the posited distinction between penalties and discounts survive a review of the ordinary sense of the words chosen by Parliament in s. 8, read together with s. 2 and in light of the Act’s objects.
4. Section 8(1) identifies three classes of charges — a fine, a penalty or a rate of interest — that shall not be “stipulated for, taken, reserved or exacted” if “the *effect*” of doing so imposes a higher charge on arrears than that imposed on principal money not in arrears. Section 8(2) affirms that subs. (1) does not prohibit a contract from requiring payment of interest on arrears of interest or principal at a rate equivalent to or lower than that payable on principal money not in arrears.
5. Had Parliament intended to prohibit only penalties (and not discounts), it would not have included a “fine” or a “rate of interest”, in addition to a “penalty”, as a type of charge that might also be prohibited: *Immeubles Fournier Inc. v. Construction St-Hilaire Ltée*, [1975] 2 S.C.R. 2, at p. 16; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974, at pp. 983-84 and 987, per Pigeon J., and p. 977, per Laskin C.J. Further, by directing the inquiry to the *effect* of the impugned mortgage term, Parliament clearly intended that mortgage terms guised as a “bonus”, “discount” or “benefit” would not as such comply with s. 8. Substance, not form, is to prevail. What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended: Waldron, at p. 86; *Halsbury’s Laws of Canada: Mortgages/Motor Vehicles* (2011), “Mortgages”, contributed by J. E. Roach, at para. HMO-198; *Re Weirdale Investments Ltd.*, at p. 190; *Beauchamp v. Timberland Investments Ltd.* (1983), 44 O.R. (2d) 512 (C.A.), at p. 516.
6. Section 8 must also be read in light of, and harmoniously with, s. 2. As the chambers judge pointed out (at para. 35), s. 2 preserves a general right of freedom to contract for “any rate of interest or discount”, with the *caveat* that such freedom is subject to what is “otherwise provided by this Act or any other Act of Parliament”. Section 2 is therefore subject to the restriction imposed by s. 8 upon the rate of interest on a loan secured by a mortgage: *Tomell Investments*, at p. 983; *Reliant Capital*, at paras. 34 and 37; *P.A.R.C.E.L.*, at para. 51.
7. Both the chambers judge and the majority at the Court of Appeal read Parliament’s inclusion of “discount” in s. 2, and its omission of the same term in s. 8, to mean that the restrictions in s. 8 do not apply to discounts. In other words, s. 8 confirmed in their view the equitable rule prohibiting penalties for non-performance while allowing for discounts. I disagree. By targeting charges, including rates of interest, that are “*reserved*” for the event of default, s. 8 casts at least as broad a net as s. 2. Given that language, Parliament had no need to specifically mention “discounts” in s. 8 in order to include them within its ambit.
8. My colleague relies upon s. 97 of *The Canada* *Joint Stock & Companies’ Act,* *1877*, S.C. 1877, c. 43, in support of her view that some discounts are permitted under s. 8. That statute, however, was a distinct enactment imposing a narrower set of restrictions upon a broader range of transactions. It applied to all loans, not just to loans secured by a mortgage. Section 8 of the *Interest Act*’s focus on real estate lending makes it difficult to trace its legislative purpose along a straight line to the protections contained in s. 97. Moreover, s. 97 prohibited only the imposition of a “fine” or a “penalty” on money in arrears, whereas s. 8 adds “reserv[ing]” a “rate of interest” to the classes of prohibited charges. Although s. 97 does refer to discounts, its narrower set of restrictions, when contrasted with s. 8, does not support the notion that some discounts are permitted under s. 8.
9. Nor does the majority of the Court of Appeal’s reliance upon *Dillingham* support a conclusion that s. 8 is directed solely at penalties for non-performance (and not at incentives for performance). In *Dillingham*, Stevenson J.A. (as he then was) found that a mortgage term setting interest at 14 percent upon default and after maturity where no other rate was stipulated did not offend s. 8. While Stevenson J.A. stated that s. 8 implemented the equitable rule (“[i]n my opinion the section is directed towards implementing the equitable principle against penalties for non-performance” (p. 196)), he added:

A stipulation for an increased rate of interest is, prima facie, such a penalty. It is something which, on the face of it, is held in terrorem over a defaulting debtor. So an increase from any stipulated amount of interest falls foul of the principle and the statute. Here, in a transaction which is not a commercial lending transaction, common sense dictates not that the transaction has a nil interest rate, but that it has made unspecified provisions for interest. I say this because it is inconceivable that in entering into this transaction the parties did not appreciate, and make some allowance for, the cost of money in arriving at the terms. It is possible, for example, that the mortgagee, as vendor, made a precise calculation based on the amount payable at maturity. I cannot say that the stipulation for interest at maturity has the effect of increasing the interest component. I am unable to conclude that the particular provision is penal and cannot, therefore, say that it comes within the principle which the section embodies. [p. 196]

1. The reason why the arrangement in *Dillingham* conformed to s. 8 was not that it took the form of a discount, as opposed to a penalty. Rather, it was because the parties were taken to have agreed to fold the cost of borrowing into a single rate of interest (14 percent), to be applied upon default or maturity. So understood, Stevenson J.A.’s reasoning illuminates his concluding reference to whether the provision was “penal”. Again, rather than confirming a putative distinction for s. 8’s purposes between penalties and discounts, he was simply referring to (in s. 8’s language) the *effect* of the impugned term: Waldron, at p. 90. It was not “penal” because its effect was not to impose a higher charge on arrears than that imposed on principal money not in arrears.
2. In sum, the ordinary sense of the words that Parliament chose to include in s. 8, read together with s. 2 and considered in light of the Act’s objects, supports the conclusion that s. 8 applies both to discounts (incentives for performance) as well as penalties for non-performance whenever their effect is to increase the charge on the arrears beyond the rate of interest payable on principal money not in arrears. To that extent, I find myself in respectful disagreement with the majority at the Court of Appeal and with the chambers judge.
3. I agree, however, with the chambers judge’s refusal to consider whether the impugned arrangements had an underlying “legitimate commercial purpose” (para. 61). It is understandable that courts would develop such a technique to infuse s. 8 with what they might see as reflecting reasonable commercial expectations: M. A. Waldron, “The ‘Legitimate Commercial Purpose’ Test Revisited — Case Comment on *Reliant Capital Ltd. v. Silverdale Development Corporation*” (2008), 41 *U.B.C. L. Rev.* 101; *TD Trust Co. v. Guinness* (1995), 12 B.C.L.R. (3d) 102 (S.C.), at paras. 17-21; *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*,2000 BCCA 365, 140 B.C.A.C. 182, at paras. 95-96. Doing so is, however, incompatible with s. 8. Part of the difficulty with the legitimate commercial purpose test is that, as Finch C.J.B.C. observed in *Reliant Capital* (at para. 87), it leads to commercial uncertainty and to s. 8’s arbitrary application. More fundamentally, inquiring into the “legitimacy” of the purpose underlying an arrangement that offends s. 8 *not* by its *purpose* but by its *effect* undermines Parliament’s clearly expressed intent. The same objection also applies to any attempt, whether achieved by “strict” construction or by focusing on other irrelevant considerations under s. 8 such as the relative degrees of sophistication or bargaining power between the parties, to derogate from the purely results-oriented focus that s. 8 expressly requires. This Court has recently observed that it cannot “do by ‘interpretation’ what Parliament chose not to do by enactment”: *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 53. But the converse is also true: courts may not *un*do by “interpretation” what Parliament chose *to do* by enactment. If s. 8 reflects bad or outdated public policy, the remedy lies with Parliament, not with the courts.
   1. Application to the First and Second Renewal Agreements
4. I am content to dispose of this appeal by considering the Second Renewal Agreement alone, since its operation was made retroactive to the date (February 1, 2009) on which the rate increase under the First Renewal Agreement took effect. That said, an interest rate increase triggered by the mere passage of time (and not by default), such as that imposed under the First Renewal Agreement, clearly does not offend s. 8.
5. My colleague and I part company on the significance of the terms of the Second Renewal Agreement. She takes 25 percent to be the effective interest rate thereunder because it was “to be paid each month” (para. 45). She also points to the accrual of the difference between the pay rate and the interest rate as indicative of an effective rate of 25 percent, since this rate “was not to be ‘taken, reserved or exacted’ in the event of default” (para. 45).
6. I disagree. Article 1 of the Second Renewal Agreement sets the interest rate at 25 percent *per annum*. Article 3 sets the “pay rate” (being the *per annum* rate applicable to the monthly interest payments Lougheed was required to make) at the greater of 7.5 percent and the prime interest rate plus 5.25 percent. By operation of articles 4 and 5, the difference between the interest rate of 25 percent and the pay rate accrues to the principal of the loan, but would be forgiven in the event of no default and repayment in full upon maturity. The effect of this scheme is therefore to reserve a higher charge on arrears (25 percent) than that imposed on principal money not in arrears (7.5 percent, or the prime interest rate plus 5.25 percent). The labelling of one charge as an “interest rate” and the other as a “pay rate” is of no consequence, given s. 8’s explicit concern for substance over form.
7. My colleague also relies on a reading of the relationship between ss. 2 and 8 in concluding that the latter must be read narrowly to allow for some discounts — specifically, “a discount . . . to provide relief from a higher rate of interest for which payment is already due” (para. 54). She cites *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* (1987), 15 B.C.L.R. (2d) 376 (C.A.), in support.
8. While I agree that the arrangement provided in *North West* does not run afoul of s. 8, it is distinguishable from the Second Renewal Agreement. The arrangement in *North West* imposed an initial rate of 19 percent. When the borrower defaulted, the parties extended the term and allowed for a reduced rate of 13 percent were the loan paid on time. In the instant case, however, the interest rate escalated over the course of the loan to 25 percent, followed by “relief” under the Second Renewal Agreement amounting to a conditional reduction to an interest rate that was still *nearly three times the originally agreed-upon rate*.
9. Conclusion and Disposition
10. I would allow the appeal with costs in this Court and in the courts below. Section 8 of the *Interest Act* applies with equal force to mortgage terms imposing by way of penalty a higher rate in the event of default, and reserving by way of discount a lower rate in the event of no default. It follows that the 25 percent *per annum* rate of interest set by the Second Renewal Agreement is void. The interest rate in force under the Second Renewal Agreement as of February 1, 2009 shall be set at the higher of 7.5 percent and the prime interest rate plus 5.25 percent.

The reasons of Abella, Moldaver and Côté JJ. were delivered by

Côté J. (dissenting) —

1. Introduction
2. I part ways with my colleague Brown J. because I am of the view that the “rate of interest payable on principal money not in arrears” under the Second Renewal Agreement is actually 25 percent. As a result, the Second Renewal cannot be said to have had the “effect” of increasing the charge on arrears, which means that s. 8 of the *Interest Act*,R.S.C. 1985, c. I-15,is not engaged. This ground alone provides a sufficient basis for dismissing the appeal.
3. In any event, I am of the view that s. 8 of the *Interest Act* does not prohibit a “forgiving discount” — that is, a discount which provides the borrower with some relief from a rate of interest that is chargeable under an agreement. Section 2 of the *Interest Act* states the general rule that “any rate of interest or discount that is agreed on” is permitted. As an exception to this foundational rule, s. 8 should be read narrowly and its application limited so as to fulfill its purpose of protecting struggling mortgage debtors. In the instant case, the Second Renewal Agreement provided Lougheed Block Inc. with a less onerous path to fulfill its payment obligations and protect its equity. As a result, the Second Renewal Agreement does not offend s. 8.
4. The Second Renewal Agreement Did Not Have the “Effect” of Increasing the Charge on Arrears
5. In my colleague’s view, the only question that needs to be answered when applying s. 8 is whether the impugned provision had the “effect” of increasing the charge on arrears. Before answering that question, however, we must first determine what the “rate of interest payable on principal money not in arrears” is.
6. In my view, the answer is straightforward. The provisions of the Second Renewal Agreement are crystal clear. The “rate of interest payable on principal money not in arrears” was set at 25 percent throughout the entire term of the agreement, and was to be applied consistently to both principal money not in arrears and principal money or interest in arrears.
7. The Second Renewal Agreement provides as follows:

Interest shall be calculated, on the full outstanding Loan balance, at the rate of 25% per annum, compounded monthly, from February 1, 2009 until the date of repayment in full.

. . .

[Lougheed] shall be required to make monthly payments, on or before the 15th day of each and every month starting May 15, 2009 and ending January 15, 2010, in an amount equal to the greater of 7.5% per annum, compounded and payable monthly, and Equitable Trust Company Prime Rate + 5.25% per annum, compounded and payable monthly (the “Pay Rate”).

The difference between the interest payable on the loan, in accordance with paragraph 1 and the interest actually paid at the Pay Rate shall accrue to the Loan (the “Accrued Interest”).

. . .

By signing this letter, you also hereby acknowledge that:

. . .

2. The interest rate payable is 25% per annum, calculated and payable monthly; [Emphasis added.]

1. By the express terms of the parties’ agreement, the interest rate payable was 25 percent. This rate was not to be triggered by default or maturity; rather, it was effective throughout and had to be paid on a monthly basis, through actual disbursements and additional financing from the lender. The amount to be paid as actual disbursements was defined in clause 3 as the “Pay Rate”. The remainder — that is to say, the difference between the 25 percent interest rate and the Pay Rate — was to be added each month to the principal of the loan pursuant to clause 4. In other words, it was to be paid monthly through additional interim financing. I stress that interest charges calculated on the basis of the 25 percent rate were to be paid monthly, and not simply “taken, reserved or exacted” in the event of default. According to the clear wording of the Second Renewal Agreement, interest was to be charged each month on the *entire* principal of the loan, which included the amounts added to the principal as interim financing to cover the difference between the agreed interest rate of 25 percent and the Pay Rate.
2. My colleague finds that in its “effect”, the Second Renewal Agreement reserved a higher charge on arrears (25 percent) than the one imposed on principal money not in arrears (the Pay Rate). I respectfully disagree. The 25 percent rate was not to be “taken, reserved or exacted” in the event of default; it was to be paid each month throughout the entire term of the Second Renewal Agreement. That is the way it was booked and that is the way the parties understood it. The possibility of having a portion of these interest payments forgiven does not have the “effect” of reducing the interest that was to be paid monthly on principal money not in arrears. Consequently, s. 8 is not engaged. I would dismiss the appeal on the basis of this ground alone.
3. Section 8 Does Not Prohibit All Discounts
4. Alternatively, I find that the appeal could also have been dismissed on the basis that s. 8 does not prohibit discounts designed to provide relief from a higher rate of interest payable, as is the case for the Second Renewal Agreement.
5. As I mentioned above, my colleague is of the view that the only question to be asked when applying s. 8 is whether the impugned provision had the “effect” of increasing the charge on arrears. According to him, there is no room for commercial context in this analysis. I agree with my colleague that courts should not take it upon themselves to tailor s. 8 to modern commercial preferences; that is the role of Parliament. However, a purposive and contextual analysis of s. 8 requires that the commercial context be considered. In the instant case, the impugned discount, viewed in light of the circumstances in which it was agreed upon, provided Lougheed with a less onerous path to fulfill its payment obligations that were then due under the First Renewal Agreement. Holding that the 25 percent interest rate provided for in the Second Renewal Agreement is invalid would not give effect to Parliament’s protective purpose, as my colleague understands it. Rather, it would reward Lougheed with an unmerited windfall.
6. Section 2 of the *Interest Act* affirms freedom of contract in the law of lending and, in so doing, expressly permits discounts: “. . . any person may stipulate for . . . any rate of interest or discount that is agreed on”. Section 8 sets out an exception to the foundational principle of freedom of contract by prohibiting increased charges on arrears. However, as my colleague observes, it does not expressly prohibit discounts. The absence of the term “discount” from s. 8 — and its corresponding presence in s. 2 — must inform our interpretation, since every word of a statute must be found to have a meaning and a function (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 211; *Communities Economic Development Fund v. Canadian Pickles Corp.*,[1991] 3 S.C.R. 388, at p. 408) and since it is settled law that each provision of a statute is presumed to have been drafted with the others in mind (Sullivan, at pp. 211 and 405-6; *Inland Revenue Commissioners v. Hinchy*, [1960] A.C. 748, at p. 766, per Lord Reid).
7. In this regard, the legislative history of the *Interest Act* is telling. The earliest incarnation of what are now ss. 2 and 8 of the *Interest Act* — s. 97 of *The Canada* *Joint Stock Companies’ Act, 1877*, S.C. 1877, c. 43 — expressly mentioned and prohibited discounts which have the effect of increasing charges on arrears:

**97.** The Company may stipulate for, take, reserve and exact any rate of interest or discount that may be lawfully taken by individuals, or in the Province of Quebec by incorporated Companies under like circumstances, and may also receive an annual payment on any loan by way of a sinking fund for the gradual extinction of such loan, upon such terms and in such manner as may be regulated by the by-laws of the Company: Provided always, that no fine or penalty shall be stipulated for, taken, reserved or exacted in respect of arrears of principal or interest, which shall have the effect of increasing the charge in respect of arrears beyond the rate of interest or discount on the loan.

1. Given that s. 8 establishes an exception to the general rule that discounts are permitted, it must be read narrowly and limited to what is necessary to fulfill its purpose: *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1207; see also *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, at para. 39.
2. In the context of the case at bar, this narrow reading is appropriate. As Professor Ruth Sullivan points out, “[i]t is impossible for drafters to spell out every qualification or limitation that might appropriately apply in a given set of circumstances”, which means that it may be appropriate to narrow the application of a legislative provision in order to remain faithful to the legislature’s intent: pp. 195-96; *Apotex Inc. v. Merck & Co. Inc.*, 2009 FCA 187, [2010] 2 F.C.R. 389, at paras. 88-89. Such an approach appears to have been followed by this Court: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533.
3. The purpose of s. 8 can be gathered from the legislative history and the debate that led up to the enactment of the *Act relating to Interest on moneys secured by Mortgage of Real Estate*, S.C. 1880, c. 42. In *Reliant Capital Ltd. v. Silverdale Development Corp.*,2006 BCCA 226,270 D.L.R. (4th) 717, Finch C.J.B.C. stated the following at para. 48:

Throughout much of the debate, money lenders were viewed in an unfavourable light and were held largely responsible for the ruin of many farmers and the resulting exodus of farmers from Canada to the United States.  Members expressed concern that the real rates of interest were often not clear to borrowers; that the rates of interest were exorbitant; that the fines for arrears were often unknown to or not present in the minds of borrowers; and that borrowers were often trapped by long loans.

1. Some of these concerns were addressed in various provisions of the resulting Act. For present purposes, there appears to have been one principal mischief which prompted Parliament to introduce s. 3 of that Act, whose wording survives substantially into modern times as s. 8 of the *Interest Act*. Namely, it was considered an abusive practice for lenders to impose a higher fine, penalty or interest rate on defaulting debtors who were already having difficulty meeting their payment obligations. The drafters appear to have been concerned that such higher charges would make it all but impossible for debtors to repay their debts, protect their equity and avoid foreclosure: *Reliant Capital*,at paras. 48-55; *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108, at para. 51; T. G. W. Telfer, “Preliminary Background Paper on the Canada Interest Act” (online), at para. 31, citing *Debates of the House of Commons*, vol. VIII, 2nd Sess., 4th Parl., March 31, 1880, at p. 963; M. A. Waldron, “The Federal Interest Act: It Sure is Broke, But is it Worth Fixin’?” (1997), 29 *Can. Bus. L.J.* 161, at pp. 164-65.
2. My colleague Brown J. concludes that discounts will generally have the “effect” of increasing charges on arrears, but I would note that not *all* discounts, viewed in their commercial context, will undermine the intended protection for struggling debtors. In some cases, a discount may be introduced in a renewal agreement to provide relief from a higher rate of interest for which payment is already due. Such an agreement can hardly be said to be unfair or tainted by abuse, coercion, intimidation or penalty: *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, 140 B.C.A.C. 182, at para. 100; *York Ventures Ltd. v. 0775740 B.C. Ltd.*, 2015 BCSC 1105, at para. 43 (CanLII).
3. The British Columbia Court of Appeal considered one such discount in *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* (1987), 15 B.C.L.R. (2d) 376. In that case, an initial mortgage agreement provided for a 19 percent rate of interest. The borrower had difficulty meeting its payment obligations, and a renewal was agreed to. That renewal agreement stipulated a 19 percent interest rate — continuing the rate applicable under the parties’ initial agreement — but provided a discounted 13 percent interest rate in the event of timely payment. The Court of Appeal concluded that it was “not persuaded that the provisions of benefit by way of forgiveness for timely payment of the mortgage debt offends the statute” (p. 380). While my colleague Brown J. insists that s. 8 prohibits discounts “whenever their effect is to increase the charge on the arrears” (para. 31) and that a focus on the commercial context derogates from the “purely results-oriented focus that s. 8 expressly requires” (para. 32), he nevertheless concludes that the relieving discount in issue in *North West* did not offend s. 8.
4. In the end, these kinds of “relieving” or “forgiving” interest rate discounts will generally make it easier for struggling mortgage debtors to meet their payment obligations. At worst, they will simply leave debtors in the same situation they found themselves in under the terms of their initial agreement. If s. 8 is interpreted as prohibiting discounts of this nature, lenders could in the future be discouraged from relieving the interest burden on struggling debtors, a disturbing irony given the purpose for which s. 8 was enacted.
5. Moreover, my colleague’s emphasis on a “purely results-oriented focus” means that borrowers in similar circumstances will benefit from a discounted interest rate regardless of the terms of their agreement or whether they pay promptly, while lenders will be deprived of the amounts a borrower had previously agreed to pay even though they have not benefited from timely payment. Concerns such as these led the courts of equity to uphold certaindiscounts in the 17th and 18th centuries despite the prohibition on imposing higher charges on arrears in mortgage loans: Lord Keeper Somers in *Strode v. Parker* (1694), 2 Vern. 316, 23 E.R. 804; Lord Keeper Wright in *Jory v. Cox* (1701), Prec. Ch. 160, 24 E.R. 77, quoted in A. C. Meredith, “A Nicety in the Law of Mortgage” (1916), 32 *L.Q.R.* 420, at pp. 421-22.
6. The Second Renewal Agreement is the kind of “relieving” or “forgiving” discount I have discussed. As Justice Romaine found, at the end of the First Renewal Agreement, Lougheed was not in a position to repay the loan principal, which was then subject to a 25 percent interest rate (2012 ABQB 411, 550 A.R. 316). While this 25 percent rate under the First Renewal Agreement was subsequently challenged, a unanimous Court of Appeal found it to be valid and my colleague supports this conclusion. Lougheed, a sophisticated borrower, could have consented to foreclosure, but instead negotiated the Second Renewal Agreement on the chance that its situation would improve. The Equitable Trust Co. agreed to forbear enforcement and extended the term of the loan in return for interest payments at the 25 percent rate already due pursuant to the First Renewal Agreement. On the condition of consistent monthly payments and payment of the principal at maturity, The Equitable agreed to give Lougheed a chance to relieve some of its interest burden. All in all, the Second Renewal Agreement provided Lougheed with a less onerous path to fulfill its payment obligations and protect its equity.
7. For all relevant purposes, the Second Renewal Agreement is indistinguishable from the interest rate discount that was upheld in *North West*, an arrangement that my colleague accepts “does not run afoul” of s. 8 (para. 37). In that case, as here, a renewal agreement provided some relief, on the condition of prompt payment, from a rate of interest that had previously been payable and due. We all agree that the 25 percent interest rate that was payable and due at the time of negotiation of the Second Renewal Agreement was valid. The Second Renewal Agreement was therefore genuinely relieving. To complain of the difference between the original interest rate and the discounted rate under the Second Renewal Agreement is to disregard the fact that the interest rate had been validly increased to 25 percent during the last month of the First Renewal Agreement.
8. Conclusion and Disposition
9. In sum, if the Second Renewal Agreement’s 25 percent interest rate is held to be invalid, Lougheed will benefit from an undeserved windfall, while Equitable will be denied the interest charges due to it under its agreement even though it has not benefited from prompt payment. Section 8 cannot be applied to produce a result that is so foreign to its original purpose of protecting struggling debtors.
10. For these reasons, I would dismiss the appeal.

*Appeal allowed with costs,* Abella*,* Moldaver *and* Côté JJ. *dissenting.*

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