TAB 1

Case Name:

Mortillaro v. Unicash Franchising Inc. (c.o.b. Unicash Financial Centres)

RE: Kenneth D. Mortillaro, Plaintiff/moving Party, and Unicash Franchising Inc. carrying on business as Unicash Financial Centres, Defendants/respondents

[2011] O.J. No. 595

2011 ONSC 923

16 C.P.C. (7th) 352

2011 CarswellOnt 802

Court File No. 03-CV-257357 CP

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: February 7, 2011.
Judgment: February 9, 2011.

(28 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Class counsel -- Fees -- Representative plaintiff -- Settlements -- Approval -- Motion by plaintiff for certification of class action and approval of settlement allowed -- Plaintiff alleged unjust enrichment on basis of defendant's payday loans with interest grossly exceeding 60 per cent -- Proposed settlement provided forgiveness of unpaid loans and $155,000 -- Cy pres distribution likely to be $50,000 -- No question class proceeding was preferred approach -- Settlement modest but practical since defendant was out of business -- Proposed counsel fee of $55,000 plus $23,147 disbursements more than 25 per cent contingency agreement but reasonable given time spent -- Representative plaintiff awarded $1,000 honorarium.

Motion by the plaintiff for certification of the class action and approval of the proposed settlement. The plaintiff alleged the defendant's payday loans carried an illegal rate of interest. The plaintiff commenced the action seeking an unjust enrichment declaration and repayment of interest. The defendant had sold its assets for $1,000,000 with the majority of the proceeds used to satisfy secure bank debts. Payday loans had been just one part of the defendant's business and had produced total

revenue of approximately $400,000. The proposed settlement provided for forgiveness of unpaid loans of class members and $155,000 for costs, 10 per cent levy to the Class Proceedings Fund, counsel fees and a donation to a credit counselling charity. The cy pres distribution was likely to be $50,000. The counsel fees sought were $55,000 plus taxes and disbursements of $23,147. The representative plaintiff sought an honorarium of $1,000.

HELD: Motion allowed. The action was the same as many other payday loan actions that were certified. The class was identifiable, the Statement of Claim disclosed a cause of action and the representative plaintiff, who took loans from the defendant, was appropriate. There was no question class proceedings were preferable. The settlement was modest but practical, give that the defendant was no longer in business and had sold its assets. The interest charged by the defendant grossly exceeded the 60 per cent criminal interest level but this action and others like it had contributed to behaviour modification. The plaintiff signed a 25 per cent contingency agreement. The proposed counsel fees were higher than the agreement but were fair and reasonable given the face value of time spent was $250,000. The honorarium sought was appropriate to recognize the plaintiff's efforts on behalf of the class.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5

Criminal Code, R.S.C. 1985, c. C-46, s. 347(1), s. 347(2)

Payday Loans Act, 2008, S.O. 2008, c. 9,

Counsel:

Susan S. Brown and Jody Brown, for the Plaintiff/Moving Party.

Meagan J. Swan, for the Defendants/Respondents.

ENDORSEMENT

1 G.R. STRATHY J.:-- This is a motion, made on consent, for certification of this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*"), for approval of a settlement between the parties, and for the approval of fees and other disbursements payable to class counsel.

2 This is a "payday loans" case against the defendant Planinvest Consulting Limited ("Unicash"). Unicash operated primarily in the Greater Toronto Area and it had no operations outside Ontario. It offered low principal, high cost consumer loans, which were designed to provide financing between paydays. The plaintiff alleges that the fee charged by Unicash to advance each payday loan is "interest" as defined in s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, and that the total interest charged exceeded an effective annual rate of 60%, contrary to s. 347(1) of the *Criminal Code*.

3 In his statement of claim, the plaintiff seeks a declaration that Unicash has been unjustly enriched and that the payday loan agreements entered into by Unicash and its customers are unenforceable. He also seeks repayment of the allegedly criminal interest received by the defendants.

4 Since the commencement of the action, Unicash has gone out of business. In February 2008, it sold its assets to National Money Mart Company, realizing a net amount of about $1 million. During settlement negotiations, Unicash disclosed that the majority of the proceeds from the sale of its business went to satisfy secured bank debts of about $750,000, and that payday loans formed a very small portion of its net revenues while it was in business.

5 Under the proposed settlement, which is subject to court approval, Unicash will forgive all unpaid payday loans owed by class members and will make a payment of $155,000, to be distributed as follows:

(a) first, to cover the costs of notices of the settlement approval hearing;
(b) second, to the 10% levy owed to the Class Proceedings Fund;
(c) third, to the fees and disbursements of class counsel, plus taxes; and
(d) finally, to InCharge Canada Debt Solutions or a similar credit counseling charity, as a *cy près* donation in lieu of distribution to class members.

6 It is estimated that the *cy près* distribution will be in the range of $50,000.00.

7 Although the settlement is a very modest one, it is driven by practical considerations - the game is simply not worth the candle because Unicash has gone out of business. This action is almost eight years old and its continued prosecution is unlikely to yield any tangible benefits to the class.

8 It is some comfort that this action and other class actions involving consumer loans have achieved the goal of behaviour modification by bringing about changes in the regulatory landscape. The *Criminal Code* has been amended to exclude payday loans from s. 347 in defined circumstances, and a new provincial regulatory scheme has been implemented to regulate the payday loans industry.

The Action and Certification

9 The representative plaintiff, Mr. Mortillaro, entered into several payday loan agreements with Unicash. He was unable to pay the last one due to his financial circumstances. He brings this action on his own behalf and on behalf of a class composed of all persons in Canada who entered into a payday loan with Unicash and who have paid or been charged interest on that loan. Unicash entered the payday loans business in Canada in 1992. Shortly after the commencement of this action, in 2003, it got out of the payday loans business. The evidence is that its total revenues from payday loans from 1992 to the time it ceased business were less than $400,000.

10 Unicash employed a standard form payday loan agreement, which was supposed to have the following terms:

(a) Unicash would lend the borrower an agreed upon sum in the total amount of $172.00 or less;
(b) the principal, together with all accrued interest, was due on the borrower's next payday;
(c)

at the time the payday loan was taken, the borrower was required to endorse and provide to Unicash a personal cheque dated for the due date in the total amount of the payday loan, which was made up of the principal amount of the payday loan, as well as the following amounts:

(i) a "cheque cashing fee" of 2.5% of the amount of the payday loan plus $1.99; and
(ii) a "handling fee" in the amount of $14.99 (collectively, the "Interest").

(d) if the loan was not repaid on the due date, a "late payment fee" in the amount of $2.00 per day was charged;
(e) if the principal and Interest were not repaid by the due date, the borrower was deemed to have opted to repay the loan and accrued Interest charges by way of the post-dated cheque; and
(f) Unicash deposited the endorsed personal cheque to its own credit at its bank, as a holder in due course.

11 In practice, Unicash did not charge the Interest as set out in the payday loan agreements. It charged $20.00 for every $100.00 of credit advanced, plus applicable late fees if a payday loan was not paid on the due date.

12 The Interest charged by Unicash is "interest" as that term is defined in s. 347(2) of the *Criminal Code*, as it is a charge or expense paid or payable for the advancing of credit under an agreement or arrangement by or on behalf of the person to whom the credit is advanced. The Interest charged by Unicash on its payday loans grossly exceeded the criminal rate of 60%. This is confirmed by the actuarial calculations obtained by the plaintiff that show that the effective annual interest rate charged by Unicash for the last payday loan taken by Mr. Mortillaro was 11,497.6%.

13 This action meets the test for certification set out in s. 5 of the *C.P.A.* Numerous similar actions have been certified in Ontario: *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46(S.C.J.), leave to appeal to Div. Ct. refused, [2007] O.J. No. 2160 (Div. Ct.); *McCutcheon v. The Cash Store Inc.* (2006), 80 O.R. (3d) 644, [2006] O.J. No. 1860 (S.C.J.); *Joseph v. Quik Payday Inc.* (2006), 38 C.P.C. (6th) 106, [2006] O.J. No. 4835 (S.C.J.); *Mortillaro v. Cash Money Cheque Cashing Inc.* (2009), 73 C.P.C. (6th) 369, [2009] O.J. No. 2904 (S.C.J.); *Bruley v. Instaloans Financial Solution Centres Ltd. et al.* (5 December 2005), Ct. File No. 05-CV-294691CP (Ont. S.C.J.). There are no material differences between those actions and this one.

14 Similar claims have been certified in British Columbia and Alberta: *MacKinnon v. National Money Mart Co.,* 2007 BCSC 348, [2007] B.C.J. No. 520; *Bartolome v. Mr. Payday Easy Loans Inc.*, 2008 BCSC 132, [2008] B.C.J. No. 167; *Bartolome v. Nationwide Payday Advance Inc.*, 2010 BCSC 1433, [2010] B.C.J. No. 1994; *Bodnar v. The Cash Store Inc.,* 2005 BCSC 1228, [2005] B.C.J. No. 1904, aff'd 2006 BCCA 260, [2006] B.C.J. No. 1171; *Bodnar v. Payroll Loans Ltd.,* 2006 BCSC 1132, [2006] B.C.J. No. 1705 ; *Ayrton v. PRL Financial (Alta.) Ltd.,* 2005 ABQB 311, [2005] A.J. No. 466, aff'd 2006 ABCA 88, [2006] A.J. No. 296; *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213, [2006] O.J. No. 1885; *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018, [2006] B.C.J. No. 1639.

15 The statement of claim discloses a cause of action. The plaintiff alleges that the Interest charged by Unicash was usurious because it exceeded an effective annual rate of 60%, contrary to s. 347 of the *Criminal Code*. It is asserted that, because Unicash charged Interest at a criminal rate, its payday loan agreements were illegal and unenforceable. It is also alleged that Unicash has been unjustly enriched and must make restitution to the class of all interest it has received at a criminal rate.

16 There is an identifiable class as described above, a common form of loan agreement and common factual underpinnings for every class member's claim. The statement of claim gives rise to common issues. The defendants acknowledge that Mr. Mortillaro is an appropriate representative plaintiff. He was the representative plaintiff in *Mortillaro v. Cash Money Cheque Cashing Inc.*, above, and has engaged in consumer advocacy relating to payday loans. He has been actively involved in the proceeding and he has retained experienced and reputable counsel to prosecute the claim. There is no question that a class proceeding is the preferable procedure for the prosecution of a claim such as this, where there are numerous claimants with very low value claims.

Settlement Approval

17 The basic terms of the proposed settlement are set out above. All class members will have the right to opt out of the class action and the settlement.

18 In considering the approval of this settlement, I have had regard to the principles set out by Cullity J. in *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93, [2005] O.J. No. 2527, at para. 7 (S.C.J.), and the frequently-cited decision of Sharpe J., as he then was, in *Dabbs* v. *Sun Life Assurance Company of Canada*, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); and (1998), 40 O.R. (3d) 429 at 439-444, [1998] O.J. No. 2811 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

19 The settlement is, obviously, very modest. By comparison, the settlement recently approved by Perell J. in *Smith Estate v. Oviet*, 2010 ONSC 1334, [2010] O.J. No. 873, was valued by class counsel at $120 million, although Perell J. was of the view that the estimate was over-stated. The release of Unicash's claims against class members may have some value. It appears that it has followed the practice of pursuing some such claim, including an action against Mr. Mortillaro. The proposed distribution to InCharge Debt Solutions, which is a not-for-profit credit counseling agency assisting individuals with debt and credit challenges, will indirectly benefit the class and will no doubt be of some benefit in assisting that agency in its very worthwhile work.

20 I am satisfied that this settlement, like some settlements of ordinary litigation, is driven by the obvious reality that the defendant has no money and that the costs of pursuing the claim would be grossly disproportionate to the eventual recovery, if indeed there is any recovery.

21 I am also satisfied that the proposed settlement is the result of *bona fide*, arms-length negotiation and that it comes with the recommendation of experienced counsel who has invested substantial resources in the litigation. In accordance with my pre-hearing direction, notice of the settlement has been published on class counsel's web site and there have been no objections.

22 As noted above, this action and others have contributed to the goal of behaviour modification because the *Criminal Code* has been amended to allow provincial regulation of payday lenders. In 2008, Ontario passed the *Payday Loans Act, 2008*, S.O. 2008, c. 9. Under the new regime, the province sets maximum interest rates. The regulations under the *Payday Loans Act* also include

provisions for better disclosure to, and protection of, payday loan consumers. Similar legislation is being or has been enacted across Canada.

23 I therefore approve the settlement.

The Fee of Class Counsel

24 Class counsel asks that their fees be approved in the amount of $55,000.00 plus GST and HST, and disbursements of $23,147.56 (being the actual amount expended), plus $500.00 for estimated ongoing disbursements (inclusive of applicable GST and HST), to be paid from the settlement fund in accordance with the terms of the settlement agreement.

25 Mr. Mortillaro originally entered into a contingency fee agreement with class counsel calling for a fee of 25% of the recovery, plus disbursements and taxes, subject to the approval of the court. The fee proposed is higher than the amount to which counsel would be entitled under that arrangement. Mr. Mortillaro agrees to the proposed fee. Class counsel's time spent in this matter has a face value of nearly $250,000.

26 In my view, the proposed fee is fair and reasonable, having regard to the factors to be considered in determining a lawyer's fee as well as the goals of the *C.P.A.* The outcome of this litigation was dictated by circumstances beyond the control of counsel. It can be regarded as a victory in principle if not in dollars. Fee awards should be designed to encourage good lawyers to take on risky and difficult class proceedings. This was such a proceeding.

27 Mr. Mortillaro has requested an honorarium of $1,000.00, to be paid out of class counsel's fee, to recognize his efforts in prosecuting this action on behalf of the class. A like payment was approved in *Mortillaro v. Cash Money Cheque Cashing Inc.*, above, although Lax J. echoed the reservations of Cullity J. in *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 at paras. 12-14 (S.C.J.), about the "risk of engendering expectations that such payments will be approved as a matter of course." I am satisfied that Mr. Mortillaro is a real plaintiff, with a real grievance and with an active involvement in the cause. The proposed payment is not intended to be compensation or a *quantum meruit* payment but is a token recognition of his efforts.

Conclusion

28 For the foregoing reasons, the action will be certified as a class proceeding for the purposes of settlement. The settlement is approved, as is the proposed fee of class counsel. The notice plan and form of notice, as amended at the hearing, are also approved.

G.R. STRATHY J.

cp/e/qlafr/qljzg/qlpxm/qlced

TAB 2

Case Name:

Smith v. National Money Mart Co.

Between
Margaret Smith and Ronald Adrien Oriet, Plaintiffs, and
National Money Mart Company and Dollar Financial Group, Inc., Defendants

[2007] O.J. No. 46

37 C.P.C. (6th) 171

29 E.T.R. (3d) 199

154 A.C.W.S. (3d) 25

2007 CarswellOnt 29

Court File No. 03-CV-1275

Ontario Superior Court of Justice

A. Hoy J.

Heard: October 25-27, 2006.
Judgment: January 5, 2007.

(146 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests -- Members of class -- Representative plaintiff -- Motion by the plaintiffs to have the action against the defendants certified as a class proceeding, and to be appointed as the representatives of the class -- Motion granted -- The motion for a class action met the necessary statutory requirements -- A preferable alternative procedure for resolution of the claims had not been identified, and it was probable that the plaintiffs' claims would not be advanced if the action was not certified -- Certification would achieve the objective of access to justice.

Motion by the plaintiffs, Smith and Oriet, to have the action against Money Mart and its indirect U.S. parent, Dollar Financial Group, Inc., certified as a class proceeding pursuant to section 5 of the Class Proceedings Act, and to be appointed as the representatives of the class -- Money Mart and Dollar opposed the requested orders -- In the action, Simth and Oriet claimed that Money Mart and its Ontario franchisees received a criminal rate of interest on "payday loans" advanced to proposed class members that were repaid by cheque, that Dollar is Money Mart's alter ego, that Money Mart, its

Ontario franchisees and Dollar conspired, among other things, to unlawfully cause Smith and Oriet to pay interest at a criminal rate, and that Money Mart and Dollar were unjustly enriched at the expense of the proposed Class members -- Smith and Oriet sought various remedies in relation to these claims: an accounting and disgorgement of the interest received; an equitable tracing order; the imposition of a constructive trust; damages; and an injunction against Money Mart, Dollar and its Ontario franchisees, to prohibit them from charging and collecting interest at a criminal rate on future loans -- The proposed class did not include persons who obtained loans outside of Ontario -- Pursuant to a 2006 order, the Franchisees had undertaken, if the action was certified as a class proceeding, to be bound by certain declarations made in the action, including whether the interest and fees they charged were interest at a criminal rate and whether the loan agreements were void or invalid in whole or in part -- HELD: Motion granted -- The motion for a class action met the necessary statutory requirements -- Given that the class could be narrowed or sub-classes created if it appeared necessary, a class proceeding was a fair, efficient and manageable method of advancing the claims of class members -- Certification would achieve the objective of access to justice -- A preferable alternative procedure for resolution of the claims had not been identified, and it was probable that the plaintiffs' claims would not be advanced if the action was not certified -- Smith and Oriet were fair and adequate representatives of the class and did not have, on the common issues for the class, an interest in conflict with the other members of the class.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5, s. 5(1), s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(e), s. 24, s. 24(1), s. 24(4), s. 24(5), s. 26(9)

Criminal Code, R.S.C. 1985, c. C-46, s. 251, s. 347, s. 347(1), s. 347(1)(a), s. 347(1)(b), s. 347(2)

Counsel:

Harvey T. Strosberg, Q.C., David Stratas and Margaret L. Waddell for the Plaintiffs

John P. Brown, F. Paul Morrison and Caroline R. Zayid for the Defendant, National Money Mart Company

Christopher D. Bredt for the Franchisees

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REASONS FOR DECISION

A. HOY J.:--

INTRODUCTION

1 The plaintiffs, Margaret Smith and Ronald Oriet, seek to have the action they have commenced against National Money Mart Company ("Money Mart") and its indirect U.S. parent, Dollar Financial Group, Inc. ("Dollar"), certified as a class proceeding pursuant to section 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA"), and to be appointed as the representatives of the class. Money Mart and Dollar oppose the requested orders.

2 In the action, the plaintiffs claim that Money Mart and its Ontario franchisees received a criminal rate of interest on "payday loans" advanced to proposed class members that were repaid by cheque, that Dollar is Money Mart's *alter ego*, that Money Mart, its Ontario franchisees and Dollar conspired, among other things, to unlawfully cause the plaintiffs to pay interest at a criminal rate and that Money Mart and Dollar were unjustly enriched at the expense of the proposed Class members. The plaintiffs seek various remedies in relation to these claims: an accounting and disgorgement of the interest received; an equitable tracing order; the imposition of a constructive trust; damages; and an injunction against Money Mart, Dollar and its Ontario franchisees, prohibiting them from charging and collecting interest at a criminal rate on future loans.

3 The proposed class does not include persons who obtained loans outside of Ontario. Seven other proposed class actions have been commenced against Money Mart in six other provinces claiming the same or similar relief to that sought in this action.

4 Money Mart's Ontario franchisees, 722906 Ontario Limited, 764815 Ontario Inc., 2042772 Ontario Inc., Kilduff Investments Ltd., Canadian Capital Corporation, 931669 Ontario Limited and 1556911 Ontario Ltd. (the "Franchisees") are not parties to this litigation. Pursuant to an order dated October 19, 2006, the Franchisees have undertaken, if this action is certified as a class proceeding, to be bound by certain declarations made in the action, including whether the interest and fees they charge are interest at a criminal rate and whether the loan agreements are void or invalid in whole or in part.

5 Dollar adopted all of the submissions made by Money Mart on this motion. Where, below, I refer to Money Mart making a particular argument or submission, that argument or submission was also made by Dollar. Submissions that were particular to Dollar are identified as having been made by Dollar.

THE BACKGROUND

6 Payday loans are loans to consumers from non-traditional lending sources for small amounts of money, for a short term: usually until the borrower's next payday. The loans are unsecured. In Ontario, payday lending is not yet subject to provincial regulation.

7 Dollar does not engage in payday lending in Ontario. Since in or around 1998, it has provided certain management services to Money Mart in exchange for a percentage of Money Mart's annual revenue from all sources. No royalty payments were received by Dollar from Money Mart prior to July 1, 1998. Directors of Dollar have also served as directors of Money Mart.

8 Actions against other payday lenders, claiming that they charge a criminal rate of interest, that is, an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60%, have recently been certified in British Columbia, Alberta and Ontario: *Kilroy v. A OK Payday Loans Inc.*, [2006] B.C.J. No. 1885 (B.C. S.C.); *Bodnar v. The Cash Store Inc.*, [2005] B.C.J. No. 1904 (B.C. S.C.), aff'd (2006), 55 B.C.L.R. (4th) 53 (C.A.); *Ayrton v. PRL Financial (Alta) Ltd.* (2005), 370 A.R. 141 (Alta. Q.B.), aff'd (2006), 384 A.R. 1 (C.A.); *McCutcheon v. The Cash Store Inc.*, [2006] O.J. No. 1860 (S.C.J.); *Bodnar v. Payroll Loans Ltd.*, [2006] B.C.J. No. 1705 (S.C.); and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, [2006] B.C.J. No. 1639 (S.C.).

9 In Money Mart and its Franchisees' case, the loans are usually for between $100 and $500, and are for a maximum term of 32 days. Most loans are for a term less than two weeks. Each loan is made pursuant to a standard form of agreement, called a "Fast Cash Advance Agreement" and the loan is called a "Fast Cash Advance". The due date of the loan is the day *before* the borrower's payday. The Fast Cash Advance Agreement describes the rate of interest as 59%.

10 At the time the loan is advanced, the borrower provides a personal cheque to Money Mart or the Franchisee for an amount equal to the principal amount of the loan, interest at 59% on the principal for a period ending one day after the stated due date of the loan, a cheque cashing fee, which is comprised of a percentage of the loan plus interest, and a flat per item fee. Money Mart and the Franchisees do not charge any "up-front" charges at the time the loan is advanced. The cheque

cashing fee varied somewhat over the proposed class period. By way of illustration of the order of magnitude, in Ms. Smith's case, the percentage fee was 2.9% and the flat fee was $14.99.

11 If the cheque cashing fee constitutes "interest", as that term is defined in section 347(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, and the borrower repays his or her loan by cheque in the manner described above, the effective rate of interest on the transaction exceeds 60%. The plaintiffs say that if the cheque cashing fees are found to be interest, the effective annual rate of interest on Ms. Smith's loans ranged from 329% to 578% and on Mr. Oriet's loans was even higher. Approximately 90% of the payday loans advanced by Money Mart during the proposed class period were repaid by cheque in this manner. Pursuant to section 347(1) of the *Criminal Code*, a person who, "(a) enters into an agreement or arrangement to receive interest at a criminal rate, or (b) receives a payment or partial payment of interest at a criminal rate" is guilty of an offence.

12 Money Mart's business model differs from that of the payday lenders against which actions have been certified in one significant respect. The Fast Cash Agreement gives each borrower the option of repaying the loan on or before the due date by cash. If the borrower does so, the cheque the borrower deposits with Money Mart or a Franchisee at the time of obtaining the loan is returned to the borrower and no cheque cashing fee is charged. In these cases, the effective interest rate clearly does not exceed 60%.

13 Money Mart's evidence is that Fast Cash Advances were structured to fall due on the day before the borrower's payday so that Money Mart could deposit the borrower's cheque on his or her payday to minimize the risk that the cheque would be dishonoured when deposited. While the due date was structured with repayment by cheque in mind, borrowers have nonetheless repaid approximately 8% of the total loans advanced by Money Mart during the proposed class period by cash. More significantly, on average, approximately 25% of Money Mart's Ontario Fast Cash Advance customers have repaid their loans in cash at one time or another. Persons who only repaid loans by cash are not included in the proposed class.

14 Fast Cash Advances are only one aspect of Money Mart's and its Franchisees' businesses. The oldest and largest part of its business is cheque cashing. They also cash cheques written by a customer on his/her own account, which it calls first party cheques, and cheques written for the benefit of the customer by another party, which it calls second party cheques. Unlike banks, Money Mart and its Franchisees do not wait for the cheques to clear before making cash available to the customer. Money Mart and the Franchisees charge different fees for cashing first party and second party cheques to reflect the different risks of non-payment between the two types of cheques. The cheque cashing fee charged by Money Mart and the Franchisees in connection with Fast Cash Advances is essentially the same as their first party cheque cashing fee.

15 In October of 2005, the Federal Justice Minister announced that he was considering new measures aimed at regulating the payday lending industry. In October of 2006, amendments to section 347 of the *Criminal Code* were introduced in Bill C-26. The proposed amendments exempt payday lenders who operate in provinces and territories with measures, including limits on borrowing costs, in place to protect borrowers from the application of section 347.

16 The "Backgrounder" published by the Department of Justice concurrently with the introduction of the bill states:

> Section 347 was initially introduced to combat the practice of loan sharking, and its links to organized crime. It was not intended to be a consumer

> protection tool for economic price regulation. Despite its intended purpose, section 347 has been interpreted as applying to most lending arrangements in Canada, including payday lending.

17 The draft amendments to section 347 have not been proclaimed in force, or passed. As noted above, legislation regulating payday lending has not yet been introduced in Ontario.

THE TEST FOR CERTIFICATION

18 Section 5(1) of the CPA provides as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The plaintiffs must show some basis in fact for each of the certification requirements in section 5(1), other than the requirement in section 5(1)(a) that the pleadings disclose a cause of action. See *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, para. 25.

5(1)(a): Cause of Action

19 In determining whether the pleadings disclose a cause of action, no evidence is admissible. The pleading will be struck out only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed. See *Hollick* at para. 25 and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at 411 (C.A.).

20 As indicated above, in their Further Fresh Statement of Claim, the plaintiffs seek declarations, assert that Dollar is Money Mart's *alter ego*, advance claims of conspiracy and unjust enrichment, and seek remedies, including an injunction, a tracing order and the imposition of a constructive trust.

21 Dollar challenged the Ontario court's jurisdiction over it in this action. Justice E. Macdonald held, in *Smith v. National Money Mart* (2005), 8 B.L.R. (4th) 159 (Ont. Sup.Ct.), that the Ontario court had jurisdiction. Dollar appealed. On the appeal, *Smith v. National Money Mart* (2006), 18 B.L.R. (4th) 22 (C.A.), the Court of Appeal held that the plaintiffs have a good, arguable case against Dollar on the basis that it is Money Mart's *alter ego*, as well as for conspiracy and unjust enrichment. Those appellate findings simplify this section 5(1)(a) analysis.

Declaratory Relief

22 The plaintiffs seek declarations that the cheque cashing fee constitutes interest and that each Fast Cash Advance Agreement or, alternatively, the provisions relating to interest and cheque cashing fees in each Fast Cash Advance Agreement, made in Ontario in the Class Period are void or invalid. These latter declarations will require a finding that Money Mart and the franchisees violated section 347 of the *Criminal Code*.

23 Money Mart argues that it is plain and obvious that the plaintiffs will not obtain the declarations sought because section 347 violates section 7 of the *Charter of Rights and Freedoms* (*Constitution Act, 1982*, as enacted by the *Canada Act, 1982*, 1982 (U.K.), c. 11) and is therefore unconstitutional and of no effect. Money Mart says section 347(1)(b) of the *Criminal Code*, does not include a *mens rea* element or provide a due diligence defence, and is therefore an absolute liability offence. Since, Money Mart submits, it is an absolute liability offence and a person convicted of an offence under section 347(1)(b) is liable to imprisonment, it violates the right to security of the person guaranteed by s. 7 of the *Charter*.

24 It is not plain and obvious and beyond a reasonable doubt to me that section 347 violates section 7 of the *Charter* and the plaintiffs will therefore not obtain the declaratory relief that they seek. *First Island Financial Services Ltd. v. Kirkstone Management Ltd.*, [1995] 7 W.W.R. 135 at para. 24, a post-*Charter* case, applied *R. v. McRobb* (1984), 20 C.C.C. (3d) 493 (Ont. Co. Ct.); appeal dismissed (1986), 32 C.C.C. (3d) 479 (Ont. C.A.) and held that s. 347 is not an absolute liability offence. The issue that Money Mart raises is not unique to it; the requested declaratory relief has passed the certification hurdle in the other payday lender cases cited above. Moreover, similar declaratory relief was in fact granted in *Kilroy*, albeit without consideration of the constitutional issue Money Mart raises.

25 The declarations described above meet the test in section 5(1)(a).

Conspiracy

26 Based on *Smith v. National Money Mart* (2006), 18 B.L.R. (4th) 22 (C.A.), I am satisfied that the plaintiffs' claim for conspiracy against Money Mart also meets the test in section 5(1)(a).

Unjust Enrichment

27 In the same decision, the Court of Appeal found that there was a good, arguable case that Dollar was unjustly enriched. The alleged unjust enrichment of Dollar is predicated on the alleged unjust enrichment of Money Mart. I am therefore satisfied that the plaintiffs' claims of unjust enrichment against Money Mart and Dollar meet the test in section 5(1)(a).

Injunction

28 Money Mart argues, relying on *Dehler v. Ottawa Civic Hospital et al.* (1979), 101 D.L.R. (3d) 686 (Ont. H.C.J.), that the plaintiffs' claim for an injunction is bound to fail, because the plaintiffs are not entitled to use an injunction to enforce the criminal law.

29 In *Dehler*, the plaintiff, who claimed to represent unborn children, alleged, among other things, that the defendant hospitals were performing abortions in contravention of section 251 of the *Criminal Code* and sought declaratory and injunctive relief against the hospitals to prohibit further therapeutic abortions. The court held that the plaintiff lacked standing to bring such an action, noting, at p. 700,

that the plaintiff had no individual rights in law or equity that had been denied or infringed, that his position was accordingly identical to that of any private citizen, and that as such he had no status to enforce the criminal law.

30 The plaintiffs refer me to a more recent decision of the Supreme Court, *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, which held that where a private litigant's rights are affected by criminal conduct, the litigant has standing to seek injunctive relief in the civil courts.

31 In the case before me, the plaintiffs allege that they have been personally affected by the alleged criminal conduct.

32 It is not plain and obvious and beyond a reasonable doubt that the plaintiffs would not be granted an injunction because they do not have standing to seek injunctive relief.

33 Moreover, an injunction is a remedy. As such, it is not clear to me that it is subject to the section 5(1)(a) "cause of action" analysis. If it is, the injunctive relief sought meets the test in subsection 5(1)(a).

Tracing Order and Constructive Trust, as against Dollar

34 Dollar argues that the plaintiffs cannot succeed in obtaining the requested tracing order and imposition of a constructive trust.

35 The Court of Appeal in *Smith v. National Money Mart* (2006), 18 B.L.R. (4th) 22 (C.A.), in upholding E. MacDonald J.'s decision that this Court has jurisdiction over Dollar in the context of the claims made in this action, noted that the plaintiffs' claim for a constructive trust, "... is effectively a remedial one that applies only if the action is made out in respect of the *alter ego* theory, the conspiracy or the unjust enrichment". Accordingly, the Court of Appeal did not consider it necessary to consider whether or not Dollar had a good, arguable case for a constructive trust. On the same reasoning, it is not necessary for me to consider whether the plaintiffs' claim for a constructive trust meets the test in section 5(1)(a).

5(1)(b): An Identifiable Class

36 Class definition is critical because it identifies the persons who are entitled to notice and relief, if awarded, and who will be bound by any judgment or settlement if they do not opt out.

37 The class definition must be defined by reference to objective criteria, without reference to the merits of the action. There must be some rational relationship between the class and the common issues. The class must not be unnecessarily broad. *Hollick* at paras. 17, 20 and 21.

38 Here, the plaintiffs seek to represent the following proposed class:

> All persons who, in the period August 19, 1997, to the date of the publication of the certification order, received a Fast Cash Advance in Ontario that was payable either in cash on or before the borrower's next scheduled payday, being the day on which the borrower is scheduled to receive his or her salary, pension benefit, or any other regularly scheduled payment, or by cheque on the borrower's next scheduled payday, and was repaid by cheque on the borrower's next scheduled payday, payable to Money Mart or a Franchisee.

The proposed class does not include persons who only repaid loans by cash, did not enter into loan transactions in Ontario and never repaid a loan by cheque on his/her next scheduled payday. It does include persons, such as Ms. Smith, who repaid some loans by cheque on their next scheduled "payday", and whose cheques in repayment of other loans were dishonoured when tendered for payment. It also includes persons, such as Mr. Oriet, who repaid some loans by cheque, and some by cash.

39 The proposed class is defined by reference to objective criteria.

40 Money Mart and Dollar made various arguments that not all class members had an interest in the proposed common issues, and therefore there is not a rational relationship between the class and the common issues. For example, Money Mart argues that the class should not include persons against whom it has rights of set-off, or persons against whom it obtained judgment in respect of unpaid loans. *Res judicata* issues may exist with respect to those people, it submits, without going into the issue in detail, and, moreover, it speculates, they likely signed releases in favour of Money Mart that would prevent them from advancing claims in this lawsuit. Those arguments are considered below, under the analysis of whether the proposed common issues are indeed common issues. I have concluded that there is some rational relationship between the proposed class and the common issues.

5(1)(c): The Common Issues

The Test

41 Section 1 of the CPA defines common issues:

> "common issues" means,
>
> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts[.]

42 *Hollick*, at para. 18, explained the test to be applied in considering if the requirement in section 5(1)(c) has been met:

> As I wrote in *Western Canadian Shopping Centres*, [2001] 2 S.C.R. 534, the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis'. Thus an issue will be common only where its resolution is necessary to the resolution of each class member's claim' (para. 39). Further, an issue will not be common' in the requisite sense unless the issue is a substantial ... ingredient' of each of the class members' claims.

43 *Cloud*, at para. 52, observes that this is a low bar, and, at para. 53, explains further the test elucidated in *Hollick*:

> In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather

> than to elucidate the various individual issues which may remain after the common trial.

Cloud goes on to explain, at para. 65, that the comparative extent of individual issues is a factor in assessing whether a class proceeding is the preferable procedure, and not in the consideration of whether the common issues requirement has been met.

The Common Issues

44 The plaintiffs seek an order stating the sixteen common issues set out in Appendix A to these reasons.

45 Money Mart argues that each of the proposed common issues, other than common issues 8 and 15, namely whether Dollar is vicariously liable for the acts of Money Mart and whether an injunction should be granted, must be determined on an individual basis and is therefore not a common issue.

46 I am satisfied that common issues 8 and 15 constitute common issues. I address below each of the challenged common issues.

Common Issue 1

47 Common issue 1 is as follows.

> (1) Have Money Mart and the Franchisees received interest in excess of an effective annual rate of 60% when calculated in accordance with generally accepted actuarial practices and principles, on each Fast Cash Advance in Ontario in the Class Period which was repaid by a cheque dated on the day after the due date specified in the Fast Cash Advance Agreement?

48 Money Mart argues that because of the principles governing the interpretation of section 347 of the Criminal Code set out in *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*"), proposed Common Issue 1 will not avoid duplication of fact finding or legal analysis.

49 *Garland No. 1*, at para. 58, states that section 347(1)(a) should be narrowly construed. If the agreement permits the payment of interest at a criminal rate but does not require it, there is no violation of section 347(1)(a). Money Mart submits that if the cheque cashing fee constitutes interest, then because borrowers have the choice of repaying their loans in cash, and therefore avoiding the payment of the cheque cashing fee, Fast Cash Advance Agreements do not require payment of interest at a criminal rate. Therefore, Money Mart submits, the plaintiffs' case turns on section 347(1)(b).

50 *Garland No. 1*, at para. 58, further states that while section 347(1)(b) should, in contrast to section 347(1)(a), be broadly construed, there is no violation of section 347(1)(b) "where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement."

51 *Garland No. 1* considered whether a late payment penalty charged by Consumers Gas offended section 347(1)(b). Each of its bills included a "due date" for the payment of current charges. Customers who did not pay by the due date incurred the late payment charge. The Supreme Court

concluded that the late payment penalty was not "voluntary" simply because it could be avoided through prompt payment. It commented, at para. 61, "When a penalty is specified in an agreement or arrangement for credit, the lender bears the risk that the payment of that penalty might give rise to a violation of s. 347(1)(b)."

52 Money Mart argues that whether a class member voluntarily paid the cheque cashing fee must be determined with respect to each individual and therefore is not a common issue, on the proposed definition of the class or any other definition. In support of this argument, it submits, as one example, that the situation of a proposed class member who repaid some loans in cash and some by cheque is very different than that of a proposed class member who repaid all of his/her loans by cheque. By way of a second example, it submits that the situation of a proposed class member, such as Mr. Oriet, who obtained a loan and repaid it by cheque after becoming aware of this action, is different than that of a proposed class member who did so before this action was commenced. It argues that in both cases the former clearly understood that he/she had a choice, and his/her payments were therefore voluntary. Money Mart did not provide any further examples. It says that it is necessary to determine, on a case-by-case basis, whether the proposed class member knew that he/she had the right to pay in cash, and chose not to.

53 In *Garland No. 1*, the Supreme Court did not approach the issue of voluntariness on a case-by-case basis. It did not consider whether or not class members understood that they would have to pay the penalty if they did not pay on time. Money Mart concedes that the threshold question in this action is whether, having regard to the right of a borrower pursuant to the Fast Cash Advance Agreement to repay the loan in cash, the payment of the cheque cashing fee specified in the Fast Cash Advance Agreement is voluntary, within the meaning ascribed to that term in *Garland No. 1*. This is clearly a common issue for the proposed class. I note that at para. 66 of *McCutcheon*, Justice Cullity dismissed the argument that whether a payment was voluntary could only be answered after an examination of the facts relating to each individual loan. Similarly, at para. 12 of *Bodnar* the British Columbia Court of Appeal concluded that voluntariness could be determined on a class-wide basis.

54 I am satisfied that proposed Common Issue 1 is a common issue.

Common Issues 2 and 3

55 Proposed Common Issues 2 and 3 are as follows:

> (2) Is each Fast Cash Advance Agreement made in Ontario in the Class Period void or invalid? If so, why?
>
> (3) Alternatively, are the provisions relating to interest, cheque cashing fees and item fees in each Fast Cash Advance Agreement made in Ontario in the Class Period invalid or void by reason of illegality? If not, what effective annual interest rate, if any, were Money Mart and the Franchisees entitled to charge on each such Fast Cash Advance?

56 Before addressing the parties' arguments, I note that I have assumed that the reference to "Fast Cash Advance Agreements" in Common Issues 2 and 3 is to those made with proposed class members. Common Issues 2 and 3 should be revised to so indicate. If I am mistaken in this assumption, counsel may make further written submissions on this issue.

57 Money Mart argues that proposed Common Issue No. 2 only relates to a subset of the proposed class, namely members of the proposed class who are in default of loans, or who have loans

outstanding that are not yet due and payable, and should accordingly be struck. If a class member has repaid his/her loan, he/she has no interest in having the entire loan agreement declared void. All he/she would want is a determination of Common Issue 3, namely that the payment of interest was void, so that he/she could obtain a refund of the interest payment, or the portion of it that exceeded the maximum permissible rate.

58 Counsel for the plaintiffs counters that all of the proposed class members have an interest in this question because all of the proposed class members have an interest in having damages calculated on an aggregate basis, given the small individual amounts at stake, and that if this question is answered in the affirmative, it will defeat Money Mart's argument, reviewed below under my discussion of Common Issue 7 - Conspiracy, that actual damage as a result of the alleged conspiracy cannot be proven on a class basis.

59 As *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249 ("*New Solutions*") held, where section 347 is found to have been violated, the remedy is in the discretion of the judge of first instance, and may range from finding the contract void *ab initio* in the most egregious cases, to finding that the interest provisions are void, to finding that notional severance, that is, "reading down" the interest provisions to be just within the legal limit, is the appropriate remedy.

60 While a subset of the proposed class has a greater interest in the remedy sought in proposed Common Issue No. 2 than the balance of the proposed class, I am satisfied that there is some relationship between the proposed class and this proposed common issue. It is not necessary that all class members have the same interest in the issue. Proposed Common Issue 2 deals with what is the appropriate remedy, which *New Solutions* says is in the discretion of the judge of first instance.

61 Money Mart also argues, relying on *New Solutions*, that proposed Common Issues 2 and 3 can only be determined on an individual basis, and not a class basis.

62 The Supreme Court explained at para. 6 of *New Solutions* that the appropriate remedy, "will hinge on a careful consideration of the specific contractual context and the illegality involved." It directs, at para. 42, that the parties' conduct in entering into the contract is one of the factors to be considered. Money Mart points to Mr. Oriet, who entered into a loan agreement after becoming aware of this action. This, Money Mart says, is conduct that, if the cheque cashing fees were found to violate section 347, would attract the remedy of notional severance. Therefore, Money Mart says, it will be necessary for the judge to consider each loan transaction individually if he or she is to exercise his or her discretion in accordance with the dictates of *New Solutions*, and the remedy to be imposed cannot be a common issue.

63 I disagree.

64 First, I believe that in this case, in exercising his or her discretion, the common issues judge could likely effectively assess all of the factors that *New Solutions* says should be considered on a class basis. As the British Columbia Court of Appeal noted at para. 17 of *Bodnar v. The Cash Store Inc.*, "The judicial discretion and spectrum of remedies recognized for s. 347 claims in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, should be capable of determination on a common basis for these standard form transactions." I note that the argument Money Mart advances was also made in *Ayrton v. PRL Financial (Alta.) Ltd.* and was not a bar to certification in that case. The Alberta Court of Appeal found that it was not obvious that an inquiry into the circumstances of each individual would be necessary.

65 Second, if Common Issue 1 was determined in the plaintiffs favour, the class could if necessary be divided into sub-groups. The common issues judge might well conclude in considering the factors in *New Solutions* on a class basis that notional severance, the mildest of the available remedies, was the appropriate remedy. If so, it would not be necessary to divide the class into sub-groups. In granting certification in *Ayrton*, the motions judge, LoVecchio J., noted that once the issue of whether section 347 had been violated was determined, the class could be divided into sub-groups if necessary, with the issues determined based on the circumstances of the representative of the sub-group. On appeal, the Alberta Court of Appeal endorsed this approach.

Common Issues 4 and 5 - Unjust Enrichment and Constructive Trust

66 Common Issue 4 is as follows:

> (1) If the answer to one or all of common issues 1, 2 or 3 is yes, was Money Mart unjustly enriched when it directly received a percentage of the royalty payments from the Franchisees and/or the illegal interest from the Class Members? If so, is Money Mart a constructive trustee holding a percentage of the royalty payments it received from the Franchisees and/or the illegal interest it received for the benefit of the Class members? What amount is held by Money Mart in the constructive trust?

67 Common issue 5 asks the same question, with reference to Dollar's receipt of royalty payments from Money Mart.

68 Money Mart's first objection is that this single proposed common issue of fact includes a number of issues. This is so, and the plaintiffs are amenable to re-drafting the single question to break it out into its component parts.

Unjust Enrichment

69 Relying on *Toronto-Dominion Bank v. Bank of Montreal* (1995), 22 O.R. (3d) 362 (Gen. Div.) and *Garland v. Consumers' Gas Company*, [2004] 1 S.C.R. 629 ("*Garland No. 2*"), at paras. 41 to 49, Money Mart argues that unjust reliance can only be determined on an individual basis and proposed Common Issues 4 and 5 are therefore not common issues.

70 MacPherson J., as he then was, noted at p. 373 of *Toronto-Dominion Bank v. Bank of Montreal* that because unjust enrichment is an equitable remedy, the party claiming it must establish that its conduct leading to its deprivation was untainted.

71 In *Garland No. 2*, Iacobucci J. found that if the plaintiff demonstrates a benefit to the defendant, a corresponding deprivation to the plaintiff and that no juristic reason from an established category exists to deny recovery, the plaintiff has made out a *prima facie* case of unjust enrichment. Iacobucci J. continued as follows, at paras. 45 to 46:

> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the

> circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances.

72 The argument that unjust enrichment cannot constitute a common issue has been dismissed in each of the decided payday lending cases referred to at the outset of these reasons.

73 In three British Columbia decisions, *Bodnar v. The Cash Store Inc.*, *Bodnar v. Payroll Loans Ltd.* and *Tracy v. Instaloans*, Justice Brown certified unjust enrichment as a common issue. She accepted the plaintiffs' argument that whether a class member had knowledge that the loan breached section 347 was an individual circumstance that, pursuant to *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] A.C. 192 (P.C.), as a matter of law the court cannot consider, and that the materiality of the knowledge issue could be determined at a common issues trial. While noting that the plaintiffs' theory that unjust enrichment could be established on a class-wide basis might ultimately fail, Justice Brown concluded that she was not satisfied that the issue could not necessarily be decided without an individual inquiry and therefore must accept it as a common issue.

74 The British Columbia Court of Appeal recently upheld Justice Brown's decision in *Bodnar v. The Cash Store Inc.*, concluding that, in the context of standard terms and small borrowers, Justice Brown did not err in concluding that the question of juristic reason did not require individual assessment.

75 After the British Columbia Court of Appeal released its decision in *Bodnar v. The Cash Store*, Justice Brown determined, as a common issue in *Kilroy*, that the payday lender was unjustly enriched by the payment of interest at a criminal rate.

76 In *Ayrton*, the Alberta Court of Appeal upheld the certification of unjust enrichment as a common issue, commenting that the judge could create sub-groups or decertify the proceeding or common issues later if necessary.

77 In *McCutcheon*, Justice Cullity also rejected a payday lender's argument that unjust enrichment could only be determined on an individual basis. An agreement providing for interest in contravention of section 347 does not fall within one of the "established categories" or juristic reasons. As to the existence of a juristic reason outside of the established categories, at para. 70 he wrote:

> However, in the absence of any evidence that might suggest that either of the parties had, or might reasonably have had, expectations of sufficient relevance to constitute a juristic reason for the enrichment of the defendants - and evidence that such expectations with respect to the loan would have varied from case to case - I would not reject the proposed common issue relating to the unjust enrichment of the Cash Store. Nor would I do so on the basis that the plaintiff is seeking an equitable remedy and that all such

> remedies are said to be discretionary. Judicial discretions are exercisable in accordance with settled principle and not at the whim of the court. In the absence of any minimum evidential basis for a finding of facts that might attract an application of such principles, a bald assertion that a remedy lies within the discretion of the court will not detract from any commonality it would otherwise possess.

78 The only evidence counsel for Money Mart directs me to is that Mr. Oriet entered into a loan transaction when he, like Money Mart, was aware of this proceeding. Having regard to *Kiriri Cotton Co.*, I do not consider this evidence a sufficient basis to decline to certify unjust enrichment as a common issue. As the Alberta Court of Appeal in *Ayrton* noted, the court has considerable flexibility to de-certify the proceeding or create sub-classes, should it become appropriate to do so.

Constructive Trust

79 Money Mart says that whether Money Mart and Dollar are constructive trustees are not common issues because, pursuant to *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 995, where a monetary award is a sufficient remedy for unjust enrichment, a constructive trust will not be found. Money Mart argues that no claimant can prove that monetary compensation is inadequate until the claimant has first proved an entitlement to damages, and that entitlement to (and any liability for) damages cannot be proved as a common issue.

80 This argument hinges on my concluding on this motion that unjust enrichment, conspiracy and damages are not common issues. I have not done so; this argument fails.

81 I note that in each of *Kilroy, Bodnar v. The Cash Store, Bodnar v. Payroll Loans Ltd.,* and *Tracy v. Instaloans* whether or not the payday lender held the benefit it received as a result of the unjust enrichment in trust for those class members who provided that benefit to the payday lender was certified as a common issue. In *Kilroy*, Justice Brown determined, as the common issues judge, that she required further submissions, and possibly further evidence, from the parties as to the necessity and appropriateness of this relief before making a decision on the issue.

82 In *Ayrton,* the issue was not dealt with; the common issue proposed and certified was whether the defendant payroll lender was liable to account.

83 In *McCutcheon*, whether the payday lender was a trustee was also certified as a common issue.

84 Dollar makes a further argument as to why, in its case, entitlement to a constructive trust is not a common issue. Its evidence is that all amounts received by Dollar from Money Mart and from other sources are received into a general concentration account, and that since Dollar began receiving royalty payments from Money Mart in 2000, the concentration account has been overdrawn on two occasions: in November 2001 and June 2005. Therefore, Dollar says, any funds received by it from Money Mart prior to June 2005 are no longer in its possession, and pursuant to *Re Graphicshoppe* (2005), 78 O.R. (3d) 401 (C.A.), class members cannot assert a trust with respect to those funds. Dollar says that if the remedy of a constructive is available against it, which it disputes, its availability will vary among class members. By way of example, it submits that the remedy would not be available in respect of either Ms. Smith or Mr. Oriet, who it says last repaid loans to Money Mart in July 2003 and January 2004, respectively. Moreover, it submits, if available to a class member, it would only be available with respect those transactions that could be traced to payments made to Dollar after June 2005.

85 If this argument prevailed at the common issues trial, there would still be common sub-issues of law and fact in relation to the remedy of constructive trust to be determined. For example, was the co-mingling of the alleged trust funds with other funds in the concentration account fatal to class members' ability to assert a constructive trust, as Dollar alleges? If not, can a class member assert a trust claim with respect to a transaction that cannot be traced to a payment made to Dollar after June 2005? If not, what is the date after which a loan must have been repaid to have resulted in a payment to Dollar after June 2005? Depending on the answers to these questions, a sub-class might be created, composed of persons who repaid loans after the applicable date. A distribution mechanism, taking into account the amounts repaid by each member of the sub-class after the applicable date, might also be established.

86 I am satisfied that the proposed common issue of whether Money Mart and Dollar are constructive trustees raises common issues necessary to the resolution of each class member's claim for a constructive trust.

Common Issue 7: Conspiracy

The Parties' Positions

87 Money Mart submits that proposed Common Issue 7 is not a "common issue" for two reasons.

88 First, it assumes that the plaintiffs' real argument in conspiracy is under the second situation in which, pursuant to *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385 at 398-399 (S.C.C.), a claim in conspiracy can be made out, namely where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), the defendants should know in the circumstances that injury to the plaintiff is likely to result, and the plaintiff suffers actual damage. Money Mart argues that this requires the plaintiffs to prove that Money Mart knew in advance that, in relation to each transaction, the claimant would in fact pay by cheque, and not by cash. Therefore, Money Mart says, conspiracy is an individual, and not a common, issue.

89 The gist of Money Mart's second, and principal, argument in relation to the conspiracy claim is this. Pursuant to *Canada Cement LaFarge Ltd.*, at pp. 398-399, a plaintiff alleging the tort of conspiracy must be able to prove that he/she suffered actual damage as the result of the conspiracy. The alleged conspiracy is set out in paragraphs 68 to 71 of the Further Fresh Statement of Claim. In essence, the plaintiffs allege that Money Mart, the Franchisees and Dollar conspired, through the Fast Cash Advance business model, which allegedly resulted in the receipt of interest at a criminal rate, to cause injury to the members of the class.

90 Money Mart's evidence is that about 10% of the members of the proposed class have failed to repay a loan. Indeed, Ms. Smith, one of the proposed representative plaintiffs, is in this category. The evidence is that the principal amount she owes Money Mart exceeds the total interest and cheque cashing fees that she paid Money Mart on the other loans she obtained. Hence, Money Mart argues, Ms. Smith did not suffer injury as result of the alleged conspiracy, and it will have to be determined on an individual basis whether each member of the class in fact suffered actual damage as a result of the conspiracy to determine whether or not that member can make out a claim in conspiracy.

91 Money Mart argues that this case is on all fours with *Chada v. Bayer Inc.* (2003), 63 O.R. (3d) 22 C.A., affirming 54 O.R. (3d) 520 (Div. Ct.). It submits that what the plaintiffs propose is to use section 24 of the CPA, which permits the assessment of damages on an aggregate basis if certain

preconditions, referred to below, are met, to determine whether there was in fact damage, and therefore liability, which it says *Chada v. Bayer* held cannot be done.

92 Money Mart also submits in connection with its second argument, I believe in the alternative, that it and the Franchisees have equitable rights of set-off in respect of the amounts that class members who are in default owe them and that, as stated in *Muscat v. Smith*, [2003] E.W.J. No. 3942, [2003] 1 W.L.R. 2853 at para. 44 (C.A.), unlike a legal set-off, an equitable right of set-off, "operates in the litigation to extinguish the claim and prevent its original establishment, rather than to provide a sum to be balanced off against the claim once established." Therefore, Money Mart says, the amounts that class members owe it operate to prevent those class members from establishing a claim against the plaintiffs in conspiracy, and not merely off-set interest it and the Franchisees received at a criminal rate. Money Mart has not yet filed or served a statement of defence; it says that it will assert equitable set-off when it does.

93 The plaintiffs argue that *Chada v. Bayer* is not applicable, the fact of damage is established by proving that Money Mart and the Franchisees received interest at a criminal rate from each class member, an aggregate assessment of damages could be made under section 24(1) of the CPA and a procedure could be fashioned under section 24(5) of the CPA to take any amounts owing to Money Mart or a Franchisee into account. Moreover, the plaintiffs counter that, if, on a *New Solutions* analysis, the common issues judge concluded that the Fast Cash Advance agreements should be declared void *ab initio*, with the result that class members in default have no obligation to repay loans in default, this individual inquiry would not be necessary.

94 With respect to Money Mart's argument in relation to equitable set-off, the plaintiffs point out that in *Bodnar v. The Cash Store Inc.*, para. 59, and *Tracy v. Instaloans*, paras. 26 and 52, Justice Brown held that set-off and counterclaims can be addressed at the individual issues stage, and do not detract from the commonality of an issue, or preclude certification. Justice Brown did not distinguish between equitable and legal rights of set-off. The plaintiffs also argue that the possibility of equitable set-off should not be a bar to certification, because there is no certainty that equitable set-off would be permitted. They suggest that if the court concluded that the effective interest rate charged by Money Mart is so high that Money Mart is found to be a "loan shark", a court might decline to exercise its equitable jurisdiction to permit equitable set-off.

Analysis

95 A claim in conspiracy does not appear to have been advanced in the payday lending cases certified to date on a contested basis.

96 I do not accept the first argument advanced by Money Mart as a bar to finding proposed Common Issue 7 a "common issue". It does not give any effect to the words, "alone or together with others" in *Canada Cement LaFarge*. Moreover, the plaintiffs have also pleaded the first situation in which *Canada Cement LaFarge* says a claim in conspiracy can be made out, namely, where, whether the conduct of the defendants is lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff and the plaintiff suffers actual damage. Money Mart takes this position because it says that the plaintiffs will be unable to prove the requisite predominant purpose. This addresses the merit of the plaintiffs' claim.

97 With respect to Money Mart's second argument, first, I discount its submissions in relation to equitable set-off. A claim by Money Mart against a class member resulting from an unpaid loan is a liquidated claim. There is mutuality. The requirements of legal set-off appear to be met. I am not clear

as to the need for Money Mart to invoke the doctrine of equitable set-off. In any event, I am satisfied that in the certification context, equitable set-off, like legal set-off, can be dealt with at the individual issues stage

98 In *Chada v. Bayer*, the plaintiffs alleged that the defendants had conspired to fix prices of iron oxide pigments used to colour concrete bricks and paving stones. The plaintiffs had purchased a new home and believed that they were indirect purchasers of bricks containing the defendants' pigments. The proposed class was homebuyers. There was no evidence that the artificially inflated cost of iron oxide pigments would have been passed on through the various links in the chain of distribution and had a price impact on all ultimate consumers of iron oxide coloured products. The plaintiffs' expert assumed this, and, on that assumption, set out a model for calculating the damages. The Court of Appeal held that liability could not be a common issue because it was not satisfied the assumption was provable by some method on a class-wide basis. Section 24 of the CPA provides a method to assess the quantum of damages on a global basis once liability has been established, but not the fact of damage. Moreover, not all buildings built and sold during the class period contained the defendants' materials. In *Chada v. Bayer,* the Court of Appeal considered that the other elements of the conspiracy claim could be common issues, but given that liability was not, did not certify the proceeding, concluding that certification was not the preferable procedure.

99 Section 24(1) of the CPA permits the court to "determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where, (a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members."

100 Pursuant to sections 24(4) and (5), if the court determines that individual claims need to be made to allocate an aggregate assessment among individual class members, it shall specify procedures for determining the claims.

101 I disagree with Money Mart's submission that this case is analogous to *Chada v. Bayer*. This is not a case of an indirect purchase of a product in a price-fixing case. Here, unlike *Chada v. Bayer*, the outstanding issue or issues in relation to liability are largely mathematical. All members of the class paid cheque cashing fees. If the cheque cashing fees constitute interest, and the common issues judge concluded that the amount of the unpaid loans should be taken into account, the common issues judge might possibly find that liability has been established, subject only to rights of set-off, which are analogous to questions relating to the assessment of monetary relief. Alternatively, if the common issues judge found that a claim in conspiracy was made out on the basis of the proposed definition of the class, except for proof of actual damage, the class could at that point be narrowed, to exclude class members in default of loans and, if Money Mart successfully advanced a *res judicata* argument at trial in respect of class members against whom it has obtained judgment, such class members as well. Liability would be a common issue for that more narrowly defined class. Liability would be an individual issue for excluded members. The claims of the excluded members would have been advanced by the determination of the other common issues, and by the determination of the other elements of a claim in conspiracy. The plaintiffs' litigation plan proposes a workable method of dealing with the individual issues.

102 At this juncture, I accept Common Issue 7 as a common issue. The set-off rights alleged are a factor in the preferability analysis.

Common Issues Relating to Damages: Common Issues 6, 9, 10, 11 and 12

103 Common issues 6, 9, 10, 11 and 12 contemplate an accounting and calculation of damages pursuant to section 24 of the CPA, referred to above under Common Issue 7.

104 Pursuant to sections 24(4) and (5) of the CPA, if the court determines that individual claims need to be made to allocate an aggregate assessment among individual class members, it shall specify procedures for determining the claims.

105 Money Mart's objection to these common issues is founded in its argument, considered under Common Issue 7 above, that proof of actual damage as a result of the alleged conspiracy is an element of the tort of conspiracy, and section 24 cannot be used for this purpose. It also argues that, because of deficiencies in its record keeping, its records cannot be relied on to determine its liability to class members, proof by individual class members will therefore be required, and s. 24 can accordingly not be used.

106 In *Cloud v. Canada (Attorney General)*, claims for an aggregate assessment of damages and punitive damages were held to be properly included as common issues. Goudge J.A. held, at para. 70, that the trial judge should determine whether he/she could make an aggregate assessment without proof of loss by each individual member. In *Healey v. Lakeridge Health Corporation*, [2006] O.J. No. 4277, Justice Cullity followed this approach, noting at para. 102 that whether the statutory conditions for an aggregate assessment of damages are satisfied and whether an aggregate assessment should be made is for the court at the common issues trial, and not for the judge hearing the certification motion to decide. Indeed, Justice Cullity noted, strictly the possibility of an aggregate assessment of damages need not be included in the common issues as the trial judge has the discretion to make such an order in any case in which it is found that the conditions of section 24(1) of the CPA are satisfied.

107 Based on those authorities, I am satisfied that Common Issues 6, 9, 10, 11 and 12 are properly included as common issues. Money Mart's objections in relation to these common issues are considered as factors in the analysis of whether a class proceeding is the preferable procedure.

Common Issues 13, 14 and 16

108 It does not matter whether or not these issues are properly framed as common issues. Having them framed as such may be a useful checklist for the common issues judge. If they are not so framed, they are matters that would nonetheless be considered. If, on this basis, Money Mart is not content to leave these as common issues, my specific ruling is as follows.

109 With respect to proposed Common Issue 13, the plaintiffs have claimed the costs of administering the plan of distribution as damages, and the amount of damages is Common Issue 9. The cost of distribution is a matter in the discretion of the court pursuant to section 26(9) of the CPA and does not need to be framed as a Common Issue.

110 With respect to proposed Common Issue 14, the plaintiffs have claimed prejudgment interest, and it does not appear to be addressed in any of the other proposed common issues. In my view, it is therefore not inappropriate to frame entitlement to prejudgment interest as a common issue.

111 Proposed Common Issue 16 - the giving of directions following determination of common issues - is a procedural question, and does not appear to me to fall within the definition of "common

issue" in the CPA. It is a matter that the common issues judge would determine, without the need to have it framed as a common issue.

5(1)(d): Preferable Procedure

The Test

112

> [T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
>
> *Cloud v. Canada (Attorney General)* at para. 73.

113 The question of preferability takes into account the importance of the common issues in relation to the claims as a whole. *Hollick* at para. 30.

114 The analysis of the preferable procedure," should be conducted through the lens of the three principal advantages of class actions-judicial economy, access to justice, and behaviour modification ..." *Hollick*, para. 27.

115 The objective of modification of behaviour does not only look at the particular defendant; it looks more broadly at similar defendants. *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 88 (C.A.).

The Parties' Positions and Analysis

116 Money Mart argues that a class proceeding is not the preferable procedure for four reasons.

117 First, Money Mart says that the plaintiffs' litigation plan, which proposes that liability and damages in the aggregate be determined at the trial of Common Issues and the court give directions relating to distribution, is fatally flawed and the action is not manageable as a class proceeding. Money Mart says the litigation plan is premised on certain, specific information existing in electronic form for each and every class member, and each and every transaction in issue, and that payment and receipt will be proved using this information. Money Mart says that these assumptions are false, and because the relevant facts cannot be proved using electronic data, the case is unmanageable as a class proceeding. Money Mart says that each of the 4.2 million Fast Cash Transactions must be reviewed manually, that to do so could take in excess of 1 million hours and that the costs associated with such a review would in virtually all cases exceed any possible recovery by that class member.

118 The plaintiffs' litigation plan, and the evidence on this motion, is that they have retained James E. Jeffrey, an actuary, who has developed an algorithm that the plaintiffs say can be used to calculate the loan principal, if necessary, and the amount of interest paid to Money Mart and/or the Franchisees by each Class Member on each Fast Cash Advance from information in Money Mart's print and electronic business records. They have also retained two apparent experts in computer software, Professor Jefim Efrim Boritz and Dennis Lee, who expressed the opinion that computer programs are available, or can be written, to extract from the computerized system that is part of Money Mart's

business records whatever information is stored therein, regardless of the format Money Mart uses or used to store this information, and the extracted information can be used in conjunction with an algorithm.

119 Money Mart says that while it used its best efforts to maintain accurate customer records, its business records are not completely accurate and therefore Mr. Jeffrey's formula cannot be relied on to calculate damages.

120 Throughout the proposed class period, Money Mart endeavoured to store an electronic record of each transaction with a customer.

121 The electronic records indicate whether the customer repaid his or her loan by cash or tendered a cheque in repayment. However, prior to September 2000, only some of the Franchisees stored their records relating to their individual Fast Cash Advance Transactions in Money Mart's data base, and then not consistently. To the extent that they did not store their records on Money Mart's database, Franchisees stored their data in their own separate data bases at their individual stores.

122 Moreover, until Money Mart implemented its new "MMCollect Database", the fact that a customer's cheque was dishonoured on presentation for payment was not recorded in Money Mart's electronic database with a standard, unique electronic code. Rather, returned cheques were recorded manually by each individual store using variety of independently operated manual and semi-automated record keeping systems. Money Mart began to implement the MMCollect Database around September, 2000 and by September, 2003 it had completed the process. When Money Mart implemented MMCollect, it entered, to the extent possible, data with respect to returned cheques that it considered still collectable. Its evidence is that not all returned cheques were, or could be, transferred to MMCollect for a variety of reasons and that many of the historical records relating to these returned items no longer exist. Therefore, Money Mart says, its records cannot be relied on to prove that it received interest at a criminal rate.

123 Counsel for Money Mart did not point me to any inaccuracies in its records in respect of time periods following the implementation of MMCollect.

124 Throughout the proposed class period, Dollar, a public company, has released audited, consolidated financial statements that included Money Mart's revenue from Fast Cash Advances, and its "bad debts". Dollar has reported Money Mart's revenue and bad debts in securities regulatory filings in the United States during the proposed class period.

125 If, on the evidence before it at trial, the common issues judge determines that Money Mart's and the Franchisees records cannot be relied on to calculate damages in relation to transactions prior to 2003, it would be open to the common issues judge to calculate damages for a subset of the class on an aggregate basis.

126 On the material before me, and given that the class can be narrowed or sub-classes created if it appears necessary, I am satisfied that a class proceeding is a fair, efficient and manageable method of advancing the claims of class members.

127 Second, Money Mart argues that the common issues, in relation to the individual issues involved in the claim as whole, are not sufficiently important to warrant finding a class proceeding the preferable procedure. The primary individual issues are the set-off and *res judicata* issues, referred to

above. In my judgment, the resolution of the common issues would significantly advance the proceeding and the common issues warrant finding a class proceeding the preferable procedure.

128 Third, Money Mart says that it is willing to mediate or arbitrate claims by individuals, at no cost to claimants; that is, Money Mart would pay for the mediator or arbitrator. Money Mart submits that individual mediation or arbitration, and not a class proceeding, is the preferable procedure for resolving proposed class members' claims. Money Mart submits that because it is willing to mediate or arbitrate claims on an individual basis, proposed class members would have access to justice, and judicial resources would not be taxed by multiple claims.

129 With respect to this argument, I note that Money Mart unsuccessfully sought to have this action stayed because the Fast Cash Advance Agreements signed by the plaintiffs contained clauses requiring any claims relating to the agreement to be referred to mediation, and if unsuccessful, determined by private arbitration. (See: *Smith v. National Money Mart* (2005), 8 B.L.R. (4th) 159 (Ont. Sup.Ct.), aff'd (2005), 12 B.L.R. (4th) 29 (C.A.)) The Court of Appeal upheld E. MacDonald J.'s decision that the appropriate time for the court to determine whether the matter should be arbitrated or litigated was at the certification motion, when determining whether a class proceeding is the preferable procedure. In its decision, the Court of Appeal indicated, at para. 15, that, "... at the certification hearing, the Superior Court judge will want to consider the wording of Ontario's *Class Proceedings Act*, the slightly different wording of s. 7(2) of the *Arbitration Act* that permits a judge to refuse a stay if the court finds that the arbitration agreement was invalid', and s. 7 of the *Consumer Protection Act, 2002,* proclaimed in force July 30, 2005 ...".

130 The arbitration clauses are not applicable in the case of Dollar. Fast Cash Advance Agreements from the start of the class period to February 2001 do not contain an arbitration or mediation clause. The Fast Cash Advance Agreements containing the arbitration provisions are standard form, non-negotiable contracts. Pursuant to the *Consumer Protection Act, 2002*, arbitration clauses in Fasts Cash Advance Agreements executed after July 30, 2005, are invalid.

131 Counsel for Money Mart confirmed, unequivocally, at the hearing of this motion that Money Mart does not rely on the arbitration clauses in the Fast Cash Advance Agreements. Rather, Money Mart carefully refers to its *willingness* to mediate or arbitrate. Therefore, it is unnecessary for me to consider whether the arbitration clause in agreements executed between February 2001 and July 30, 2005, is enforceable.

132 I am satisfied that a class proceeding is preferable to arbitration or mediation. Money Mart itself says that the cost of proving individual claims would exceed any possible recovery by class members. Money Mart does not concede that it has breached section 347 of the *Criminal Code* or offer to fund counsel for borrowers who elect to mediate or arbitrate. The uncontradicted evidence of plaintiffs' counsel is that, if retained, the cost to prepare for and attend an individual mediation or arbitration would exceed $15,000 and $20,000, respectively. The plaintiffs cannot afford such legal fees. The legal fees would be disproportionate to the amount is issue in an individual mediation or arbitration. Ms. Smith's claim, by way of example, involves only about $83. Plaintiffs' counsel is acting on a contingency basis in this action, and the plaintiffs have obtained funding from the Class Proceedings Fund. Money Mart has never elected to arbitrate any dispute with any of its customers at any time; it has instead chosen to resort to the courts, instituting over 137,000 actions during the class period against customers who did not repay their loans. Nor has a customer ever asked for arbitration or mediation. I do not believe that any class member would spend the time, or expend the effort, necessary to mediate or arbitrate.

133 Fourth, Money Mart says that a class action is not necessary to secure behaviour modification; this can be achieved through legislation, such as Bill C-26, coupled with the provincial regulation it contemplates. Money Mart's business practices exceed the standards so far established by legislation introduced in Manitoba and British Columbia, except they provide for a "cooling off" period of 24, as opposed to 48, hours. The draft Manitoba legislation contemplates that rates will be set after public consultation and taking into account the actual costs incurred by payday lenders. There is no indication in the draft legislation as to maximum permitted rates and charges, and therefore as to whether and to what extent Money Mart will need to modify its current rates and charges in order to comply.

134 While Bill C-26 has not been enacted, it casts into doubt whether Money Mart's behaviour needs to be modified.

135 My view that, at this juncture, this action may not be necessary to secure behaviour modification does not, however, lead me to conclude that a class action is not the preferable procedure for resolving the common issues. Certification will achieve the objective of access to justice. As indicated above, a preferable alternative procedure for resolving the claims has not been identified, and it appears that the plaintiffs' claims would not be advanced, if the action was not certified. The flip-side of achieving access to justice, which in this case "trumps", is that, as but for certification these claims would presumably not be advanced, certification will in this case increase the judicial work-load, rather that resulting in judicial economy.

136 For all of the above reasons, and having regard to the ability to narrow the class or create-sub-classes if warranted, I am satisfied that the preferable procedure requirement is met.

Section 5(1)(e)

The Proposed Representative Plaintiffs

137 Ms. Smith is a 61-year-old pensioner. Mr. Oriet is a married 34-year-old project manager who obtained 60 Fast Cash Advances over a three-year period. They have been involved in the prosecution of this action for over three years, including appeals to the Court of Appeal and the Supreme Court of Canada. Mr. Oriet attended on this motion. Counsel advised that Ms. Smith was unable to do so for medical reasons. They have obtained funding from the Class Proceedings Fund. They have attended to be cross-examined on two occasions. The action has been vigorously and capably prosecuted.

138 Dollar argues that Ms. Smith and Mr. Oriet are not suitable representatives of the class because any funds that they paid to Money Mart were received by Dollar before June 1, 2005, when Dollar's concentration account last went into overdraft, and, based on *Graphicshoppe*, they would therefore not be entitled to a constructive trust as against Dollar, and would have no interest in pursuing this proposed claim on behalf of the class. On the basis that the plaintiffs' claims for a constructive trust against Dollar are remedial, and apply only if the action is made out in respect of the *alter ego* theory, the conspiracy or unjust enrichment, I am not convinced that the alleged inability of Ms. Smith and Mr. Oriet to assert a constructive trust makes them unsuitable as representatives of the class. Dollar's argument pre-supposes that Ms. Smith and Mr. Oriet's motivation in this action is purely financial. If the plaintiffs succeed in this action, the amounts recovered by each class member will be small. The amount of the potential, individual recovery does not appear to be what motivates Ms. Smith and Mr. Oriet; therefore, I am not concerned that they would not pursue a constructive trust claim on behalf of other class members if they were not entitled to advance such a claim, personally, or that there is any real conflict as a result. Consistent with para. 98 of *Pearson v. Inco*, if the action is made out in

respect of the *alter ego* theory, the conspiracy or unjust enrichment claims, and it turns out that the representative plaintiff is not properly representing the interests of the class in pursuing the remedy of a constructive trust, the court could take steps at that point.

139 The fact that Ms. Smith defaulted on a loan does not make her an unsuitable representative of the class at this juncture. If the class definition is subsequently narrowed, she may cease to be a suitable representative.

140 I am satisfied that Ms. Smith and Mr. Oriet would fairly and adequately represent the class and do not have, on the common issues for the class, an interest in conflict with the other members of the class.

A Workable Plan

141 As discussed above under the section 5(1)(e) preferability analysis, the litigation plan proposes that liability and damages in the aggregate be determined at the trial of the common issues, and that the court then give directions as to distribution.

142 In addition to the issues, discussed above, that Money Mart raised with respect to a litigation plan premised on the determination of liability and damages in the aggregate, Dollar submits that the ability of class members to trace interest they paid to Dollar is essential to their entitlement to a constructive trust, that the litigation plan does not indicate how class members will do so and is therefore unworkable, and certification should accordingly be denied, at least with respect to the claim for a constructive trust in respect of Dollar.

143 The current, October 24, 2006, draft of the litigation plan is silent on how class members will trace interest they paid Money Mart or Franchisees to Dollar. The plaintiffs plead that the royalty payments paid by Money Mart to Dollar were at least in part funded by illegal interest paid directly or indirectly by class members to Money Mart. Because what is at issue is an alternative remedy, I do not think that it is necessary at this juncture for the plaintiffs to set out in their litigation plan how that remedy would operate.

144 I note that the litigation plan contemplates that all damages or compensation be paid *cy-près*, or that each Class Member be paid a share of, or his or her individually assessed, damages, with any unpaid amounts to be distributed *cy-près*. For greater certainty, in concluding, as required by ss. 5(1)(e) of the CPA, that the plaintiffs have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the Class and of notifying class members of the proceeding, I do not impliedly endorse a *cy-près* distribution, either in its entirety or as to any unclaimed or undistributed portion of an award, as appropriate in the circumstances.

CONCLUSION AND ORDER TO ISSUE

145 For the above reasons, the requirements for certification in section 5(1) of the CPA are satisfied and an order shall issue certifying the proceeding as a class proceeding. The class shall initially be as proposed by the plaintiffs in this motion; Ms. Smith and Mr. Oriet shall be the representative plaintiffs; and, save as hereinafter provided, the common issues shall be as set out in Appendix A hereto, except that (a) assuming that this is the plaintiffs' intention, Common Issues 2 and 3 shall be revised to indicate that they relate only to Fast Cash Advance Agreements with class members; and (b) Common Issues 4 and 5 shall be redrafted to incorporate the drafting changes proposed by Money Mart at the hearing. It appears to me that the common issues could be re-cast,

with more precision and possibly with sub-issues, to be of greater assistance to the common issues judge, and I encourage the parties to do so.

146 The parties may provide written cost submissions in accordance with a timetable agreed to by them, or may request a case conference to address the provision of costs submissions.

A. HOY J.

* * * * *

APPENDIX A

COMMON ISSUES

1. Have Money Mart and the Franchisees received interest in excess of an effective annual rate of 60%, when calculated in accordance with generally accepted actuarial practices and principles, on each Fast Cash Advance in Ontario in the Class Period which was repaid by a cheque dated on the day after the due date specified in the Fast Cash Advance Agreement?
2. Is each Fast Cash Advance Agreement made in Ontario in the Class Period void or invalid? If so, why?
3. Alternatively, are the provisions relating to interest, cheque cashing fees and item fees in each Fast Cash Advance Agreement made in Ontario in the Class Period invalid or void by reason of illegality? If not, what effective annual interest rate, if any, were Money Mart and the Franchisees entitled to charge on each such Fast Cash Advance?
4. If the answer to one or all of common issues 1, 2, or 3 is yes, was Money Mart unjustly enriched when it directly received a percentage of the royalty payments from the Franchisees and/or the illegal interest from the Class Members? If so, is Money Mart a constructive trustee holding a percentage of the royalty payments it received from the Franchisees and/or the illegal interest it received for the benefit of the Class members? What amount is held by Money Mart in the constructive trust?
5. If the answer to one or all of the common issues 1, 2 or 3 is yes, was Dollar Financial unjustly enriched when it received a percentage of the royalty payments from Money Mart? If so, is Dollar Financial a constructive trustee holding a percentage of the royalty payments for the benefit of the Class members? What amount is held by Dollar Financial in the constructive trust?
6. Is Money Mart and/or Dollar Financial required to account to the Class? If so, why and how?
7. Have Money Mart, Dollar Financial and the Franchisees conspired one with the other? If so, who conspired with whom, when, where, why and for what purpose?
8. Is Dollar Financial vicariously liable or otherwise responsible for the acts of its subsidiary Money Mart? If so, why?
9. Is Money Mart and/or Dollar Financial liable to pay damages to the Class? If so, why and in what amount?
10. What is the amount of the Total Interest?
11.

Should the court assess damages in the aggregate, in whole or in part, for the Class? If so, what is the amount of the aggregate damage assessment and who should pay it to the Class?

12. Should Money Mart and/or Dollar Financial pay punitive damages to the Class? If so, who, why, in what amount and to whom?
13. Should Money Mart and/or Dollar Financial pay the costs of administering and distributing the recovery? If so, who should pay, what amount and why?
14. Should Money Mart and/or Dollar Financial pay prejudgment interest? If so, who should pay? What is the annual interest rate? Is the payment to be simple or compound interest? How are the prejudgment and postjudgment interest to be calculated?
15. Should Money Mart, the Franchisees, Dollar Financial, their servants and agents and any other person having notice of the injunction be enjoined from charging or collecting interest, an item fee and a cheque cashing fee on any Fast Cash Advance in Ontario which, in total, results in an effective annual interest rate of more than 60% at the time the Fast Cash Advance Agreement was entered into?
16. If the court determines common issue 1 in favour of the Class, and if the court considers that participation of individual Class members is required to determine individual issues:

    (a) are any directions necessary?
    (b) should any special procedural steps be authorized? and
    (c) should any special rules relating to admission of evidence and means of proof be made?

TAB 3

Case Name:

McCutcheon v. The Cash Store Inc.

IN THE MATTER OF a Claim under the Class Proceedings Act, S.O. 1992, c.6
Between
Thompson McCutcheon, Plaintiff, and
The Cash Store Inc. and Rentcash Inc., Defendants

[2006] O.J. No. 1860

80 O.R. (3d) 644

27 C.P.C. (6th) 293

148 A.C.W.S. (3d) 200

2006 CarswellOnt 2973

2006 CanLII 15754

[2006] O.T.C. 424

Court File No. 04-12118 CP

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: April 18, 2006.
Judgment: May 10, 2006.

(85 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests -- Application by McCutcheon for certification of a class proceeding against Cash Store and Rentcash for charging interest for loans at a criminal rate in breach of s. 347(1)(a) of the Criminal Code allowed in part -- The pleadings against Rentcash were dismissed as there were no direct dealings with that company pled -- In light of the common issues, McCutcheon established a strong case for a finding that certification would accord with the three objectives of the Class Proceedings Act.

Application by McCutcheon for certification of a class proceeding against Cash Store and Rentcash for charging interest for loans at a criminal rate in breach of s. 347(1)(a) of the Criminal Code -- The

action arises out of the agreements in the payday loan arrangements with the Cash Store -- Terms of the loan agreements included payment of a broker's fee of 22.54 per cent of the principal amount of each loan, interest of 59 per cent on the principal amount and a fee of $10 for the cash card required to access the funds advanced to the customer -- Cash Store had direct dealings with the plaintiffs whereas Rentcash was a parent company -- The various plaintiffs sought a declaration that the agreements were harsh, unconscionable, illegal, and unenforceable at least to the extent of the illegality -- HELD: Certification allowed in part -- The pleadings against Rentcash were dismissed as there were no direct dealings with that company pled -- The Court was satisfied that the proposed common issues and the potential liability of the Cash Store for unjust enrichment and of the unconscionable transactions legislation of Ontario, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan, would be shared by all class members -- Although breaches of provincial consumer protection law were pleaded, no common issues in respect of such breaches were proposed or addressed at the hearing -- The resolution of the common issues in favour of the plaintiff was likely to advance the proceedings substantially -- In light of the common issues, the plaintiff established a strong case for a finding that certification would accord with the three objectives of the Class Proceedings Act.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2,

Civil Code of Quebec, Article 3168

Civil Procedure Rules, Rule 5.03(1), Rule 5.03(5), Rule 25.06(8)

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5, s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 24(1), s. 26, s. 26(4)

Consumer Protection Act,

Criminal Code, s. 347, s. 347(1), s. 347(1)(a), s. 347(1)(b), s. 347(1)(c), s. 347(1)(d), s. 347(2)

Unconscionable Transactions Act, R.S.O. 1990, c.U.2,

Counsel:

David Thompson and Matthew G. Moloci for the Plaintiff

Timothy Pinos, Robin Moodie and Peter Henein for the Defendants

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1 **M.C. CULLITY J.**:-- The plaintiff entered into numerous short-term loan transactions ("payday loans") with the defendant, the Cash Store Inc. ("Cash Store"). In these proceedings commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"), he claims that, by virtue of their involvement in those transactions, the Cash Store and its parent, Rentcash Inc. ("Rentcash"), breached the provisions of section 347(1)(a) and (b) of the *Criminal Code of Canada,* R.S. 1985, c. C-46 by entering into an agreement, or arrangement, to receive interest at a criminal rate, and by receiving such interest. He seeks a declaration to that effect and that the agreements or arrangements are harsh,

unconscionable, illegal, and unenforceable at least to the extent of the illegality. He claims an accounting and reimbursement of all such "illegal amounts" on the basis of unjust enrichment. Breaches of the *Unconscionable Transactions Act,* R.S.O. 1990, c.U.2, the *Consumer Protection Act*, and similar legislation in other provinces, are also alleged and as grounds for further claims to restitution. These claims are made pursuant to the CPA on behalf of a class of persons who entered into similar payday loan arrangements with the Cash Store.

2 The Cash Store is a corporation incorporated under the laws of Alberta. It carries on business at locations in nine provinces - including Ontario - and two territories. It is a wholly-owned subsidiary of Rentcash which was incorporated in Ontario but has its head office in Alberta. The plaintiff has pleaded that Rentcash was the "directing mind and will" of the Cash Store.

3 Although, in their statement of defence, the defendants deny that any of the borrowers dealt directly with Rentcash, all the allegations of fact and law in the statement of claim are made against the "Defendants".

4 It is pleaded that the defendants held themselves out not as lenders but as brokers engaged by their customers to obtain loans from independent third parties. The plaintiff alleges that the defendants are not independent of, or at arm's length with, the alleged lenders. It is pleaded that the defendants:

(a) represented themselves as agents of their customers when they were actually agents of the lenders;
(b) guaranteed the repayment of all loans to the lenders, plus an annual return on their investments;

(c) agreed with the lenders to undertake all collection and enforcement measures with respect to the loans; and

(d) agreed to indemnify the lenders with respect to any losses.

5 It is an essential element of the plaintiff's claims, as pleaded, that all of the payday loans were made on the same - or substantially the same - terms. These included payment of a broker's fee of 22.54 per cent (25 per cent after March 11, 2004) of the principal amount of each loan, interest of 59 per cent on the principal amount and a fee of $10.00 for the cash card required to access the funds advanced to the customer.

6 The plaintiff moved for certification of the proceeding under the CPA. The motion was opposed by the defendants. In their counsel's submission, none of the requirements in section 5(1)(a) through 5 (1)(e) of the CPA is satisfied.

Section 5(1)(a): disclosure of a cause of action.

7 As I have indicated, the plaintiff's claims for restitution are based on breaches of section 347 of the *Criminal Code*, of provisions of the *Unconscionable Transactions Act* and the *Consumer Protection Act* and of those of similar statutes in other provinces.

8 Section 347(1) of the *Criminal Code* reads as follows:

347(1) Notwithstanding any Act of Parliament, everyone who:

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or
(b) receives a payment or partial payment of interest at a criminal rate is guilty of
(c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
(d) an offence punishable on summary conviction and is liable to a fine not exceeding $25,000.00 or to imprisonment for a term not exceeding six months or to both.

9 For the purposes of this case, "interest" - as defined in section 347(2) - includes the aggregate of all charges and expenses paid or payable for the loans and the term "criminal rate" means:

> ... an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60 per cent on the credit advanced under an agreement or arrangement.

10 Although it is pleaded that each of the three payments charged to the customers was interest within the meaning of section 347(1), plaintiff's counsel emphasised that no claims were made against the lenders and that those against the defendants for breaches of section 347(1) were limited to the broker's fee of 22.54 per cent (25 per cent after 11th March, 2004) of the amount of each loan. The fee is alleged to have been levied as a lump sum at the inception of the loan and at the time of any subsequent rollover. It is pleaded that, by itself, a fee of approximately 22.5 per cent resulted in an effective annual rate of interest of 1170 per cent, 585 per cent and 270 per cent on loans of seven days, 14 days and 30 days respectively, without compounding. Given this limitation, I believe plaintiff's counsel were correct in their submission that, contrary to that of counsel for the defendants, the lenders were not necessary parties to the proceedings to the extent that the claims are based on breaches of the *Criminal Code*.

11 In my opinion, sufficient material facts have been pleaded in respect of the claims based on such breaches to satisfy the "plain and obvious test" propounded in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 that, unquestionably, is applicable for the purpose of determining whether the statement of claim discloses a cause of action against the Cash Store.

12 The claims based on alleged breaches of the *Unconscionable Transactions Act*, and the *Consumer Protection Act* and the similar legislation in other jurisdictions received little attention at the hearing or in the factums of counsel. I am satisfied that the material facts that give rise to causes of action with respect to these claims have been pleaded. Defendants' counsel did not suggest otherwise. Their objection was that the pleading is defective for a failure to join the lenders as parties.

13 As pleaded, these claims extend to the interest of 59 per cent and the cash card fee of $10.00, as well as the broker's fee. However, only one of the 13 common issues proposed by the plaintiff refers to the provincial legislation and that issue is conditioned on a prior finding that the Cash Store, or Rentcash, was unjustly enriched by the payment of interest at a criminal rate. It raises the question whether the provincial legislation was breached by the provision for the payment of such interest.

14 As, reading the pleading generously, I am prepared to accept the submission of plaintiffs counsel that the allegation of a criminal rate of interest relates only to the broker's fee, it must follow, I believe, that, despite the more extensive allegations in the pleading, certification is requested on the

basis that the claims of breaches of the provincial legislation are intended to be similarly restricted. I am not aware of anything in the CPA, or of any other reason, that would prevent a plaintiff from seeking to certify proceedings on the basis of only some of the claims - or of more limited claims - than those pleaded.

15 If, therefore, the plaintiff claims only against the defendants for restitution of amounts received in breach of the provincial legislation - and only with respect to the broker's fee that one or the other of them would retain - I do not believe that these causes of action should be considered to be materially deficient because of the failure to join the lenders as parties. In my opinion they are not persons "whose presence is necessary to enable the court to adjudicate effectively and completely on the issues" in the proceeding within the mandatory language of rule 5.03(1) on which Mr Pinos relied. The lenders may, or may not, be helpful - or even necessary - witnesses if and to the extent, for example, that the plaintiff seeks to rely on the allegation that the lenders were undisclosed principals of the defendants, but that is not the same thing: see *Amon v. Raphael Tuck & Sons Ltd*, [1956] 2 W.L.R. 372 (Q.B.D.), at page 392, *per* Devlin J.

16 Independently of his submission that the lenders were necessary parties to the proceedings, Mr Pinos submitted that the material facts that would constitute, or give rise to, a cause of action against Rentcash have not been pleaded.

17 It is fundamental to this submission that - as the defendants have pleaded in their statement of defence - Rentcash did not deal directly with the customers and could only be liable on the causes of action pleaded if, as a parent corporation, it was to be identified with its subsidiary. This would, in effect, require the corporate veil to be pierced - an exercise that is permitted only in exceptional cases. As Cumming J. stated in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), at para 22:

> The autonomous and independent existence of the corporate entity as a juristic person separate and apart from its shareholders is a cornerstone of Canadian law. A stringent test must be satisfied before one may pierce the corporate veil of a subsidiary corporation and impose liability upon a parent corporation on the basis of an asserted agency relationship ...

18 In response to this submission, plaintiff's counsel pointed to the allegation in the statement of claim that Rentcash was "the directing mind and will" of the Cash Store and to the fact that all of the allegations and claims pleaded by the plaintiff were made against the defendants jointly. For the purposes of section 5(1)(a), it is to be assumed that the factual allegations in the statement of claim will be proven at trial.

19 There is ample authority that, exceptionally, the corporate veil may be pierced if it is proven that a parent corporation has exercised complete domination and control over the affairs and activities of a subsidiary. The authorities include *Aluminum Co. of Canada Ltd. v. City of Toronto,* [1944] S.C.R. 267, at page 271, *per* Rand J.; *Dominion Bridge Co. Ltd v. The Queen* [1975] C.T.C. 263 (F.C.T.D.), aff'd. [1977] C.T.C. 554 (F.C.A.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.); and *Smith v. National Money Mart Company et al.*, [2006] O.J. No. 1807, (Court of Appeal, Reasons May 5, 2006).

20 In *Haskett,* at paragraphs 61-63, Feldman J. A. stated:

> In order to found liability by a parent corporation for the actions of a subsidiary, there typically must be both complete control so that the

> subsidiary does not function independently and the subsidiary must have been incorporated for a fraudulent or improper purpose or be used by the parent as a shield for improper activity: ...
>
> The pleading falls short of suggesting that the relationship of the respective related respondent corporations is that of a conduit to avoid liability, nor is there an allegation that the parent company controls the subsidiary for an improper purpose.
>
> For the above reasons, the claims against the companies as pleaded must be struck out as disclosing no reasonable cause of action.

21 In Mr Pinos' submission, the pleading here is similarly deficient. Although it is alleged that Rentcash was "the directing mind and will" of the Cash Store - an allegation that reflects the language that appears in a number of the decisions - it was neither pleaded nor suggested that the Cash Store was incorporated for a fraudulent or improper purpose, or that it was to be used, or was used, by Rentcash as a shield for improper activity. It followed, said Mr Pinos, that in accordance with *Haskett* and rule 25.06(8), the material facts required to disclose the existence of cause of action against Rentcash have not been pleaded and the claims against it could not properly be included in any order certifying the proceedings.

22 I am satisfied that, to the extent that the plaintiff seeks to rely on the control exercised by Rentcash over its subsidiary, the plea that it was the directing mind and will of the Cash Store is, on the authority of *Haskett*, insufficient. For the purpose of piercing the corporate veil between a parent corporation and its subsidiary, it is, apparently, not enough to establish that the latter was a mere puppet of the former. Some fraudulent or other "improper" motive for the former's existence must be pleaded, and proven.

23 It follows that the plea with respect to the directing mind and will of Rentcash does not, by itself, provide the material facts required to disclose a cause of action against it for the purpose of the motion to certify the proceedings.

24 It is possible that the claims against Rentcash could be saved if - reading the pleading generously - the factual allegations made against the defendants jointly are viewed separately and independently from those relating to the control exercised by Rentcash. On that reading of the statement of claim, it could be implied that the plaintiff and the other members of the putative class dealt directly with Rentcash. As the question that arises under section 5(1)(a) must be decided solely on the pleadings, Mr Pinos' attempt to rely on the cross-examination of the plaintiff to demonstrate that he had no direct dealings with Rentcash cannot be accepted. (By the same token, the suggested inadequacy of the affidavit evidence filed on behalf of the plaintiff to prove that Rentcash exercised complete dominion and control over the activities and operations of the Cash Store could have no bearing on the issues under section 5(1)(a)).

25 However, as I understand the plaintiff's position to be that the claims against Rentcash are based solely on its relationship with the Cash Store - and that he does not intend to assert and rely on any direct contact or dealings between Rentcash and the customers - I do not believe that the rule that the pleading should be construed generously would justify a different interpretation.

26 In consequence, the claims against Rentcash will not be included in any order certifying the proceedings. Plaintiff's counsel indicated that, if only the claims against the Cash Store are accepted

for certification, the plaintiff might subsequently move for leave to amend the statement of claim to rectify the deficiency in the pleading of claims against Rentcash. Counsel also advised that, if leave to amend was granted, the plaintiff might also move to include the claims in any certification order that may be made on this occasion. It would obviously be inappropriate for me to comment on the likely outcome of any such hypothetical motions, and I refrain from doing so.

Section 5(1)(b): an identifiable class

27 At the hearing, plaintiff's counsel proposed the following class definition which had been revised to meet a number of objections raised by defendants' counsel in their factum:

> Any person in Canada, resident outside the Province of British Columbia, who borrowed money as a 'payday loan' from a Cash Store location, and who repaid the loan and the standard broker fee charged by the Cash Store (22.54 % of the loan amount to March 11, 2004; 25 per cent of the loan amount after March 11, 2004) on or after the due date of the loan.

28 The definition excludes persons resident in British Columbia in deference to the similar proceeding against the present defendants that was certified in *Bodnar v. The Cash Store Inc. et al.,* [2005] B.C.J. No. 1904 (B.C.S.C.) where the class was confined to residents of British Columbia.

29 Subject to the defendants' objections to the inclusion of persons resident outside Ontario, the definition is in my opinion acceptable. The criteria are objective, rather than subjective, and the class is not over-inclusive in the sense explained by McLachlin C.J. in *Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.), at para 21. There is also the necessary rational connection between the members of the class and the common issues to which I will refer.

30 Defendants' counsel raised two objections to the inclusion of persons not resident in the province. The first - and the more fundamental - is that the court has no jurisdiction to bind persons who obtained loans from the Cash Store in the other provinces or territories in which they were resident. The second - alternative - objection is that, even if such jurisdiction exists, the court should not exercise it in the circumstances of this case.

31 The challenge to the court's jurisdiction raises issues that have yet to be decided definitively by an appellate court in Ontario, or by the Supreme Court of Canada. They have been debated at length in numerous learned articles and in papers presented at legal conferences. They have also been discussed in a number of decisions at first instance in this court - some of which have been upheld on appeal without any specific analysis of the jurisdictional questions. In two decisions released earlier this year, judges in Quebec and Saskatchewan expressed reservations about the width of the jurisdiction that this court had been asked to exercise.

32 At the most general level, the problems raised by so-called "national classes" relate to the manner in which the real and substantial connection test endorsed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, *Hunt v. T&N plc,* [1993] 4 S.C.R. 289 and *Beals v. Saldanha,* [2003] 3 S.C.R. 416 - and applied by the Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) and *Currie v. McDonald's Restaurants Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.) - is to be adapted to the special features of class proceedings and, in particular, to those that exist in Ontario and Alberta - and in some foreign jurisdictions - where legislation enables the court to bind class members who do not opt out of the proceedings. The issues

are whether a real and substantial connection must exist between each member of the class and the forum and, if so, what connecting factors will be relevant and acceptable for this purpose.

33 Although the traditional roles in *Emanuel v. Symon,* [1908] 1 K.B. 302 (C.A.) have now been replaced by the more flexible principles in *Morguard*, the emphasis in proceedings other than class actions is still, for the most part, placed on the contacts between the defendant and the forum. Of these the defendant's activities within the forum that are material facts, or otherwise closely connected with the cause of action, are particularly important. When extending the real and substantial connection test to non-resident class members in opt-out jurisdictions, there is clearly an analogy between the position of such members and that of defendants in individual actions in that the issue is whether the court has power to bind them. There are, however, differences. One is that the class members are also in the position of plaintiffs - albeit passive plaintiffs. The purpose of the litigation is, or should be, to confer benefits upon them and even where - as is most commonly the case - the proceedings end with a settlement, this purpose is reflected in the requirement that the court must approve it as being in the class members' interests.

34 The potential detriment to class members is the reverse of that confronting defendants contesting jurisdiction in individual proceedings. The members face the risk of being bound by a decision in favour of the defendants, or one that will provide them with less compensation than they believe is their entitlement. Depending on the significance to be attributed to the right to opt out, these consequences effect a loss of autonomy and, even independently of them, such a loss will result from the members' compelled involvement with proceedings in which they may not desire to participate. I note that this result can occur in any proceeding in the limited circumstances in which rule 5.03(5) is applicable.

35 The significance to be placed on the existence of the right to opt out is, of course, an important consideration. If the failure to do so could be regarded as analogous to an implied submission to the jurisdiction by a defendant, the arguments against acceptance of national classes would be much weaker.

36 On the present state of the authorities that I must, or should, follow, it is settled that the inclusion of non-residents within a class for the purposes of the CPA will not *per se* amount to an excess of jurisdiction: *Western Canadian Shopping Centres Ltd. v. Dutton,* [2001] 2 S.C.R. 534 (a class of "foreign investors"); *Currie* (customers of McDonald's restaurants in Canada included in a class certified in Illinois). In other cases, involving claims in tort, a sufficiently substantial connection between Ontario and non-resident class members has been found to exist if the locus of the tort was in Ontario, or aspects of the alleged tortious conduct of the defendants *vis a vis* each of the class members occurred here: *Nantais v. Teletronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (G.D.)*; Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (G.D.). The decision of the Court of Appeal in *Currie* - a case of recognition of a foreign judgment - is consistent with the findings in such cases.

37 The more difficult cases - of which this is one - are those in which the claims of the non-resident class members are based entirely on material facts that occurred outside Ontario. In such a case, the only connecting factor between Ontario, on the one hand, and such members and their claims, on the other, may be that they have claims against the same defendants and that these raise the same common issues as the claims of class members resident in Ontario over whom - and whose claims against the defendants - the court has jurisdiction.

38 In some of the cases, the existence of such a connection has been found to be sufficient. In *Wilson*, for example, at paras 65 and 66 Cumming J. stated

> As already discussed, there is a real and substantial connection between the alleged cause of action in tort by Ontario residents against the defendants. In my view, this court's jurisdiction is well-founded in respect of the claims of Ontario residents ....
>
> The CPA is merely a procedural statute. It affords the latitude to a court to establish a "national class" in a class proceeding. In my view, the CPA is not unconstitutional on the basis that the Ontario legislature is legislating extraterritorially. The CPA allows this court to include non-residents as parties in an action in which Ontario has unquestioned jurisdiction with respect to Ontario residents.

39 Essentially the same approach was, I believe, followed by the learned judge in *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), referring back to his earlier decision in the same case: [2002] O.J. No. 298 (S.C.J.), paras 100-101.

40 Similarly, in *Harrington v. Dow Corning* (1997), 29 B.C.L.R (3d) 88 (B.C.S.C.), Mackenzie J. noted that resident and non-residents shared the same common issue and stated:

> It is that common issue which establishes the real and substantial connection necessary for jurisdiction.

41 Again, in *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.), in accepting and national class, Brockenshire J. stated:

> Here, I regard the common interest of the class members, the commercial realities of the situation, and the broad objectives of the Ontario Act, as outweighing any concerns expressed over extra territorial involvement of the Ontario court.

42 I believe it is fair to say that the learned judges in the decisions at first instance in Ontario and British Columbia were influenced by the utility of having all claims decided in one court in the same proceeding and, also, in the earlier cases, by the fact that class proceedings statutes were then in force in only three provinces.

43 The reasoning in the last three cases I have mentioned does not fit happily with that of the courts of Quebec and Saskatchewan in *HSBC Bank Canada Ltd. v. Hocking*, [2006] J.Q. No. 507 (S.C.) and *Englund v. Pfizer Canada Inc.*, [2006] S.J. No. 9 (Q.B.), respectively.

44 *Hocking* involved claims against the defendant bank for an alleged overcharging of penalties when mortgages, or hypothecs in Quebec, on residential properties were prepaid. The bank operated through its offices in different Canadian jurisdictions including Ontario and Quebec and its customers presumably dealt with an office in the jurisdiction where they were resident and the property was located. This court certified an action brought against the bank in Ontario on behalf of a national class and approved a settlement of the proceeding. The settlement was to be binding only if an order recognising and giving effect to that of this court was made by the Superior Court of Quebec. Roy J. subsequently refused to grant such an order on a number of grounds. In her judgment, this court had

no jurisdiction to make an order in a proceeding in Ontario that would bind residents of Quebec; if it had possessed such jurisdiction, it should have declined to exercise it on the ground of the doctrine of *forum non conveniens*; there been a lack of procedural fairness at the certification hearing in this court in which the objections of a Quebec resident had not been accepted; and the notice given to the Quebec members of the class was inadequate.

45 On the first ground, I understand the finding of the learned judge to have been based, strictly, on the provisions of Article 3168 of the *Civil Code of Quebec* which stipulates that, in personal actions of a patrimonial nature, the jurisdiction of a foreign court will be recognised only in specified circumstances that did not include those of *Hocking*. Roy J. did, however, refer to the decisions in Ontario in the context of her consideration of the following submission of counsel for the objector in this court:

> [The objector] submits that a court which is not competent to hear the case of a class member cannot gain such jurisdiction through the assertion of collective rights. The class members who are residents of Quebec did business with HSBC in Quebec, and as such the contractual obligations had to be enforced in Quebec; the fault alleged took place in, and the injury was suffered in Quebec. The action of class members resident in Quebec thus had no connection with Ontario. (para 43)

46 The learned judge then noted that the decisions cited by counsel did not directly address the issue that counsel had raised. She then commented:

> A careful study of the authorities submitted by the parties demonstrates that, in the majority of cases where the court found a real and substantial connection in the context of class actions involving class members resident in several provinces, the connection was between the forum, the action and each individual member of the class. (para 45)

47 Roy J. then referred to *Carom, Nantais* and *Currie* as cases where a real and substantial connection was found to have existed between each class member, Ontario and the proceedings in this court.

48 A similar lack of enthusiasm for national classes was indicated by Klebuc J. in *Englund*. The case concerned allegedly harmful effects of drugs marketed throughout Canada by a subsidiary of a German corporation. The subsidiary had its business office in Ontario but sales representatives in Saskatchewan as well as in Ontario and other provinces. An application for a stay of proceedings of a class action in Saskatchewan was sought on the ground that a similar proceeding was pending in Ontario. Each of the actions was brought on behalf of a national class. Although the action for a stay was based on the principle of *forum non conveniens*, the court's reasons for denying a stay were more widely framed. Klebuc J. stated (at para 44):

> I reject [the defendant's] submission that the Ontario CPA allows for the creation of a "national class" that binds non-Ontario residents unless they opt out of a class action certified in Ontario because the laws of Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of law committed within the Province. (para 44)

49 Neither in *Hocking* nor in *Englund* was any reference made to the reasoning in the decisions in Ontario, and in British Columbia, that have accepted a more expansive approach to jurisdiction. While the courts in Quebec and Saskatchewan may limit the jurisdiction of the court to cases where one or more of the material facts that constitute each class member's cause of action against the defendants occurred in Ontario, the more expansive approach accepts as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants.

50 Until further guidance is provided by an appellate court, I intend to follow the decisions of this court that apply the wider approach to jurisdiction. I do not believe that to do so would be inconsistent with the decision in *Currie* - the one decision of the Court of Appeal in which jurisdictional issues created by the inclusion of non-residents in a class have been considered. In *Currie,* the issue related to the recognition of a foreign judgment and not to the jurisdiction of this court. As, however, the Court of Appeal found that the decision of the foreign court was made without jurisdiction and, as, in the modern law, jurisdiction for the purpose of recognition and for the purpose of an assumption of jurisdiction by a court of the forum can require an application of the real and substantial connection test, as well as principles of order and fairness, the reasoning of the court has some bearing on the jurisdictional question that arises in this case.

51 Sharpe J.A. commenced his analysis by recognising that the application of the real and substantial connection test and of principles of order and fairness, to unnamed non-resident plaintiffs in a class action raised a novel point. He referred to the differences between the position of a class member and that of a typical defendant in a traditional two-party lawsuit and was of the opinion that rules for recognition and enforcement should reflect these differences. While recognising the duty of the court to ensure that the interests of class members are adequately represented and protected, he insisted that it would be wrong to approach the issue by asking simply whether the court in Illinois would have had jurisdiction over the defendants at the suit of a Canadian plaintiff:

> The court must have regard to the rights and interests of unnamed plaintiffs who did not participate in the [Illinois] proceedings. The question of jurisdiction should be viewed from the perspective of the Ontario client of a McDonald's Canada restaurant, participating in a promotional prize giveaway presented by McDonald's Canada, who has done nothing to invoke or submit to the jurisdiction of the Illinois court. (para 21)

52 On the basis of his analysis and assessment of the competing considerations - in which he emphasised the importance of procedural fairness to the class members - the learned judge concluded:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. (para 30)

53 While the reasons, and the decision, in *Currie* make it clear that the special position of class members may have a serious impact on issues of jurisdiction, I do not think they provide unequivocal

guidance for a case like this where all the material facts that give rise to a non-resident class member's cause of action would have occurred outside Ontario and their only other connection to Ontario consisted of a commonality of interest with the proposed representative plaintiff and the resident class members over whose claims against the defendants this court has jurisdiction.

54 In *Currie* the court in Illinois was found to lack jurisdiction for the purpose of recognition and enforcement because of inadequacies in the notice given to the Canadian residents. In consequence the third of the preconditions to jurisdiction identified by Sharpe J.A. was not satisfied. The first - "a real and substantial connection linking the cause of action to the foreign jurisdiction" - was found to have been satisfied in the following passage (at para 22):

> The principal connecting factors linking the cause of action asserted in Currie's proposed class action to the state of Illinois are that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. The alleged wrongful conduct, manipulating the "random" selection of winners of "high-value" prizes to ensure that no such prizes would be awarded to contestants in Canada, occurred in the United States. This factor is a "real and substantial connection" in favour of Illinois jurisdiction.

55 As I read that passage, and the reasons as a whole, the court was not required to, and did not, consider whether the position would have been different if all material facts constituting the causes of action of the non-resident and resident class members had occurred outside, and inside the forum, respectively. Before one could apply the first of the learned judge's preconditions to jurisdiction to such a case, it would be necessary to answer the question: "Whose cause of action?" It is with respect to that situation that the views of the courts in Quebec and Saskatchewan may be at variance from those expressed in this court and it is the situation that arises in this case.

56 By incorporating fairness considerations into the rules for jurisdiction, the reasoning in *Currie* abandons some of the traditional distinctions between jurisdiction and recognition. As between the provinces and territories of Canada, the latter must still, however, accommodate the requirements of full faith and credit referred to in *Hunt*. It is possible that what I have described as the expansive approach to jurisdiction adopted in some of the previous decisions in this court can co-exist with rules of recognition that give weight to such requirements, as well as with an application of the principle of *forum non conveniens* - modified if necessary - where proceedings have been commenced in more than one jurisdiction. Whether or not this would be an appropriate method of dealing with the problems of national classes in the absence of uniform legislation, I believe I should follow the previous decisions of this court in deciding the jurisdictional question posed by the facts of this case.

57 For these reasons, I am not prepared to accept the defendants' submissions that there is no real and substantial connection between Ontario and the claims of residents of other Canadian provinces and territories, and that this is sufficient to deprive the court of jurisdiction to bind them in these proceedings.

58 There remains, of course, the question whether the other two preconditions to jurisdiction identified in *Currie* have been, or will be, satisfied. They relate to the requirements of order and fairness that the Court of Appeal insisted were pre-requisites to a finding of jurisdiction, and not separate defences to an action to enforce a foreign judgment.

59 The issues relating to adequate representation and notice are likewise not considered to bear only on the circumstances in which a court might properly decline to exercise a jurisdiction that has been found to exist. Although, perhaps inevitably, the submissions of counsel tended to blur the distinction between matters that go to jurisdiction and those relate to the appropriateness of its exercise, both adequate representation and notice are required by the provisions of the CPA. The adequacy of representation arises under section 5(1)(e) and will be dealt with in that context. The appropriate notice to be given to class members is usually considered if and when the requirements for certification have been found to be satisfied. Defendants' counsel did, however, submit that order and fairness would not be served if I included persons resident outside Ontario within the class. This, said Mr Pinos, would be unfair to both the defendants and such persons because of the lack of any specific connections between the latter and Ontario, and because the claims of each such class member arise under a separate contract governed by the laws of the province or territory in which it was effected.

60 I do not find these submissions to be compelling in the circumstances of this case. The claims based on section 347(1) of the *Criminal Code* will not be affected by variations in the governing laws, the same general principles of contract law will apply in all jurisdictions other than Quebec and the submission of plaintiff's counsel that the specific provincial statutes that have been pleaded are similar in their language and effect was not disputed. In these respects, the case is materially different to that in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.), where Haines J. declined to exercise jurisdiction over non-resident members of a putative class. In my judgment, considerations of order and fairness militate in favour of extending the class to include persons outside Ontario so as to make it unnecessary for a separate action to be commenced on behalf of claimants in each of the other Canadian jurisdictions. It is, I believe, in the interest of class members to keep the number of law suits to a minimum and I see no unfairness to defendants in permitting this to be done by accepting a class that includes persons not resident in Ontario. The possibility that, if the class was restricted to residents of the Province, separate lawsuits in each other province and territory might not be commenced and that, in consequence, the defendants' exposure to liability would be more limited would not, in my opinion, give rise to unfairness in any relevant sense.

61 Mr Pinos submitted that, even if non-residents are to be included within the class, residents of Nunavut and Quebec should be excluded because the Cash Store did not operate in those jurisdictions. Although this must significantly reduce the likelihood that class members will be resident in those jurisdictions, it does not eliminate the possibility that persons now resident in those provinces had previously obtained payday loans from a Cash Store located elsewhere in Canada. Just as former residents of British Columbia could be included in the class, I do not think I would be justified in accepting the proposed limitation.

62 I was also asked by defendants' counsel to exclude residents of Alberta on the ground that similar litigation against the defendants is pending there. Although counsel understood that the litigation is "in abeyance", they did not appear to be certain about its exact status. I have, in previous cases, indicated that, for reasons of comity, I would ordinarily defer to the jurisdiction of other Canadian courts - in which substantially identical or overlapping proceedings are pending - by excluding persons resident within their respective provinces or territories from a class to be accepted for the purpose of the CPA. I would follow the same practice in this case subject to the possibility that an order certifying the proceedings in this case might subsequently be amended to expand the class in the event that the proceedings in Alberta are permanently stayed, or discontinued, without a settlement on the merits. (Since these reasons were prepared, I have been informed by plaintiff's

counsel that he now recalls having advised the Court in Alberta that he would not be seeking to have residents of that province included in the class in this proceeding).

Section 5(1)(c): common issues

63 The common issues proposed on behalf for the plaintiff relate solely to the broker's fees charged, and to be retained, by the Cash Store. In general terms, the issues have been framed to determine:

(a) whether the agreements with the Cash Store, or its receipt of the brokerage fees, breached the provisions of section 347(1)(a) or (b) of the *Criminal Code*;
(b) if the infringement of section 347(1)(b) occurred, whether the Cash Store was unjustly enriched and to that extent is a trustee, or is liable to account, to the class members; and
(c) whether transactions by the Cash Store that infringed the provisions of section 347(1)(a) or (b) constituted harsh and unconscionable practices in contravention of applicable provincial legislation.

64 Similar issues are proposed with respect to Rentcash but, in view of my finding that no cause of action has been adequately pleaded against it, they cannot be accepted. For essentially the same reason, an issue relating to the liability of the defendants for punitive damages - an issue that, it seems, is premised on a finding that Rentcash was unjustly enriched - must be rejected.

65 The defendants did not dispute that the question whether the transactions between the Cash Store and its customers breached sections 347(1)(a) would be a common element of the claims of each member of the class. It was not disputed that the terms on which the loans were advanced - including the payment of the broker's fee - were standard terms at all Cash Store locations across Canada.

66 Defendants' counsel submitted that a resolution of each of the other proposed common issues would require an examination of the facts relating to each loan and, in consequence, could not be effected at a trial of common issues. In Mr Pinos' submission, the question whether breaches of section 347(1)(b) had occurred could not be a common issue because it is established that there is no such breach if the payment of interest at a criminal rate arises from a voluntary act of the debtor: *Garland v. Consumers Gas Co.*, [1998] 3 S.C.R. 112, at para 58; *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 at para 34. Whether a payment was voluntary was, he submitted, essentially a question that could only be answered after an examination of the facts relating to each individual loan. I do not accept that submission.

67 In *Degelder*, Major J defined the concept of a voluntary act as "an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement". Here the payment of the brokerage fee was required by the agreement and there is no suggestion that there could be any subsequent events that would provide the borrowers with any option, or ability, to determine whether or not it would be charged. I do not consider that the decision of the Divisional Court in *Markson v. MBNA Canada Bank*, [2005] O.J. No. 4625 - or my decision at first instance in the same case, [2004] O.J. No. 3226 - provides any support for the defendants' position on this point. In *Markson*, I accepted a common issue relating to a breach of section 347 - without distinguishing between paragraphs (a) and (b) of section 347(1) - but held that the plaintiff had not discharged the burden of demonstrating that a resolution of certain common issues relating to

each class member's claim for restitution would constitute a sufficiently significant step in the attempts by the class members to enforce their claims. On the appeal, the majority of the Divisional Court agreed with that conclusion (at para 49). The facts of *Markson* differed from those of this case in that there were several variables that could affect whether the interest charged exceeded a criminal rate and a number of these were within the control of the debtors. While, in view of these variables, an examination of the individual facts of each transaction would be required to determine whether interest at a criminal rate had been received and the extent, if any, of the defendants' unjust enrichment, the threshold question whether, and in what circumstances, the payments at such a rate were voluntary depended, as here, on the terms of the agreements between the parties and could therefore be accepted as a common issue.

68 In my judgment, the existence of the variables that, in *Markson*, would affect the question whether interest at a criminal rate was received on any particular loan - and the amount of such interest - distinguishes the facts on which the decision was based from those of this case. The broker's fee was charged upfront, and the question whether it is to be considered to be interest at a criminal rate can be determined as a common issue without an inquiry into the subsequent acts of the borrower and the other circumstances of the transactions. I do not accept the submission of defendants' counsel that "only a minimal number of circumstances surrounding the contract can be determined at a class-wide level" if the word "minimal" is intended to suggest that material facts relating to the common issue could not be decided on this basis.

69 To a large extent, the defendants' objections to the commonality of the issue relating to the unjust enrichment of the Cash Store were based on what I have found to be an incorrect assumption that the plaintiff's claims extend to the 59 % interest and the $10 cash card fee, and were not confined to the broker's fee. In addition, it is pleaded in the statement of defence that the terms of the contract provide a juristic reason for any enrichment that may have occurred. While the existence of a contract has often been referred to as an adequate juristic reason, I do not believe that this can be so when the enrichment is alleged to have resulted from a contract that breached the provisions of section 347 and is alleged to have been unjust for that reason. Just as in *Garland v. Consumers Gas Co. (No. 2)* (2004), 237 D.L.R. 4th) 385 (S.C.C.), compliance with orders of the Ontario Energy Board that conflicted with section 347 of the *Criminal Code* was held not to provide a juristic reason, a finding that interest received in contravention of the section was pursuant to a contract will not provide a defence to a claim for unjust enrichment. An illegal reason surely cannot be an acceptable juristic reason. On that basis, the contract in this case would not fall into one of the "established categories" of juristic reasons referred to in *Garland No. 2*.

70 In *Garland No. 2* it was held that, if a plaintiff can satisfy the court that the established categories are not applicable, the defendant may still establish the existence of a juristic reason by reference to public policy considerations and the reasonable expectations of the parties. In that case, the relevant public policy consideration was found to be that "a criminal should not be permitted to keep the proceeds of their crime" and the same must be the case here. Mr Pinos, however, submitted that the court must consider the reasonable expectations of the parties and that this will require it to look at all the circumstances surrounding each loan. However, in the absence of any evidence that might suggest that either of the parties had, or might reasonably have had, expectations of sufficient relevance to constitute a juristic reason for the enrichment of the defendants - and evidence that such expectations with respect to the loan would have varied from case to case - I would not reject the proposed common issues relating to the unjust enrichment of the Cash Store. Nor would I do so on the basis that the plaintiff is seeking an equitable remedy and that all such remedies are said to be discretionary. Judicial discretions are exercisable in accordance with settled principles and not at the

whim of the court. In the absence of any minimum evidential basis for a finding of facts that might attract an application of such principles, a bald assertion that a remedy lies within the discretion of the court will not detract from any commonality it would otherwise possess.

71 I understand the proposed common issue that refers to the provincial legislation to be confined to the question whether loan transactions entered into in breach of section 347(1)(a) of the *Criminal Code* are to be considered as, *per se*, "harsh and unconscionable" and, as such, also in contravention of the statutes in force in some of the provinces. Construed in that manner, it would not give rise to individual issues relating to the circumstances of the parties and of the negotiations for each loan, as suggested by counsel for the defendants.

72 In the result, I am satisfied that the proposed common issues relating to a breach of section 347 (1)(a), and the potential liability of the Cash Store for unjust enrichment in respect of the alleged breach of section 347(1)(b), and of the unconscionable transactions legislation of Ontario, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan, would be shared by all class members. These issues do not extend beyond the agreement to receive, and the receipt of, the broker's fees. Although breaches of provincial consumer protection law were pleaded, no common issues in respect of such breaches, as such, were proposed or addressed at the hearing.

73 I note that very similar common issues with respect to breaches of section 347, and a consequential unjust enrichment of the Cash Store, were accepted in *Bodnar* for the purpose of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. However, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 that was referred to in that case has not been pleaded in these proceedings. I do not know whether this was an oversight. The statute would be relevant only with respect to any customers who obtained payday loans in British Columbia and are now resident elsewhere in Canada.

74 I am also satisfied that the resolution of the common issues in favour of the plaintiff is likely to advance the proceedings substantially. For the reasons I have given, I do not accept the defendant's identification of a myriad of individual issues that, it was submitted, would remain to be determined and would outweigh any benefits to be obtained from the common issues trial. If, at the trial, the plaintiff is successful in proving a breach of section 347(1)(b), and a consequential unjust enrichment, this would appear to be a case where the court could, and probably would, make an aggregate assessment of restitutionary damages pursuant to the powers conferred by section 24(1) of the CPA.

75 The parties have not been able to provide a precise estimate of the size of the class but it appears that there may be several hundred thousand members though, possibly, significantly less than 1 million. The evidence of the president and secretary of the Cash Store - who was also the president and chief executive officer of Rentcash - was that, from the beginning of 2003 to the third quarter of 2005, the Cash Store brokered 1,135,463 loan transactions and that the average amount of the loans was $367. There was no evidence of the number of individuals who were involved in more than one such transaction although counsel considered that this would probably have occurred.

76 The defendants have not denied the likelihood that, if breaches of section 347(1) are proven, it will be possible for the defendant to estimate from its records the aggregate amount of interest charged, and received, at a criminal rate. It is essential to the plaintiff's case for certifying the proceedings that the transactions between the Cash Store and its customers at each of its locations followed a standard pattern and that the terms on which the loans were arranged and the broker's fees were charged did not vary significantly. The only significant variations are likely to relate to the term

of each loan - which, on the evidence, would not have exceeded 18 days - and the amounts advanced to the class members. In consequence, a resolution of the proposed common issues should substantially resolve the claims of the class members one way or the other. If the issues are decided in favour of the class, the only steps remaining should be to make an aggregate assessment of damages, to determine the manner in which these are to be applied for the benefit of the class members and - subsequent to the trial - to identify them and the loan, or loans, each received, if this is found to be necessary. In this connection, I note that the provisions of section 26 of the CPA authorize the trial judge to make *cy pres* distributions whether or not all of the class members can be identified, or the exact share of each can be determined, and notwithstanding the fact that persons other than class members may incidentally benefit.

Section 5(1)(d) - a class action as the preferable procedure.

77 In view of the common issues I have accepted, the plaintiff has, in my judgment, established a strong case for a finding that certification would accord with the three objectives of the CPA: access to justice, judicial economy and behavioural modification. For the purposes of the statute, access to justice does not require that each claimant will receive a distribution of part of the amount for which a defendant has been found liable. Section 26(4) of the CPA recognizes that members may benefit otherwise than from a direct distribution to each of them. Justice is, moreover, accessed by proceedings that will recognize and affirm that the rights of class members have been infringed.

78 The amounts that each of the class members may claim to have been unjustly deprived of are likely to be so small that I would be reluctant to certify the proceedings if I had accepted the submission of defendants' counsel with respect to the issues that would have to be decided on a case by case basis through a series of mini-trials. A costs benefit analysis would then suggest - as I believed to be the case in *Markson* - that any benefit to the class to be obtained by certification as a class proceeding would be non-existent. I do not believe that certification should be denied in a case like this - where a trial of the common issues may well determine the question of liability - just because the amounts each class member could legitimately claim are likely to be so small - so small, in fact, that even the enforcement of individual claims in the small claims court would very likely be prohibitively expensive.

79 In his dissenting judgment on the appeal to the Divisional Court in *Markson*, O'Driscoll J. accepted, and endorsed, the submission of the appellant's counsel that a "classic case for certification as a class proceeding" was presented when:

1. The defendant has received interest at a criminal rate;
2. The damages each class member has suffered are small;
3. Absent a class proceeding, the class members will be denied access to justice;
4. Absent a class proceeding, the defendant may continue to flout its legal obligations;
5. Absent a class proceeding there will be no remedy reasonably available to the class; and
6. Absent a class proceeding, the defendant will be permitted to keep the proceeds of its crime.

80 Although I had not regarded such considerations as determinative on the particular facts and the issues in *Markson*, I believe they are compelling on the facts of this case given the extent to which the

common issues would dispose of the question of the Cash Store's liability and, probably, the computation of the total amount of any unjust enrichment to be attributed to it. In consequence, the conclusion of O'Driscoll J. that "this case fits perfectly into the mould of design for class proceedings" is one that I would respectfully echo in disposing of this motion.

Section 5(1)(e) - A suitable representative plaintiff with a litigation plan

81 The defendants challenged the ability of the plaintiff to represent the class on the ground that his answers in cross-examination reveal that he is unable to recollect facts relating to his numerous transactions with the Cash Store. I am not able to attribute any significant weight to this objection. Mr McCutcheon's personal recollections of the number, the amounts and the terms of the loans made to him are likely to be of far less importance than the evidence in the documents obtained from the defendants at discovery. It is on the basis of these that his claims and those of the other class members will likely stand or fall. He has retained experienced counsel and - notwithstanding the need to prove and rely upon the laws of other Canadian jurisdictions to a limited extent - I see no reason to doubt that his interests and those of the class will be adequately represented. The other facts that he could not remember include matters such as the layout of the Cash Store he attended, the names of the employees he dealt with and the details of the conversations he had with them. I do not believe that these facts should be material at a trial of the common issues I have accepted.

82 There is nothing to suggest that Mr McCutcheon has any potential conflicts of interest with the other class members, or that his transactions with the Cash Store were in any way atypical. Contrary to the submission of defendants' counsel I do not accept that "his individual circumstances may differ greatly from those of a large number of other class members" in any respect that could materially affect a determination of the common issues. As was the case with counsel's submissions on the preferable procedure, the objections to Mr McCutcheon as a representative plaintiff were premised largely on the existence of numerous individual issues that I do not consider should arise.

83 For the same reason, I believe that most of the defendants' objections to the proposed litigation plan miss the mark. Given the small size of the maximum amounts recoverable if the broker's fees are held to include interest at a criminal rate, and the likelihood that an aggregate assessment of damages could be made, plaintiff's counsel submitted that it was neither necessary nor appropriate for him to provide a detailed litigation plan that would deal with the distribution of any amount recovered. In his submission, this question would best be left to the discretion of the judge at the trial of the common issues after the facts relating to the size of the class and the amounts recoverable have been determined and the question of an aggregate assessment has been dealt with. Counsel submitted that, if the common issues were decided in favour of the plaintiff and the members of the class, the powers conferred in section 24 and 26 of the CPA - including the power to order a *cy pres* distribution pursuant to section 26(4) - would provide the trial judge with ample authority to fashion an appropriate distribution procedure. I am in agreement with these submissions.

84 I do, however, agree that further attention is required to the form of notice to be given to class members and the manner in which this will be done. Subject to a satisfactory resolution of that matter - which can be dealt with at a case conference - there will be an order certifying the proceedings against the Cash Store in accordance with these reasons.

85 Counsel should seek an appointment to deal with the question of costs or, if they would prefer to make their submissions in writing, those of the plaintiff should be made within 14 days of the release of these reasons and any responding submissions of the defendants should be made within a further 10 days.

M.C. CULLITY J.

TAB 4

Case Name:

Joseph v. Quik Payday Inc.

Between
Edward Joseph, Plaintiff, and
Quik Payday Inc., Quik Payday, Inc., David M. Dunkley and Linda Miller, Defendants

[2006] O.J. No. 4835

38 C.P.C. (6th) 106

153 A.C.W.S. (3d) 281

2006 CarswellOnt 7681

Court File No. 05-CV-283048 CP

Ontario Superior Court of Justice

A. Hoy J.

Heard: November 28, 2006.
Judgment: December 1, 2006.

(32 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- An order issued certifying the action, approving the settlement agreement and approving class counsel's fees and disbursements -- The pleadings disclosed a cause of action, with an identifiable class, and the proposed issues constituted common issues.

Civil procedure -- Settlements -- Approval -- An order issued certifying the action, approving the settlement agreement and approving class counsel's fees and disbursements -- The settlement was fair, reasonable, and was in the best interests of the class as a whole.

Commercial law -- Banking -- Loans -- Interest -- An order issued certifying the action, approving the settlement agreement and approving class counsel's fees and disbursements.

The parties, who had reached a settlement of a proposed class proceeding in which the plaintiffs sought damages for having received a criminal interest rate in various "payday" loans, sought a consent order for certification and settlement approval -- HELD: An order issued certifying the action, approving the settlement agreement and approving class counsel's fees and disbursements -- The

pleadings disclosed a cause of action, with an identifiable class, and the proposed issues constituted common issues -- -- The settlement was fair, reasonable, and was in the best interests of the class as a whole.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1), s. 29(2)

Criminal Code, R.S. 1985, c. C-46, s. 34(2), s. 347(2)

Counsel:

Odette Soriano, for the Plaintiff

Andrew J. Roman, for the Defendants

ENDORSEMENT

1 **A. HOY J.**:-- The parties have reached settlement of this proposed class proceeding, and seek a consent order for certification and settlement approval. Class Counsel also seek court approval of their fees.

2 This proposed class action is another action with respect to what are commonly referred to as "pay day loans": short term, unsecured loans maturing on the borrower's next pay day.

3 The plaintiff alleges that all the "cheque cashing fees", interest and any other charges exacted by the defendant Quik Payday Inc. ("Quik Payday") in respect of the loans are "interest", as that term is defined in s. 347(2) of the *Criminal Code*, R.S., 1985, c. C-46, and that Quik Payday accordingly entered into agreements to receive interest at a criminal rate, and received interest at a criminal rate, in violation of s. 347 of the *Criminal Code*.

4 Quik Payday is an Alberta corporation. It offered pay day loans over the Internet to individuals throughout Canada between October 2002 and February 2005. It ceased offering payday loans shortly after this action was commenced.

5 Its parent company is the defendant Quik Payday, Inc. ("Quik Payday U.S."), a Utah corporation, which offered payday loans over the Internet to individuals in the United States. It has also ceased carrying on business. David Dunkley is a principal of both corporate defendants, and a resident of Utah. Ms. Miller was a nominee Canadian director who did not have an active role in the Quik Payday business.

Should the Action be Certified as a Class Proceeding?

6 Section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") provides that the Court shall certify a class proceeding if:

(a) the pleadings or the notice of application discloses a cause of action;
(b)

there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. The requirements are the same in a settlement context as in a litigation context, although it is generally accepted that they need not be as rigorously applied in a settlement context as in a litigation context.

7 I have concluded that, in the settlement context, the requirements for certification are met.

8 I am satisfied, in the context of a settlement, that the pleadings disclose a cause of action.

9 The statement of claim alleges that Quik Payday has charged and received interest on its payday loans in contravention of s. 347 of the *Criminal Code* and that the other defendants conspired with Quik Payday to charge and receive interest at a criminal rate. The plaintiff asserts unjust enrichment, breach of contract, conspiracy and the common law in respect of the unenforceability of illegal contracts.

10 I am similarly satisfied in the context of a settlement that the identifiable class requirement has been met. The plaintiff seeks certification of a settlement class defined as:

> All persons in Canada other than the Defendants, their past or present employees, officers, directors, agents or affiliated companies, who, in the period between October 2, 2002 and February 11, 2005 borrowed money from Quik Payday Inc. as a 'payday loan', and either:
>
> Sub-Class 1 - have repaid Quik Payday Inc. in full; or
>
> Sub-Class 2 - defaulted on the payment of their final Payday Loan from Quik Payday Inc.

11 The Class is comprised of 1,589 individuals who took payday loans from Quik Payday. The defendants have produced a list identifying all the Class Members, and the amounts of interest they have paid to Quik Payday.

12 The Class is defined by reference to objective criteria, without reference to the merits of the action.

13 Pursuant to the terms of the Settlement Agreement, the parties have agreed on the following issues, as common issues for the purposes of this motion:

(a) Are the payday loans agreements or arrangements for the purpose of the advancing of credit within the meaning of s. 347(1) of the *Criminal Code*?
(b) Are the "Interest" and "Cheque Cashing Fee" (as those terms are employed in the Payday loan agreements) "Interest" as defined in s. 34 (2) of the *Criminal Code*?
(c) If the answer to (b) is yes, then are the payday loans agreement or arrangements to charge interest at a criminal rate?
(d) Is each payday loan agreement between Quik Payday Inc. and a Class Member void and unenforceable by reason of illegality, and if not entirely void, then are the interest provisions thereof unenforceable in whole or in part?
(e) Did the payments of interest result in the unjust enrichment of the defendants or any one thereof, as a result of their receipt of interest at a criminal rate? If so, should a constructive trust be imposed on the defendants or any one thereof with respect to the interest they received from the payday loans?
(f) Is this an appropriate case for damages to be awarded in an aggregate amount, and if so, how much?

14 I am satisfied that, in the context of a settlement, that the proposed issues constitute common issues.

15 Further, I am satisfied that in the context of a settlement, a class proceeding is a preferable procedure for the resolution of these common issues.

16 Mr. Joseph is a member of Sub-Class 2. I am satisfied that Mr. Joseph, who retained experienced counsel, has fairly and adequately represented the interests of the Class and does not have, on the common issues with the Class, common interests in conflict with the interests of other Class Members.

17 The Settlement Agreement supplants or satisfies, the requirement for a workable litigation plan.

18 Accordingly, the requested Order to certify this action as a class proceeding shall issue. I note in so determining that there have been a number of recent decisions granting certification for class proceedings against payday lenders, both on a contested and on a consent basis:

McCutcheon v. *The Cash Store Inc.*, [2006] O.J. No. 1860 (Sup. Ct.)

Bodnar v. *The Cash Store Inc.*, [2005] B.C.J. No. 1904, 2005 BCSC 1228, aff'd [2006] B.C.J. No. 1171 (C.A.)

Bodnar v. *Payroll Loans Ltd.*, [2006] B.C.J. No. 1705 (B.C. S.C.)

Ayrton v. *PRL Financial (Alta.) Ltd.*, [2005] A.J. No. 466 (Alta. Q.B.), aff'd [2006] A.J. No. 296 (C.A.)

Kilroy v. *A OK Payday Loans Inc.*, [2006] B.C.J. No. 1885, 2006 BCSC 1213

Tracy v. *Instaloans Financial Solutions Centres (B.C.) Ltd.*, [2006] B.C.J. No. 1639 (B.C. S.C.)

Should the Settlement Agreement be Approved?

The Terms of the Settlement Agreement

19 The Settlement Agreement provides that the defendants will pay to Class Counsel an all-inclusive lump sum amount comprising the entire balance in the bank accounts of Quik Payday, estimated to be approximately $192,000, less the reasonable professional fees incurred and estimated to be incurred by defendants' counsel to conclude this settlement. Defendants' counsel estimates these fees at $22,000; Class Counsel agrees this amount is reasonable. This net amount (the "Settlement Fund") will therefore be approximately $170,000. The Settlement Fund is to be distributed as follows: first, in payment of the costs of the claims administrator; second, in payment of Class Counsel's fees, as approved by the Court; and third, to Sub-Class 1 members who file claims that are accepted and approved by the claims administrator. Each Sub-Class 1 member's claim is not to exceed the total interest paid by him or her, less $11.41 for each payday loan. Eleven dollars and forty-one cents is the maximum permissible interest on an average loan. If there is a balance remaining after *pro rata* distributions to Sub-Class 1 members who file claims, it is to be paid to Credit Counselling Canada, a not-for-profit consumer credit advocacy agency.

20 As part of the settlement, Quik Payday Inc. has agreed to take no collection action against the Sub-Class 2 Class members in respect of their defaulted loan obligations.

Test on Approval of the Settlement

21 Pursuant to s. 29(2) of the CPA, the Court must approve a settlement for it to be binding. It affects a large number of individuals who are not before the courts.

22 For a settlement to be approved, it must be fair, reasonable, and in the best interests of the Class as a whole. *Dabbs* v. *Sunlife Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.).

23 There is a strong initial presumption of fairness when a proposed Class settlement, negotiated at arm's length by counsel for the Class, is presented for Court approval. *Vitapharm Canada Ltd.* v. *F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118, 74 O.R. (3d) 758 (Sup. Ct.) at paragraph 17.

Analysis

24 In this case, the settlement was arrived at following lengthy, arms-length negotiations between counsel. Class Counsel are experienced, and recommend the settlement. From the defendants' records, Class Counsel was able to calculate the amount and duration of an average loan and the portion thereof that constitutes interest at a "criminal rate". Class Counsel was also able to determine that Sub-Class 1 customers took an average of 2.6 payday loans. On that basis, the aggregate loss for Sub-Class 1 (calculated as the amount of interest paid in excess of the maximum permitted rate) was $132,763.20. The amount of the recovery for Sub-Class 1 members, using this calculation as a measure of aggregate loss, is very significant.

25 Class Counsel has had access to substantial financial disclosure concerning the corporate defendants. Quik Payday U.S. is no longer in operation, and having reviewed the financial records of Quik Payday and Quik Payday U.S., Class Counsel is of the opinion that, given the amounts at issue, it would not be economically efficient to proceed to trial in the hopes of achieving a better result.

26 I also note, in relation to the amount of the settlement, the evidence that Quik Payday' aggregate net income for the total period that it was in operation was $71,286.95. Class Counsel has satisfied itself, by reviewing financial disclosure, that Mr. Dunkley funded Quik Payday by way of loan and has not received any repayment of principal or interest or received any other distributions from Quik Payday. Similarly, Class Counsel has satisfied itself from review of financial disclosure that Quik Payday made no distributions in the course of its operations to Quik Payday U.S., except to pay for web site and back office (largely computer forms and server space) at fair market value.

27 With respect to the fairness of the settlement to members of Sub-Class 2, the evidence is that Sub-Class 2 customers also took an average of 2.6 payday loans, and if each was an "average loan" in amount and duration, the unpaid principal in respect of the final loan would exceed interest charged by Quik Payday in excess of the maximum permitted rate on the prior loans. The evidence is that there are 786 members of Sub-Class 2, and the unpaid principal in respect of the 786 defaulted transactions totals $228,163.42. Hence, there is a significant benefit to members of Sub-Class 2.

28 Quik Payday was an Internet lender. Communication with class members has accordingly been by direct e-mail and has been more effective than usually the case. There have been no objectors to the settlement. All Class Members who have contacted plaintiff's counsel have expressed their support of the settlement.

29 I am satisfied that the settlement is fair, reasonable and in the best interests of the Class as a whole.

Approval of Class Counsel's Fees

30 Before the statement of claim was issued, Mr. Joseph entered into a retainer agreement with Class Counsel providing for fees in the amount of 25% of the total recovery achieved in litigation, plus disbursements and GST. Class Counsel seeks approval of fees in the amount of $42,000, which is 25% of the estimated total recovery of $170,000, plus GST, and less than the value of their time on an hourly basis expended and to be expended in the prosecution and completion of the claim. Class Counsel also seeks court approval for reimbursement of disbursements incurred to date totalling $2,385, inclusive of GST, and further disbursements to be incurred in completing this settlement, to be paid from the Settlement Fund. Class Counsel estimates further disbursements at approximately $650, plus applicable GST.

31 In the circumstances, the fees and disbursements requested by Class Counsel are fair and reasonable. Class Counsel have achieved a very good result. The requested fees, disbursements incurred to date and further disbursements of up to $750, net of applicable GST, are accordingly approved. Court approval is required for payment of further disbursements in excess of $750, net of applicable GST.

Order to Issue

32 An order shall issue, in the form on which I have endorsed my *fiat*, certifying this action, approving the settlement agreement and approving Class Counsel's fees and disbursements, as herein provided.

A. HOY J.