TAB 5

Case Name:

Mortillaro v. Cash Money Cheque Cashing Inc.

Between
Kenneth D. Mortillaro, Plaintiff, and
Cash Money Cheque Cashing Inc., Defendant
Proceeding under the Class Proceedings Act, 1992

[2009] O.J. No. 2904

73 C.P.C. (6th) 369

2009 CarswellOnt 4007

179 A.C.W.S. (3d) 275

Toronto Court File No. 03-CV-257357CP

Ontario Superior Court of Justice

J.L. Lax J.

Heard: June 15, 2009.
Judgment: July 9, 2009.

(26 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Settlements -- Approval -- Motion by plaintiff for certification of class action, approval of proposed settlement and class counsel fees allowed -- Plaintiff alleged defendant payday loan company charged criminal interest rates -- Proposed class of approximately 114,000 clearly defined and would allow for judicial economy -- Proposed settlement of granting $50 voucher to each plaintiff and donation of $5 per redeemed voucher to Ontario Class Proceedings Fund supported by precedent and no members of class raised reasonable objections -- Defendant agreed to pay $380,000 in legal fees, plus disbursements, which was fair and reasonable.

Motion by the plaintiff for certification of a class action, approval of a proposed settlement and class counsel fees. The plaintiff alleged that the defendant, a payday loan company, had charged criminal interest rates. The proposed class was all Canadian residents, excluding people from British Columbia and Quebec, who took a loan from the defendant, prior to June 15, 2009. The proposed settlement granted each member of the class a $50 voucher that was fully transferrable and could be used toward future loans or to pay down and existing loan. For each voucher redeemed, the defendant would pay

$5 to the Ontario Class Proceedings Fund. The defendant also agreed to pay $380,000 in legal fees, plus disbursements.

HELD: Motion allowed. The plaintiff's pleadings were clear and the class was clearly defined. Given that the class was estimated to contain 114,000 people, class proceedings would clearly promote judicial economy. There was precedent for approving the voucher settlement, which would allow the defendant to continue business. Given the legislative changes and changes in defendant's lending practices, it was in the best interests of the class for the defendant to continue operating. Members of the class only submitted two objections to the proposed settlement and, as both sought to put the defendant out of business, neither was reasonable. The quantum of legal fees offered was fair and reasonable. While the plaintiff had hired counsel on a contingency basis, the cash value of the vouchers could not be accurately determined and used as a yardstick, so the offer by the defendant was the best method of payment.

Statutes, Regulations and Rules Cited:

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

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:

M. Waddell & O. Soriano, for the Plaintiff.

V. Genova & C. Barbato, for the Defendant.

ENDORSEMENT

1 J.L. LAX J.:-- The plaintiff brings this motion, on consent, for certification of the action as a class proceeding, approval of a proposed settlement, and approval of class counsel fees. The claim relates to the interest charged by the defendant on short term loans, commonly referred to as payday loans. The plaintiff alleges that the fee charged by the defendant to advance each payday loan is 'interest' as defined in s. 347(2) of the *Criminal Code* and that the total interest charged exceeds an effective annual rate of interest of 60% contrary to s. 347(1) of the *Criminal Code*.

2 The payday lending industry began to take root in Canada in the early 1990s. Cash Money began its operations in 1992 and now has a total of 102 stores operating in Ontario, Alberta, Manitoba, Nova Scotia, New Brunswick and British Columbia. At the time this action was commenced in 2003, the industry was not regulated and this action is one of numerous class actions that were commenced against payday lenders. Soon after, the participants in the industry began to organize themselves by establishing a Code of Best Business Practices and by lobbying the government to regulate the participants.

3 In 2004, Canadian payday lenders through the Canadian Payday Loan Association established a Code of Best Business Practices to be adhered to by its members. In 2007, Parliament amended the

Criminal Code to permit each province to regulate payday lenders. Where this has occurred, interest charges are no longer "criminal" if they do not exceed the rate set by the province. All of the provinces in which Cash Money operates that are the subject of this proposed class action have regulated or are in the process of regulating the payday lending industry in these provinces. In Ontario, regulations under the *Payday Loans Act, 2008*, S.O. 2008, c. 9, came into force on July 1, 2009. The legislation permits payday lenders in Ontario to charge interest of up to $21.00 per $100.00 borrowed.

4 There can be little doubt that the launching of class proceedings was instrumental in spurring the payday loan industry to take action to regulate their businesses and highlighted the need for a legislative response to provide better consumer protection. Before this occurred, it was problematic to resolve claims that arguably would be funded by monies obtained through illegal means. For this and other reasons, a mediation that was conducted in this action in 2005 before Winkler R.S.J. (now, Winkler C.J.O.) was not successful. As changes to the payday loan industry unfolded, these concerns were no longer incurable obstacles to settlement and the parties resumed settlement negotiations which had been ongoing from time to time since the summer of 2004. These negotiations resulted in the settlement that is before the court.

5 As a result of the settlement, the parties jointly seek certification for the purposes of settlement of a class defined as:

> "All persons resident in Canada, excluding British Colombia and Quebec, and excluding the defendant, its officers, directors or affiliated companies, who obtained one or more payday loan(s) from Cash Money Cheque Cashing Inc. on or before June 15, 2009."

6 British Columbia residents are excluded as there is a separate class proceeding that has been commenced in that province. Quebec residents are excluded because the defendant does not carry on business in Quebec. June 15, 2009 was the date of hearing for certification and settlement approval at which time I granted certification and approved the settlement and class counsel fees with reasons to follow.

Certification

7 The *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") provides that the court shall certify the proceeding as a class proceeding if all of the criteria set out in section 5(1) of the CPA are met. Section 5(1) provides:

> 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.

8 Where certification is sought for the purpose of settlement, all the criteria for certification still must be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. These requirements may be applied less stringently when certification is sought on consent in the context of intended settlement approval as is the case here: *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.* (2004), 2 C.P.C. (6th) 15 (Ont. S.C.J.).

9 For settlement purposes, I am satisfied that each of the criteria for certification is satisfied. Similar if not identical claims have been asserted in other class proceedings that have been certified against other payday lenders in Ontario, including *Smith v. National Money Mart* (2007), 37 C.P.C. (6th) 171 (Ont. S.C.J.); *Bruley v. Instaloans Financial* (December 5, 2005) Ct. File No. 05-CV-294691 (CP) (Ont. S.C.J.); *McCutcheon* v. *Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.) and *Joseph v. Quik Payday Inc.* (2006), 38 C.P.C. (6th) 106 (Ont. S.C.J.).

10 The pleadings disclose a cause of action against Cash Money for unjust enrichment, for damages in restitution for all interest received at a criminal rate, for declaratory relief and for punitive damages. There is an identifiable class defined by objective criteria. The claims of the class raise common issues as to whether the payday loans agreements are void and unenforceable by reason of illegality; whether the defendant was unjustly enriched; whether a constructive trust should be imposed with respect to the interest the defendant received from the payday loans and whether damages can be awarded in the aggregate. A single trial of the common issues will achieve judicial economy for a class estimated to include 114,000 members. While the goal of behaviour modification has now largely been achieved, without a class action there would not be any meaningful access to justice as most of the loans are in small amounts of a few hundred dollars. The proposed representative plaintiff has no interest in conflict with class members and would fairly and adequately represent their interests.

Settlement

11 In order to approve a settlement, the Court must find that it is fair, reasonable and in the best interests of the class. The Court may be guided by a number of factors. These are described in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at para. 71 (Ont. S.C.J.) and *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2005), 74 O.R. (3d) 758 at para. 117 (S.C.J.) as including: (a) the likelihood of recovery or success: (b) settlement terms and conditions; (c) recommendation and experience of counsel; (d) future expense and likely duration of litigation; (e) the opinion of neutral parties; (f) number of objectors and nature of objections; (g) the presence of good faith and the absence of

collusion; (h) degree and nature of communications by counsel and the representative(s) with class members; and, (i) the dynamics of and position of the parties during the negotiations.

12 Not all factors will be relevant, nor is it necessary that all factors receive the same consideration or be accorded the same significance.

13 The proposed settlement provides that each payday loan customer may apply for and receive one voucher in the amount of $50.00 that may be used towards a future payday loan or to pay down an outstanding loan, whether or not the class member is in default on an existing loan. In addition, the defendant will pay $5.00 to the Ontario Class Proceedings Fund for each redeemed voucher. The vouchers will be fully transferable and therefore provide value to any class member who does not wish to take any further payday loans from Cash Money. There is a relatively simple procedure for processing claims, which will be administered by Cash Money under the supervision of the court. The Bruneau Group has been appointed as the independent arbiter of any disputes and shall report to the court at the conclusion of its retainer.

14 Application forms were available in all Cash Money stores and online immediately following settlement approval and will remain available until March 16, 2010. Following the three-month opt-out period, voucher applications will be processed. Vouchers are redeemable for one year. The defendant will bear the costs of administration and of the notice program.

15 There is precedent in Ontario for the approval of voucher settlements: *Waddell v. Apple Computer Inc.* (2008), 67 C.P.C. (6th) 1 (Ont. S.C.J.); *Nantais v. Easyhome Ltd.*, [2005] O.J. No. 5805 (S.C.J.); *McCutcheon*; *Wong v. TJX Companies*, [2008] O.J. No. 398 (S.C.J.). In appropriate circumstances, voucher settlements can serve both the class and the defendant and increase the overall value of settlement. Although it is not easy to assign a cash value to a voucher settlement, in circumstances where the vouchers are transferable, there is evidence of a secondary market in which the vouchers can be discounted and converted to cash and/or there is evidence of a class of repeat users, a voucher settlement can be fair and reasonable and in the best interests of the class.

16 Voucher settlements have been found to be appropriate where the quantum of damages for each claimant is either too difficult and/or too costly to determine as in *Nantais* or where a cash settlement would compromise the defendant's ability to continue as a viable concern as in *McCutcheon*. In that case, which was an action against the only publicly-traded payday lender in Canada, Cullity J. approved a settlement capped at $3 million with claims being paid in equal parts cash and vouchers. He acknowledged that the settlement amount resulted in a significant disparity between the fees received by the defendant and the amounts that would be payable under the settlement. He accepted the submissions of counsel that the disparity was justified, in part, by the limited financial resources of the defendant.

17 Cash Money is a privately-held Ontario corporation and highly leveraged with secured debt. If the action were to proceed successfully to judgment at trial, class counsel identified several significant obstacles to collection and, in particular, the uncertainty of obtaining priority for the judgment over all or some of the defendant's secured debt. As part of the settlement negotiations, Cash Money's 2008 audited financial statements were provided to class counsel and to the court. They show low retained earnings, a high percentage of bad debt and a banking agreement that does not allow for lending facilities to be used to fund a class action settlement, either directly or indirectly.

18 Class counsel conducted investigations into the real property assets of the principals of the company. They were satisfied that neither of the two original principals have significant realizable

real property assets and that virtually all of the dividends paid to the shareholders have been rolled back into the company by way of shareholder loans. Therefore, pursuing the principals personally would not result in any meaningful advantage to the class given the risk and delay that such a claim would pose. Class counsel were also satisfied, based on their investigations, that a settlement could not be funded from cash on hand or paid from future revenues. As well, there was a concern that if the business failed or was sold, the settlement might never be paid.

19 One of the essential elements of any settlement from the point of view of Cash Money was that the company needed to be able to carry on business. This required it to have ongoing access to cash to operate the business to fund future payday loans. There is little realizable value in the company's assets as its value arises from its ongoing cash flow. Given the current and pending regulation of the payday loan industry in Canada, it is evident that Parliament and the Legislatures have seen fit to permit this industry to continue to provide services to the public. Many of the class members remain payday loan customers of the defendant and have shown a desire to continue to make use of this service. Class counsel concluded that the continuation of the business was a fair and reasonable compromise to achieve a settlement.

20 On the whole of the financial information disclosed by Cash Money, class counsel were satisfied that a settlement that provides for a benefit to be immediately paid to the class in the form of a voucher and that would permit Cash Money to continue in business was the best means of effecting a settlement that would bring the litigation to an end without further delay, cost and uncertainty, yet provide meaningful compensation to class members. It also considered the positive modification of the defendant's behaviour as evidenced by the Code of Best Practices and the amendments to provincial and federal legislation. Among the important behaviour modifications achieved by the Code was the elimination of "rollover loans", whereby a customer could extend a payday loan for a further term by paying the interest charges twice. This had been a highly lucrative source of revenue for the defendant and was voluntarily eliminated in 2004.

21 The Notice of Certification and Settlement Approval Hearing was disseminated through newspaper publication and by poster size notices prominently displayed in each of the stores. I was advised that there were a total of 62 enquiries from prospective class members, which is some indication that notice was effective. Two written objections were received. One of the objectors proposed that the defendant "should be forced to return every penny that was obtained illegally, even if it puts them out of business." For reasons already given, putting the defendant out of business would not be in the best interests of the class. The other objector found the settlement to be unacceptable because "it encourages predatory lending." In light of the legislative changes that I have described, this objection is not well-founded.

22 As in *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.) and *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.), the terms of the settlement were negotiated on the principle of Cash Money's ability to pay while remaining a viable concern. The settlement avoids the real and substantial risk that class members will receive no benefit from the litigation or a judgment. I am satisfied that the settlement terms and conditions, taken together, are fair and reasonable and in the best interests of the class, having regard to the factors to be considered in approving settlements generally and voucher settlements in particular.

Class Counsel Fee

23 Under the settlement agreement, Cash Money has agreed to pay legal fees of up to $380,000 plus disbursements and taxes, should they be approved by the court. Class counsel requests fees in

this amount, disbursements of $22,059.39 and taxes of $20,102.95. The amount sought represents approximately the time expended and to be expended, with no premium. I find the fees to be fair and reasonable and I approve the counsel fees, disbursements and taxes in the amounts requested.

24 As part of her submissions on fees, counsel pointed out that the plaintiff entered into a contingent fee retainer agreement that provides that class counsel will receive 25% of the amounts recovered for the class, plus disbursements and taxes. I do not accept her submission that under the terms of the retainer, this would entitle counsel to a fee of $1.567 million. This amount is calculated on the basis that the value of the settlement to the class is $6,270,000, of which $5,700,000 is the value if all class members apply for and receive a voucher and 10% of this amount or $570,000 is paid to the Class Proceedings Fund. I accept that the vouchers have a real value if redeemed or transferred for cash, but the cash value of a voucher settlement cannot confidently be determined and a percentage that is based on an assumed potential value is, in my opinion, an inappropriate yardstick for the calculation of class counsel fees.

25 Class counsel requested that I approve a payment to Mr. Mortillaro of $1,000 from the fees to be paid to class counsel. A similar request (although in the amount of $10,000) was approved in *McCutcheon*. I approved this payment, largely for the reasons given by Justice Cullity in that case, but with the same reservations he expressed at paras. 12-14.

26 Finally, I agreed to an order sealing a portion of the record to protect disclosure of the financial information of Cash Money, a privately-held company, and the names of its investors and shareholders. The court has had full access to this information and accepts the submissions of experienced counsel that the settlement amount is consistent with an amount that Cash Money can afford and that the detrimental effects of releasing this information will far outweigh any potential benefits. In particular, Cash Money is a defendant in a class action in British Columbia and I am advised that the disclosure in that action has not been as extensive as here. Disclosure could potentially jeopardize the manner in which that class action proceeds. Class members have had access to class counsel who have been addressing inquiries about the settlement and will continue to do this. The unsealed portion of the record provides adequate financial disclosure to any member of the public who may be interested in this settlement.

J.L. LAX J.

cp/e/qlrxg/qlmxb/qlaxw/qlhcs/qlcal

TAB 6

Case Name:

MacKinnon v. National Money Mart Co.

Between
Kurt MacKinnon, Plaintiff, and
National Money Mart Company, Defendant
(Registry No. S030527)
And between
Louise Parsons, Plaintiff, and
National Money Mart Company, Defendant
(Registry No. S052095)

[2007] B.C.J. No. 520

2007 BCSC 348

2007 CarswellBC 561

156 A.C.W.S. (3d) 294

Vancouver Registry Nos. S030527 and S052095

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: November 27 - 29, 2006.
Judgment: March 14, 2007.

(100 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Members of class -- Common interests -- Representative plaintiff -- Application by the plaintiffs to certify their action against the defendant as a class proceeding and to be appointed as representative plaintiffs allowed -- Plaintiffs claimed that the fees charged by the defendant under its loan program amounted to a criminal rate of interest -- They sought a constructive trust remedy for alleged unjust enrichment -- Action was certified on behalf of all persons who borrowed money from the defendant under the loan program since 1996.

Application by the plaintiffs to certify their action against the defendant National Money Mart Company as a class proceeding -- Plaintiffs also sought to be appointed as representative plaintiffs for the class -- Proposed class was all persons who borrowed money from Money Mart under its 'Fast

Cash Advance' loan program and who repaid the loan with a post-dated cheque, provided to obtain the loan, between January 29, 1993 and the date that notice was given to the class -- Plaintiffs claimed that the fees charged to them and other members of the class contravened s. 347 of the Criminal Code -- S. 347 made it illegal to receive interest at a rate that exceeds 60 per cent per annum -- HELD: Application allowed -- Pleadings disclosed a cause of action -- It was premature to consider Money Mart's claim that there was no cause of action because s. 347 was unconstitutional -- Constitutional issue was beyond the scope of a certification hearing -- Pleadings were sufficient to support the plaintiffs' claim for a constructive trust remedy for alleged unjust enrichment -- There was an identifiable class of two or more persons -- However, the class period was to commence on January 1, 1996 because the Fast Cash Advance system only started in 1996 -- Claims raised common issues -- Those issues were whether the cheque cashing fee was interest under the Code, whether the standard loan agreements constituted agreements to receive interest at a criminal rate, whether the payment of cheque cashing fees resulted in the receipt by Money Mart of interest at a criminal rate, whether Money Mart was unjustly enriched and, if it was unjustly enriched, whether Money Mart held the benefit in trust and was liable to account for the fees received and all profits earned from those fees -- Further issues were whether providing loans at an illegal rate of interest was an unconscionable act or practice, whether Money Mart was liable to class members who suffered loss or damage because of the unconscionable act or practice and whether Money Mart was liable for punitive or exemplary damages -- Each of these issues would move the litigation forward -- Issues did not have to be addressed on an individual basis -- Class proceeding was the preferable procedure -- It was a fair, efficient and manageable method for advancing the claims of the class members -- Class members did not have an interest in pursuing separate actions -- Based on the common issues that were accepted certification would result in access to justice, judicial economy and behavioural modification -- Individual actions or resorting to alternative dispute resolution sessions would likely create an economic bar to the resolution of individual claims -- Class proceeding was the most simple and practical means for resolving the common issues identified -- Individual issues in this case did not overwhelm the common issues -- Plaintiffs were suitable representative plaintiffs -- They would vigorously prosecute the claim and had an interest in common with the proposed class members with respect to the common issues -- Their proposed class management plan was sufficient.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, s. 8, s. 105, s. 171

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

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4, s. 4(1), s. 4(1)(a), s. 4(1)(c), s. 4(1)(d), s. 4(1)(e), s. 4(1)(e)(i), s. 4(1)(e)(iii), s. 4(2), s. 14(1), s. 27, s. 27(1)(b), s. 29(1)

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

Rules of Court, B.C. Reg. 221/90, Rule 18A, Rule 19(24), Rule 51A

Trade Practice Act, R.S.B.C. 1996, c. 457, s. 4, s. 4(3)(a), s. 4(3)(d), s. 4(3)(e), s. 22(1)

Counsel:

Counsel for the plaintiff: P.R. Bennett, M.W. Mounteer.

Counsel for the defendant, National Money Mart Company: F.P. Morrison, J.P. Brown, J. Yates.

Counsel for the Intervenor Attorney General of British Columbia: C. Jones.

BROWN J.:--

INTRODUCTION

1 The plaintiffs, Kurt MacKinnon and Louise Parsons apply for:

1. an order consolidating their actions;
2. an order certifying the action against National Money Mart Company as a class proceeding pursuant to s. 4 of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 ("***CPA***"), and appointing them as representative plaintiffs for the class.

2 The application to consolidate the actions is not contested. It is appropriate to consolidate the actions as they are duplicate actions. That order is granted.

3 The proposed class is all persons who have borrowed money from Money Mart under their "Fast Cash Advance" loan program and who have repaid that loan with a post-dated cheque, which the borrower provided to Money Mart in order to obtain the loan, between January 29, 1993 and the date that notice is given to the class.

4 The plaintiffs allege that the fees charged to them and to other members of the proposed class contravene s. 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46, which makes it illegal to agree to receive or to actually receive interest at a rate which exceeds 60% per annum.

5 The plaintiffs seek the following relief:

(a) a declaration that the standard First Party Cheque Cashing Fees charged by Money Mart upon repayment of the Fast Cash Advance loan, are interest within s. 347 of the ***Criminal Code***;
(b) a declaration that the standard form Fast Cash Advance Loan Agreements used by Money Mart to provide Fast Cash Advance loans to the class members are unlawful;
(c) an accounting and restitution to the class members of all First Party Cheque Cashing Fees received by Money Mart from the plaintiffs and other class members in order to obtain their Fast Cash Advance loans;
(d) damages for unconscionable trade acts and practices pursuant to s. 22 (1) of the ***Trade Practice Act***, R.S.B.C. 1996, c. 457 ("***TPA***") and ss. 105 and 171 of the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 ("***BPCPA***"); and
(e) punitive damages.

6 The plaintiffs argue that this action is virtually identical to other payday loan actions that have already been certified in this jurisdiction and in others: ***Bodnar et al v. The Cash Store et al***, 2005 BCSC 1228, aff'd 2006 BCCA 260; ***Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.***, 2006 BCSC 1018; ***Bodnar v. Payroll Loans Ltd. et al***, 2006 BCSC 1132; ***Kilroy v. A O.K. Payday Loans Inc.***, 2006 BCSC 1213 (certified by consent); ***Kilroy v. Money Sense*** (6 October 1995), Vancouver S053297 (S.C.) (certified by consent for settlement); ***Ayrton v. PRL Financial (Alta.) Ltd. et al***, 2005 ABQB 311, aff'd 2006 ABCA 88; ***McCutcheon v. The Cash Store Inc. et al***, [2006] O.J. No. 1860 (Ont. Sup. Ct.); ***Davis v. Stop N Cash*** (9 November 2005) Toronto 04-CV-2451 (Ont. Sup. Ct.); ***Bruley v. Instaloans et al***, (Ont. Action No. 05-CV-294691) (certified by consent for settlement).

7 Briefly, this action concerns short term loans for small amounts provided by Money Mart as "Fast Cash Advances". These loans are marketed as loans to be used by borrowers in order to satisfy short term cash needs between pay days. The plaintiffs assert that the cheque cashing fees constitute interest within s. 347 of the ***Criminal Code***, that total interest exceeds the criminal rate of interest and breaches the ***TPA*** and ***BPCPA***. The plaintiffs seek recovery of interest above 60%, and damages.

MONEY MART'S FAST CASH ADVANCES

8 Since 1996, Money Mart has provided short term loans for small amounts, which it calls "Fast Cash Advances". Money Mart sets the term and maximum amount of the Fast Cash Advance by reference to the borrower's next scheduled pay day. Each borrower is required to execute Money Mart's standard form Fast Cash Advance Loan Agreement. Its terms are not negotiable. The maximum allowable term for a Fast Cash Advance loan is 31 days, but it cannot exceed the borrower's next scheduled pay day. The due date of the Fast Cash Advance loan is fixed as the date before the borrower's next scheduled pay day. Each borrower is required to provide Money Mart with a cheque, payable to and endorsed by the borrower, that is post-dated to the date of the borrower's next scheduled pay day. The amount of the cheque is the principal amount of the Fast Cash Advance loan, plus interest on the Fast Cash Advance loan, plus Money Mart's standard First Party Cheque Cashing Fee.

9 Each of the Fast Cash Advance Loan Agreements identifies an amount as interest. The stated annual rate of interest in the Fast Cash Advance Loan Agreements has varied over time between 46% - 59%.

10 Each agreement also sets out a formula for the cheque cashing fee based on a percentage of the principal amount of the loan plus an item fee. These fees have also varied over time, from 2.9% plus an item fee of $9.95 to 13.99% plus an item fee of $2.49.

11 Each of the loan agreements provides that the borrower must repay the principal plus interest in cash on the due date, which is the day before the borrower's next scheduled pay day. If the borrower does not repay this amount in cash by this date, Money Mart cashes the post-dated cheque which the borrower first provided in order to obtain the loan.

THE REPRESENTATIVE PLAINTIFFS' EVIDENCE

12 Between August 1999 and September 2002, Mr. MacKinnon entered into fifty-seven Fast Cash Advance Loans with Money Mart. Each time Money Mart was repaid using the post-dated cheque given by Mr. MacKinnon to obtain his loan. Each of his loans would qualify as a class loan.

13 Between June 1997 and August 1998, Louise Parsons entered into twenty-three Fast Cash Advance Loans from Money Mart. Fourteen of these were repaid using the post-dated cheque that she provided at the time of her loan advance. These loans would qualify as class loans.

14 The plaintiffs have also provided three expert reports from Mr. Ian Karp F.S.A., F.C.I.A, setting out his actuarial evidence.

15 In the 31 March 2003 report, Mr. Karp demonstrates that the effective annual rate of interest is greater than 60% for each of the listed transactions. Transaction A, for example, represents a loan obtained by Kurt MacKinnon on 20 January 2001. Mr. MacKinnon borrowed $200.00 and was required to pay back a total, including First Party Cheque Cashing Fees, of $222.30 on 2 February 2001. Assuming the cheque cashing fees are interest, the interest on this loan is 1,845%.

16 Mr. Karp opines that if a borrower repays a loan in 31 days, plus a fee of 2.9% of the principal advanced and interest at an effective annual rate of 59%, the effective annual rate of interest will always be far greater than 60%.

17 Money Mart has provided approximately 2,274,000 Fast Cash Advance loans in British Columbia between 29 January 1997 and 30 October 2006, which were repaid with the post-dated cheque provided by the borrower. Money Mart estimates that there are approximately 127,900 class members.

THE REQUIREMENTS FOR CLASS CERTIFICATION

18 Section 4(1) of the ***CPA*** provides that the court must certify a proceeding as a class proceeding if the following requirements are met:

> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

19 I will address each of these elements individually.

Do the Pleadings Disclose a Cause of Action?

20 The plaintiffs argue that these claims disclose a cause of action as they are identical to those in ***Bodnar v. The Cash Store*** and ***Kilroy v. A O.K. Payday Loans***.

21 The defendant argues that the action is based entirely on s. 347 of the ***Criminal Code***, which it claims is unconstitutional, and therefore there is no cause of action. The defendant also argues that the pleadings are insufficient to support the plaintiffs' claim for a constructive trust remedy for the alleged unjust enrichment.

(i) Constitutionality of s. 347(1)(b)

22 Section 347(1)(b) of the ***Criminal Code*** reads, "[n]otwithstanding any Act of Parliament, every one who ... (b) receives payment or partial payment of interest at a criminal rate is guilty of ...". The defendants contend that s. 347(1)(b) creates an absolute liability offence and is thus unconstitutional and of no force or effect. The defendant argues: that the provision only requires the act of receiving interest at a criminal rate without a corresponding *mens rea* element, thus imposing liability notwithstanding an absence of intent; and, that s. 347(1)(b) does not provide a due diligence defence, as required by ***R. v. Finlay***, [1993] 3 S.C.R. 103. Money Mart claims that the absence of a *mens rea* element and the absence of a due diligence defence makes the offence an absolute liability offence. Money Mart contends that because a person convicted of the offence is liable for a term of imprisonment, s. 347 violates s. 7 of the ***Charter***, making it unconstitutional and of no force or effect.

23 The plaintiffs argue that the challenge to the constitutionality of s. 347(1)(b) is premature unless or until the Court determines that the First Party Cheque Cashing Fees are interest within the meaning of that section and that Money Mart has collected interest at a criminal rate. Furthermore, plaintiffs' counsel argues that the constitutionality of s. 347(1)(b) goes to the merits of the plaintiffs' claim, which are inappropriate to consider at the certification stage.

24 I accept the plaintiffs' argument that it is premature to decide the question of the constitutionality of s. 347(1)(b) at this stage in the proceedings. It must be plain and obvious that a plaintiff cannot succeed before the court will refuse to certify a class action under s. 4(1)(a) of the ***CPA***. In my opinion, the issue of constitutionality of s. 347(1)(b) is beyond the scope of a certification hearing.

25 The Attorney General of British Columbia appeared in response to the Notice of Constitutional Question. He raised substantive arguments supporting the constitutionality of s. 347(1)(b). Because I have concluded that the defendant's argument is premature, I do not need to address these.

(ii) Insufficiency of pleadings

26 The Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The onus is similar to that required to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the Rules of Court, B.C. Reg. 221/90. As stated in ***Brogaard v. Canada (Attorney General)***, 2002 BCSC 1149, at [paragraph] 30:

> It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The test is similar to the onus on a defendant to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the Rules of Court. However, on a certification application, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled.

27 In this case, the plaintiffs plead that Money Mart has been enriched by the cheque cashing fees paid by members of the class which has resulted in the receipt of interest in excess of the maximum rate of interest permitted under s. 347 of the ***Criminal Code***. The plaintiffs plead that each member of the class has been correspondingly deprived by this payment and that there is no juristic reason why Money Mart should have received or should retain the benefit of these fees. As a result, they plead that Money Mart has been unjustly enriched and holds the unlawful benefit it has received in trust for the class members.

28 The cause of action here is unjust enrichment. The plaintiffs assert that a remedy of constructive trust would be appropriate. I accept the plaintiffs' argument that they have pled the material facts necessary to establish an action for unjust enrichment. As long as the material facts have been properly pleaded, it is not necessary to go on to plead the legal result that follows from those facts (***Canned Heat Marketing Inc. v. CFM International Inc.***, [1998] B.C.J. No. 2409 (S.C.)). The plaintiffs are therefore not required to plead all of the circumstances which may establish that it would be appropriate to impose a constructive trust remedy.

29 In my view, the pleadings are sufficient to satisfy the low threshold that the plaintiffs are required to meet.

Is There an Identifiable Class of Two or More Persons?

30 The plaintiffs' proposed class for this proceeding is all persons who have borrowed money from Money Mart as a Fast Cash Advance loan and have repaid that loan using the post-dated cheque provided to Money Mart in order to obtain that loan, between 29 January 1993 and the date that notice is given to the class.

31 The purpose of a class definition, as expressed in ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) and ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, is:

1. to determine those who are entitled to notice;
2. to identify those people who have a potential claim for relief against the defendant; and
3. to define the parameters of the lawsuit so as to identify those persons who are bound by its result.

32 In this case, the proposed class meets these requirements. The defendant does not dispute this. Rather, it argues that there is no evidence that the class period should begin in January 1993. The defendant says that the Fast Cash Advance system only started in 1996 and that there is no evidence of Fast Cash Advance loans before that date. I accept the defendant's argument on this point. The class period should be 1 January 1996 until the date of notice.

Do the Claims Raise Common Issues?

33 Section 4(1)(c) of the ***CPA*** requires the court to determine if the claims of class members raise common issues. The common issues that the plaintiffs propose are:

(a) Does the Cheque Cashing Fee constitute interest as defined by and for the purposes of s. 347 of the ***Criminal Code***?

(b)

If the answer to (a) is yes, do the standard form Fast Cash Advance Loan Agreements constitute agreements to receive interest at a criminal rate, contrary to s. 347(1)(a) of the ***Criminal Code***?

(c) If the answer to (a) is yes, has the collection by Money Mart of the Cheque Cashing Fees resulted in the receipt by Money Mart of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***?

(d) If the answer to (c) is yes, has Money Mart been unjustly enriched by the collection of Money Mart's standard First Party Cheque Cashing Fees?

(e) If the answer to (d) is yes, then does Money Mart hold the benefit it has received from the collection of those First Party Cheque Cashing Fees in trust for the class members; is Money Mart liable to account to the Class Members for the First Party Cheque Cashing Fees received and all profits earned?

(f) If the answer to (b) or (c) is yes, do the loans to class members on terms that are prohibited by the ***Criminal Code*** constitute an unconscionable act or practice within the meaning of s. 4 of the ***TPA*** and s. 8 of the ***BPCPA***?

(g) If the answer to (f) is yes, is Money Mart liable for damages to those class members who have suffered any loss or damage?

(h) If the answer to (b) or (c) is yes, does the conduct of Money Mart justify an award of punitive or exemplary damages?

(i) If the answer to (h) is yes, what is the amount of punitive or exemplary damages to be awarded?

(I have paraphrased the proposed common issues. The full text is attached as Schedule A.)

(i) Proposed Common Issues A - C: Characterization of the fee; Legality of the agreement; Receipt of unlawful interest

34 The first three common issues are:

A. Does the cheque cashing fee constitute interest as defined by s. 347 of the ***Criminal Code***?

B. Do the standard form loan agreements constitute agreements to receive interest at a criminal rate?

C. Does payment of the cheque cashing fees result in receipt by Money Mart of interest at a criminal rate?

35 Section 347(1) creates two offences:

1. the offence of entering into an agreement or arrangement to receive interest at a criminal rate (s. 347(1)(a)) and
2. the offence of receiving payment or partial payment of interest at a criminal rate (s. 347(1)(b)).

36 These issues turn on whether or not the cheque cashing fees can be characterized as interest. Interest is defined in s. 347(2) of the ***Criminal Code*** as

> the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, 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 or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes.

37 The defendant argues that the first three common issues are not truly common.

38 With respect to the first issue, the defendant says that its determination will not significantly advance the litigation because it is not an offence to charge interest. Rather, it is only an offence to charge interest at a criminal rate, a rate that exceeds 60% per annum. Furthermore, because the ultimate interest rate charged depends upon when the was repaid, Money Mart asserts that whether or not it actually received interest at a criminal rate can only be determined if each individual class member can establish when they made their individual payments.

39 Second, the defendant argues that s. 347(1)(a) requires the court to consider the agreement at the time the transaction was entered into, asserting that the loan agreements themselves do not require a payment of interest at a criminal rate. The defendant argues that the plaintiffs have advanced an hypothesis whereby each class member needed the benefit of the loan until the next pay day, thus requiring them to repay their debt with a cheque; consequently, the agreement required payment of the cheque cashing fees. For their part, the defendants say that many customers repay their loans in cash, thus avoiding all cheque cashing fees and all circumstances where the agreements might breach s. 347. The defendant contends that to determine whether any individual needed the benefit of the loan until his or her actual pay day will require an investigation of individual circumstances, and so cannot be a common issue.

40 With respect to the third common issue, that is whether receipt of the cheque cashing fees constitutes a breach of s. 347(1)(b), the defendant argues that this inquiry is limited to those loans that were in fact repaid by cheque on the due date. As a result, each individual will have to establish payment of the cheque cashing fees and collection by Money Mart. The defendant argues that because the loan agreements enable a debtor to avoid all fees by permitting repayment in cash, the payment of interest at a criminal rate would be the result of a voluntary act of the debtor. The defendant contends that where an act is wholly under the control of the debtor and not compelled by the lender, there can be no violation of s. 347(1)(b) because borrowers have the choice of paying in cash and avoiding all cheque cashing fees. The defendant therefore contends that those who pay by cheque are voluntarily incurring the cheque cashing fee such that there can be no breach of s. 347(1)(b). The defendant argues that determining whether payment by cheque is a voluntary act will require an individual inquiry in each case and so cannot be a common issue.

41 The plaintiffs argue that these common issues are essentially the same as those that were already accepted as common in ***Bodnar v. The Cash Store, Tracy v. Instaloans***and ***Bodnar v. Payroll Loans***. The plaintiffs say that there is no basis upon which these cases can be distinguished and that therefore the issues proposed in this action are proper common issues.

42 To be common, issues need not dispose of the litigation. As noted in ***McDougall v. Collinson***, 2000 BCSC 398 at [paragraph] 86:

> A resolution of the common issues does not have to be determinative of liability or supportive of the relief sought. It need not produce the same result for all members of the class. It must, however, advance the litigation forward. If it does not, then certification is inappropriate.

43 Here, resolving each of these issues will move the litigation forward. With respect to the first issue, the characterization of the cheque cashing fee is the cornerstone of this litigation. If it is determined that the cheque cashing fee is not interest within the wording of s. 347 of the ***Criminal Code***, then the action necessarily fails. If it is determined that the fee is properly characterized as interest within s. 347, then the action is advanced significantly and the other issues may be considered.

44 The defence's objections to the second and third common issues turn on the "voluntariness" of the payment of the loan by cheque, rather than cash.

45 The plaintiffs' theory is that, properly interpreted, the agreement requires the payment of both interest and fees because it is only where the borrower fortuitously has sufficient cash prior to his or her next pay day that this payment can be avoided. They call attention to the similarities between the case at bar and ***Garland v. Consumers' Gas Co.*** [1998] 3 S.C.R. 112, where the gas company defendants argued that late payment charges were incurred voluntarily because they could be avoided by timely payment. In response to this argument, Major J. for the majority said at [paragraph]61:

> The respondent's assertion that customers "voluntarily" pay the LPP [late payment penalty] is unpersuasive. The prepayment of the mortgage in *Nelson*, [1986] 1 S.C.R. 749, was a voluntary act because it was wholly at the debtor's initiative and was not compelled by the lender's demand or by a determining event set out in the agreement. A customer's failure to pay the LPP by a named date is not voluntary in the same sense. The LPP is automatically triggered by an event specified in the arrangement between the parties, i.e. the passage of time. The fact that the respondent consents to the possibility of late payment, and thereby presents its customers with the option of paying before or after the due date, does not mean that a customer "voluntarily" incurs the LPP when he or she fails to pay on time. A penalty is not "voluntary" simply because it could conceivably be avoided through prompt payment. If that were the case, then all penalties could be considered voluntary, and the inclusion of the term "penalty" in s. 347(2) would become meaningless. 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).

46 Furthermore, the plaintiffs argue, the payment of the cheque cashing fee is an act compelled "by the occurrence of a determining event set out in the agreement." According to the Supreme Court of Canada in ***Degelder Construction Co. v. Dancorp Developments,*** [1998] 3 S.C.R. 90 at [paragraph] 34.

> [t]here is no violation of s. 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.

47 I am not satisfied that these issues necessarily require the Court to look at individual circumstances. A similar voluntariness issue was addressed in ***Bodnar v. The Cash Store***. In that case, the defendants argued that a borrower chooses when to pay broker's fees, chooses whether to receive funds using a cash card, and chooses how many debit transactions will be made. As a result, the defendants argued, the resulting fees were incurred voluntarily. In that case I concluded at [paragraph] 36:

> I am not satisfied that these issues necessarily require the court to look at individual circumstances. Whether choosing to pay broker's fees, or choosing to receive funds by cash card, or choosing to repeatedly use a cash card, thereby incurring fees, constitutes a voluntary payment at law is an issue which can be considered on a class-wide basis. In the event that the court determines that the voluntariness issue cannot be decided for the entire class, it would constitute a defence to an individual's claim, but would not detract from the commonality of the criminal interest rate issues: whether the fees are illegal interest and related questions could be determined, would move the litigation forward, with voluntariness to be considered at the individual issues stage.

48 The Court of Appeal also considered the issue of voluntariness in ***Bodnar v. The Cash Store Inc.***, 2006 BCCA 260 at [paragraph] 11-12, saying:

> The appellants contend that the illegality issue had another individualized dimension: whether payment of interest greater than 60 percent arises from a voluntary act of the borrower - that is, whether it is an act wholly within the borrower's control and not compelled by the lender or the occurrence of some determining event set out in the agreement. On this aspect, the Chambers judge concluded that the voluntary payment issue was a question of law that could be considered on a class-wide basis with perhaps an exception related to payment of brokerage fees or the use of a cash card that could be considered later at an individualized stage of the litigation if necessary. This would not detract from moving the litigation forward by determining the illegal interest and related issues in common.
>
> The Chambers judge's conclusion on the voluntary aspect is supported by the judgment of the Supreme Court of Canada in ***Garland v. Consumers' Gas***, [1998] 3 S.C.R. 112, where Major J., in the reasons of the majority, rejected the proposition that the gas company's late payment charges were incurred voluntarily because they could be avoided by timely payment of the gas bills (at para. 61). No individual inquiry was required. In my view, there was no error in the Chambers judge's conclusion on the voluntariness issue.

49 As in ***Bodnar***, I am not persuaded by the defendant's arguments on these issues.

(ii) Proposed Common Issues D - E: Unjust enrichment; Remedies for unjust enrichment

50 The next common issues are:

D. Has Money Mart been unjustly enriched?
E. If so, does Money Mart hold the benefit in trust, is Money Mart liable to account for the fees received and all profits earned from these fees?

51 It is well established law that unjust enrichment requires proof of enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. The defendant first argues that the issue of unjust enrichment is not common because determining whether a lender has been unjustly enriched requires examining all the features of the particular borrower and the specific circumstances of the transaction.

52 Second, Money Mart argues that the loan agreements grant a customer the contractual right to repay his or her loans in cash, thus avoiding all fees. This would provide a juristic reason for the "enrichment".

53 Third, Money Mart argues that unjust enrichment is an equitable cause of action which requires the court to exercise its discretion according to principles of fairness and equity. Money Mart argues that the Supreme Court of Canada in ***Transport North American Express Inc. v. New Solutions Financial Corp.***, 2004 SCC 7 indicated that judicial discretion should be employed in cases involving s. 347 of the ***Criminal Code*** in order to provide remedies that are tailored to the contractual context involved. Money Mart argues that this, too, will necessarily involve the examination of all of the features of the borrower and the circumstances of each transaction.

54 For their part, the plaintiffs argue that unjust enrichment is a common issue because, according to their theory of the case, there is no justification in law for the retention of interest received in violation of s. 347(1) of the ***Criminal Code***. They also disagree with the defendant's characterization of ***Transport***. The plaintiffs argue that ***Transport*** concerns the extent to which a court may enforce the terms of an agreement which requires payment of interest at a criminal rate. The court in that case set out a spectrum of remedies, none of which permit the lender to collect and retain interest at a criminal rate.

55 These same arguments were raised in ***Bodnar v. The Cash Store Inc.*** The defendant in that case also argued that the claim of unjust enrichment necessarily involved an inquiry into each individual claimant's circumstances. There, as here, the plaintiffs relied on ***Garland v. Consumers' Gas Co.,*** 2004 SCC 25 at [paragraph] 65:

> Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff.

The plaintiffs argued that as a question of law, one who receives payment of interest at a criminal rate has been unjustly enriched and cannot establish a reason to deny recovery.

56 In ***Bodnar***, I concluded that that case was akin to ***Elms v. Laurentian Bank of Canada***, 2001 BCCA 429, where, on the plaintiff's theory, no individual inquiry was required. As was the case in Elms, while the plaintiffs might not succeed on the merits of the issue, I was not satisfied that the issue required individual inquiries. In ***Bodnar***, the Court of Appeal concurred, saying:

> [i]n that context, I do not think there was any error in the Chambers judge's conclusion that the question of juristic reason did not require individual assessment. The respondents' claims will all stand or fall on the general

effect of illegality, assuming they succeed in establishing a breach of the ***Code*** or the ***TPA*** or ***BPCPA***. 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.

57 Here, too, I am not satisfied that the issue of unjust enrichment must be addressed on an individual basis.

58 With respect to the constructive trust/liability to account issues, the defendant argues that whether a constructive trust is an appropriate remedy cannot be addressed until the court has determined that monetary compensation is not adequate. The defendant argues that entitlement to compensation or damages cannot be proved as a common issue, but must be proven individually. Money Mart argues that it has no liability to account to an individual if that individual owes it money.

59 Again, this issue was certified in essentially the same form in ***Bodnar v. The Cash Store, Tracy v. Instaloans, Bodnar v. Payroll Loans et al***, and ***Parsons v. Coast Capital***, [2006] B.C.J. No. 751. I am not satisfied that these issues necessarily cannot be decided on a class-wide basis. I adopt my reasons in ***Tracy*** at [paragraph] 48-52.

(iii) Proposed Common Issues F - G: Unconscionability and damages

60 The common issues here are:

F. Does providing loans at an illegal rate of interest constitute an unconscionable act or practice pursuant to s. 4 of the ***TPA*** and s. 8 of the ***BPCPA*** regardless of the factors set out in s-s. (3)(a) through (d);

G. Is Money Mart liable for damages to those class members who have suffered loss or damage because of the unconscionable act or practice?

61 Here, the defendant argues that the issue of unconscionability cannot be examined without assessing the factors listed in s-s. (3)(a)-(d) of the ***TPA***. These factors are:

(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d)

> that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

Money Mart argues that each of these factors can only be considered on an individual, as opposed to class-wide, basis, and that therefore the issue of unconscionability is not common to the class.

62 The plaintiffs argue that they have confined their allegation of unconscionable act or practice to a breach of s-s. (3)(e): that the terms or conditions were so harsh or adverse to the consumer as to be inequitable.

63 The defendant's argument was made and dismissed in ***Bodnar v. The Cash Store Inc.*** Mr. Justice McKenzie, speaking for the Court of Appeal said:

> Relying on the direction in s. 8(2) that the court must consider all of the surrounding circumstances in determining whether an act or practice is unconscionable, the appellants contend that they are permitted to raise factors referred to in s. (8)(3)(a) - (d) on an individualized basis in answer to the respondents' allegations under subparagraph (e). In my view, that is a misreading of the provisions. Subsections (a) to (d) are intended to identify factors from which an inference of unconscionability may be drawn. They do not outline defences to claims of unconscionability. If the respondents limit their claims to subsection (e) unconscionability, I do not think subsections (a) to (d) could be of any assistance to the appellants in defending those claims.

64 This case cannot be distinguished from ***Bodnar*** and therefore these comments apply. These issues can be certified as common.

(iv) Proposed Common Issues H - I: Punitive damages

65 The common issues here are:

> H. Does the conduct of Money Mart justify an award of punitive or exemplary damages?
> I. What would be the amount of punitive or exemplary damages to be awarded?

66 These issues are virtually identical to those in ***Bodnar v. The Cash Store, Tracy v. Instaloans, Bodnar v. Payroll Loans***, and ***Parsons v. Coast Capital***.

67 The defendant argues that punitive damages can only be awarded after the total amount of compensatory damages has been assessed. The defendant argues that punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff, and any advantage or profit gained by the defendant, relying on ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18. The defendant argues that this will require a consideration of individual circumstances.

68 This point was addressed in ***Bodnar v. Payroll Loans*** and in ***Tracy v. Instaloans***. In ***Bodnar*** I said:

With respect to punitive damages, in ***Reid v. Ford Motor Company***, 2003 BCSC 1632 and ***Fakhri v. Alfalpha's Canada Inc.*** (2004), 34 B.C.L.R. (4th) 201, 2004 BCCA 549, the applicability of punitive damages was found to be a common issue. On the plaintiff's theory, whether punitive or exemplary damages apply is at least partly a common issue. As noted in ***Fakhri***, there are two stages in deciding a punitive damage claim: first, the defendant's behaviour is assessed to determine if it is deserving of a punitive response (the common issue), and second, the effect of that behaviour on individual class members is examined ([paragraph] 23). Here, the plaintiff's theory for damages hinges largely on the conduct of the defendants. Whether punitive damages should be awarded can therefore be determined on a class-wide basis. Other damage questions can be determined at a later stage. As the Court of Appeal noted in ***Fakhri*** at [paragraph] 26 the ***Class Proceedings Act*** contemplates such a flexible approach.

In light of the foregoing, I am persuaded that the issues proposed by the plaintiff are common and suitable for a class proceeding. I adopt the words of LoVecchio J. in ***Ayrton*** where he held, with respect to a similar argument:

> In my view, the claims in this case raise similar issues of fact and law that, once resolved, will advance the class members' claims in a meaningful way. The class members have all been advanced loans by the Defendants under a nearly identical scheme whereby they are required to pay a brokerage fee on top of interest for their loan. There is one central issue to their claims that, once resolved, will advance the class members' claims in a meaningful way.
>
> That issue is whether the brokerage fee constitutes interest under s. 347 of the *Criminal Code*. If the answer is yes, there are other questions that follow regarding the receipt of that interest and what remedies flow from the receipt of that interest, that can be answered. It may be that at this stage the class members should be divided into sub-groups depending on whether they paid their loans on time, were granted an extension of a few days, or were granted an extension of a few months. However, the factual and legal issues for the court to determine regarding these sub-groups, such as the availability of notional severance, or a juristic reason for the Defendants' enrichment, can be determined based on the circumstances of a representative for those subgroups. ([paragraph]s 85-86)

These comments apply equally here.

Is a Class Proceeding the Preferable Procedure?

69 Whether or not a class proceeding is the preferable procedure was intended to capture two ideas: (1) whether it is preferable in the sense of being a fair, efficient and manageable method to handle the claim, and (2) whether it is preferable to other procedures. These ideas were first expressed by

McLachlin C.J.C. in ***Hollick*** at [paragraph] 28 and later affirmed in ***Rumley v. British Columbia***, 2001 SCC 69. This behoves the Court to undertake a sort of cost/benefit analysis, which was described by our Court of Appeal in ***Hoy v. Medtronic Inc.***, 2003 BCCA 316.

> it is not an accounting exercise to determine economic viability. The analysis, rather, involves an assessment of whether a class proceeding would advance the claims in any meaningful way. If resolution of the common issues goes a considerable measure towards obtaining relief for the plaintiffs, then the benefit of proceeding by way of class action, as opposed to individual actions, is a factor in favour of certification. Certification, in such circumstances, would advance the objects of judicial economy and improved access to the courts.

70 Section 4(1)(d) of the ***CPA*** provides that a Court must certify a proceeding where a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. Subsection (2) requires the court to consider all relevant matters including:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

71 I will consider each of these issues in turn.

(a) Is a class proceeding fair and efficient? Do the common issues predominate?

72 I combine these issues because they overlap in this case.

73 The plaintiffs submit that if the common issues identified are resolved in favour of the class, then Money Mart will be liable to the class members for all of the cheque cashing fees it collected from class members. The plaintiffs submit that this proceeding will be fair and efficient and that the common issues predominate. The plaintiffs say that the determination of Money Mart's liability to the class will be the aggregate of these fees, which can be determined from Money Mart's records of the fees it has collected. The plaintiffs refer to s. 29(1) of the ***CPA***:

> 29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (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 a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

The plaintiffs say that the aggregate liability can reasonably be determined from Money Mart's records, without reference to the evidence of individual class members. Errors in the defendant's records, which the plaintiffs say may amount to 12,000 out of 2 million transactions, may be accommodated by adjustment to the total liability. Finally, the plaintiffs say that this assessment is a matter to be addressed after the common issues trial, relying on ***Serhan Estate v. Johnson & Johnson***, [2006] O.J. No. 2421 (Sup. Ct.).

74 The defendant argues that common issues do not predominate; their records are not sufficiently detailed or reliable and the court will be required to look at each individual transaction, which will become a monster of complexity. They say that this will consume hundreds of thousands of hours and is not fair or efficient.

75 Money Mart made the same argument in ***Smith v. National Money Mart Company***, [2007] O.J. No. 46 (Sup. Ct.), an Ontario class proceeding which is virtually identical to the action before me. There Mr. Justice Hoy said:

> Money Mart argues that a class proceeding is not the preferable procedure ... 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.

Mr. Justice Hoy rejected that argument:

> 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.
>
> 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.

([paragraph] 117, [paragraph] 125, [paragraph] 126)

76 I adopt Mr. Justice Hoy's reasons on this point.

77 Money Mart argues that the plaintiffs' aggregate assessment cannot work, in any event, because the defendant would have an equitable set-off against any class member who owes Money Mart for other loans. The defendant says that equitable 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": ***Muscat v. Smith***, [2003] 1 W.L.R. 2853, at 2864.

78 This, too, was argued and rejected in ***Smith***. Mr. Justice Hoy said:

> 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.

([paragraph] 97)

Again, I accept Mr. Justice Hoy's reasons on this point.

79 In addition, I note that in ***Federal Commerce and Navigation Ltd. v. Molena Alpha Inc.*** [1978] 3 All E.R. 1066 (C.A.), the Court of Appeal was careful to say that not every cross-claim has the effect of extinguishing or reducing the claim, and distinguishes a set-off, or a defence properly reducing the claim, from a counterclaim:

> When the debtor has a true set-off it goes in reduction of the sums owing to the creditor .... But when the debtor has no set-off or defence properly so called, but only a counterclaim or cross-action, then the creditor need not allow any deduction to be made. He can ... leave the debtor to bring an action for ... his counterclaim. (at p. 1077)

80 In my view, the cross-claim of the defendant is likely a counterclaim, rather than a set-off as contemplated in ***Muscat*** and ***Federal Commerce***. However, I do not need to decide the issue at this time.

(b) Do a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions?

81 There is no evidence that there are class members who have an interest in pursuing individual action.

(c) Are the claims the subject of other proceedings?

82 There are no other proceedings in British Columbia against Money Mart.

(d) Are other means of resolving the class members' claims less practical or less efficient? Would the administration of the class proceeding create greater difficulties than those likely to be experienced if relief were sought by other means?

83 I have collapsed the last two factors into one. In the context of this case and in the submissions of the parties, each factor addresses the same considerations.

84 The plaintiffs argue that the class members' individual claims are for modest amounts, at most a few thousand dollars. The plaintiffs say that they do not have the financial ability to pursue individual action. The plaintiffs say that a class proceeding would be more economic and efficient than the alternative dispute resolution ("ADR") proposed by Money Mart. They say that even though Money Mart offered to conduct this ADR at no cost to the plaintiffs, an expert's report would still be required, and this alone would make the litigation uneconomical for individual claimants. Further, the result of any one ADR session would not be binding on the class.

85 Money Mart argues that ADR would be more efficient and less costly than a class proceeding. Second, Money Mart argues that the federal and provincial governments are actively taking steps to regulate the business practices of payday lenders with the introduction of Bill C-26. This, Money Mart argues, eliminates behaviour modification as a possible consequence of this action because any "modification" required will be done through legislation and regulation. Finally, Money Mart argues that the amounts involved do not justify the proceedings, citing ***Nelson v. Hoops L.P., a Limited Partnership***, 2004 BCCA 174, and ***Markson v. MBNA Canada Bank*** (2005), 78 O.R. (3d) 39 (Sup. Ct.).

86 In view of the common issues I have accepted, the plaintiff has established that certification would accord with the three objectives of the CPA: access to justice, judicial economy and behavioural modification. Given the cost-saving objective of class proceedings, I conclude that individual actions or alternative dispute resolution sessions would likely create an economic bar to the resolution of individual claims. A class proceeding would facilitate economic access to justice for the plaintiffs. As I mentioned in ***Tracy***:

> Presenting legally complex claims is expensive and difficult. This hurdle may well be insurmountable, given the amount in issue in each individual claim. If individuals were to pursue individual actions or arbitrations, there would be an unnecessary proliferation of proceedings, fact finding and legal analysis.

87 A class proceeding is the most simple and practical means for resolving the common issues identified.

88 These objectives were recognized by Chief Justice McLachlin in ***Hollick v. Toronto (City),*** 2001 SCC 68, where she also remarked that "it is essential therefore that courts not take an overly restrictive approach to the legislation [Ontario's ***CPA***], but rather interpret the ***Act*** in a way that gives full effect to the benefits foreseen by the drafters."

89 With respect to Bill C-26, it remains to be seen whether the federal and provincial governments will take action to regulate the payday loan industry.

90 Finally, with respect to the minimal' amounts in issue: ***Nelson*** and ***Markson*** are markedly different from this case. In ***Markson***, 8 million transactions would need to be reviewed in order to identify the small percentage which might have resulted in the payment of interest at a criminal rate. The individual claims were unlikely to exceed $7.50. Here, on the plaintiffs' theory, each class member will have paid interest at a criminal rate. The amounts involved would be larger than those in ***Markson.***

91 In ***Nelson***, the plaintiff claimed that his contract for the purchase of two season tickets for Vancouver's N.B.A. team, the Grizzlies, with Hoops L.P., included express or implied terms that he could purchase season tickets for the same seats from year to year after the 2000-01 season, as well as the right to upgrade his tickets to better seats as they became available. Before that could happen, the Grizzlies were moved for the 2001-02 season. In response to this move, the plaintiff sought to certify a class action alleging fraudulent misrepresentation by Hoops L.P. The plaintiff pleaded that he had relied upon statements by Hoops L.P. that the team would stay in Vancouver beyond the 2000-01 season and that he would not have purchased the tickets absent those assurances. Groberman J. gave three reasons why a class proceeding would not be conducive to the fair and efficient resolution of the common issues: (1) the class members' circumstances were so diverse that likely no more than a small number of them would share a cause of action; (2) the individual issues in the case overwhelmed the common issues as they concerned individual motivations for buying the tickets, individual knowledge of Hoops L.P.'s statements and the individual reliance on those statements; (3) the claims in question were so small as to not be worthy of adjudication before the Court.

92 Here, the circumstances of the class members are not so diverse that only a small number of them share a cause of action. Second, the individual issues in this case do not overwhelm the common issues. The resolution of the common issues would significantly advance this litigation. Finally, the claims in question here, while not large, are not as small as those contemplated in ***Nelson***.

93 Given the significant number of common issues involved in this litigation and their importance in relation to the claims as a whole, a determination of the common issues would significantly advance the case. Aside from the larger number of loans and claimants involved, this case is indistinguishable from the other payday loan actions which recognized a class proceeding as the preferable procedure.

(e) Are the Plaintiffs Suitable Representatives?

94 Section 4(1)(e) requires that the Court determine that there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

95 I am satisfied that the plaintiffs would vigorously prosecute the claim and have an interest in common with the proposed class members with respect to the common issues. There is no evidence to suggest that they would be in conflict, or could not fairly and adequately represent the interests of the class members in respect of these common issues. Indeed, Money Mart does not dispute that the plaintiffs satisfy the requirement of s. 4(1)(e)(i) and s. 4(1)(e)(iii).

96 The focus of the defendant's argument is with respect to the second requirement. Money Mart argues that the plan put forward by the plaintiffs is not an appropriate case management plan for the case at bar. The defendant submits that the plaintiffs' case management plan is essentially the same as was accepted in ***Bodnar, Tracy*** and ***Payroll***. The problem, Money Mart argues, is that the scope of this case is much greater given the larger number of class members, making past case management plans unsuitable. The defendant also argues that the plaintiffs have not adduced any evidence as to how they propose that the individual issues will be dealt with after the common issues are determined. The proposed class management plan is attached to this judgment at Schedule "B".

97 For their part, the plaintiffs propose that after the common issues are determined an independent Claims Processor will be appointed by the Court. This approach is contemplated by the ***CPA*** in s. 27 (1)(b). Using the defendant's records, the Claims Processor will determine the amount of interest received at a criminal rate. The Claims Processor will determine each class member's entitlement to payment from the class fund based on claim processing rules developed and approved by the Court. The Claims Processor will submit a report to the Court setting out each class member's entitlement for approval. Disputed claims will be referred to an independent Referee who will determine the issue on the basis of written evidence unless he or she concludes that an oral hearing is necessary. The resolution of these claims would be submitted to the Court for approval.

98 As this court has noted in ***Fakhri et al. v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)***, 2003 BCSC 1717 at [paragraph] 77:

> The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

99 I am satisfied that the plan in this case is sufficient for these purposes.

CONCLUSION

100 I conclude that the plaintiffs' action should be certified as a class action.

BROWN J.

* * * * *

SCHEDULE A

Common Issues

1. Do the fees charged by the Defendants or their franchisees in the operation of their Payday Loan businesses and paid or payable by the Class members upon the advance, repayment or renewal of their Payday Loans, pursuant to the terms of the

agreements or arrangements used by the Defendants in their Payday Loan businesses to advance the Payday Loans to the Class members, in addition to any charge expressly stated by those agreements or arrangements to be interest, and expressed in any form, other than a charge for the actual cost of insuring certain risks of default in repayment of the Payday Loan (collectively the "Payday Loan Fees"), constitute interest as defined by and for the purpose of s. 347 of the ***Criminal Code***, either in whole or in part?

2. If any of the Payday Loan Fees charged by any of the Defendants or their franchisees in the operation of their Payday Loan businesses constitute interest under s. 347 of the ***Criminal Code***, either in whole or in part, do the agreements or arrangements pursuant to which those Payday Loan Fees have been collected from Class members constitute an agreement or arrangement to receive interest at a criminal rate, contrary to s. 347(1)(a) of the ***Criminal Code***?
3. If any of the Payday Loan Fees charged by any of the Defendants or their franchisees in their Payday Loan businesses constitutes interest under s. 347(1) of the ***Criminal Code***, either in whole or in part, has the collection by those Defendants or their franchisees of those Payday Loan Fees upon repayment of the Payday Loan, either on the due date of the Payday Loan or within 60 days of its advance, together with any charge expressly stated to be interest, resulted in the payment by Class members to and the receipt by those Defendants or their franchisees of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***?
4. If the franchisees of those Defendants who operates a franchise system of Payday Loan businesses (the "Franchisor Defendants") have received interest at a criminal rate as a result of the payment by class members of the Payday Loan Fees charged by the franchisees for the Payday Loans advanced by them to those Class members, have the Franchisor Defendants received through their franchisees a partial payment of the criminal interest paid by the Class members in respect of the payday loans advanced to them by the franchisees, contrary to s. 347(1)(b).
5. If any of the Defendants through the operation of their Payday Loan businesses have received interest at a criminal rate from Class members in respect of their Payday Loans, or have received through their franchisees a partial payment of such interest paid to their franchisees by class members, have those Defendants been unjustly enriched by the receipt of interest at a criminal rate from those Class members or by the receipt of a partial payment of such interest?
6. If any of the Defendants have been unjustly enriched by the receipt of interest at a criminal rate from members of the Class in respect of their Payday Loans or by the receipt of a partial payment of such interest paid to their franchisees by Class members:

    (a) do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit to those Defendants? And
    (b) are those Defendants liable to account to those Class members for the unlawful interest received from them and all profits earned therefrom?

7. If the franchisees of the Franchisor Defendants have received interest at a criminal rate from Class members in respect of their payday loans:

(a) have those Franchisees been unjustly enriched by the receipt and retention of interest at a criminal rate from those Class members; and

(b) if so, are the Franchisor Defendants liable to account to those Class members for that unjust enrichment of their franchisees?

8. If any of the Defendants have received interest or a partial payment of interest at a criminal rate from Class members pursuant to the terms upon which those Defendants or their franchisees advanced Payday Loans to Class members, does the provision by those Defendants of Payday Loans to Class members on such terms, and the receipt by those Defendants of interest or a partial payment of interest at a criminal rate in respect of those Payday Loans, constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practices Act***, R.S.B.C. 1996, c. 457?

9. If the conduct of any of the Defendants in advancing Payday Loans to Class members or collecting interest from Class members in respect of those Payday Loans, or operating a franchise system pursuant to which Payday Loans are provided to and interest is collected from Class members at a criminal rate, constitute unconscionable acts or practices pursuant to s. 4 of the ***Trade Practices Act***, are those Defendants liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to s. 22(1) of the ***Trade Practices Act***?

10. If any of the Defendants have advanced Payday Loans to Class members on terms which are prohibited by s. 347(1)(a) of the ***Criminal Code*** or have collected interest at a criminal rate from Class members in respect of Payday Loans advanced to them, contrary to s. 347(1)(b) of the ***Criminal Code***, or operate a franchise system pursuant to which Payday Loans have been advanced to and interest collected from Class members at a criminal rate, contrary to s. 347(1) of the ***Criminal Code***, does the conduct of those Defendants justify an award of punitive or exemplary damages?

11. If the conduct of any of the Defendants in advancing Payday Loans to Class members and collecting interest from Class members in respect of those Payday Loans, or in operating a franchise system pursuant to which payday loans are advanced to and interest is collected from Class members at a criminal rate, justifies an award of punitive or exemplary damages, what is the amount of punitive or exemplary damages to be awarded?

SCHEDULE B

CASE MANAGEMENT PLAN

The Plaintiffs propose the following Case Management Plan should certification be granted:

NOTICE

1. A hearing will be held to settle the terms and manner of giving Notice to Class members, and the forms of the opt-in notices and the opt-out notices and the date for their delivery, within 60 days from the date this action is certified as a class proceeding (the "Certification Date").

2.

The Notice to the Class will be published, delivered or otherwise circulated within 90 days of the Certification Date.

DISCOVERY

3. In terms of any discovery required:

Each party will deliver Lists of Documents relating to the certified common issues within 90 days of the Certification Date.

A schedule of Examinations for Discoveries relating to the certified common issues shall be set at a Case Management Conference held within 60 days of the Certification Date and those examinations shall be completed pursuant to that schedule within 180 days from the Certification Date.

EXPERT REPORTS

4. The Plaintiffs will deliver any further expert reports in relation to the certified common issues within 180 days of the Certification Date.
5. The Defendant will deliver its expert reports in relation to the certified common issues within 60 days following the receipt of the Plaintiffs' expert reports.
6. The Plaintiffs will deliver any reply reports within 30 days of the receipt of the Defendant's expert reports.

CASE MANAGEMENT AND INTERLOCUTORY APPLICATIONS

7. There will be a Case Management Conference before the Case Management Judge every two months, unless the parties and the Court agree that such a hearing is not required.
8. Pursuant to s. 14(1) of the *Class Proceedings Act,* the Case Management Judge shall hear all interlocutory applications either at the regular Case Management Conferences or on a date for hearing secured at a Case Management Conference or through Trial Division.
9. All materials in support of an interlocutory application shall be delivered and signed in accordance with Rule 51A of the Rules of Court.

COMMON ISSUES TRIAL

10. The Plaintiffs propose to resolve the common issues through a summary trial application pursuant to Rule 18A to be held within one year of the Certification Date. A schedule for the delivery of Affidavits and Arguments shall be set at a Case Management hearing within 180 days of the Certification Date.
11. In the event any of the common issues are determined to be unsuitable for resolution upon the summary trial, a date shall be fixed for the trial of the remaining common issues within 120 days of Judgment on the summary trial application.

INDIVIDUAL ISSUES DETERMINATION

12. If the Defendant is wholly successful on the common issues, the case will be at an end and no individual issues determination will be required.
13. The Plaintiffs propose that if any or all of the common issues are resolved in favour of the Class, then the parties will convene for argument under section 27 of the *Class Proceedings Act* to determine the appropriate course for any remaining issues. At this time the Plaintiffs intend to present the following process:

    a. After the determination of the common issues, the parties and the Court will consider whether there are any issues remaining that may be determined as secondary common issues.
    b. The Defendant will be required to account for all monies received at a criminal rate. These monies will be placed in a trust fund for the benefit of the class members.
    c. Claims Forms will be developed by the parties and approved by the Court. If defences are identified during the determination of the common issues that necessitate additional evidence from class members, then the Claims Forms will require class members to swear a statutory declaration setting out all material facts within their knowledge relevant to any such defences.
    d. An independent Claim Processor will be appointed by the Court. Using the Defendant's records, the Claim Processor shall determine each class member's entitlement based on Claim Processing Rules developed by the parties and agreed upon by the Court. These Claim Processing rules will be designed to allow for the majority of claims to be determined using an automated system. The Claim Processor will submit a report to the Court setting out each class member's entitlement for approval.
    e. If the Defendant or any class member disputes a class member's entitlement as determined by the Claim Processor, they must set out in writing the basis for that dispute along with supporting evidence. The opposing party will have the opportunity to submit written evidence in response to the dispute.
    f. Any disputed claim that cannot be resolved by agreement will be referred to an independent Referee agreed upon by the parties or appointed by the Court. The Referee shall determine the dispute on the basis of the written evidence presented, unless the Referee concludes that an oral hearing is necessary for a just determination. A report of the Referee's determination of disputed claims will be submitted to the Court for approval.

SUMMARY

1. Certification Date plus 60 days — Hearing on Notice

2.	Certification Date plus 90 days	Delivery of Notice
3.	Certification Date plus 90 days	Delivery of List of Documents
4.	Certification Date plus 180 days	Examinations for Discovery concluded
5.	Certification Date plus 180 days	Delivery of plaintiffs' Reports
6.	Certification Date plus 240 days	Delivery of Defendant's Reports
7.	Certification Date plus 270 days	Delivery of Plaintiffs' Reply Reports

8. Certificate Date plus 1 year Summary Trial

TAB 7

Case Name:

Bartolome v. Mr. Payday Easy Loans Inc.

Between
Jose Bartolome, Plaintiff, and
Mr. Payday Easy Loans Inc. and Pavel Solovev,
Defendants
And between
Jose Bartolome, Plaintiff, and
Nationwide Payday Advance Inc., Defendant
And between
Jose Bartolome, Plaintiff, and
Cashnow Solutions Inc. DBA Cash Converters Guildford,
Defendant

[2008] B.C.J. No. 167

2008 BCSC 132

165 A.C.W.S. (3d) 415

Dockets: L051079, L051075 and S045479

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

B. Brown J.

Heard: September 17, 2007.
Judgment: February 1, 2008.

(76 paras.)

Application by Bartolome to certify actions against several companies providing payday loans as class proceeding -- Bartolome borrowed from each company several times between 2002 and 2004, alleging each time he was charged unlawful rates of interest -- Sought to represent class of plaintiffs resident in B.C. who borrowed from companies between February 2002 and January 2007 -- Bartolome's pleadings were virtually identical to those in other payday loan cases previously certified by court in B.C. --

HELD: Bartolome's pleadings disclosed reasonable cause of action -- Bartolome identifiable class of plaintiffs -- Common issues were appropriately framed -- Class proceeding was preferable procedure --

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 7

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1), s. 4(1) (e)

Criminal Code, R.S.C. 1985, c. C-46, s. 347

Counsel:

Counsel for the plaintiff: P.R. Bennett and M.W. Mounteer.

Counsel for the defendant: W.K. Branch and L. Brasil.

Reasons for Judgment

1 B. BROWN J.:-- The plaintiff, Mr. Bartolome, applies to certify each of these actions against the defendants. These applications were heard together. The defendants are represented by the same counsel and have each taken the same position in opposition to the application.

2 The factual circumstances of each case against the defendants are somewhat different, so I will deal with these individually at the outset.

NATIONWIDE PAYDAY ADVANCE INC.

3 Since April 2000, Nationwide Payday Advance Inc. ("Nationwide") has provided short-term loans for small amounts known as Payday Loans, at various locations in British Columbia and by transactions through the internet and by telephone. These loans were for amounts up to $500 and for a term not exceeding 20 days.

4 Nationwide's standard form of loan agreement required the borrower to pay:

1. Interest, which was stated to be 59% per annum; and
2. An Administration Fee calculated at 22% of the principal advanced.

If the borrower did not attend at the Nationwide location and repay the amount of the Payday Loan, interest fee, and Administration Fee in cash, on or before 12:00 noon the day after the due date, Nationwide would directly debit the borrower's bank account for that amount pursuant to a Payment Authorization Agreement executed by the borrower when the loan was obtained.

5 Between 2003 and 2004, Mr. Bartolome obtained approximately 25 Payday Loans from Nationwide. Each of these loans was for between $200 and $400 and for a term of not more than 15 days. Mr. Bartolome repaid all but the final loan on time and in full. The final loan remains unpaid.

6 The plaintiff provided an expert report from Mr. Ian Karp setting out the actuarial evidence in relation to Mr. Bartolome's dealings with Nationwide. That report indicates that, as an example, Mr. Bartolome's loan of $300 on August 16, 2003, repaid at $372.78 on August 30, 2003, resulted in an effective annual interest rate, if the Administration Fee is included in the calculation of interest, of 28,697%.

7 Mr. Karp further opines that interest alone, which is stated to be calculated at 59% per annum, actually exceeded 60% in each case.

8 Finally, Mr. Karp indicates that an Administrative Fee of 22% of the principal advanced will result in an effective annual rate of interest in excess of 60% where the principal amount of the loan advanced is repaid, with that Administrative Fee, within 154 days of the loan advance.

9 Between February, 2002 and January 10, 2007, Nationwide provided loans to 3,047 borrowers in British Columbia.

MR. PAYDAY EASY LOANS INC. AND PAVEL SOLOVEV

10 Since February 2002, Mr. Payday Easy Loans Inc. ("Mr. Payday") has been in the business of providing and has provided short-term loans for small amounts known as Payday Loans at a location at 3421 Kingsway in Vancouver, British Columbia, and transactions through the internet and by telephone. These loans were for amounts between $100 and $600 for a term not exceeding the borrower's next scheduled pay day. If the borrower wished to obtain a loan immediately, Mr. Payday's standard form loan agreement required:

1. the borrower to pay interest, which prior to November 2002 was stated to be calculated at 46.4% per annum, but which was calculated and charged by Mr. Payday as .75% of the principal advanced for a loan of 7 days or less, and 1.5% of the principal advanced for a loan of 8 days or more, and after November 2002, was stated to be calculated at 52.14% per annum, but which was actually calculated and charged by Mr. Payday as 1% of the principal advanced for a loan of 7 days or less, and 2% of the principal advanced for a loan of 8 days or more; and
2. a Verification Fee calculated as 9% of the principal advanced for a loan of 7 days or less and 18% of the principal advanced for a loan of 8 days or more.

11 Mr. Payday's standard form loan agreements provided that the Verification Fee could be avoided if the borrower elected to wait 5 business days to obtain the loan. There is evidence that one person waited 5 business days to obtain the loan. As security, the borrower was required to pay Mr. Payday a post-dated cheque for the principal amount of the loan advanced, interest fee, and Verification Fee. Mr. Payday held the cheque and used the cheque to obtain repayment of the loan unless the borrower attended to repay the loan, interest fee, and Verification Fee by other means before the loan's due date.

12 Mr. Solovev was the sole officer and director of Mr. Payday and was responsible for overseeing all aspects of Mr. Payday's operations.

13 Between 2003 and 2004, Mr. Bartolome obtained approximately 12 Payday Loans from Mr. Payday. Each was for between $200 and $400 and for a term of not more than 17 days. Mr. Bartolome repaid all but the final loan on time and in full. The final loan remains unpaid.

14 Again, the plaintiff has provided expert reports from Mr. Ian Karp. If the Verification Fee is included in the calculation of interest, then the effective annual rate of interest was 14,299% for Mr. Bartolome's loan of $200 on September 5, 2003, repaid at $220 on September 12, 2003.

15 Mr. Karp also opines that an interest fee of 1% will always be unlawful for a loan of 7 days or less, and an interest fee of 2% will always be unlawful (because it exceeds 60%) for a loan of less than 16 days. Accordingly, in his opinion, each loan provided by Mr. Payday after November 2002 exceeded the criminal rate of interest where the loan was for less than 16 days.

16 Mr. Karp opines that a Verification Fee of 9% of the principal advanced will result in an effective annual rate of interest in excess of 60% where the principal amount of the loan is repaid with that Verification Fee within 66 days of the loan advance and a Verification Fee of 18% of the principal advanced will result in an effective rate of interest in excess of 60% where the principal amount is repaid with that Verification Fee within 128 days of the loan advance.

17 Between February 2002 and January 15, 2007, Mr. Payday provided loans to 1,305 borrowers in British Columbia at its storefront location and to 99 borrowers online, who indicated that they resided in British Columbia.

CASHNOW SOLUTIONS INC. dba CASH CONVERTERS GUILDFORD

18 Since at least 2003, Cashnow Solutions Inc. dba Cash Converters Guildford ("Cashnow") has been in the business of providing and has provided short-term loans for small amounts, known as Payday Loans, at a location at 152nd Street in Surrey, British Columbia. The loans were for amounts up to $1,000 and for a term not exceeding 31 days.

19 Cashnow's standard form loan agreement required the borrower to pay an Administration Fee and interest, calculated as follows:

1. for loans of 7 days or less, an Administration Fee calculated at 19% of the principal advanced and interest calculated at 1% of the principal advanced, for total loan fees of 20% of the principal;
2. for loans between 8 and 15 days, an Administration Fee calculated at 28.5% of the principal advanced and interest calculated at 1.5% of the principal advanced, for total loan fees of 30% of the principal amount of the loan; and
3. for loans between 16 and 31 days, an Administration Fee calculated at 37% of the principal advanced and interest calculated at 3% of the principal advanced, for total loan fees of 40% of the principal amount advanced.

20 If the borrower did not attend at the location and repay the principal and loan fees on or before the due date, Cashnow would directly debit the borrower's bank account for that amount, using a Payment Authorization Agreement executed by the borrower when the loan was obtained.

21 Between 2003 and 2004, Mr. Bartolome obtained approximately 21 loans from Cashnow. The loans were for between $100 and $760 and a term of not more than 22 days. Mr. Bartolome paid an Administration Fee of at least 15% of the principal amount of the Payday Loan. He repaid all but two of the loans on time and in full. Two loans remain unpaid.

22 The plaintiff has provided expert reports from Mr. Karp. Mr. Karp opines that, as an example, Mr. Bartolome's loan of $760 taken on December 20, 2003 and paid on January 4, 2004 in the amount of $912, if the Administration Fee is included in the calculation of interest, resulted in an effective annual interest rate of 8,375%.

23 Mr. Karp opines that an Administration Fee equal to 15% of the principal advanced will result in an effective annual rate of interest in excess of 60% where the principal amount of the advanced loan is repaid with that Administration Fee within 108 days of the loan period.

24 Cashnow says that as of September 6, 2006, it had dealt with 636 customers, and estimated the class size at 238.

25 The plaintiff says that these actions are virtually identical to other Payday Loan actions that have already been certified in this jurisdiction and others. The plaintiff also says that the issues proposed in this action have already been approved for certification by this court and, with the exception of those dealing with the liability of Mr. Solovev as a director, have received appellate approval in ***Bodnar v. The Cash Store Inc.***, 2005 BCSC 1228, aff'd 2006 BCCA 260, [2006] 9 W.W.R. 41 ("***Bodnar v. The Cash Store***"). The plaintiff says further, that many of these issues were summarily determined in favour of the class in ***Kilroy v. A OK Payday Loans Inc.***, 2006 BCSC 1213, 273 D.L.R. (4th) 255, aff'd, 2007 BCCA 231, 278 D.L.R. (4th) 193 ("***Kilroy***").

26 The plaintiff says that collectively these decisions are determinative of the application and that the court should follow these decisions and certify the action as a class proceeding.

27 The defendants oppose certification on the following basis:

1. They say that the pleadings do not disclose a cause of action. They invite the court to follow ***Hoffman v. Monsanto Canada Inc.***, 2005 SKQB 225, [2005] 7 W.W.R. 665, aff'd, 2007 SKCA 47, 283 D.L.R. (4th) 190 ("***Hoffman***") and to conduct a more robust analysis of the cause of action, permitting the class action to proceed only if the applicant for certification satisfies the judge that the class has what appears to be an "authentic cause or causes of action". They say this case is premised on s. 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46, which they say is unconstitutional as a breach of s. 7 of the ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11. They say that because s. 347 is unconstitutional, there is no cause of action.
2. They argue that the common issues as stated are not appropriate and that the unjust enrichment common issue (d) (see Appendices) should be broken into three sub-issues, following the approach taken by the Court of Appeal in ***Parsons v. Coast Capital Savings Credit Union***, 2007 BCCA 247, 69 B.C.L.R. (4th) 204 ("***Parsons***").
3. If the actions are certified, they say:

i. that there should be no right for persons who are not residents of British Columbia to opt into these proceedings as the proposed class is restricted to residents of British Columbia who have borrowed money;
ii. that in the event that the action is certified, they should have the right not to do business with members of the class and they seek orders facilitating a process to allow customers to opt-out of the proceeding; and
iii. they say that the terms of notice of certification should not be left to be dealt with at a later date, and they seek confirmation that the plaintiff will pay the costs of notice.

THE REQUIREMENTS FOR CLASS CERTIFICATION

28 Section 4(1) of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 ("***CPA***"), provides that the court must certify a proceeding as a class proceeding if the following requirement are met:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of 2 or more persons;
(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
(e) there is a representative plaintiff 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, an interest that is in conflict with the interests of the other class members.

DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

29 The plaintiffs argue that these claims disclose a cause of action as they are identical, or substantially identical to those in ***Bodnar v. The Cash Store*** and ***Kilroy***.

30 They say that this court has already recognized the claims regarding joint and several liability of Mr. Solovev as a director of Mr. Payday in ***Bodnar v. Payroll Loans Ltd. et al***, 2006 BCSC 1132 ("***Bodnar v. Payroll Loans***") and ***Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd. et al***, 2006 BCSC 1018 ("***Tracy***").

31 The test applied in this province on this issue is stated in ***Brogaard v. AG Canada***, 2002 BCSC 1149, 7 B.C.L.R. (4th) 358 ("***Brogaard***"). There the court said at para. 30:

> It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The test is similar to the onus on a defendant to strike out a statement of claim for failing to disclose a cause of

> action on an application pursuant to Rule 19(24) of the *Rules of Court*. However, on a certification application, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled. The threshold is a very low one.

32 In ***Hoffmann***the Saskatchewan Court of Appeal, at para. 50, stated the test this way:

> [T]he representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies.

33 I am by no means satisfied that this statement of the test is actually any different from that enunciated by our courts in ***Brogaard***. ***Brogaard*** would, of course, be binding upon me in any event. However, assuming that ***Hoffmann*** is indeed a different test from that enunciated in ***Brogaard*** and assuming that ***Hoffmann*** applied in this case, the plaintiffs have satisfied me that the pleadings disclose "an apparently authentic or genuine cause of action on the basis of facts as pleaded and the law that applies" because, as they have argued, this case is virtually identical, if not identical, to many cases already certified by this court and the certification upheld by the Court of Appeal. This court and the Court of Appeal have already determined that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies.

34 With respect to the argument that s. 347 is unconstitutional, the defendants acknowledge that this issue was already argued before me in ***MacKinnon v. National Money Mart Company***, 2007 BCSC 348 ("***MacKinnon***") and in that case I determined that the argument was premature:

> [22] Section 347(1)(b) of the ***Criminal Code*** reads, "[n]otwithstanding any Act of Parliament, every one who ... (b) receives payment or partial payment of interest at a criminal rate is guilty of ..." The defendants contend that s. 347(1)(b) creates an absolute liability offence and is thus unconstitutional and of no force or effect. The defendant argues: that the provision only requires the act of receiving interest at a criminal rate without a corresponding *mens rea* element, thus imposing liability notwithstanding an absence of intent; and, that s. 347(1)(b) does not provide a due diligence defence, as required by ***R. v. Finlay***, [1993] 3 S.C.R. 103. Money Mart claims that the absence of a *mens rea* element and the absence of a due diligence defence makes the offence an absolute liability offence. Money Mart contends that because a person convicted of the offence is liable for a term of imprisonment, s. 347 violates s. 7 of the ***Charter***, making it unconstitutional and of no force or effect.
>
> [23] The plaintiffs argue that the challenge to the constitutionality of s. 347 (1)(b) is premature unless or until the Court determines that the First Party Cheque Cashing Fees are interest within the meaning of that section and that Money Mart has collected interest at a criminal rate. Furthermore, plaintiffs' counsel argues that the constitutionality of s. 347(1)(b) goes to the merits of the plaintiffs' claim, which are inappropriate to consider at the certification stage.

> [24] I accept the plaintiffs' argument that it is premature to decide the question of the constitutionality of s. 347(1)(b) at this stage in the proceedings. It must be plain and obvious that a plaintiff cannot succeed before the court will refuse to certify a class action under s. 4(1)(a) of the ***CPA***. In my opinion, the issue of constitutionality of s. 347(1)(b) is beyond the scope of a certification hearing.
>
> [25] The Attorney General of British Columbia appeared in response to the Notice of Constitutional Question. He raised substantive arguments supporting the constitutionality of s. 347 (1)(b). Because I have concluded that the defendant's argument is premature, I do not need to address these.

35 As in ***MacKinnon***, it is my view that it is premature to decide the question of constitutionality of s. 347 of the ***Criminal Code*** at this stage of these proceedings.

IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS?

36 The proposed class is:

1. In the action against Nationwide: "All residents of British Columbia who have borrowed money as a "Payday Loan" from Nationwide and have repaid the loan and Nationwide's standard "Administration Fee" either on the due date of the loan or within 154 days of the loan advance";
2. In the action against Mr. Payday: "All residents of British Columbia who have borrowed money as a "Payday Loan" from Mr. Payday and have repaid the loan and Mr. Payday's standard "Verification Fee" either on the due date of the loan or within 128 days of the loan advance";
3. In the action against Cashnow: "All residents of British Columbia who have borrowed money as a "Payday Loan" from Cashnow and have repaid the loan and Cashnow's standard "Administration Fee" either on the due date of the loan or within 108 days of the loan advance".

37 As stated in ***Tracy*** at para. 25, the purpose of a class definition is:

1. to identify those people who have a potential claim for relief against the defendants;
2. to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and
3. to describe those who are entitled to notice.

38 In each of the cases, there is an identifiable class. A proposed class member could tell with a minimum of effort and on objective terms whether he or she is a member of the proposed class.

39 The defendants do not suggest that there is not an identifiable class.

DO THE CLAIMS RAISE COMMON ISSUES?

40 On this point, the plaintiffs argue that the issues are identical or substantially identical to those already accepted for certification in ***Bodnar v. The Cash Store***, ***Tracy***, ***Bodnar v. Payroll Loans***, and ***Kilroy***.

41 The defendants do not argue otherwise, but argue that the unjust enrichment common issue (d) should be broken down into three sub-issues as it was in ***Parsons***. The defendants say that common issue (d) should be broken down into the following three sub-issues:

> (a) If the defendant has, through the collection of Administration Fees, received interest at a criminal rate from class members, has it benefited by the receipt of such interest?;
> (b) If the defendant has benefited by the receipt of interest at a criminal rate from the class members, has the plaintiff shown that no juristic reason from an established category exists to deny recovery of such interest from it; and
> (c) If there is no juristic reason from an established category of law, has the defendant established, as a matter of law, any residual defence that might constitute a juristic reason for its enrichment?

42 The plaintiff argues that the form of the common issue concerning unjust enrichment has been adopted by this court in various class proceedings involving identical claims against payday loan companies and has been affirmed in the context of such an action by the Court of Appeal decision in ***Bodnar v. The Cash Store*** and has been decided by this court in ***Kilroy***, a decision upheld by the Court of Appeal.

43 In my view, the common issues are appropriately framed. In ***Parsons***, the Court of Appeal considered factual circumstances quite different from those before me. At para. 28 the court in ***Parsons*** stated:

> Coast Capital contends that the individual circumstances of credit union members will be relevant to whether, assuming the first two questions are answered yes', it has been unjustly enriched and whether the equitable remedies of trust and accounting may be appropriate. The Credit Union again points to some members who deliberately create overdrafts as a means of managing their cash flow; who manipulate the "down time" of ATMs to claim cash when there is no cash in their accounts; or who, knowing that there are no or insufficient funds in their accounts, engage in the "empty envelope" practise when using ATMs. Indeed, the Credit Union notes that in Ms. Parsons' own case, the patterns of deposits of cheques from the same drawer that were later dishonoured, giving rise to overdrafts, may suggest the deliberate creation of overdrafts, perhaps for "ulterior" motives. Coast Capital intends to argue at trial that conduct of this kind, considered in light of the parties' expectations and public policy considerations in each instance, may give rise to "juristic reasons" for its benefiting from the collection of overdraft charges in some cases or groups of cases. [Emphasis in original].

44 It was against these factual circumstances that the Court of Appeal determined to subdivide the common issue of unjust enrichment, which it had not done in ***Bodnar v. The Cash Store***. The Court of Appeal in ***Parsons*** went on to state at para. 39:

> In this case, the solution is not to revoke the certification order but to refine the questions as phrased, to properly reflect the possibility that equitable or individual (to the plaintiffs) circumstances may be relevant to the proofs of their claims or to Coast Capital's defences to them. Beginning with unjust enrichment, I would divide the third question into three as follows:
>
> > (c)(i) If the defendant has, through the collection of overdraft charges received interest at a criminal rate from class members, has the defendant benefited by the receipt of such interest?
> >
> > (c)(ii) If the defendant has benefited by the receipt of interest at a criminal rate from class members, has the plaintiff shown that no juristic reason from an established category exists to deny recovery of such interest from the defendant?
> >
> > (c)(iii) If there is no juristic reason from an established category of law, has the defendant established as a matter of law any residual defence which may constitute a juristic reason for the enrichment of the defendant?
>
> If the answer to the second question is that a juristic reason exists in some cases only, the Court must resolve the question with reference to the relevant sub-groups or individuals. Similarly, if the answer to the last question is that a defence exists in some cases only, those defences would be tried at the sub-class or individual level. I would also add the phrase "or any sub-class thereof" after the phrase "members of the class" in question (d), and after the phrase "class members" in sub-paras. (i) and (ii) thereof.

45 In my view, it is not necessary or appropriate to rephrase the common issues here. First, the facts are different from ***Parsons***. There is no suggestion here that the borrowers manipulated the defendants to their advantage, which may have implications: whether the defendants received a benefit and whether any benefit was unjust. Here, the class members all borrowed using the defendants' standard lending procedures. Second, this is one of many class actions involving payday lenders. The actions are very similar. The common issues are virtually identical in each of the actions and the Court of Appeal has already approved of the form of common issues in actions such as this. This action has much more in common with ***Bodnar v. The Cash Store*** than it does with ***Parsons***. It would create mischief to modify the common issues between actions that are essentially identical. Third, the divided common issues from ***Parsons*** are implicit in the question as framed, as was demonstrated in this court in ***Kilroy***.

IS A CLASS PROCEEDING THE PREFERABLE PROCEDURE?

46 These issues have been raised in the context of payday loans in a number of actions before this court. In each of them, the court has concluded that a class proceeding was the preferable procedure. For example, in my judgment in ***Bodnar v. The Cash Store***, I said:

> [62] I am satisfied that a class proceeding is the only effective way of proceeding. The individual claims are likely to be small. The cost of

> pursuing the litigation, given its complexity, is likely to be high and will require expert evidence. If individuals were to pursue individual actions, there would be an unnecessary proliferation of individual actions with the attendant costs and inconvenience to the administration of justice. Proceeding by a class proceeding will avoid the duplication of fact finding and legal analysis.
>
> [63] As has been frequently noted, there are three main advantages to class proceedings: (1) they serve judicial economy by avoiding unnecessary duplication of fact finding and legal analysis; (2) they improve access to justice for claims that would be uneconomical to pursue individually; and (3) they serve efficiency in justice by ensuring that wrongdoers or potential wrongdoers face the consequences of harm caused and modify their behaviour accordingly.
>
> [64] Here, the common issues, as phrased, will substantially advance the litigation. Individual actions are impractical. A class proceeding will preserve judicial resources and avoid a duplication of fact finding and legal analysis. If, as the plaintiffs allege, borrowers are paying interest at a criminal rate, then the third legislative objective, behaviour modification, would be served.

47 This was affirmed by the Court of Appeal at para. 20 of their decision in ***Bodnar v. The Cash Store***:

> In my view, those conclusions are amply supported. As the Chambers judge stated, a resolution of the common issues will substantially advance the litigation and individual actions are impractical. ***Cassano***, [2005] O.J. No. 845, is distinguishable. There the issues involved non-disclosure of the fees on currency conversion that required individual assessment and the certification judge concluded that resolution of the common issues would not significantly advance the litigation. In this case the Chambers judge has concluded that resolution of the common issues will advance the litigation. I am satisfied that there are not grounds on which this Court could disturb her conclusion that class proceedings are the preferable procedure.

48 Those reasons apply equally to this case. Indeed, the defendants do not suggest they do not.

49 Resolution of the proposed common issues will substantially resolve the claims of class members one way or the other. There is no evidence that there are individuals who would have an interest in pursuing individual actions. I understand there are no other proceedings in British Columbia that relate to the subject matter of this proceeding. In my view, this is the most efficient way of resolving the class members' claims. The individual claims of class members are for modest amounts, at most a few thousand dollars. The plaintiff does not have the financial means to pursue an individual action and it is likely that others in the class would be in a similar situation.

50 As in the other payday loan actions, which have been certified, in my view the administration of the class proceeding will not create greater difficulties than those likely to be experienced if relief were sought by other means.

IS THE PLAINTIFF A SUITABLE REPRESENTATIVE?

51 Section 4(1)(e) of the ***CPA*** requires that the court determine if there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

52 On the evidence before me it would appear that Mr. Bartolome is an appropriate representative who would fairly and adequately represent the interests of the class. There was no evidence to indicate that he has an interest in conflict with the interests of the other class members.

53 He has produced a case management plan, which is essentially the same as the plan accepted in ***Bodnar v. The Cash Store***, ***Tracy***, ***MacKinnon*** and ***Bodnar v. Payroll Loans***. That plan was implemented in ***Kilroy***.

54 The defendants take issue with two aspects of the plan: first, the right to opt into the class and second, the giving of notice of certification.

55 The defendants argue that there should be no right for persons who are not residents of British Columbia to opt into these proceedings. They say that the proposed class is restricted to "residents of British Columbia who have borrowed money ...". They say that the fact that the ***CPA*** provides a mechanism to opt-into proceedings does not, in and of itself, provide for the extension of the class beyond its proposed definition. They say that if the certified class includes persons who are not residents of British Columbia, a separate sub-class should be created in accordance with s. 6(2) of the ***CPA***.

56 The plaintiff says that the right to opt-into this class proceeding should be available to those who borrowed from the defendants while they were residents of British Columbia, but who are no longer residents. He says that there is no sound basis to exclude such persons who wish to participate in this class proceeding from doing so. He does not know if there is anyone who would come within this category, or whether anyone will choose to opt in.

57 Section 16(2) of the ***CPA*** provides that a person who is not a resident of the province may opt-into the class proceeding if that person would be, but for not being a resident, otherwise a member of the class. Section 16(4) provides that a person may not opt in unless the subclass of which the person is to become a member has, or will have, at the time that the person becomes a member, a representative plaintiff who satisfies the requirements of ss. 6(1)(a)-(c). Section 6(2) requires that a class comprised of residents and non-residents must be divided into subclasses.

58 To be workable and maintain the right to opt in contemplated by the ***CPA***, in this case the order should provide that anyone wishing to opt in may contact class counsel. The plaintiff may then apply to create a subclass as contemplated by s. 6(2), and determine an appropriate representative for the subclass (who may or may not be the plaintiff).

59 With respect to notice, the defendants say that they do not wish to leave the notice issue to be agreed to at a later date. They say that they want confirmation that the plaintiff will pay the costs of notification. They say that this is not public interest litigation that there is no evidence that the costs of notice are beyond the plaintiff and/or his counsel, and the plaintiff should bear the costs of notice.

60 The plaintiff says that before addressing who should pay for the notice, the court should determine the nature and extent of notice to be given. He says that originally he contemplated notice by direct mailing, newspaper publications and in-store and internet publications. He says that experience in other cases has shown that members do not opt-out, that no useful purpose is served by direct mailing or extensive newspaper publication. He proposes that notice be published in one copy of the Vancouver Sun and the Province weekend newspapers, by posting notice in the defendants' stores and on their websites, and by notice on class counsel's website. He says that he does not have the resources to pay for notice and that the defendants should bear the cost of notice.

61 Section 19 of the ***CPA*** permits a court to dispense with notice, having regard to the factors listed in that section. Notice is not required in every case. Section 24 of the ***CPA*** permits a court to make any order that it considers appropriate as to the costs of notice, including an order apportioning costs among parties. Here, notice permits a potential class member to opt-out of the class. Unless a class member opts out, that individual remains a member of the class. Experience has shown that class members do not opt-out. The parties most likely to benefit from notice are the defendants, because they will benefit from the reduced size of the class and potential recovery by the class.

62 I accept the submission of the plaintiff that the notice originally contemplated was more extensive than necessary. Notice as proposed by the plaintiff above will be adequate. If the defendants feel that direct mailing will be beneficial, class counsel has advised that they will do so, at the defendants' expense. It is also appropriate that the defendants bear the cost of notice in each of their actions, with the exception of notice on class counsel's website. The plaintiff has adduced evidence of his limited resources, and, as I have indicated, the defendants will benefit from notice and it is appropriate that they carry part of the expense.

THE RIGHT TO REFUSE TO DO BUSINESS WITH MEMBERS OF THE CLASS

63 The defendants argue that some of their customers are repeat customers who return to seek loans on more than one occasion. They say that if the case is certified, membership in the class is tantamount to a statement that all members of the class are unhappy with the services provided by the defendants and that they take the position that they do not have to fulfill the contractual terms upon which they seek loans from the defendants. They say that they should have the right to know whether the customer who is applying for a loan is or is not a member of the class and should have the right to choose whether or not to carry on business with a customer who chooses to be a part of the class. They say that in ***Smith v. National Money Mart Co.***, [2007] O.J. No. 1507 (S.C.J.) (QL) ("***Smith***"), the Ontario Superior Court of Justice granted an application brought by the defendant, Money Mart, to approve a process permitting it to advise class members during the opt-out period that Money Mart could choose not to make further loans to the class members unless they opted-out of the class action. They say that in ***Smith***, the court made ancillary orders to facilitate the process proposed by Money Mart to communicate with its customers and these orders included:

(a) a requirement that the plaintiffs provide to Money Mart daily lists of class members who have opted out of the proceedings, throughout the duration of the opt-out period;

(b)

a right for Money Mart to make opt-out forms available at its places of business;

(c) a right for Money Mart to determine from its records or from the information provided by the plaintiffs whether a customer is a member of the class and if so, a right to decline to make a further loan; and

(d) the inclusion in the form of a notice of certification of a statement indicating that "Money Mart may choose not to make a Fast Cash Advance or Payday Loan to class members who participate in the class action".

64 The defendants ask for the imposition of similar terms in this case. They say that the appropriate opt-out period should be six months.

65 The plaintiff says that the defendants' communication to class members about the class proceeding during the opt-out period should be carefully circumscribed. They have no objection to the defendants refusing to transact business with any of the class members or advising the class of that possibility in the notice that is given to them of the class proceeding. However, the plaintiff says that communications about the class proceedings between the defendants and class members must be carefully monitored and circumscribed by the court during the opt-out period.

66 The plaintiff says that communications with class members are open to abuse, citing as an example, ***Atkinson v. Ault Foods Ltd.***, [1997] O.J. No. 4676 (Gen. Div.) (QL), where Mr. Justice McKenzie said at para. 2:

> In the present case, it is clear that the Defendant's action in corresponding with class members with a view to solicit opt-outs in the class proceeding were nothing more than a sugar-coated in terrorem device to intimidate class members from exercising their recourse to the courts.

67 The plaintiff says that in ***Smith***, the court directed the following procedure and restrictions at para. 40:

> Money Mart is free to determine from its records, including from the information provided by the plaintiffs, whether or not an individual applying for a loan is a class member, and if so, decline to make a further loan. It shall not ask an individual applying for a loan whether or not he/she is a class member. It may ask applicants whether or not they obtained payday loans prior to the date that is the end date of the class period ...
>
> Money Mart shall not initiate communication with customers regarding the class action or the opt-out procedure until after the customer has applied for a loan and Money Mart has either declined to make the loan or made the loan. Money Mart's in-store communication with class members regarding why it has declined a loan, the class action and the opt-out procedure shall be restricted to directing class members to the Notice and the brochure (or "Questions and Answers"). Money Mart shall take all reasonable steps to ensure all in-store personnel are aware of this restriction and comply with it.

> Money Mart shall provide a draft brochure (or draft "Questions and Answers") to the plaintiffs within seven days; the plaintiffs shall work with Money Mart in the ensuing seven days to resolve the language. If they are unable to do so, I will make myself available to promptly resolve any matters that the parties cannot.

68 The plaintiff says that he is prepared to share with the defendants any and all opt-out forms as they are received. The defendants ought to be able to obtain any other information they require from class members in order to make a lending decision, such as whether they have borrowed in the past from the defendants, without making any reference to the class proceeding.

69 Communications with class members when a loan has been denied must be carefully circumscribed to ensure that a denial of the loan does not become a mechanism to coerce a class member to opt-out of the class proceeding. If the defendants deny a loan to an individual because that person is a class member, any communications about the class proceedings and why the class member has been denied a loan should be confined to a written communication in a form agreed to by the parties or approved by the court.

70 If the class member has any questions, the defendants should be required to advise the class member that he or she is precluded by court order from engaging in any further discussion and the class member should be directed to class counsel.

71 The plaintiff says that class members should have the right to rescind their opt-out decision for 14 days after delivery. The plaintiff says that having opt-out forms available in the defendants' stores and on their web sites creates a real risk that members, who are in need of a loan, will regard the opt-out form as nothing more than another piece of documentation that must be executed in order to obtain a loan. The plaintiff says that providing this 14 day period allows class members to obtain legal advice and information from class counsel and to ensure that each individual effectively exercises their opt-out decision. They say that this should not have a negative impact on the defendants: if the defendants implement a policy of denying loans to individuals who are class members, then they have already decided to take the risk that class members will take their business elsewhere. If the defendants elect not to advance a loan until the 14 day period has expired, then, at worst, the individual will take their borrowing business elsewhere.

72 Finally, the plaintiff says that an opt-out period of 30 days is sufficient. They say that the only real likelihood of any class member will come from an existing customer of one of the defendants who chooses to submit an opt-out form to obtain another loan from one of the defendants. The plaintiff says that the majority of the defendants' loans are in the range of 14 days, so an opt-out period of 30 days will permit the class proceeding to come to the attention of repeat customers in the defendants' stores.

73 I accept the plaintiff's submissions with respect to the need to be cautious about communications between the defendants and class members during the opt-out period. In saying this, I intend no criticism of the defendants, rather my concern is to ensure that any decision made by class members is an informed decision. I agree that a delay before the opt-out becomes effective is appropriate. This will permit class members to obtain legal advice. The delay should not harm the defendants who are free not to do business with a customer until the opt-out becomes effective. Nor should the delay harm class members. As many of the defendants have submitted before me in payday loan proceedings, the customers are under no pressure to accept the terms offered by any one payday lender because there are many other payday loan companies available to them. To protect against any possible prejudice to

a class member, I will limit the delay to 7 days, unless class counsel notifies the defendant that the opt-out becomes effective earlier. In other words, the notice to opt-out will be come effective 7 days after receipt by class counsel unless class counsel advises the defendants that it is effective earlier.

74 The terms of communication by the defendants with class members will be circumscribed, as it was in ***Smith*** and modified by these reasons. If the parties are not able to work out the details, they may appear before me.

75 Class counsel will provide copies of the opt-out notices as received on a daily basis by email, or as otherwise agreed, to the defendants.

76 In my view, a two month notice period is adequate. That should allow sufficient time for the class action to come to the attention of the defendants' repeat customers so that they may opt-out of the class proceeding if they choose to do so. I note that in ***Smith*** the court set a six month notice period. However, in ***Smith*** the court had evidence that made a six month notice period appropriate. I do not have such evidence here. If the defendants are of the view that repeat customers will not learn of the action in the two months allotted, they may, of course, elect to notify the repeat customers by direct mail, as contemplated in para. 62 above.

B. BROWN J.

* * * * *

Appendix "A"

The Common Issues of Mr. Payday Easy Loans Inc.

The common issues to be determined in this class proceeding are:

(a) Do the Verification Fees charged by Mr. Payday constitute interest as defined by and for the purpose of s. 347 of the *Criminal Code*, either in whole or in part?

(b) If the answer to (a) is yes, then do the standard form agreements pursuant to which those Verification Fees have been collected from Class members constitute agreements or arrangements to receive interest at a criminal rate, contrary to s. 347(1)(a) of the *Criminal Code*?

(c) If the answer to (a) is yes, then has the collection by Mr. Payday of those Verification Fees in accordance with the terms of the standard form agreements on which the Payday Loans have been advanced by Mr. Payday to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members to and the receipt by Mr. Payday of interest at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*:

(d) If the answer to (c) is yes, has Mr. Payday been unjustly enriched by the collection of those Verification Fees from the Class Members?

(e) If Mr. Payday has received a payment of interest at a criminal rate from Class Members in respect of the Class Loans, then:

(i)

were the Class loans advanced by Mr. Payday to the Class Members at the direction and for the benefit of Solovev?

(ii) were the Verification Fees received by Mr. Payday paid in whole or in part to Solovev? And

(iii) did Solovev direct the transfer, use, or otherwise have the benefit of the Verification Fees collected by Mr. Payday from the Class Members?

(f) If the answer to any one of (e)(i) to (iii) is yes, then has Solovev been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of their Class Loans?

(g) If the answer to (d) or (f) is yes:

(i) Do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit those Defendants? and

(ii) Are those Defendants liable to account to those Class members for the benefit received from them and all profits earned therefrom?

(h) If the answer to (b) or (c) is yes, does the provision by Mr. Payday of the Class Loans to Class members on terms that offend s. 347(1) of the *Criminal Code*, or and the receipt by Mr. Payday of interest at a criminal rate in respect of those Class Loans, constitute an unconscionable act or practice within the meaning of s. 4 of the *Trade Practices Act* and s. 8 of the *Business Practices and Consumer Protection Act*, irrespective of whether the factors set out in s. (3)(a) through (d) of those sections are present in any individual case?

(i) If the answer to any one of (e)(i) to (iii) is yes, then does such conduct of Solovev constitute unconscionable acts or practices within the meaning of s. 4 of the *Trade Practices Act* and s. 8 of the *Business Practices and Consumer Protection Act*, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

(j) If the answer to (h) or (i) is yes, are those Defendants liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the *Trade Practices Act* s. 22(1) and the *Business Practices and Consumer Protection Act* ss. 105 and 171?

(k) If the answer to (b) or (c) is yes, then is Solovev jointly and severally liable for the acts of Mr. Payday in advancing Class Loans on terms that offend s. 347(1)(a) of the *Criminal Code* or receiving interest in respect of the Class Loans at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*.

(l) If the answer to (b) or (c) is yes, and if Solovev has participated in or been unjustly enriched by the Class Loans, then does the conduct of Mr. Payday and Solovev, or any one of them, justify an award of punitive or exemplary damages?

(m) If the answer to (l) is yes, what is the amount of punitive or exemplary damages to be awarded?

Appendix "B"

The Common Issues of Nationwide Payday Advance Inc.

The common issues to be determined in this proceeding are:

(a) Do the Administration Fees charged by the Nationwide constitute interest as defined by and for the purpose of s. 347 of the *Criminal Code*, either in whole or in part?

(b) If the answer to (a) is yes, then do the standard form agreements pursuant to which those Administration Fees have been collected from Class members constitute agreements or arrangements to receive interest at a criminal rate, contrary to s. 347(1)(a) of the *Criminal Code*?

(c) If the answer to (a) is yes, then has the collection by Nationwide of those Administration Fees in accordance with the terms of the standard form agreements on which the Payday Loans have been advanced by Nationwide to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members to and the receipt by Nationwide of interest at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code:*

(d) If the answer to (c) is yes, has Nationwide been unjustly enriched by the collection of those Administration Fees from the Class Members?

(e) If the answer to (d) is yes:

  (i) Does Nationwide hold the benefit it has received as a result of this unjust enrichment in trust for those Class members who provided that benefit to Nationwide? And

  (ii) Is Nationwide liable to account to those Class members for the benefit received from them and all profits earned therefrom?

(f) If the answer to (b) or (c) is yes, does the provision by Nationwide of the Class Loans to Class members on terms that offend s. 347(1) of the *Criminal Code*, or and the receipt by Nationwide of interest at a criminal rate in respect of those Class Loans, constitute an unconscionable act or practice within the meaning of s 4 of the *Trade Practices Act* and s. 8 of the *Business Practices and Consumer Protection Act*, irrespective of whether the factors set out in s. (3)(a) through (d) of those sections are present in any individual case?

(g) If the answer to (h) is yes, is Nationwide liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the *Trade Practices Act* s. 22(1) and the *Business Practices and Consumer Protection Act* ss. 105 and 171?

(h) If the answer to (b) or (c) is yes, then does the conduct of Nationwide justify an award of punitive or exemplary damages?

(i) If the answer to (l) is yes, what is the amount of punitive or exemplary damages to be awarded?

Appendix "C"

The Common Issues of Cashnow Solutions Inc.

The common issues to be determined in this class proceeding are:

(a) Do the Administration Fees charged by the Cashnow constitute interest as defined by and for the purpose of s. 347 of the ***Criminal Code***, either in whole or in part?

(b) If the answer to (a) is yes, then do the standard form agreements pursuant to which those Administration Fees have been collected from Class members constitute agreements or arrangements to receive interest at a criminal rate contrary to s. 347(1)(a) of the ***Criminal Code***?

(c) If the answer to (a) is yes, then has the collection by Cashnow of those Administration Fees in accordance with the terms of the standard form agreements on which the Payday Loans have been advanced by Cashnow to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members to and the receipt by Cashnow of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***:

(d) If the answer to (c) is yes, has Cashnow been unjustly enriched by the collection of those Administration Fees from Class Members?

(e) If the answer to (d) is yes:

  (i) Does Cashnow hold the benefit it has received as a result of this unjust enrichment in trust for those Class members who provided that benefit to Cashnow? and

  (ii) Is Cashnow liable to account to those Class members for the benefit received from them and all profits earned therefrom?

(f) If the answer to (b) or (c) is yes, does the provision by Cashnow of the Class Loans to Class members on terms that offend s. 347(1) of the ***Criminal Code***, or and the receipt by Cashnow of interest at a criminal rate in respect of those Class Loans, constitute an unconscionable act or practice within the meaning of s. 4 of the ***Trade Practices Act*** and s. 8 of the ***Business Practices and Consumer Protection Act***, irrespective of whether the factors set out in s. (3)(a) through (d) of those sections are present in any individual case?

(g) If the answer to (h) is yes, is Cashnow liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the ***Trade Practices Act*** s. 22(1) and the ***Business Practices and Consumer Protection Act*** ss. 105 and 171?

(h) If the answer to (b) or (c) is yes, then does the conduct of Cashnow justify an award of punitive or exemplary damages?

(i) If the answer to (1) is yes, what is the amount of punitive or exemplary damages to be awarded?

TAB 8

Case Name:

Bartolome v. Nationwide Payday Advance Inc.

Between
Jose Bartolome, Plaintiff, and
Nationwide Payday Advance Inc., Defendant

[2010] B.C.J. No. 1994

2010 BCSC 1433

Docket: L051075

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.A. Griffin J.

Heard: September 30 and October 1, 2010.
Judgment: October 13, 2010.

(28 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Class counsel -- Retainer agreement -- Representative plaintiff -- Settlements -- Approval -- Application by plaintiff in payday loan class action for approval of settlement agreement -- In addition, class counsel sought approval of its retainer agreement with the plaintiff and their legal fees and disbursements, which included payment to the representative plaintiff -- Application granted -- The settlement agreement was fair, reasonable, and in the best interests of the class, and the retainer agreement was also fair and reasonable -- The representative plaintiff provided services to the class accompanied by positive results, which warranted an award to him of $2,000, to be paid as a disbursement.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection (Payday Loans Amendment) Act 2007, SBC 2006, CHAPTER 35,

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

Counsel:

Counsel for Plaintiff: Paul R. Bennett and Mark W. Mounteer.

Counsel for the Defendant: Luciana P. Brasil and Ward K. Branch.

Reasons for Judgment

S.A. GRIFFIN J.:--

INTRODUCTION

1 This proceeding is one of a number of class proceedings in this Province brought against businesses that advanced short term loans, known as payday loans, to B.C. residents. The underlying theory of the claims is that the payday loan businesses charged various fees that amounted to criminal interest, contrary to s. 347(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].

2 Counsel for the plaintiff appear to have been the first in Canada to advance these types of claims. Initially they sought to advance an industry-wide class action in British Columbia, launching the claim in January 2003. Following preliminary applications and an appeal (*MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, [2005] 1 W.W.R. 233), the efforts to certify the industry-wide action as a class proceeding were unsuccessful (*MacKinnon v. National Money Mart Co.*, 2005 BCSC 271). One of the insurmountable hurdles to certification was the fact that different members of the payday loan industry had differing ways of structuring their fees, and thus differing defences on the issue of whether or not the fees amounted to illegal interest.

3 Following this unsuccessful start, which took over two years of litigation, plaintiff's counsel then brought a number of individual actions targeting separate members of the payday loan industry, and sought certification as class proceedings on behalf of the representative plaintiffs in those individual actions. This is one of those actions, targeted against Nationwide Payday Advance Inc. [Nationwide].

4 The litigation in the parallel payday loan proceedings has been hard-fought. There have been numerous contested applications. Eventually, counsel for the plaintiff's began to succeed in obtaining class certification of the individual actions, one-by-one.

5 Ultimately, and some six years of litigation later, the first settlements were reached in two of these payday loan actions in 2009. They were approved by Madam Justice Dickson of this court in February 2010, in *Bodnar v. Cash Store Inc.*, 2010 BCSC 145 ("*Cash Store*") and in *Casavant v. Cash Money Cheque Cashing Inc.*, 2010 BCSC 148 ("*Cash Money*"). A third settlement was reached and approved by this court in July 2010, in *MacKinnon v. National Money Mart Co.*, 2010 BCSC 1008 ("*Money Mart*").

6 On September 30 and October 1, 2010, the parties appeared before me seeking approvals of settlements in this claim and two other payday loan actions: *Bodnar v. Payroll Loans Ltd.*, Vancouver Action No. L051078, and *Bartolome v. Mr. Payday Easy Loans Inc.*, Vancouver Action No. L051075.

RELIEF SOUGHT

7 In the within action, the plaintiff applies for approval of the settlement and approval of the appointment of Epiq Systems Inc. as claims process reviewer under the settlement.

8 In addition, class counsel seeks approval of its retainer agreement with the plaintiff and their legal fees and disbursements. As a disbursement, they also seek approval of a payment to the representative plaintiff, as compensation for his role in advancing the litigation on behalf of all class members.

ANALYSIS

9 The factual and legal issues relevant on this application have already been thoroughly canvassed in the three prior decisions of this court granting substantially similar relief as is sought here, in similar proceedings regarding payday loans: *Cash Store*, *Cash Money*, and *Money Mart*. It would neither advance the jurisprudence nor the parties' interests to have me paraphrase what has already been said so well by my judicial colleagues.

10 The legal tests for approval of a class action settlement and counsel fees were set out by Madam Justice Dickson in *Cash Store*, *supra*, at paras. 16-26.

11 The legal test in relation to approval of compensation to the representative plaintiff changed after the decisions in *Cash Store* and *Cash Money*, and is set out by Mr. Justice Greyall in *Money Mart*, *supra*, at paras. 51-52, citing *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, rev'g 2009 BCSC 330.

12 The court's task on this application has been assisted by an affidavit from plaintiff's counsel, the Affidavit #1 of Mr. Mark W. Mounteer made September 28, 2010 [Mounteer Affidavit]. The Mounteer Affidavit provides the detailed evidence in support of the application, and to the critical eye, raises no issues of concern. It strikes me that appending this detailed evidence could be of assistance to other class action litigants. Rather than summarize the evidence, I append his affidavit as Appendix 1 to this judgment. I have redacted one sentence from the beginning of paragraph 37 of the affidavit which defence counsel regarded as controversial. I have also only included one exhibit to the affidavit, Exhibit "A", the Settlement Agreement and Release.

13 It should be noted that the defendant denies liability and that this settlement is a compromise of a disputed claim.

14 The federal and provincial governments amended legislation in 2007 affecting the payday loan industry, with the result that as of November 1, 2009, the payday loan companies were able to make lawful loans in accordance with new regulations, as described in paragraph 8 of the Mounteer Affidavit (s. 347.1 of the *Criminal Code* and *Business Practices and Consumer Protection (Payday Loans Amendment) Act 2007*, S.B.C. 2006, c. 35, respectively). This means that the end-date for any calculations of allegedly illegal fees is October 31, 2009.

15 The degree to which the proposed settlement in this case differs from the settlements in the other three settled BC payday class actions is modest and of no negative consequence to class members. If anything, the changes are more of a fine-tuning than anything else.

16 The key terms of the settlement are, in summary:

a. Nationwide will establish a settlement fund of cash and vouchers amounting to 20% of the total allegedly unlawful fees, described as administration fees, paid by class members. The administration fees totalled $3,814,421 and so the settlement fund will be $762,884.

b.

Each class member will be entitled to claim from the settlement fund the total amount of administration fees paid by that class member in respect of that class member's loans, plus interest at 3.5% per annum on those fees from the dates they were paid until the effective date of the settlement, but net of approved legal expenses.

c. If the claims made, net of approved legal expenses, exceed the amount of the settlement fund, the class members will receive a *pro rata* share of the settlement fund. That *pro rata* share will be calculated on the basis of claims made, as opposed to on the basis of the number of members in the class, thereby increasing the payout to claiming class members.

d. If a class member has an outstanding amount owing on a loan from Nationwide, that member's settlement benefit will first go towards extinguishing the outstanding loan, with the balance of any remaining settlement benefit being paid to that class member.

e. If a class member's settlement benefit is not sufficient to discharge that member's outstanding loan, the settlement benefit will be paid towards that outstanding loan and will extinguish the amount of the debt that is equal to the total administration fees paid by the member.

f. The class members will receive their settlement benefit (subject to payment of outstanding debt), as 50% in cash and 50% in vouchers. The vouchers can be redeemed for cash approximately 3 years after the settlement. Alternatively, the vouchers can be used to pay any outstanding or future fees in relation to loans from Nationwide.

g. Nationwide will release and discharge all class members from that portion of outstanding loans relating to the allegedly unlawful administration fees. This term applies without the necessity for the class members to make any claim.

h. Nationwide will administer the settlement at its own cost. However, it will be reviewed by an experienced independent claims administrator, Epiq Systems Inc., and will pay the costs of this review ($15,000.00). The claims administrator will report to the court at the end of its review of the claims process.

i. Class members who do not agree with a decision of Nationwide administering the settlement may appeal that decision. The process will involve delivering an appeal form to the plaintiff's class counsel. If they and defence counsel cannot work out a resolution, ultimately appeals will be to this court.

j. If there is any balance in the settlement fund after payment out of claims and approved legal expenses, or at the end of the redemption period, it will be returned to Nationwide. I was advised that there is unlikely to be any significant amount left in the fund.

17 The plaintiff's counsel has gone to some lengths to come up with a plan to notify class members. They have designed a plan that reflects a sustained and sincere effort to maximize the number of claimants who take-up the settlement. Notice will be sent by mail to the last known address of a class member, if the address information is less than three years old. It was felt that going beyond three years would be fruitless, as the demographic of the class tends to be one that often moves residence. As well, the notice will be sent to the last known email address of each class member. It will be

posted on the internet website of the internet loan business of Nationwide. It will also be posted in the two large daily Vancouver newspapers, The Province and the Vancouver Sun (the newspaper publications are more of a formality).

18 The form of notice to class members is worded in plain language and is easy to follow. So too are the claims forms and the forms of voucher. All seem designed to make it easy for class members to make a claim.

19 I turn now to review the legal fees and expenses of class counsel. The retainer agreement between the plaintiff and class counsel was entered into on March 8, 2004. It is a contingency agreement that provides for a fee of 35% of the total amount recovered by the class, plus disbursements.

20 This fee agreement was the basis of class counsel fees which were approved in *Cash Store*, *Cash Money* and *Money Mart*. In each of those cases, as here, class counsel sought a fee of 30% of the amount of the settlement fund, rather than the greater 35% fee set out in the retainer agreement. In each of those cases, as here, class counsel proposed that they would charge no further fees to implement the settlement or deal with any subsequent claims appeals. The proposed fees in this case are well within the norm for hard-fought litigation of this scope and risk (see *Cash Money* at para. 26).

21 Here, class counsel propose that their disbursements of $5,340.84 (including taxes) be paid, but that they will charge no further disbursements. The representative plaintiff approves of the proposed fees and disbursements.

22 Class counsel have kept time records of their time spent on this action, as well as on the three other actions that have settled to date, *Cash Store*, *Cash Money* and *Money Mart.* Class counsel have been careful not to duplicate the recording of time. For example, if a task was of benefit to three actions, the lawyers' time spent on it was recorded one-third each to the three actions. The fees calculated on a 30% contingency fee amount to approximately 3.1 times the fees that would be paid based on an hourly basis.

23 The settlements approved in BC have been more favourable to class members than the payday loan class action settlements approved by the Ontario Superior Court of Justice in *McCutcheon v. The Cash Store Inc.*, [2008] O.J. No. 5241 [*McCutcheon*], *Mortillaro v. Cash Money Cheque Cashing Inc.*, [2009] O.J. No. 2904 [*Mortillaro*] and in *Smith Estate v. National Money Mart Co.*, 2010 ONSC 1334 [*Smith Estate*].

24 The court in *Smith Estate* had many concerns about the structure of the settlement in that case, as expressed at para. 33 of that judgment. Those concerns were shared by plaintiff's counsel in the BC payday loan actions.

25 The model of settlement agreement ultimately reached by plaintiff's counsel in BC, in the *Cash Store*, *Cash Money* and *Money Mart* actions, as well as in this action before me, has these key differences when compared to the settlements in the Ontario payday loan actions:

> *Amount of Entitlement*
>
> In BC the settlement fund is based on an assessment that the class members have a very strong claim and that there should be no discount for litigation risk. As such, claiming class members are entitled to receive up to 100% of

the allegedly unlawful fees paid. Claiming class members are entitled to a *pro rata* share of the fund (as opposed to limiting their share based on the total number of class members, regardless of whether all class members claim). Based on expected take-up rates and the size of the settlement fund, it is very likely that class members who make a claim will receive a 100% refund of the allegedly unlawful fees.

In contrast, I am advised that class members could expect to receive a very small percentage of their claims to the allegedly unlawful fees in the settlement in *Smith Estate*, for example, 14%.

Cash Benefit

In both jurisdictions, there was a concern that an immediate lump sum settlement of all allegedly unlawful fees might bankrupt those defendants who continue to carry on business, and so the settlements were structured to try to avoid this problem.

In BC, the first stage of settlement involves an immediate cash payment of one half of the claim. At the same time, vouchers are delivered to the class member equal to the value of the second half of the claim. The vouchers are redeemable for cash three years from their issuance. Alternatively, a class member has the option of using the vouchers in exchange for services from the defendant.

Two of the Ontario settlements also used a part cash/part voucher system (*McCutcheon* and *Smith Estate*); another used the voucher system alone (*Mortillaro*). In contrast to the BC model of settlement[1], the vouchers in the Ontario settlements were only redeemable in services, or to offset outstanding loans, and could not be redeemed for cash. This could render the vouchers practically worthless to participating class members who no longer want to borrow from the defendant. The part cash/part voucher system applied in the Ontario settlements also reveals a difference in how class counsel fees are structured in BC, as will be discussed shortly.

Participation by class members with outstanding loans

In BC, a class member is eligible to participate in the cash aspect of the settlement even if they have defaulted in making loan payments on the non-contentious part of the loan.

I am advised that in the Ontario settlement in *Smith Estate*, a class member who has defaulted on a loan would not be entitled to any similar cash benefit from the settlement.

Class Counsel Fees

In BC, the class counsel fees are to be paid 50% from the cash portion and 50% from the voucher portion of the settlement. Since there is always a risk that some vouchers will not be cashed in or used, structuring fees this way

decreases the impact of legal fees on the upfront cash portion of the settlement.

This was not the case in the Ontario actions involving vouchers and cash, since vouchers could not be redeemed for cash.

26 I point out these differences not to criticize the approval of the settlements in Ontario, which were supported by evidence that they were in the best interests of the class, and were mediated by skilled and highly respected mediators. The classes in those cases were also represented by experienced class counsel. Each action, however, is different, and has to take into account factors unique to the class and the defendants, including the risks that any judgment might not be collectable due to financial limitations of the defendants. To that end, the more favourable settlement terms in BC support the conclusion that the settlement proposal in this case is fair and reasonable and in the best interests of the class. It also supports the conclusion that the legal work by BC plaintiff's counsel, in prosecuting the BC payday loan claims and ultimately achieving the settlement, was exceptional.

27 Based on the evidence in this proceeding, and for similar reasons as analyzed in *Cash Store*, *Cash Money*, and *Money Mart*, I conclude that:

a. the settlement proposed in the plaintiff's Notice of Application is fair, reasonable, and in the best interests of the class;
b. Epiq Systems Inc. should be appointed as claims process reviewer under the settlement; and
c. the retainer agreement between the plaintiff and Hordo & Bennett dated March 8, 2004, and the proposed legal fees and disbursements, are fair and reasonable.

I therefore approve the above matters.

28 In addition, I have concluded that the representative plaintiff provided services to the class accompanied by positive results, which ought to be recognized by an award to him of $2,000, to be paid as a disbursement.

S.A. GRIFFIN J.

* * * * *

APPENDIX 1

This is the 1st affidavit of Mark W. Mounteer in this case and was made on 28/Sept/ 2010 No. L051075

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOSE BARTOLOME, PLAINTIFF, AND
NATIONWIDE PAYDAY ADVANCE INC., DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

AFFIDAVIT

I, MARK W. MOUNTEER, of Suite 1801, 808 Nelson Street, Vancouver, British Columbia, barrister & solicitor, SWEAR THAT:

1. I am a partner with the law firm of Hordo & Bennett, solicitors for the Plaintiff, in this matter, and as such have personal knowledge of the facts and matters to which I have deposed hereinafter, save and except where the same are stated to be on information and belief, and where so stated I verily believe them to be true.

1. The Claims

2. This action claims that administration fees collected in the operation of the Nationwide's short term loan business are interest charged and received contrary to s. 347(1) of the *Criminal Code*. This section prohibits the receipt of interest at a "criminal rate" which s. 347(2) defines as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60% on the credit advanced". Section 347(2) defines "interest" very broadly as "all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense in any other form, paid or payable for the advancing of credit".
3. Since April 2000, Nationwide Payday Advance Inc. ("Nationwide") has provided short-term loans for small amounts known as Payday Loans, at various locations in British Columbia and by transactions through the internet and by telephone. These loans were for amounts up to $500 and for a term not exceeding 20 days.
4. Nationwide's standard form of loan agreement required the borrower to pay interest, which was stated to be 59% per annum, and an Administration Fee calculated at 22% of the principal advanced.
5. If the borrower did not attend at the Nationwide location and repay the amount of the Payday Loan, interest fee, and Administration Fee in cash, on or before 12:00 noon the day after the due date, Nationwide would directly debit the borrower's bank account for that amount pursuant to a Payment Authorization Agreement executed by the borrower when the loan was obtained.
6. The central allegation in this action is that the Administration Fee charged by Nationwide is interest for the purpose of s. 347(1) of the *Criminal Code*. The action claims that Nationwide's standard loan contracts which provided the payment of these Administration Fees are prohibited by s. 347(1) of the *Criminal Code* and that through the collection of these Administration Fees Nationwide has received interest at a criminal rate contrary to that same section.
7. The action claims that Nationwide has all been unjustly enriched by the unlawful fees it collected and seeks restitution of those fees. The Plaintiff also claims that the charging and collection of the unlawful loan fees by Nationwide is an unconscionable trade act and practice contrary to the *Business Practices and Consumer Protection Act* and its predecessor legislation;
8. In May of 2007, Parliament amended the *Criminal Code* to include s. 347.1, which permitted the provinces to regulate the payday loan industry and excluded from the operation of s. 347(1) of the *Code* any payday loan agreements authorized under

provincial regulation. The province subsequently passed the *Business Practices and Consumer Protection (Payday Loans Amendment) Act 2007*, S.B.C. 2006, c. 35 and regulations were subsequently enacted under this legislation to regulate the payday loan industry in British Columbia. This new regulatory regime came into force on November 1, 2009. It renders lawful any payday loans made after this date by licensed payday loan companies in accordance with these new regulations.

2. The Prosecution of the Claim against Nationwide

9. This claim was first advanced as part of an action that was commenced by the Plaintiff Kurt MacKinnon on January 29, 2003 against Nationwide and 25 other defendants which operated 17 other different payday loan businesses. In that action, the plaintiff, Kurt MacKinnon had borrowed from four other businesses operated by five of the other 25 defendants in that action. Mr. MacKinnon did not have any dealings with Nationwide. Mr. MacKinnon brought that action in a representative capacity against the remaining defendants from which he did not borrow. The MacKinnon Action was, to our knowledge, the first proposed class action against the payday loan industry in Canada.
10. On March 20, 2003, Nationwide, along with a number of other defendants, brought an application seeking that the claims against them in the MacKinnon Action be struck on the basis that they failed to disclose a reasonable claim, and sought an order for special costs.
11. On May 29, 2003, the Plaintiff delivered a Notice of Motion to certify the action as a class proceeding. The materials filed in support of this application included an Affidavit from the Plaintiff MacKinnon, two expert actuarial reports and Affidavits from several other persons who had borrowed from the other Defendants. Mr. Bartolome filed an affidavit in the MacKinnon Action in support of certification setting out his dealings with Nationwide and advising that if necessary he was prepared to act as a Representative Plaintiff in the MacKinnon Action on behalf of those persons that borrowed from Nationwide.
12. By Order made June 26, 2003, the Case Management Judge directed that Nationwide's outstanding application be heard in conjunction with, in the case of the motions to strike, a determination under s. 4(1)(a) of the *Class Proceedings Act* as to whether the Statement of Claim failed to disclose a cause of action against those Defendants who never had any contractual dealing with the Plaintiff MacKinnon.
13. This application was heard by Madam Justice Brown in September 2003. In Reasons for Judgement released on February 3, 2004, the Court held that the *Class Proceedings Act* did not require that there must be a named plaintiff with a cause of action against each defendant.
14. Nationwide and the other Defendants sought leave to appeal from the dismissal of their applications. These leave applications were heard on March 2, 2004 and leave was granted on March 10, 2004; 2004 BCCA 137.
15. Nationwide's appeal from the dismissal of its strike application, came on for hearing before a panel of five Justices on April 15, 2004.
16. On September 24, 2004, the Court of Appeal pronounced Reasons for Judgment on these appeals. The Court of Appeal upheld the Chambers Judge's dismissal of the applications to strike the action brought by those Defendants who had not advanced loans to the Plaintiff MacKinnon; 2004 BCCA 472.

17. When the Court of Appeal Reasons were pronounced, the certification hearing was ongoing before the Case Management Judge. The certification application proceeded for five days from September 20 through 25 and then for another two days on October 18 and 19, 2004.
18. On March 1, 2005, the Case Management Judge pronounced Reasons for Judgment dismissing the application to certify the action as a class proceeding; 2005 BCSC 271. In so doing, Madam Justice Brown concluded that "this action, as presently constituted, cannot be certified" on the basis that she was not satisfied that there were common issues arising out of the various different ways in which the different Defendants carried out their different payday loan businesses, or that a class action against all of these Defendants was the preferable procedure for the resolution of those claims; 2005 BCSC 271.
19. On March 14, 2005, the claims against Nationwide in the MacKinnon Action were dismissed without costs, on a term that the dismissal of the action would not preclude any other person, who had a cause of action against Nationwide in respect of the loan fees paid by that person, from commencing an action under the *Class Proceedings Act* and applying to have that action certified as a class proceeding.
20. Shortly thereafter on April 29, 2005, Mr. Bartolome commenced this action advancing exactly the same claims as were advanced in the MacKinnon action.
21. In September, 2005, Madam Justice Brown was appointed as the Case Management Judge for this action. Her Ladyship had already been appointed Case Management Judge for several actions brought under the *Class Proceedings Act* against payday loan companies.
22. The Plaintiff delivered an application to certify this action as a class proceeding in September, 2006. The materials delivered in support of the application included an Affidavit from the Plaintiff as well as three actuarial expert reports from Mr. Ian Karp.
23. By this time, Madam Justice Brown had certified three actions involving three different payday loan businesses; *Bodnar v. The Cash Store*, 2005 BCSC 1228; *Tracy v. Instaloans*, 2006 BCSC 1018, and *Bodnar v. Payroll Loans Ltd.*, 2006 BCSC 1132. The Court of Appeal had also affirmed the certification in *Bodnar v. The Cash Store*; 2006 BCCA 260. Notwithstanding that the issues the Plaintiff sought to certify in this action against Nationwide were precisely the same as the issues certified in these three other actions, Nationwide opposed the Plaintiff's application to certify the action as a class proceeding.
24. On August 30, 2007, the Plaintiff delivered its Memorandum of Argument in support of certification. In response to this Argument, the Defendant delivered an Outline which narrowed the scope of the hearing to three main issues. Nationwide argued that action should not be certified because:

    (a) the pleadings failed to disclose a cause of action because they say that s. 347(1) of the *Criminal Code* was unconstitutional as contrary to the *Charter of Rights*. This constitutional challenge necessitated the issuance by Nationwide of a Notice of Constitutional Question to the Attorneys General of Canada and British Columbia.
    (b) the common issue relating to unjust enrichment, as proposed by the Plaintiff, failed to follow the approach taken by the Court of Appeal in *Parsons v. Coast Capital Savings Credit Union*, 2007 BCCA 247, 69 B.C.L.R. (4th) 204;

25. Nationwide further argued that if the action were certified, then:

    (a) there should be no right for persons who are not residents of British Columbia to opt into the action as the class is restricted to residents of British Columbia who have borrowed money;
    (b) Nationwide should have the right to tell Class members that unless they opt-out of the Class action they could not borrow any additional loans from Nationwide.
    (c) Mr. Bartolome should be ordered to pay the costs of providing the certification notice to members of the Class.

26. The certification hearing proceeded for a full day on September 17, 2006. In reasons for Judgement dated February 1, 2008, Madam Justice Brown rejected each of Nationwide's arguments, holding that:

    (a) it was premature to consider the constitutionality of s. 347(1) of the *Criminal Code*;
    (b) the Court of Appeal's in *Parsons v. Coast Capital* was factually distinguishable for the facts of this case;
    (c) Non-residents should be afforded the opportunity to opt-into the class;
    (d) Nationwide should bear the cost of the notice, because it was most likely to benefit it; and
    (e) communications with class members when a loan has been denied must be carefully circumscribed to ensure that a denial of the loan does not become a mechanism to coerce a class member to opt-out of the class proceeding.

27. Nationwide filed a Notice of Appeal on February 25, 2008, which primarily focused on the constitutionality of s. 347(1) of the *Criminal Code*. Nationwide delivered its factum on May 28, 2008 and the Plaintiff filed a factum in response on June 6, 2008. In July 2008, Nationwide agreed not to proceed with its appeal and instead be bound by the outcome of the appeal on the same issue in *MacKinnon v. Money Mart* action. The Appeal in *MacKinnon v. Money Mart* was heard in January 2009 with judgment reserved until March 13, 2009. The Court of Appeal, sitting as a five member panel dismissed the argument that s. 347 of the Criminal Code was unconstitutional as contrary to the *Charter of Rights*.
28. One week was then reserved before Madam Justice Griffin commencing June 21, 2010 for the trial of the common issues in this action.

3. The Settlement

29. Throughout the course of the action, the parties engaged from time to time (but relatively infrequently) in settlement discussions. These discussions did not result in any significant progress towards settlement, as the Parties held different views as to Nationwide's capacity to fund a settlement in the range which the Plaintiff was willing to accept.
30.

In 2009, a Settlement was reached in the B.C. class proceeding against one of Nationwide's largest payday loan competitors which operated under the business names of "The Cash Store" and "Instaloans". Counsel for the Cash Store in that action also acts as counsel for Nationwide in this action. Mr. Bartolome was also a representative Plaintiff in that action. This B.C. settlement was followed shortly by a settlement of another B.C. action brought under the Class Proceedings Act against another payday loan competitor -- Cash Money (which had a significant presence in Ontario and a more limited presence in British Columbia). Both settlements were subsequently approved by the B.C. Supreme Court on February 2, 2010: *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145; *Casavant v. Cash Money Cheque Cashing Inc.*, 2010 BCSC 148.

31. Both The Cash Store/Instaloans and Cash Money settlements had been preceded by the settlement of class actions in Ontario against these payday loan operators which extended across Canada (excluding B.C. and, in the case of The Cash Store/Instaloans settlement, Alberta). As Class counsel in the B.C. class actions, we rejected the settlement of those actions on the same terms as the Ontario actions as we regarded the nature and extent of the benefits provided under these Ontario settlements, both collectively and individually, to be insufficient (limited cash and service vouchers in the Ontario Cash Store/Instaloans settlement and service vouchers only in the Ontario Cash Money settlement).

32. Both The Cash Store/Instaloans and Cash Money B.C. settlements ultimately approved by the B.C. Supreme Court follow the same basic settlement structure:

(a) A settlement fund is established in the amount of 20% of the unlawful fees collected in the operation of the payday loan business. The Cash Store/Instaloans settlement fund totalled approximately $18.75 million. The Cash Money settlement fund was approximately $1.265 million.

(b) The settlement fund consists of 50% cash and 50% vouchers. The vouchers are redeemable for cash after three years, for a six month period. In the interim, the vouchers can be used for services at The Cash Store/Instaloans and Cash Money.

(c) Legal fees in the amount of 30% of the settlement fund (plus taxes and disbursements) are paid 50% from the cash portion of the settlement fund and 50% from the voucher portion of the settlement fund, shortly after the settlement fund was established. In each case, the payday loan company makes a notional cash payment from the voucher fund which serves to reduce the amount of vouchers available to pay the Class members' claims.

(d) Class members who claim will be entitled to receive 100% of the amount of the allegedly unlawful fees they paid, together with interest, if the fund remaining after payment of legal expenses is sufficient to do so. If not, each Class member will receive their pro rata share of the settlement fund (calculated by dividing the settlement fund by the total amount of claims made against the settlement fund and multiplying each claim made by that ratio). Class members will receive their settlement benefits payable one half in cash and one half in cash redeemable vouchers.

(e)

Class members who do not claim under the settlement but are indebted to the payday loan company will have their outstanding debt in relation to the principal they received, and any lawful interest payable on the due date of the loan, extinguished up to the amount of the loan fees they paid. All debt relating to any other fees will also be extinguished.

(f) Class members who do make a claim under the settlement but who are indebted to the payday loan company will have their settlement benefits applied to extinguish their outstanding debt (again, in relation to the principal advanced and the lawful amount of interest payable on the due date of the loan) and will receive any remaining balance of their settlement entitlement.

33. In early 2010, a settlement was negotiated with Money Mart on similar terms to the Cash Store, which provided for the creation of a $24.75 million settlement fund (1/2 cash and 1/2 cash-redeemable vouchers). This Court subsequently approved that settlement; *MacKinnon v. National Money Mart Company*, 2010 BCSC 1008.

34. As Class counsel in these other B.C. payday loan class actions, we concluded that the settlement of these class actions on these terms was fair and reasonable, having regard to five basic factors:

(a) We considered that the claims for recovery of the fees alleged to be unlawful in these actions had a very strong prospect of success. By the spring of 2009, the liability to make restitution of unlawful payday loan fees had been established in two other payday loan actions in which we acted as Class counsel and that liability had been affirmed by the Court of Appeal; *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213, aff'd 2007 BCCA 231; *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2008 BCSC 669, aff'd 2009 BCCA 110. We were of the view that the principles set out in these decisions would apply with equal force to any payday loan business operating in British Columbia.

(b) We recognized that the payday loan operators would have limited financial resources available from business operations to pay any eventual Judgment rendered against them, as these Judgments would effectively require the defendants to disgorge most of the revenue generated in the operation of their payday loan business, which in the case of The Cash Store/Instaloans and Cash Money was the vast majority of its business revenue. The magnitude of the eventual Judgment in these payday loan actions, and the fact that the payday loan companies had little in the way of exigible assets, created a significant prospect that Judgment would bring the business to an end through bankruptcy or otherwise. The value that could be recovered in those circumstances for the benefit of Class members was very uncertain.

(c) We also recognized the practical reality that the majority of Class members who would be entitled to participate in a settlement of the payday loan actions would not do so, even if they received notice of the settlement. We gained our understanding of this phenomenon

concerning Class participation in class action settlements, known as the "take up rate" from our review of published information and our own experience, as set out in greater detail below.

(d) We understood from our representative Plaintiff in these and other actions, including the representative Plaintiff in this action, and from our dealings generally with Class members, that the representative Plaintiff did not wish to have any further dealings with the payday loan companies and this view was shared by many of the Class members. For this reason, delivery of vouchers which could only be redeemed for services provided by the payday loan companies was not regarded as a benefit by these persons and was unacceptable to them.

(e) We understood from our interactions with payday loan borrowers that many of them were repeat borrowers who would eventually default on their loan, as had been the case with the representative plaintiffs in The Cash Store/Instaloans, Cash Money, and Money Mart actions. It was, in our view, essential that any indebtedness of the representative Plaintiff and Class members not preclude them from recovering under any settlement, as their claim for loan fees paid generally exceeded significantly the amount of any outstanding lawful indebtedness. In addition, we concluded that any Class member should receive the benefit of a set-off of the amount of any unlawful loan fees they paid against a principal amount of any outstanding loan, even if they did not make a claim in the settlement, as this was a consequence that would flow from the finding of liability that we considered likely.

35. As Class counsel, we considered that the same factors applied to and should govern the terms of any potential settlement of this class proceeding against Nationwide.

36. Beginning in October 2009, Ms. Brasil and I reached an agreement in principle to work towards a settlement of this action on the same general terms as The Cash Store. Between October 2009 and April 2010, more than 15 draft settlement agreements were exchanged between counsel in an attempt to apply the Cash Store settlement to the unique circumstances of the Nationwide business. The final Settlement Agreement in the Nationwide action was executed by the parties effective April 27, 2010. A copy of the executed Settlement Agreement (the "Settlement") is attached as Exhibit "A" to this Affidavit.

37. [sentence redacted] In particular, the Plaintiff had become aware that:

(a) Payday loans had been provided under the name Nationwide at Common Exchange locations in British Columbia. Until July 2006, Mr. Veldhuis and Adam Tobias were the directors of Common Exchange Ltd., after which time their wives, Dini Veldhuis and Linda Tobias, became the directors;

(b) Mr. Veldhuis and Mr. Slee (Nationwide's principals) were also the directors of a business called Direct Credit. When Payday loan regulations came into force in November 2009, Direct Credit had applied for a licence to provide payday loans.

38. In order to deal with these discoveries, the Plaintiffs required that the settlement agreement include:

(a) All payday loans provided by both Nationwide and the Direct Credit group of companies.
(b) Representations by Mr. Slee, Mr. Veldhuis and Mrs. Veldhuis that they did not provide payday loans through any other companies than Nationwide and Direct Credit, and in particular, the Common Exchange did not directly provide payday loans other than as agent for Nationwide; and
(c) Statutory declarations by Adam Tobias and Linda Tobias that the Common Exchange did not directly provide payday loans other than as agent for Nationwide.

39. The key differences between the Nationwide settlement and the Cash Store settlement are as follows:

(a) A procedure was set up to determine the amount of the verification fees charged by Nationwide as to provide for a final determination of that amount prior to the settlement being approved by the Court.
(b) The timelines in the Nationwide action were shortened, given the smaller number of likely claimants, as to provide Class members with a more timely refund under the Settlement. For example, the claims review process was shortened from 3 months under the Cash Store settlement to 1 month under this proposed settlement.
(c) The Notice provided to members of the class was increased to include email.
(d) The net settlement benefit amount was determined in the same simplified methodology used in the Cash Money case. This could potentially provide an increased benefit to Class members if the take-up rate is lower than expected.
(e) Any appeals under the Settlement which cannot be resolved between counsel for the Defendants and class counsel will be referred to the Court for determination.

40. It is my opinion as counsel that the terms of the Settlement are a fair and reasonable compromise of the claims made in this action. There are several factors that form the foundation for this conclusion. These include the amount of the benefit each claiming Class member is entitled to and will likely receive, the benefit provided to non-participating Class members, the impact on Nationwide and the absence of any hurdles in the way of participation by Class members in the Settlement. These and other factors are explained in more detail below.

A. The Amount of Entitlement

41. The amount of the individual benefits each claiming Class member is entitled to receive under the Settlement is, in my view, a fair and reasonable reflection of the strength of each individual Class member's claim. Under the terms of the Settlement, each Class member is entitled to receive the full amount of their claim for the Administration Fees paid, if the settlement fund is sufficient to pay all of the claims. There is no deduction in the amount of individual entitlement for litigation

risk. This means that each Class member is entitled to receive the very same amount they would receive if the claim were successfully litigated, provided the fund is sufficient to pay that amount to each claiming Class member.

B. The sufficiency of the settlement fund.

42. The Settlement requires Nationwide to establish a settlement fund in the amount of $762,884. This amount is equal to 20% of the $3,814,421 in Administration Fees collected by Nationwide in the operation of its payday loan business in relation to class loans from the commencement of that business until November 1, 2009, when the new regulatory regime came into effect in British Columbia; attached as Exhibit "B" to this Affidavit is a copy of a report from Deloitte & Touche LLP confirming that calculation.

43. We believe that a settlement fund of this amount will likely be sufficient to pay the full amount of each Class member's claim (subject to deduction of all legal expenses relating to recovery, defined in the Settlement Agreement as "Approved Legal Expenses"). We reached this conclusion based on public information we had obtained concerning take-up rates in consumer lending class actions and our own experience. For example, in terms of the former, we obtained data from a company experienced in class action administrations in the United States which indicated that take-up rates for consumer lending class actions are generally around 5%.

44. Our own experience concerning take-up rates was based largely on the settlement in *MacKinnon v. Vancouver City Savings Credit Union*, 2004 BCSC 1604, a case involving overdraft fees which were alleged to have been collected in contravention of s. 347(1) of the *Criminal Code*. In that settlement, Class members were entitled to receive either 80% or 60% of the overdraft fees they had paid, depending on the nature of their account, together with the interest compounded semi-annually at 5%. All Class members had to do to make a claim was to register with VanCity either in person, by phone or submit a simple claim form. Direct notice of the settlement was mailed to Class members who still had accounts at VanCity, which we believed to constitute the great majority of the Class. In the end, the claims made against the settlement represented 29% of eligible claims, even though direct notice had been given to a great proportion of the Class who only had to make a simple phone call to make a claim.

45. A similar settlement was reached in *Parsons v. Coast Capital Savings Credit Union*, 2009 BCSC 330, which also involved overdraft fees alleged to have been collected in contravention of s. 347(1) of the *Criminal Code*. In this case, the credit union had stopped charging the overdraft fees at issue in 2003 after the commencement of the action in VanCity. However, this action was more vigorously litigated than the VanCity action and a settlement was not reached and approved until early 2009. The extent of notice given, the claims process and the level of benefits were all precisely the same as the VanCity settlement. The only substantial difference was that by the time the Coast Capital settlement was administered, the claims that were the subject of settlement were substantially older than the claims in the VanCity settlement. In the end result, the take-up rate in the Coast Capital settlement was only approximately 10% of the eligible claims.

46. We also had some limited exposure to take-up rates in the context of a payday loan action from the settlement of *Kilroy v. Money Sense Cheque Services Inc.*, B.C.S.C. Vancouver Registry No. S053297. This was a claim involving a cheque

cashing company which provided a limited number of payday loans for approximately a 10 month period between late 2001 and the summer of 2002. A settlement was reached in 2005 under which Money Sense agreed to refund all of the loan fees collected in respect of its payday loan business from the 48 borrowers who had obtained payday loans. Direct notice was given to all 48 of those borrowers, at their address according to the records of Money Sense, advising them that they were entitled to a full refund. Ultimately, claims were made and paid representing approximately 9% of the settlement fund. While this settlement experience involved an admittedly small sample, the level of class participation was consistent with the published information concerning take-up rates in consumer lending actions.

47. While the amount of the settlement fund at 20% of eligible claims is less than the 29% of eligible claims paid under the *MacKinnon v. VanCity* settlement, we consider it unlikely that class participation in this Settlement will reach the same level as in *MacKinnon v. VanCity*. We believe that there are two different characteristics in respect of the classes that will account for different levels of class participation. First, we believe that the Class in *MacKinnon v. VanCity* was likely much more stable, in the sense that the great majority of Class members would have remained in a banking relationship with VanCity and therefore would have been directly informed of the settlement. In contrast, it is our experience both from dealing with payday loan borrowers and from the Money Sense settlement that payday loan borrowers are more transient and that the contact information in the records of payday loan companies are often out of date within several years. As discussed below in the context of the notice to be given to the Class, Nationwide has confirmed that this is consistent with its experience in dealing with its borrowers.

48. Second, we believe that the Class population in *MacKinnon v. VanCity* was more diverse than the Class population under the Settlement. The Class in VanCity was made up of members of the credit union, which included not only persons from all walks of life but corporations operating business accounts. This latter category of Class members in particular would be motivated economically to recover whatever business expense had been charged to them in the way of overdrafts. In contrast, the Class membership here represents a particular segment of the population who has turned to expensive short term borrowing as a means to deal with financial difficulties they are facing.

49. Our conclusion concerning the sufficiency of the settlement fund is supported by the results of Class participation in the Ontario Cash Store/Instaloans settlement approved in *McCutcheon v. The Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.). We were informed by B.C. counsel for The Cash Store/Instaloans during the approval of the settlement of the B.C. action that the claims made under the *McCutcheon* settlement represented 5% of eligible Class members and comprised 11% of the amount of eligible claims. While we believe that the class participation under the Settlement will be somewhat higher because of the greater benefits provided, the claims experience in the *McCutcheon* action further supports our conclusion that a settlement fund consisting of 20% of the Administration Fees collected by Nationwide in British Columbia will likely be sufficient to pay all claiming Class members their full entitlements, or at least a substantial portion thereof.

C. The certainty and timeliness of payments.

50. One of the benefits Class members will receive under the Settlement is that they will be provided with their benefits (in the form of cash and cash redeemable vouchers) within 1 year of settlement approval. In contrast, had this matter proceeded to trial, we believe that it would have taken much longer to ultimately obtain any benefits for Class members and the amount of those benefits would have been uncertain.

51. While the common issues in this action were set for summary trial in June of this year, Judgment on those common issues would almost certainly have been reserved. Furthermore, given the experience to date in this action, it is almost certain any adverse Judgment against Nationwide would have been appealed. In our estimation, this would have deferred any ultimate determination of liability until the spring of 2011 at the very earliest, assuming no further appeals were taken beyond the Court of Appeal.

52. In addition to the final determination of liability arising out of the resolution of the common issues, there would still have to be further steps in the litigation to determine quantum of liability, whether Judgment would be awarded in the favour of the Class as a whole or whether individual claims would have to be made, and the process for distributing benefits to Class members. These determinations, and the appeals that could potentially be brought from them, would further delay the receipt of benefits by Class members through the litigation process.

53. Furthermore, given the new regulatory environment which permits Nationwide to operate legally, we also considered that there was a reasonable prospect the Court might, either to avoid any possible consequence of receivership or insolvency or for other reasons, refuse to make a global award in favour of the Class but instead require Nationwide to pay Class members amounts to which they were entitled as they came forward and made a claim. In that event, the Settlement reached looks very much like a claims process that would be put in place after the Judgment, in that the Class members are entitled individually to receive the full amount of the Administration Fees they paid. Other than an award of interest on that amount, the only difference is that under the Settlement structure, the liability of Nationwide is limited to 20% of the Administration Fees it collected whereas under a claims process after Judgment Nationwide's liability would be limited only by the number of Class members who came forward to claim.

54. If we are correct in our assessment that the settlement fund will be sufficient to pay all claiming Class members who come forward their entitlements in full (subject to the same reductions for legal expenses as would be made for Class members claiming after Judgment), then this limitation on Nationwide's liability has no impact on each individual claiming Class member. Yet even if we are wrong in that assumption and the level of class participation exceeds the 20% level reflected in the amount of the settlement fund, we believe the benefits provided by the Settlement are still fair and reasonable because they avoid the delay and uncertainty inherent in the litigation process.

55. For example, if it is assumed that the level of Class participation would reach the level in MacKinnon v. VanCity and 30% of eligible claims were made, this would mean claiming Class members would still receive the return of approximately 2/3 of the Administration Fees they paid (subject to deduction for the legal expenses of recovery).

D. The Voucher is a deferred cash payment.

56. Another key benefit under the terms of the Settlement is that although the Class members will receive their settlement benefits one half in cash and one half in vouchers, which under the Settlement are fully redeemable for their full face value in cash three years from their issuance.
57. In our view, the vouchers issued under the Settlement are simply a mechanism by which a deferred cash payment is provided to the Class members. We considered it was reasonable for part of the cash payment to Class members to be deferred in order to assist Nationwide in financing the Settlement and thereby increasing the value of the benefits provided under it. We believed that if the Settlement were confined to immediate cash payments, the overall value of the Settlement would be less.
58. For those Class members who regard the various services offered by Nationwide to be of value to them, the vouchers may be exchanged immediately for those services. For those Class members who do not wish to use those services, the voucher can be redeemed in cash in full three years from the date of the delivery. We believe this to be a fair and reasonable way in which to provide the Class members with full cash benefits but in a manner that was affordable to Nationwide.

E. Potential for a beneficial distribution of Approved Legal Expenses.

59. One further benefit of the Settlement is that it provides the potential for a beneficial distribution of some or all of the Approved Legal Expenses (which under the Settlement is defined as the collective amount of fees, disbursements and taxes approved by the Court) over the remainder of the settlement fund. This is so because pursuant to para. 29 of the Settlement, each claiming Class member is entitled to a pro-rata distribution of the settlement fund remaining after payment of the Approved Legal Expenses up to the full amount of their claim.
60. This formula for distribution means that if the amount of the settlement fund is sufficient to pay both the Approved Legal Expenses and the total amount of the Class members', the Class members will receive the full amount of their claim without any deduction for the legal expense of recovery. Instead, the entire cost of recovery will be paid by the remainder of the settlement fund that is not required to pay Class members' claims.
61. Similarly, if the level of class participation is such that the settlement fund is sufficient to pay Class members 85% of their entitlements after payment of the Approved Legal Expenses, the Class members will receive that same proportion of their claim. This effectively means that the Class members are contributing only 15% of their claim to the costs of recovery of this action, with the balance of those costs being absorbed by the remainder of the settlement fund. This still places the claiming Class members in a better position than if the Class members were required to pay their pro-rata share of the Approved Legal Expenses, as they would likely be required to do under an individual claims process after trial and Judgment.
62. If there is a residue remaining in the settlement fund after payment of the Approved Legal Expenses and the claims made by Class members in full, then under para. 52 of the Settlement this residue will remain in the fund to be applied against the

redemption of the vouchers. Any cash remaining at the expiry of the voucher redemption period will be returned to Nationwide, a result which will materialize only if the take-up rate is much lower than anticipated.

F. The benefit to non-participating Class members.

63. One other significant feature of the Settlement is that it provides a substantial benefit to non-participating Class members who have an outstanding indebtedness to Nationwide relating to a payday loan or any other transaction. Under para. 35 of the Settlement, all Class members who have not submitted a claim will be released from any obligation to pay any outstanding fees in relation to their outstanding loans and their obligation to repay any outstanding principal amount and lawful interest payable on the due date of the loan, or any other indebtedness they may have to Nationwide, will be extinguished by the amount of the Administration Fees they have paid.

G. Notice and claims process.

64. The final advantage of the Settlement is that it does not place any hurdles in the way of participation by Class members in the Settlement. Wide-spread notice will be given to the Class and the procedure for making a claim is a very simplified one which does not require any proof by Class members.
65. The Settlement provides that direct notice will be sent to the last known address of each Class member where that address information is less than 3 years old. We agreed to this restriction as to the age of the address information as it has been our experience in trying to contact payday loan borrowers from address information that is several years old that the address information is almost always invalid. This has been confirmed by the defendant companies in the other payday loan settlements.
66. In addition to this direct mailing, notice of this Settlement will be posted on the websites of both Nationwide and our firm and will also be posted in each retail location of Nationwide in B.C. In addition, the notice will be published in each of the Vancouver Sun and Province newspapers.
67. We agreed to this extent of newspaper publication for two reasons. First, we do not believe that newspaper publication of legal notice is an effective mechanism by which to reach Class members. In our view, newspaper publication largely serves the function of formality of notice and publication in each of the Vancouver Sun and Province newspapers is amply sufficient for this purpose.
68. As for the claims process, the Settlement provides for a very simple claims form to be provided by the Class member. All the Class member must do is provide some form of identification as the Class member did when they first obtained the loan from Nationwide. They will be able to make a claim over the internet, on the telephone or at any Nationwide store. No further proof of the claim is required from the Class member.
69. The Class members' claims will be determined by Nationwide based on its records. To ensure that the claims are being properly administered, the Settlement in para. 40 provides for an independent reviewer, Epiq Systems Inc., to review the Settlement administration and provide a report to the Court concerning that review.

Exhibit "C" to this Affidavit is a copy of a brochure from Epiq describing the company and their experience.

70. In addition, each Class member will have the right to appeal any determination made by Nationwide concerning their entitlements under the settlement. If the appeal cannot be resolved by agreement, the Settlement provides for binding summary determination by this Court.

71. In these circumstances, we believe that the safe-guards provided under the Settlement in the forms of the review and the rights of the appeal are sufficient to ensure that the Settlement is being properly administered. Furthermore, Nationwide is funding all the costs of the settlement administration, which is a further significant financial benefit to the Class.

4. <u>Legal Fees and Disbursements</u>

72. Hordo & Bennett is a small firm of eight lawyers. Our practice is exclusively devoted to civil litigation, with an emphasis on commercial matters, in which we act as counsel for both Plaintiff and defendants. Our firm's practice is focused on disputes that involve significant and complex claims and we keep our caseload relatively small in order to focus our efforts on such matters.

73. This action is one of a series of actions under the *Class Proceedings Act* against payday loan companies, both large and small, in which our firm acts as plaintiff's counsel. We had previously been involved in commercial cases with a criminal interest rate issues. We believed we had the expertise and could bring to bear the resources necessary to pursue this action and the other subsequent actions against payday loan companies. We chose to do so, in part, because we were of the view that the payday loan companies where charging amounts to their borrowers that were far in excess of the amount permitted by the *Criminal Code* in circumstances where there was no enforcement of the *Criminal Code* by prosecution, where the payday loan companies were routinely and aggressively pursuing their borrowers in Small Claims Court and where the borrowers were generally unable and ill-equipped to afford legal representation to analyze and assert their legal rights against the payday loan companies.

74. Our Retainer Agreement with Mr. Bartolome, which is attached to this Affidavit as Exhibit "D", has already been approved by this Court in *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145. This Agreement provides that we would conduct this case on a contingency basis and that our legal fees would be paid only in the event that the action was successful either in whole or in part. We also agreed to incur disbursements to an aggregate of $25,000 without immediate reimbursement. The Retainer Agreement provides in para. 6 that "the solicitor's legal fees shall be thirty five per cent (35%) of the total amounts recovered by the class under any judgments, orders or settlement" and sets out an estimate of the expected fees in para. 7, as required by s. 38(1) of the *Class Proceedings Act*. It also provides in para. 10 that "unpaid disbursements will be a first charge paid out of the proceeds of any Order, Judgment or settlement, with interest at 10 per cent per annum not compounded."

75. Mr. Bennett has been the lawyer with primary conduct and responsibility of this action. He was called to the bar in 1988 and has practiced with R.J. Randall Hordo, Q.C. since he was an articled student with our predecessor firm of McAlpine & Hordo. Mr. Bennett is widely recognized as a leading class action practitioner in

British Columbia as reflected in the extracts from the Lexpert and Best Lawyers websites attached as Exhibit "E" to this Affidavit.

76. I have assisted Mr. Bennett in this litigation. I am a partner at Hordo & Bennett, called to the bar in 2003. I practice almost exclusively in the area of class actions. I was the former chair of the CBA Class Action Section and am recognized with a BV Rating in Class Actions by Martindale-Hubbell. Mr. Bennett and I have the primary responsibility within our firm for all of the actions underway against various payday loan companies.

77. Even though this matter was conducted on a contingency basis, records were kept of the time spent by members of our firm on this matter in accordance with our normal practice where time-based fees are billed. The value of the time recorded on this matter, at our firm's standard hourly rates in effect at the time the services were provided, up to September 15, 2010 is $55,066.50. This total includes the following hours spent by the following lawyers, with their hourly rates which were in effect through to August 1, 2010:

Paul R. Bennett 66.00 hours $425 per hour

Mark W. Mounteer 136.35 hours $275 per hour

78. These rates are reflective of the Vancouver market for legal services without account of the influence from the hourly rates in the local market charged by the national law firms. It is my understanding that the hourly rates of lawyers in the Vancouver offices of the national law firms are substantially higher. For example, I am aware that one lawyer in the Vancouver office of a national law firm, who acted as defence counsel for one of the Defendants in The Cash Store/Instaloans actions, and whose year of call is the same as Mr. Bennett, was earlier this year charging an hourly rate to defence clients of $575 an hour.

79. In addition to the work undertaken specifically for this action, this class proceeding has also benefited by the work undertaken by our firm in connection with the other payday loan actions in which we act as class counsel. Many of the legal issues concerning criminal interest rate charges that have been addressed in these other actions are also applicable to this action, such as the right to restitution of unlawful interest, the unconscionability of collecting interest at a criminal rate, whether the amendment to the *Criminal Code* and the provincial payday loan regulations provide a defence to a claim for the recovery of unlawful interest, and whether any unlawful interest received is held on constructive trust. These issues have all been reviewed, analyzed and resolved in favour of the Plaintiff Class in the *Kilroy v. A OK Payday Loans* and *Tracy v. Instaloans* cases referred to in para. 34(a) above, in decisions of both the B.C. Supreme Court and the Court of Appeal. I believe that these decisions and the principles established by them contributed to the settlement of this action. Had the legal work with respect to these and other related issues been undertaken for this action, the time recorded by our firm on this action would have been substantially higher.

80. In addition to the time our firm has incurred on this matter, our firm has also incurred approximately $4.27 million of time pursuing all the other various payday loan actions in which we act as Plaintiff's counsel. This time includes approximately $1.8 million of time in the Money Mart action, approximately $940,000 of time incurred in The Cash Store/Instaloans actions and approximately

$138,000 of time incurred in the Cash Money action. In the settlement of these actions, the B.C. Supreme Court approved the payment to our firm of a legal fee equal to 30% of the settlement fund established in each of the settlements. This resulted in a legal fee payable to our firm of $7,425,000 in the Money Mart action, $5,639,942.20 in The Cash Store/Instaloans action, and $379,505.08 in the Cash Money action.

81. Hordo & Bennett proposes that the legal fee payable to our firm also be set by this Court at an amount equal to 30% of the settlement fund established pursuant to the Settlement, which will result in a fee of $228,865.26 plus taxes and disbursements. This is less than the 35% fee contemplated by the Retainer Agreement, in recognition of the fact that this action is being settled just prior to the trial of the common issues.

82. I anticipate that further work will need to be done by our firm in implementing the Settlement, if approved by this Court, and in dealing with the claims process review and any appeals in accordance with the terms of the Settlement. No further charge will be made or sought by our firm for that work, beyond the fee approved by this Court in approving the Settlement.

83. I have discussed this proposed fee with Mr. Bartolome. I have explained to him that the fee provisions of our Retainer Agreement require approval of the Court, as set out in the Agreement, and that up to 30% of their recovery under the Settlement could be paid in contribution to our legal fee, in addition to their pro-rata share of taxes and approved disbursements. He has advised me that he approves of the proposed fee.

84. Under the Settlement, the legal fees, taxes and disbursements will be paid from the Settlement Fund, 50% in cash and 50% in vouchers. In negotiating the Settlement, we insisted that the legal expenses be paid equally from both portions of the settlement fund so as to not unduly burden the cash portion of the settlement fund with the payment of these expenses, which would be a first charge on the cash portion of the fund pursuant to s. 38(6) of the Class Proceedings Act. Payment of legal expenses from just the cash fund pursuant to this first charge would reduce the amount of cash payments to be distributed immediately to Class members.

85. Under the Settlement, Nationwide has agreed to nominally pay one half of the legal expenses from the voucher fund. This mechanism for payments of the legal expenses of this action will serve to maximize the amount of cash that is available for immediate distribution to the Class after payment of those legal expenses.

86. In terms of disbursements, we have incurred external costs of $1,578.89 and have recorded internal costs of $3,507.62 for total disbursements of $5,340.84 (including GST) to September 28, 2010. A schedule of those disbursements is attached to this Affidavit as Exhibit "F". It is my opinion that all of these disbursements were reasonable and necessary for the conduct of this action.

87. We do not propose to charge any interest on the disbursements set out in Exhibit "D", as provided for in our Retainer Agreement. We also confirm that our firm will absorb the costs of, and will not seek any further reimbursement for, any future disbursements incurred subsequent to those approved by the Court and which are necessary in connection with the completion of this matter.

5. <u>Compensation to the Representative Plaintiff</u>

88.

We would propose that as part of this application for approval of the Settlement and of the legal expenses relating to this action, this Court approve a payment of compensation to the representative Plaintiff in this action for the services he has provided and the contribution he has made for the benefit of the Class.

89. Mr. Bartolome first contacted our office in 2004 after researching the MacKinnon Action on the internet. He had been borrowing payday loans for a number of years and had fallen into financial difficulty. Mr. Bartolome retained us in connection with his payday loans. In 2004, Mr. Bartolome:

    (a) provide evidence in the MacKinnon Action against Nationwide, Mr. Payday Easy Loans, Stop 'N' Cash, and Money Mart;
    (b) was joined as a representative Plaintiff in the Cash Store Action; and
    (c) commenced a putative class action against Cashnow.

90. In or around March 2005, I contacted Mr. Bartolome and advised him that the Court had refused to certify the Money Mart Action as an industry wide class action; *MacKinnon v. Money Mart*, 2005 BCSC 271. He agreed to stand as a representative Plaintiff in new actions to be commenced against 310 Loan (Nationwide) and Mr. Payday Easy Loans.

91. In 2006, Mr. Bartolome attended our office to prepare to his evidence in support of the certification of this action. In connection with the certification hearing, Mr. Bartolome provided us with personal documents such as bank account statements.

92. Throughout the course of this action, Mr. Bartolome has been engaged with us from time to time to be briefed with respect to the status of the action, to receive our recommendations concerning its conduct and to provide us with instructions.

93. We have also advised Mr. Bartolome concerning settlement discussions that have occurred as well as developments relating to possible settlement.

94. When we had completed negotiations of the formal Settlement Agreement, Mr. Bennett advised me that he met with Mr. Bartolome on a weekend to review with him details of the terms of the Settlement Agreement. He took the Agreement away with him and later advised that it was acceptable to him.

95. It is my opinion that Mr. Bartolome has diligently discharged his responsibilities as representative Plaintiff. He has incurred burdens for the benefit of the Class that would not have been required to bear had he chosen to pursue his own individual claim for his own benefit through small claims procedures or had he left it to others to advance this action as representative Plaintiff.

96. We propose that Mr. Bartolome be paid $2,000 as an honorarium for his services and contribution as representative Plaintiff, to be paid as a disbursement.

SWORN BEFORE ME)

at Vancouver, British Columbia)

on 28/Sept/2010)

Mark W. Mounteer

A commissioner for taking affidavits for British Columbia

Paul R. Bennett

THIS AFFIDAVIT was prepared by the law firm of Hordo & Bennett, whose place of business and address for service is 1801 - 808 Nelson Street, Box 12146, Nelson Square, Vancouver, British Columbia, V6Z2H2. Telephone: (604)682-5250. Fax: (604)682-7872. Counsel Reference: Paul R. Bennett

Exhibit "A"

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("**Agreement**") is entered into May 27, 2010 (the "**Settlement Date**"), by and between Nationwide Payday Advance Ltd., Direct Credit Payday Loans Inc., Direct Credit Canada Inc., Direct Credit BC Inc., Direct Credit Holdings Inc., Direct Credit Operations Inc., Direct Credit Services Inc., Nathan Slee, Henk Veldhuis, and Dini Veldhuis (collectively the "**Nationwide Parties**"), and the Plaintiff in *Bartolome v. Nationwide Payday Advance Inc.*, Supreme Court of British Columbia, Vancouver Registry No. L051075 (the "**Bartolome Action**").

WHEREAS, Nationwide Payday Advance Ltd., Direct Credit Payday Loans Inc., Direct Credit Canada Inc., Direct Credit BC Inc., Direct Credit Holdings Inc., Direct Credit Operations Inc., or Direct Credit Services Inc., have provided payday loans to residents of British Columbia at stores operating under the names "Nationwide" and "Common Exchange" and over the internet through the www.310loan.com website;

WHEREAS Linda Tobias and Dini Veldhuis are shareholders of Common Exchange (2006) Ltd., Common Exchange Newton Ltd., and Common Exchange Ltd. (collectively, the "**Common Exchange Franchisors**") which have operated a franchise pawn shop business under the name "Common Exchange";

WHEREAS Henk Veldhuis and Adam Tobias are officers of the Common Exchange Franchisors;

WHEREAS some Common Exchange stores, either operated by the Common Exchange Franchisors or their franchisees have occasionally provided payday loans as agents for Nationwide Payday Advance Ltd., Direct Credit Payday Loans Inc., Direct Credit Canada Inc., Direct Credit BC Inc., Direct Credit Holdings Inc., Direct Credit Operations Inc., or Direct Credit Services Inc.

WHEREAS, in the Bartolome Action, the Plaintiff alleges, among other things, that Nationwide entered into illegal agreements and received interest in contravention of s. 347 of the Criminal Code;

WHEREAS Nationwide denies each and every one of the allegations made in the Bartolome Actions, and any wrongdoing of any kind;

WHEREAS Nationwide and the Plaintiff have vigorously litigated their respective positions in connection with all aspects of the Bartolome Action;

WHEREAS, as a result of several years of litigation, the Parties are thoroughly familiar with the factual and legal issues presented by their respective claims and defenses and recognize the uncertainties as to the ultimate outcome in the Bartolome Action, and the likelihood that any final result could require years of further complex litigation and substantial expense;

WHEREAS, Class Counsel believe that the claims the Plaintiff has asserted have merit; however, Class Counsel also recognize that (a) it would be necessary to continue prosecuting the Bartolome Action through a trial of the common issues and, even if successful there, through the series of possible appeals, all of which will delay substantially the Class Members' receipt of benefits from each of the Bartolome Action, and (b) there are significant risks in this litigation, whose outcome is uncertain; therefore, balancing the costs, risks, and delay of continued litigation against the benefits of the settlement, Class Counsel have concluded that settlement as provided in this Agreement will be in the best interests of the Class;

WHEREAS, this Agreement was entered into after extensive arm's length discussions and negotiations between Class Counsel and Defense Counsel;

WHEREAS, the Parties desire to compromise and settle all issues and claims against Nationwide, as well as any similar claims that might be advanced against the Affiliated Companies or the Owners, if they were to be added to the Action;

WHEREAS, Class Counsel and Defense Counsel agree that the settlement contemplated by this Agreement (the "**Settlement**") is a fair, reasonable, and adequate resolution of the claims advanced against Nationwide in the Bartolome Action;

WHEREAS, the Parties desire and intend to seek court approval of the Settlement in the Bartolome Action as set forth in this Agreement;

NOW, THEREFORE, it is agreed that in consideration of the premises and mutual covenants set forth in this Agreement, and the entry by the Court of a final Order approving the terms and conditions of the Settlement as set forth in this Agreement, the Bartolome Action will be settled and compromised under the terms and conditions contained herein.

Definitions

1. Whenever the following capitalized terms are used in this Agreement and in the Schedules annexed hereto (in addition to any definitions elsewhere in this Agreement), they will have the following meanings:

   (a) "**Administration Fee**" means the Administration Fee charged in relation to short-term loans obtained from Nationwide or the Affiliated Companies;
   (b) "**Affiliated Companies**" means Direct Credit BC Inc., Direct Credit Payday Loans Inc., Direct Credit Canada Inc., Direct Credit Holdings Inc., Direct Credit Operations Inc., and Direct Credit Services Inc.;
   (c) "**Claims Process Reviewer**" means Epic Systems Inc.;
   (d) "**Class Counsel**" means Hordo & Bennett;
   (e) "**Class Loans**" means short-term loans obtained prior to November 1, 2009 by persons resident in British Columbia from Nationwide or the Affiliated Companies, where the loan and the standard "Administration Fee" charged were both repaid in full within 154 days of the of the date the loan was obtained;
   (f) "**Class Notice**" means the notice to the Settlement Class of this Settlement, in the manner described in paragraph 10 of this Agreement

and in the form attached as ***Schedule B***, or in such other form as may be approved by the Court;

(g) "**Court**" means the Supreme Court of British Columbia;

(h) "**Credit Reporting Agencies**" means Equifax Canada Inc. and Trans Union of Canada Inc.;

(i) "**Defense Counsel**" means Branch MacMaster;

(j) "**Effective Date of Settlement**" means the next calendar day after the day on which all appellate rights with respect to the Approval Order in the Bartolome Action have expired or have been exhausted, other than an appeal taken solely in relation to the payment of compensation to the Plaintiff from the Approved Legal Expenses, as defined and set out in paragraph 24 below;

(k) "**Identification Document**" means the Settlement Class Member's driver's licence, passport, or some other form of government-issued photo identification;

(l) "**Nationwide**" means Nationwide Payday Advance Ltd.;

(m) "**Outstanding Loan**" means any short-term loan received by a Settlement Class Member which is past its due date and has not been repaid as of the Effective Date of the Settlement;

(n) "**Additional Outstanding Loan**" means any short-term loan received by a Settlement Class Member, which is not an Outstanding Loan under paragraph 1(m), but which is past its due date and has not been repaid as of the deadline for submission of Claims Forms pursuant to paragraph 36;

(o) "**Outstanding Amount**" means the principal amount of any Outstanding Loan, actually received by a Settlement Class Member, plus the interest payable on the due date of the Outstanding Loan, plus Administration Fees payable in relation to loans obtained on or after November 1, 2009, less any payment by the Settlement Class Member of principal, interest, Administration Fees or other fees by the Settlement Class Member on account of said loan;

(p) "**Additional Outstanding Amount**" means the principal amount of any Additional Outstanding Loan, actually received by a Settlement Class Member, plus the interest payable on the due date of the Additional Outstanding Loan, plus Administration Fees payable in relation to loans obtained on or after November 1, 2009, less any payment by the Settlement Class Member of principal, interest, Administration Fees or other fees by the Settlement Class Member on account of said loan;

(q) "**Parties**" means Nationwide and the Plaintiff;

(r) "**Plaintiff**" means Jose Bartolome;

(s) "**Owners**" means Nathan Slee, Henk Veldhuis and Dini Veldhuis;

(t) "**Settlement Administrator**" means Direct Credit BC Inc.;

(u) "**Settlement Class**" or "**Settlement Class Members**" means persons who, while a resident of British Columbia, obtained Class Loans and have not opted out of this Settlement;

(v) "**Settlement Fund**" means a cash and vouchers fund to be established by Nationwide in an amount equal to 20% of the total Administration

Fees paid by Settlement Class Members to Nationwide or the Affiliated Companies in relation to Class Loans; and

(w) "**Settlement Website**" means a webpage to be established and maintained by the Settlement Administrator with information regarding the Settlement and claims process.

2. This Agreement is for settlement purposes only, and conditional upon the making of a final order approving the Settlement in the Bartolome Action, and neither the fact of, nor any provision contained in, this Agreement nor any action taken hereunder will constitute, or be construed as, any admission of the validity of any claim or any factual allegation that was or could have been made by the Plaintiff, Settlement Class Members, or by Nationwide in the Bartolome Action, as amended in accordance with this Agreement, or of any wrongdoing, fault, violation of law, or liability of any kind on the part of Nationwide. This Agreement will not be offered or be admissible in evidence by or against Nationwide or cited or referred to in any other action or proceeding, except (1) in any action or proceeding brought by or against the Parties to enforce or otherwise implement the terms of this Agreement, or (2) in any action involving the Plaintiff, Settlement Class Members, or any of them, to support a defense of res judicata, collateral estoppel, release, or other theory of claim preclusion, issue preclusion, or similar defense.

Representations

3. The Owners warrant that, other than Nationwide and the Affiliated Companies, no company or partnership in which they have acted as an employee, officer, director, or partner has carried on the business of provided payday loans to residents of British Columbia prior to November 1, 2009. In particular, the Owners warrant that Common Exchange (2006) Ltd., Common Exchange Newton Ltd., Common Exchange Ltd., L-270 Holdings Ltd., 679170 BC Ltd., 544680 B.C. Ltd., and 553338 B.C. Ltd. have not, to their knowledge, provided payday loans to residents of British Columbia prior to November 1, 2009, other than as agents of Nationwide and the Affiliated Companies.
4. By way of a separate agreement, which is attached as Schedule J to this Agreement, Adam Tobias and Linda Tobias warrant that, Common Exchange (2006) Ltd., Common Exchange Newton Ltd., Common Exchange Ltd., L-270 Holdings Ltd., 679170 BC Ltd., 544680 B.C. Ltd., and 553338 B.C. Ltd. have not, to their knowledge, provided payday loans to residents of British Columbia prior to November 1, 2009, other than as agents of Nationwide and the Affiliated Companies.
5. Henk Velhduis, Nathan Slee, Nationwide, and the Affiliated Companies warrant that no fees have been charged by Nationwide or the Affiliated Companies to members of the Class, other than the Administration Fees, NSF fees, and contractual interest at a rate not exceeding 59% per annum.
6. Nationwide and the Affiliated Companies warrant that payday loans have been provided by Nationwide and the Affiliated Companies to residents of British Columbia prior to November 1, 2009 only under the business name "Nationwide Payday Advance" and "310-Loan" and have been provided over the internet only using the website www.310loan.com.

Approval Process

7. Following execution of this Agreement, the Plaintiff will seek an order in the Bartolome Action substantially in the form attached as ***Schedule A*** to this Agreement (the "**Approval Order**") that:

    (a) corrects the style of cause in the Bartolome Action and so that the corporate defendant is properly described as "Nationwide Payday Advance Ltd.";
    (b) approves the Settlement in the Bartolome Action;
    (c) approves the Class Notice in the form attached as ***Schedule B*** to this Agreement; and
    (d) appoints the Settlement Administrator and Claims Process Reviewer. (collectively, the "**Approval Motions**")

8. Nationwide will consent to the Approval Motions for the sole purpose of giving effect to the terms of the Settlement.
9. If the Approval Order is not granted in full or if it is reversed or modified on appeal:

    (a) this Agreement and all orders made pursuant to it will be null and void, will have no further force and effect with respect to the Parties and will not be offered in evidence or used in any litigation for any purpose; and
    (b) all orders in existence as of the date on which this Settlement was executed will become operative and fully effective, as if proceedings relating to this Settlement had not occurred. In such event, the Parties reserve all rights to object to or otherwise challenge all such pre-existing orders.

Notice

10. Subject to approval by the Courts, the Settlement Administrator will cause Class Notice to be disseminated within 14 days of the Effective Date of the Settlement, as follows:

    (a) The Class Notice will be sent by regular mail to the last known address of each Settlement Class Member, where the Settlement Class Member's address information is less than three years old as of the Settlement Date;
    (b) The Class Notice will be sent by email to the last known email address of each Settlement Class Member;
    (c) The Class Notice will be published once in each of the Vancouver Sun and The Province newspapers, in a size not less than 1/6 of a page;
    (d) The Class Notice will be posted on the Settlement Website;
    (e) The Class Notice will be posted on the website www.310loan.com and in all British Columbia store locations of Common Exchange,

Nationwide and the Affiliated Companies for 3 months from the Effective Date of the Settlement; and

(f) The Class Notice will be posted on the website of Class Counsel.

11. Nationwide will pay the costs associated with disseminating Class Notice in accordance with paragraph 10(a)-(e) of this Agreement.
12. Within 21 days of the Effective Date of the Settlement, the Settlement Administrator will provide written confirmation to Class Counsel that Class Notice was disseminated in accordance with paragraph 10 of this Agreement.

Establishment of Settlement Fund

13. In consideration of the dismissal of the Bartolome Action with prejudice under the terms of this Agreement, the mutual releases benefitting, among others, the Nationwide Parties will establish the Settlement Fund using equal portions of cash (the "**Cash Fund**") and vouchers (the "**Voucher Fund**").
14. Within 30 days of the Settlement Date, Nationwide:

    (a) will provide its calculation of the Settlement Fund from the records of Nationwide and the Affiliated Companies (the "Settlement Fund Calculation") to the Plaintiff along with all supporting data files; and
    (b) provide a letter to the Plaintiff from Nationwide's accountants confirming that the Settlement Fund Calculation is an accurate calculation of the Settlement Fund.

15. Upon Nationwide completing its obligations under para. 14, the Plaintiff will be entitled to have an independent accountant, appointed by the Plaintiffs at the Plaintiffs' expense, review the calculation and confirmation of the Settlement Fund. Nationwide shall provide Class Counsel with any data or documents reasonably required to conduct its review. Such review will be completed within 60 days of the Settlement Date.
16. If the Parties are unable to agree on the calculation of the total amount of the Settlement Fund within 60 days of the Settlement Date, the issue will be submitted immediately to the Court for summary determination.
17. On the Effective Date of the Settlement, the Nationwide Parties will deposit the Cash Fund in an interest-bearing trust account (the "**Trust Account**"). The interest earned on the Trust Account will be added to the Cash Fund.

Opting Out

18. Persons who would otherwise be Settlement Class Members but who do not wish to participate in the Settlement or be bound by the terms of this Agreement may opt out of the Settlement Class.
19. In order to opt out of the Settlement Class, Settlement Class Members must submit a written request to Hordo & Bennett containing his or her name, address, telephone and signature in the form attached as ***Schedule C*** within 3 months of the Effective Date of the Settlement.
20. Opt-out forms available will be available on the websites of Hordo & Bennett and at Nationwide locations for 3 months after the Effective Date of the Settlement.

21. Hordo & Bennett will forward a copy of all opt-out forms received to the Settlement Administrator 3 month after of the Effective Date of the Settlement.

Administration of Settlement

22. Promptly after the Effective Date of the Settlement, the Settlement Administrator will carry out the settlement administration obligations assigned to him or her under this Agreement.
23. The Nationwide Parties will pay the costs associated with the administration of the Settlement.

Approved Legal Expenses

24. The Parties acknowledge that:

    (a) Class Counsel may seek approval of legal fees in an amount not to exceed 30% of the Settlement Fund, before any deductions, as well as reimbursement of disbursements and taxes payable in relation to these amounts (collectively, the "**Approved Legal Expenses**"); and
    (b) Class counsel may seek approval of the payment of compensation to the Plaintiff, in an amount up to $5,000, which, if approved, will be paid directly by Class Counsel from the Approved Legal Expenses.

25. The Settlement is not conditional on approval of Class Counsel's request for Approved Legal Expenses.
26. Nothing in this Agreement will be taken as either restraining or permitting submissions by Defense Counsel as to the appropriateness of the amount sought in legal fees.
27. Subject to approval by the Court, the Approved Legal Expenses will be paid from the Settlement Fund within 14 days of the Effective Date of the Settlement, as follows:

    (a) 50% of the Approved Legal Expenses will be paid from the Cash Fund; and
    (b) 50% of the Approved Legal Expenses will paid in cash by the Nationwide Parties but will be notionally paid from the Vouchers Fund such that said payment will result in an immediate reduction of an equivalent monetary value in the Voucher Fund made available for distribution to the Class.

Class Members' Claims

28. Each Settlement Class Member will be entitled to claim from the Settlement Fund an amount calculated as the total amount of Administration Fees paid by the Settlement Class Member in respect of that Settlement Class Member's Class Loans, but not any other loans, plus interest at 3.5% per annum on those Administration Fees from the date the Administration Fees were paid running until the Effective Date of the Settlement, compounded semi-annually (the "**Claim**"),

from which Claim certain deductions in relation to Approved Legal Expenses and outstanding loans may be made as set out below.

Net Settlement Benefit

29. Each Settlement Class Member will be entitled to receive a settlement benefit in relation to their Claim, net of Approved Legal Expenses ("**Net Settlement Benefit**"), calculated as follows:

    (a) if the total amount of the Settlement Class Members' Claims and Approved Legal Expenses is less than the Settlement Fund, each Settlement Class Member will be entitled to receive a Net Settlement Benefit in an amount equal to that Settlement Class Member's Claim.
    (b) if the total amount of the Settlement Class Members' Claims and Approved Legal Expenses is more than the Settlement Fund, each Settlement Class Member will be entitled to receive a Net Settlement Benefit in an amount equal to that Settlement Class Member's pro rata share of the Settlement Fund remaining after payment of the Approved Legal Expenses, calculated as follows:

        (i) subtract the amount of the Approved Legal Expenses from the amount of the Settlement Fund;
        (ii) divide the amount of the Settlement Fund remaining after subtraction of the Approved Legal Expenses, as set out in (i), by the total amount the Settlement Class Members' Claims to arrive at the pro rata ratio of each Settlement Class Member's share of the Settlement Fund; and
        (iii) multiply each Settlement Class Member's Claim by the pro rata ratio set out in (ii) to arrive at each Settlement Class Member's Net Settlement Benefit.

as determined by the following formula:

Settlement Fund -- Approved Legal Expenses X Settlement Class members' Claim = Net Settlement Benefit

Total amount of Settlement Class members' Claims

30. If the Settlement Class Member has any Outstanding Amount or any Additional Outstanding Amount, the Settlement Class member's Net Settlement Benefit will be applied in satisfaction of that amount (collectively, the "**Outstanding Debt**"), as follows:

    (a) if the Outstanding Debt is less than the Settlement Class Member's Net Settlement Benefit, then the portion of the Settlement Class Member's Net Settlement Benefit sufficient to discharge the Outstanding Debt will be paid to Nationwide from the Settlement Fund and will extinguish the Outstanding Debt and the balance of the Settlement

Class Member's Net Settlement Benefit will be paid to the Settlement Class Member; or

(b) if the Settlement Class Member's Settlement Benefit is insufficient to discharge the Settlement Class Member's Outstanding Debt, all of the Settlement Class Member's Net Settlement Benefit will be paid to Nationwide from the Settlement Fund and that payment will extinguish a portion of the Outstanding Debt in an amount equal to the total amount of the Administration Fees paid by the Settlement Class Member, and the remainder of the Settlement Class Member's Outstanding Debt will not be extinguished by anything in this Agreement.

31. Payments to the Settlement Class Members of their Net Settlement Benefits, and any payments to Nationwide from those Net Settlement Benefits in satisfaction of any Outstanding Debt, will be made 50% in cash from the Cash Fund and 50% in vouchers from the Vouchers Fund.

32. Vouchers will be issued in $20 denominations, or in lesser amounts as required to complete payment to each Settlement Class Member, in the name of each Settlement Class Member who is entitled to a payment from the Voucher Fund, and:

(a) can be used by the Settlement Class Member to pay any outstanding or future fees in relation to short-term loans at Nationwide stores or on the www.310loan.com website, in accordance with the procedures outlined in ***Schedule D***;

(b) are not transferable but will accrue to the benefit of any Settlement Class Member's estate;

(c) do not expire;

(d) will be eligible for redemption for an equivalent amount of cash by presentation to the Settlement Administrator during a 6 month the period, commencing three years and 5 months after the Effective Date of Settlement (the "**Redemption Period**"), in accordance with the procedure outlined in ***Schedule D***; and

(e) will be in the form attached as ***Schedule E***.

33. Settlement Class Members who neither make a claim nor opt-out within 3 months of the Effective Date of the Settlement will not be entitled to any payments from the Settlement Fund, but will be bound by, and benefit from the releases described in paragraphs 34 and 35 of this Agreement.

Release of Claims

34. On the Effective Date of the Settlement, the Settlement Class Members forever release and discharge Nationwide, the Affiliated Companies, and their officers, directors, managers and employees, as well as the Owners, and their heirs, successors, administrators and assigns, from all claims, demands, actions, suits or causes of action that have been brought or could have been brought, are currently pending or were pending, or are ever brought in the future, whether known or unknown, asserted or unasserted, under or pursuant to any statute, regulation,

common law or equity, arising from loans obtained from Nationwide and the Affiliated Companies prior to November 1, 2009, including all claims advanced in the Bartolome Action.

35. On the Effective Date of the Settlement, Nationwide or the Affiliated Companies forever releases and discharges all Settlement Class Members, whether they have submitted a claim for benefits pursuant to this Agreement or not, of and from all claims, demands, actions, suits or causes of action that have been brought or could have been brought, are currently pending or were pending, or are ever brought in the future, whether known or unknown, asserted or unasserted, under or pursuant to any statute, regulation, common law or equity, arising from loans obtained from Nationwide or the Affiliated Companies up to November 1, 2009, and any Outstanding Amount, except for any amount by which the Settlement Class Member's Outstanding Amount, exceeds the amount of Administration Fees paid by the Settlement Class Member in relation to Class Loans.

Claims Period and Process

36. Settlement Class Members seeking to make a claim for benefits pursuant to this Settlement must do so within 3 months of the Effective Date of the Settlement.
37. Settlement Class Members who wish to make a claim must complete, sign and submit a Claim Form in the form attached as ***Schedule F*** to the Settlement Administrator within 3 months of the Effective Date of the Settlement, together with a copy of his or her Identification Document.
38. In completing and signing the Claims Form, Settlement Class Members will authorize the Settlement Administrator to verify the information provided against the records of Nationwide and the Affiliated Companies, and will declare that the information given in the Claims Form is true and correct under the penalty of perjury.
39. Within 4 months of the Effective Date of the Settlement, the Settlement Administrator will complete its review of the claims submitted and will notify each Settlement Class Member who makes a claim as to his or her eligibility, if any, for benefits by mailing each Class Member at the address designated in the Claims Form a letter in the form attached as ***Schedule G*** to this Agreement (the "**Entitlement Letter**"). Nationwide shall provide to Class Counsel an electronic copy of all Claims Forms received from, and all Entitlement Letters sent to, Settlement Class Members.

Review of Claims Process

40. The obligations of the Settlement Administrator under this Agreement will be reviewed by the Claims Process Reviewer.
41. The costs of the review of the claims process, which costs will be capped at $15,000 (fifteen thousand dollars), will be paid by Nationwide.
42. A copy of the Claims Process Reviewer's report will be filed with the Court when the review of the claims process is completed.

Appeal Process

43.

Within 5 months of the Effective Date of the Settlement, Settlement Class Members who do not agree with the decision of the Settlement Administrator may appeal that decision.

44. Settlement Class Members wishing to appeal the decision of the Settlement Administrator must, within 5 months of the Effective Date of the Settlement, deliver to the Class Counsel a completed Appeal Form in the form attached as Schedule H to this Agreement, and any supporting documents.

45. Upon receipt of completed Appeal Forms, Class Counsel shall determine if a bona fide issue for appeal has been raised. If Class Counsel determines that a bona fide issue has not been raised, Class Counsel will notify the Settlement Class Member of Class Counsel's conclusion and advise them that if the Settlement Class Member wishes to continue their appeal they must make an application to the B.C. Supreme Court within 10 days at the Settlement Class Member's expense and without the assistance of Class Counsel. If Class Counsel determines that a bona fide issue has been raised, Class Counsel shall forward the completed Appeal Form in the form and any supporting documents to Defense Counsel, whom may reconsider, in whole or in part, the Settlement Administrator's decision. Should that occur, Defense Counsel and/or the Settlement Administrator will notify the Class Member and Class Counsel and the appeal will only proceed if there are unresolved issues, and will be confined to any such issues.

46. If there are appeals that Class Counsel has determined raise bona fide issues that have not been resolved by agreement with Defence Counsel, then no later than 6 months after the Effective Date of the Settlement, Class Counsel will secure a hearing before the Court for review and ultimate disposition of all appeals, and will notify the appealing Settlement Class Members as to same, as well as of his or her right to be present and make submissions. Class Counsel will also arrange for delivery to the Court and each appealing Settlement Class Member, as they pertain to them, of the Appeal Forms, Supporting Documents and any submissions of Class Counsel and Defense Counsel (the "**Appeal Material**").

47. The decision of the Court will be final, with no further right of appeal.

48. There will be no costs payable in relation to the appeals.

Payments to Settlement Class Members

49. The Settlement Administrator will pay Class Members' claims by mail to the addresses designated by the Settlement Class Members in the Claim Forms 5 months after the Effective Date of the Settlement if:

    (a) no appeals have been filed;
    (b) all appeals have been withdrawn; or
    (c) the parties agree that the outcome of any appeals will not affect the entitlement of those Settlement Class Members who have not appealed.

50. If paragraph 49 does not apply, then the Settlement Administrator will pay Class Members' claims by mail to the addresses designated by the Settlement Class Members in the Claim Forms within 30 days after the determination of the last appeal.

51. Within 30 days of the payment of class members claims pursuant to paragraphs 49 or 50, Nationwide and/or the Affiliated Companies will provide a letter, in the form

attached as **Schedule I**, to the Credit Reporting Agencies advising that any record of the Outstanding Loan with the Credit Reporting Agencies should be removed as the information concerning the Outstanding Loan is inaccurate, if:

(a) the Settlement Class Member is fully released by the Settlement Agreement in relation to any Outstanding Debt, and
(b) the Settlement Class Member indicates in the Claim Form that he or she believes there is a report of an Outstanding Loan on a credit report held by the Credit Reporting Agencies and requests that a letter to be send to the Credit Reporting Agencies.

Security for Vouchers

52. Any residue remaining in the Cash Fund of the Settlement Fund after payment of the Approved Legal Expenses and Settlement Class Members' claims, which is equal to or less than the amount paid from the Cash Fund on account of claims, will remain in the Trust Account, earning interest for the benefit of the Settlement Fund, to be applied against redemption of Vouchers. The balance of the Cash Fund will be immediately returned to Nationwide after the last of the Settlement Class Member's claims is processed and paid, and if applicable, adjusted as a result of the appeal.
53. If the intellectual property, customer lists, or accounts receivable of Nationwide, or any other assets necessary to the continued operations of Nationwide's payday loan business, are sold prior to the end of the Redemption period, then an amount of those sale proceeds, as required to make the balance in the Trust Account equal to the unredeemed Vouchers, must be paid into the Trust Account, earning interest for the benefit of the Settlement Fund, to be applied against redemption of Vouchers.
54. At the end of the Redemption Period, any cash remaining in the Trust Account, including interest accrued on any portion of those funds, will then be immediately returned to Nationwide.

Dismissal of Bartolome Action

55. After payment of the Approved Legal Expenses and Settlement Class Member's claims, and provided that the Claims Process Reviewer's report has been filed with the Court pursuant to paragraph 42 of this Agreement, Nationwide may apply to have the Bartolome Action dismissed in its entirety, without costs and with prejudice.
56. Neither the Plaintiff nor any Settlement Class Member will object to a dismissal application brought pursuant to paragraph 55 of this Agreement.

General

57. Any document, information or data provided by Nationwide in the Bartolome Action or under this Agreement, which has not been publicly disclosed by Nationwide, and any personal information of Settlement Class Members obtained or created in the administration of the Settlement, is confidential and, except as required by law, will only be used and disclosed for the purpose of this Settlement,

including distributing the notices contemplated by the Agreement and the administration of the Settlement.

58. No Settlement Class Member will have any claim against the Representative Plaintiff, Class Counsel, Defense Counsel, the Settlement Administrator, the Claims Process Reviewer, or any agent designated by Class Counsel based on the payments or other benefits made or provided substantially in accordance with this Agreement or with further Orders of the Court or any appellate court.

59. Nothing in this Agreement shall limit the ability of Class Counsel to provide notice of this Settlement or otherwise communicate with Settlement Class Members concerning their entitlements under the Settlement, either by email or by telephone, and all such communications shall remain privileged.

60. This Agreement and its attachments will constitute the entire Agreement of the Parties and will not be subject to any change, modification, amendment, or addition without the express written consent of counsel on behalf of all Parties to the Agreement. This Agreement supersedes and replaces all prior negotiations and proposed agreements, written or oral.

61. All Schedules are incorporated into this Agreement by reference.

62. This Agreement will be binding upon and inure to the benefit of the Parties hereof and their representatives, heirs, successors, and assignees.

63. In the event any one or more of the provisions contained in this Agreement will for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provision if the Parties mutually elect to proceed as if such invalid, illegal, or unenforceable provision had never been included in this Agreement.

64. The Court will retain continuing and exclusive jurisdiction over the Parties hereto, including the Plaintiff and all Settlement Class Members, and over the administration and enforcement of the Settlement and the benefits to the Plaintiff and Settlement Class Members hereunder, notwithstanding that the Bartolome Action may have been dismissed pursuant to paragraph 55 of this Agreement.

65. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of this Agreement must be made by motion to the Court.

66. The undersigned Class Counsel warrant that they are fully authorized to execute this Agreement on behalf of the Plaintiff and to legally bind the Plaintiff to this Agreement.

67. Nationwide warrants that it is fully authorized to execute this Agreement and provide the Releases contemplated herein on its own behalf.

68. The Parties hereby agree to stay all proceedings in the Bartolome Action until the approval of this Agreement has been finally determined, *except* the stay of proceedings will not prevent the filing of any motions, affidavits, and other matters necessary to the approval of this Agreement.

69. Nationwide and the Plaintiff acknowledge that they have been represented and advised by independent legal counsel throughout the negotiations that have culminated in the execution of this Agreement, and that they have voluntarily executed the Agreement with the consent and on the advice of counsel.

70. This Agreement may be executed in counterpart by the parties hereto, and a facsimile signature will be deemed an original signature for purposes of this Agreement.

71. This Agreement will be construed under and governed by the laws of the Province of British Columbia.

72. The Parties have negotiated and fully reviewed the terms of this Agreement, and the rule that uncertainty or ambiguity is to be construed against the drafter will not apply to the construction of this Agreement by a court of law or any other adjudicating body.

73. Whenever, under the terms of this Agreement, a person is required to provide service or written notice to the Settlement Administrator, Nationwide or to Class Counsel, such service or notice will be directed to the individuals and addresses specified below, unless those individuals or their successors give notice to the other Parties in writing:

As to Class Counsel:

Paul Bennett and Mark Mounteer
Hordo & Bennett
1801-808 Nelson Street
Vancouver, B.C.
Fax: (604) 682-7872
E-mail: pbennett@hrb.bc.ca
mmounteer@hrb.bc.ca

As to Nationwide:

Luciana Brasil
Branch MacMaster
1410-777 Hamby Street
Vancouver, BC V6Z 154
Fax: (604) 684-3489
Email: lbrasil@branmac.com

As to the Settlement Administrator:
Nationwide Settlement Administrator
c/o Direct Credit BC Inc.
13426 72nd Ave
Surrey BC V3W 2N8 Canada
Fax: 1-888-886-6650
Email: claims@nationwidesettlement.ca

IN WITNESS THEREOF, the Parties hereto have executed this Agreement as follows:

Date: _____ By:

[May 26/2010 written by hand] Paul Bennett as Class Counsel,

On behalf of Plaintiff and Settlement Class Members [executed]

Date: _____ By:

[May 14/2010 written by hand] Henk Veldhuis

On his own behalf and on behalf of Nationwide and the Affiliated Companies [executed]

Date: _____ By:

[May 14, 2010 typed in] Nathan Slee,

On his own behalf and on behalf of Nationwide and the Affiliated Companies [executed]

Date: _____ By:

[May 14/2010 written by hand] Dini Veldhuis [executed]

1 The *Money Mart* decision states at para. 40 that both the *Cash Store* and *Cash Money* decisions dealt with vouchers redeemable for services only, and not cash. This statement is not correct, as noted at para. 13 of *Cash Store* at para. 16 of *Cash Money*.