

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE
CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE
INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926
ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

FACTUM

**(re: appointment of representative counsel for class action plaintiffs,
returnable June 11, 2014)**

May 30, 2014

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
P.O. Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay – LSUC No. 31885W
Tel: 416-595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

James Harnum – LSUC No. 60459F
Tel: 416-542-6285 / Fax: 416-204-2819
Email: jharnum@kmlaw.ca

Agent for Harrison Pensa LLP, counsel to Timothy
Yeoman (class plaintiff)

TO: SERVICE LIST

PART I - OVERVIEW

1. This is a motion by Timothy Yeoman, the plaintiff in the class proceeding *Timothy Yeoman v. The Cash Store Financial Services Inc. et al.*, Ontario Superior Court of Justice, File No. 7908/12 CP (the “**Class Action**”) for an order appointing him as representative (the “**Class Representative**”) of the Class members in this CCAA proceeding, and for an order appointing Harrison Pensa LLP as representative counsel to the Class members and Koskie Minsky LLP as agent to Harrison Pensa LLP (collectively, “**Representative Counsel**”).
2. All of the factors applicable to granting a representation order in insolvency proceedings as set out in the *Canwest* case are met.
3. The moving party is not seeking funding for the costs of representative counsel at this time. There is no prejudice to any other party with the appointment of representative counsel.
4. Other than 0678786 B.C. Ltd. (“**McCann**”) and Trimor Annuity Focus LP #5 (“**Trimor**”), no other party has objected to the appointment of Representative Counsel.
5. The Statement of Claim was filed on August 1, 2012 in London, Ontario. The Class Action is being case managed by Mr. Justice Grace who has scheduled a motion for certification on September 15, 2014.
6. On April 14, 2014, The Cash Store Financial Services Inc. and other entities obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.O. 1985, c. C-36 (“**CCAA**”). As a result, the Class Action and the certification motion have been stayed against the CCAA Applicants, pending further order of the court.
7. The Class Action alleges, *inter alia*, that the defendants’ practice of charging exorbitant fees for various financial products which are tied to their loan products, as well as interest on those fees, is unlawful and in contravention of the Ontario *Payday Loans Act*, S.O. 2008, c. 9 (“**PLA**”).

8. Representative Counsel is necessary, just, and fair so that thousands of Class members who individually have small claims and are of limited means, yet who have meritorious claims for compensation for unlawful interest charged to them will have representation in the CCAA proceeding.

9. The courts have issued representation orders for class action members in a number of insolvency cases such as *Muscletech*, *Canadian Red Cross*, and *Sino Forest*.

PART II – THE FACTS

10. On April 24, 2012, Timothy Yeoman engaged in a “payday loan” transaction offered by Cash Store. For a loan of \$400 and a duration of 9 days, Mr. Yeoman was charged \$68.60 in “fees and service charges” and was required to pay \$78.72 in interest, for a total cost of borrowing of \$147.32.

11. On August 1, 2012, Mr. Yeoman filed the Class Action against Cash Store, Instaloans Inc., and The Cash Store Inc., each of whom subsequently became Applicants in the CCAA proceeding (collectively, “**Cash Store**”). On August 27, 2013, The Class Action was amended to add other defendants who are not Applicants in this proceeding.

12. The Class Action asserts the following causes of action against the Applicants:

- a) breach of the PLA;
- b) breach of the *Competition Act*, RSC 1985, c C-34;
- c) conspiracy; and
- d) unjust enrichment.

13. Mr. Yeoman seeks to represent all customers of Cash Store who entered into similar loan transactions in Ontario and were charged unlawful costs of borrowing by Cash Store. The class definition in the statement of claim consists of all persons in Canada who entered into “payday loan” transactions, including a product called a “Basic Line of Credit” with Cash Store (being The Cash Store Financial Services Inc., The Cash Store Inc., and Instaloans Inc.) in Ontario from September 1, 2011 and onward.

14. There are estimated to be thousands of individual borrowers in the Class.

15. Damages for the Class members are estimated at over \$50 million, based on publicly available information. Details of the precise number of Class members and the calculation of their damages will be made when particulars of the Class and the amounts charged to each Class member are obtained from the Applicants.

Affidavit of Timothy Yeoman sworn May 9, 2014 ("Yeoman Affidavit")
para. 2, p. 16, Motion Record of Timothy Yeoman.

16. Class actions similar to the Class Action have been certified in Ontario against many payday lenders who charged unlawful rates of interest, including a 2006 class action against Cash Store:

- *Mortillaro v. Unicash Franchising Inc.*, 2011 ONSC 923, (Yeoman BOA, Tab 1);
- *Smith v. National Money Mart Co.* (2007), 37 CPC (6th) 171, [2007] O.J. No. 46 (SCJ), leave to appeal to Div. Ct. refused, [2007] O.J. No. 2160 (Div. Ct.), (Yeoman BOA, Tab 2);
- *McCutcheon v. The Cash Store Inc.* (2006), 80 O.R. (3d) 644, [2006] O.J. No.1860 (S.C.J.) (Yeoman BOA, Tab 3);
- *Joseph v. Quik Payday Inc.* (2006), 38 C.P.C. (6th) 106, [2006] O.J. No. 4835 (S.C.J.) (Yeoman BOA, Tab 4); and
- *Mortillaro v. Cash Money Cheque Cashing Inc.* (2009), 73 C.P.C. (6th) 369, [2009] O.J. No. 2904 (S.C.J.) (Yeoman BOA, Tab 5).

17. Similar class actions have also been certified in British Columbia and Alberta, including an action against Cash Store in 2005:

- *MacKinnon v. National Money Mart Co.*, 2007 BCSC 348, [2007] B.C.J. No. 520 (Yeoman BOA, Tab 6);
- *Bartolome v. Mr. Payday Easy Loans Inc.*, 2008 BCSC 132, [2008] B.C.J. No. 167 (Yeoman BOA, Tab 7);
- *Bartolome v. Nationwide Payday Advance Inc.*, 2010 BCSC 1433, [2010] B.C.J. No. 1994 (Yeoman BOA, Tab 8);

- *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228, [2005] B.C.J. No. 1904, aff'd 2006 BCCA 260, [2006] B.C.J. No. 1171 (Yeoman BOA, Tab 9);
- *Bodnar v. Payroll Loans Ltd.*, 2006 BCSC 1132, [2006] B.C.J. No. 1705 (Yeoman BOA, Tab 10);
- *Ayrton v. PRL Financial (Alta.) Ltd.*, 2005 ABQB 311, [2005] A.J. No. 466, aff'd 2006 ABCA 88, [2006] A.J. No. 296 (Yeoman BOA, Tab 11);
- *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213, [2006] B.C.J. No. 1885 (Yeoman BOA, Tab 12); and
- *Tracy v. Instalozans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018, [2006] B.C.J. No. 1639 (Yeoman BOA, Tab 13).

The Applicants' contravention of the PLA and the loss of the Applicants' PLA licence

18. Since 2008, all payday lenders operating in Ontario, including Cash Store, have been governed by the PLA. The PLA was passed by the Ontario legislature in June 2008 to regulate certain payday lenders in Ontario and provide an exemption from the criminal interest rate provisions in the *Criminal Code*, provided that the lenders comply with the PLA. Ontario Regulation 98/09 (collectively with all other amendments to Ontario Regulation 98/09 enacted pursuant to the PLA, the "**Regulations**") set out the requirements for the content of a payday loan agreement. An amendment to the Regulations came into force in September, 2011 (the "**2011 Regulation**").

Yeoman Affidavit, para. 3, p. 16-17 Exhibit C, Fresh As Amended Statement of Claim, paras. 26, 28, and 30, p. 86-87, Motion Record of Timothy Yeoman.

19. Despite the 2011 Regulation, Cash Store did not make substantive changes to its lending practices. Cash Store continued to refuse to make actual cash available to borrowers. Instead, the only manner in which Cash Store made immediate payday loans available was through the purchase of pre-loaded debit cards and credit cards (provided by one of Cash Store's business partners, DirectCash, who, along with its related corporate entities, are non-Applicant defendants in the Class Action). The pre-loaded debit and credit cards required the borrower to pay several additional fees, including fees for the purchase of the card and various transaction fees.

Yeoman Affidavit, para. 3, p. 16-17, Exhibit C, Fresh As Amended Statement of Claim, para. 37, p. 88, Motion Record of Timothy Yeoman.

20. Cash Store added additional fees to the “borrowed” principal amount of a loan and charged the maximum rate of interest under the PLA on the total of the additional fees and the principal loan amount.

Yeoman Affidavit, para. 3, p. 16-17, Exhibit C, Fresh As Amended Statement of Claim, para. 38, p. 88, Motion Record of Timothy Yeoman.

21. In February, 2013, as a result of Cash Store’s continued breaches of the PLA, the Ontario Registrar for the PLA brought an application to have Cash Store’s payday lending license under the PLA revoked.

Yeoman Affidavit, para. 3, p. 16-17, Exhibit C, Fresh As Amended Statement of Claim, para. 38, p. 88, Motion Record of Timothy Yeoman.

22. On February 1, 2013, Cash Store announced that it had ceased offering payday loans to customers and had instead started to offer a product called a “line of credit”. The Class Action alleges that Cash Store continued in substance to offer payday loans, albeit under a different name (i.e., a line of credit), and that it continued to charge interest in excess of the maximum rate permitted under the PLA on the additional fees and the principal loan amount.

Foreman Affidavit para. 5, p. 176, Exhibit B, Affidavit of Sarah Bowden sworn February 5, 2014, para. 21, p. 205, Exhibit E, Motion Record of Timothy Yeoman.

23. On June 7, 2013, the Director of the Ontario Ministry of Consumer and Business Services filed an application to begin legal proceedings against Cash Store in respect of its line of credit product.

Foreman Affidavit para. 5, p. 176, Exhibit B, Affidavit of Sarah Bowden sworn February 5, 2014, para. 22, p. 205-206, Exhibit E, Motion Record of Timothy Yeoman;

24. In July 2013, the Applicants’ PLA licence lapsed. The Applicants nevertheless continued to offer the “line of credit” product to customers.

Foreman Affidavit para. 6, p. 176-177, Exhibit C, Supplementary Affidavit of Sarah Bowden sworn March 5, 2014, para. 3(a), p. 857, Exhibit A, *The Director v. The Cash Store*, 2014 ONSC 980 at para. 2, Motion Record of Timothy Yeoman

25. On February 12, 2014, in *The Director v. The Cash Store*, the Ontario Superior Court of Justice held that Cash Store's "BLOC [Basic Line of Credit] product constituted a payday loan under subsection 1(1) of the PLA" and ruled that the Applicants "are prohibited from acting as a loan broker of the BLOC without a loan broker's licence under the Act [PLA]."

Foreman Affidavit para. 6, p. 176-177, Exhibit C, Supplementary Affidavit of Sarah Bowden sworn March 5, 2014, para. 3(a), p. 857, Exhibit A, *The Director v. The Cash Store*, 2014 ONSC 980 at para. 2, Motion Record of Timothy Yeoman

26. On February 13, 2014, the Ontario Ministry of Consumer Services issued a news bulletin stating that the Ontario Registrar of Payday Loans "issued a proposal to refuse recent applications made for payday lender licences from Cash Store and Instalozans", and referenced past convictions against Cash Store in Ontario Provincial Offences Court for operating as a payday lender in Ontario without a licence.

Foreman Affidavit para. 6, p. 176-177, Exhibit C, Supplementary Affidavit of Sarah Bowden sworn March 5, 2014, para. 3(b), p. 857, Exhibits B and C, Motion Record of Timothy Yeoman

27. Also on February 13, 2014, Cash Store issued a press release stating that "The Company is not currently permitted to sell any payday loan products in Ontario", and that "the Company is no longer offering any of its line of credit products in Ontario".

Foreman Affidavit para. 6, p. 176-177, Exhibit C, Supplementary Affidavit of Sarah Bowden sworn March 5, 2014, para. 3(c), p. 858, Exhibit D Motion Record of Timothy Yeoman

28. Section 6(3) of the PLA states that the consequence of a breach of the PLA by a lender is that borrowers are only required to repay the principal loan amount advanced to them and are not required to pay any additional costs of borrowing (i.e., interest and fees) charged by a payday lender. Accordingly, any collections in respect of interest and fees are unlawful under the PLA.

Payday Loans Act, s. 6(3).

Criminal Code, ss. 347 and 347.1

The Class members' claims are meritorious

29. The factors below indicate that the Class Action is a stronger case than the above-noted certified payday loan class actions:

- a) The Class Action is based on contraventions of specific provisions of the PLA that are intended to protect consumers from unlawful interest rates, and which Cash Store breached;
- b) Cash Store admitted in publicly filed materials that it is unable to comply with the new PLA because of its business model;
- c) After a period of dispute between the PLA regulator and Cash Store, Cash Store announced that it would cease offering payday loans and would allow their licenses under the PLA to expire. Without a PLA license, Cash Store began to offer a "line of credit" product, and took the position that it does not require a license under the PLA to do so;
- d) As noted above, the Ontario Superior Court of Justice ruled that Cash Store's line of credit product qualifies as a payday loan that is subject to the PLA;
- e) The Ontario Registrar of Payday Loans has refused to grant Cash Store's recent applications for payday lender licenses because of Cash Store's business model; and
- f) Cash Store recently pleaded guilty in Ontario Provincial Offences Court to operating as a payday lender in Ontario without a license, in contravention of the PLA.

PART III – THE ISSUE

- 1) Should the court appoint a representative for the members of the Class Action and representative counsel in the CCAA proceeding? Answer: Yes.

PART IV – THE LAW

30. In *Nortel Networks Corporation (Re)*, Mr. Justice Morawetz (as he then was) confirmed that the court has authority to appoint representative counsel in CCAA proceedings under Rules 10.01 and 12.07 of the *Rules of Civil Procedure*, as well as section 11 of the CCAA. Mr. Justice Morawetz held that representative counsel should be appointed to allow vulnerable stakeholders (in that case, employees and retirees) to participate in the CCAA proceedings:

[13] [I]t is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency

[14] I am in agreement with these general submissions.

Nortel Networks Corporation (Re) (2009), 2009 Carswell ON 3028 (Ont. S.C.) ("*Nortel*") at paras. 11, 13-14 and 16, Yeoman BOA, Tab 14.

31. In *Canwest Publishing Inc.*, Madam Justice Pepall (as she then was) summarized the factors considered by Canadian courts when issuing representative counsel orders in insolvency proceedings (the "**Canwest Factors**"):

- a) the vulnerability and resources of the group sought to be represented;
- b) any benefit to the companies under CCAA protection;
- c) any social benefit to be derived from representation of the group;
- d) the facilitation of the administration of the proceedings and efficiency;
- e) the avoidance of a multiplicity of legal retainers;

- f) the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- h) the position of other stakeholders and the Monitor.

CanWest Publishing Inc. (Re), [2010] 2010 CarswellOnt 1344 (S.C.) (“*CanWest*”) at para. 21, Yeoman BOA, Tab 15.

32. In *Canwest*, Justice Pepall held that it is preferable to grant a representation order early in a CCAA proceeding, both for the parties to be represented and for the CCAA Applicants, and despite the possibility “that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them”:

[23] The primary objection to the relief requested is prematurity...Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor’s website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

[24] In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and the Salaried Employees and

Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

33. As one Canadian practitioner summarized in a recent article:

In the U.S. system, creditors' committees are commonplace. Although creditor's committees are sometimes used in Canada – and sometimes U.S. creditors' committees in ancillary U.S. proceedings are formally recognized in Canada – they are not required in the Canadian insolvency system. In that regard, one distinctive Canadian approach that has been used in a number of cases, particularly in the last 15 years, is that of a court-appointed representative counsel.

“The Role of Representative Counsel in Canadian Insolvency Proceedings” by Jeffrey Carhart, National Insolvency Review, February 2013, Vol. 30, No. 1

34. The Courts have recognized that it is appropriate to grant a representation order for class members where a class action has been stayed by an initial CCAA order so that class members can continue to be represented in the CCAA proceeding. In *Muscletech Research and Development Inc., Re*, Justice Farley appointed representative counsel for class action members and stated:

[8] I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement...

[9] I would reiterate my observations in *Re Grace Canada Inc.*, [2005] O.J. No. 4868 (Ont. S.C.J.) at paragraph 5 and 11:

5. It would seem to me that the various class proceedings would benefit from cooperation and coordination – using the 3 Cs of the Commercial List (communication, cooperation and common sense). Otherwise, they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.

...

11. It would seem to me that **the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.**

Muscletech Research and Development Inc., Re, 2006 CanLII 3282 (ON SC) (“*Muscletech*”) at paras. 8-9, Yeoman BOA, Tab 16.

Justice Farley referenced the reasoning of Mr. Justice Blair (as he then was), in *Campeau v. Olympia & York Developments Ltd.*, (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.):

...in my view, it is more appropriate, and **in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings.** Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — **must be dealt with as part of a “controlled stream” of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors.**

Muscletech at para. 10, Yeoman BOA, Tab 16.

35. In *Canadian Red Cross Society*, the court appointed five representative counsel to represent class members in five class actions that had been filed against Canadian Red Cross Society based on tainted blood claims.

Re Canadian Red Cross Society, 1999 Casrwell Ont 3234, Order of Blair J. dated July 28, 1999, Yeoman BOA, Tab 17.

36. The courts have also issued representation orders for a variety of creditor groups so that they can have meaningful representation in insolvency proceedings:

- *Metcalfe & Manfield Alternative Investments II Corp.*: The court appointed representative counsel for certain holders of ABCP;
- *Rousseau Resort Developments Inc.*: The court appointed representative counsel on behalf of condominium unit owners in the receivership of the resort;

- *MF Global*: The court appointed representative counsel to represent all customers of MF Global.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. Order of Campbell J. dated March 17, 2008, Yeoman BOA, Tab 18.

WestLB AG, Toronto Branch v. Rousseau Resort Developments Inc. ("Rousseau Resort") Order of Pepall J. dated August 20, 2009, Yeoman BOA, Tab 19.

MF Global Canada Co. Order of Campbell J. dated November 14, 2011, Yeoman BOA, Tab 20.

A representation order for the members of the Class Action readily meets the Canwest Factors and should be ordered

- a) The Class members are a vulnerable group who individually lack financial resources to pursue litigation, and without a representation order will not have representation in the CCAA proceeding**

37. The Class Members are an economically vulnerable group. Payday lenders are typically used by people of low financial means. The Class members are thousands of individuals who entered into payday loan transactions with the Applicants and were charged unlawful costs of borrowing in contravention of the PLA. Individually, their claims are relatively small. Collectively, the total of their claims is very significant. It is not cost-effective or practical for borrowers to engage in individual litigation against the Applicants, which would likely involve a multiplicity of small claims court actions. The only practical recourse for such individuals to advance their claims for compensation is a class proceeding with a class counsel advancing their collective claims.

38. As a result of the Initial CCAA Order, the Class Action and the certification motion against the Applicants have been stayed. In the CCAA proceeding, Class counsel does not have formal authority to act on behalf of the class. Without a representation order, the individual Class members will not have representation in the CCAA proceeding and the vast majority of their claims are at significant risk of effectively being extinguished by the mere imposition of the stay of proceedings. It is therefore appropriate and fair that representative counsel be appointed so that the class members have representation in the CCAA proceeding. Since the class proceeding is stayed by the CCAA filing, a representation order is an appropriate mechanism in

this case to enable Class members to continue to have representation in the insolvency proceeding.

b) A Representation Order provides a benefit to the companies

39. Representative Counsel will benefit the Applicants by obviating the need for the Applicants to deal with individual class members advancing individual claims. Representative Counsel can promote finality of the litigation against the Applicants through the adjudication of the Class Action in a consistent and streamlined manner collectively for the Class members, including in a claim process if one is put in place, thereby providing an overall benefit to the Applicants.

c) A Representation Order provides a social benefit

40. Representative Counsel can provide a reliable source of information about the CCAA process to Class members and can advocate in respect of the entire Class. As the claims of the Class members relate fundamentally to the unlawful business practices of the Applicants, the appointment of representative counsel provides access to justice for the class members in a complex process and thereby enhances the integrity of the Canadian insolvency system.

41. Further, it is in the public interest to ensure that companies such as Cash Store operate in accordance with the law and the PLA. Ensuring that Class Members have representation provides an important social benefit so that they can protect their rights in a new, complex proceeding, advance their claims and also ensures that unlawful conduct such as the conduct alleged in the Class Action is deterred.

d) A Representation Order facilitates the administration of the CCAA proceeding and enhances its efficiency

42. Representative Counsel will function as one focused point of contact for all Class members and help facilitate the administration of the company's reorganization in an efficient

manner. It avoids the need for the Applicants to deal with a potentially large number of individual unrepresented borrowers advancing individual and possibly inconsistent claims.

e) The avoidance of a multiplicity of legal retainers

43. A multiplicity of legal retainers for individuals with claims based on similar facts can lead to inconsistent positions being taken by similarly situated claimants and contribute to increased delay and cost for the Applicant's reorganization efforts. Having one Representative Counsel for all customer plaintiffs of Cash Store will prevent the multiplicity of legal retainers and avoid the conflicts that can arise from such multiple retainers.

f) The balance of convenience favours representative counsel

44. In *Dugal v. Research in Motion*, Mr. Justice Campbell issued a representation order and referred to the "balance of convenience" factor described in *Police Retirees of Ontario v. Ontario Municipal Employees' Retirement Board*, a leading case on representation orders:

...the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience test, I must consider the inconvenience that would be experienced by each party of the representation order were or were not granted.

Dugal v. Research in Motion, (2007), 87 O.R. (3d) 721 (S.C.), para. 21, Yeomoan BOA, Tab 21.

Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.), para. 18, Yeoman BOA, Tab 22.

45. The balance of convenience strongly favours granting a representation order. At this time, the proposed Representative Counsel has agreed to adjourn the request for funding of costs from the Applicants. No stakeholder in the CCAA proceeding will be prejudiced by the issuance of a representation order. On the other hand, if the representation order is not granted, substantial

prejudice will result to the Class Members who will not have representation in the CCAA proceeding and are at considerable risk that their claims against the Applicants will be effectively extinguished by the operation of the stay of proceedings.

g) Whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order

46. No other representation order has been made in these proceedings in respect of the Class members.

h) The position of other stakeholders and the Monitor

47. Other than McCann and Trimor, no other party, in particular not the Monitor, nor the CRO, nor the DIP Lender, nor the senior secured creditors, have indicated that they oppose the representation order.

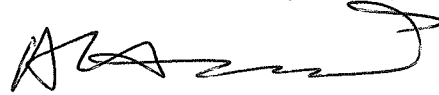
PART V - ORDER REQUESTED

48. The moving party requests an Order:

a) appointing Timothy Yeoman as representative of the members of the Class Action and Harrison Pensa LLP as class counsel and Koskie Minsky LLP as agent for Harrison Pensa (collectively, "Representative Counsel"); and

b) costs of this motion from any party opposing this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2014.



ANDREW J. HATNAY



JAMES HARNUM

SCHEDULE "A"

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	<i>Mortillaro v. Unicash Franchising Inc.</i> , 2011 ONSC 923
2.	<i>Smith v. National Money Mart Co.</i> (2007), 37 CPC (6 th) 171, [2007] O.J. No. 46 (SCJ), leave to appeal to Div. Ct. refused, [2007] O.J. No. 2160 (Div. Ct.)
3.	<i>McCutcheon v. The Cash Store Inc.</i> (2006), 80 O.R. (3d) 644, [2006] O.J. No.1860 (S.C.J.)
4.	<i>Joseph v. Quik Payday Inc.</i> (2006), 38 C.P.C. (6 th) 106, [2006] O.J. No. 4835 (S.C.J.)
5.	<i>Mortillaro v. Cash Money Cheque Cashing Inc.</i> (2009), 73 C.P.C. (6 th) 369, [2009] O.J. No. 2904 (S.C.J.)
6.	<i>MacKinnon v. National Money Mart Co.</i> , 2007 BCSC 348, [2007] B.C.J. No. 520
7.	<i>Bartolome v. Mr. Payday Easy Loans Inc.</i> , 2008 BCSC 132, [2008] B.C.J. No. 167
8.	<i>Bartolome v. Nationwide Payday Advance Inc.</i> , 2010 BCSC 1433, [2010] B.C.J. No. 1994
9.	<i>Bodnar v. The Cash Store Inc.</i> , 2005 BCSC 1228, [2005] B.C.J. No. 1904, aff'd 2006 BCCA 260, [2006] B.C.J. No. 1171
10.	<i>Bodnar v. Payroll Loans Ltd.</i> , 2006 BCSC 1132, [2006] B.C.J. No. 1705
11.	<i>Ayrton v. PRL Financial (Alta.) Ltd.</i> , 2005 ABQB 311, [2005] A.J. No. 466, aff'd 2006 ABCA 88, [2006] A.J. No. 296
12.	<i>Kilroy v. A. OK Payday Loans Inc.</i> , 2006 BCSC 1213, [2006] O.J. No. 1885
13.	<i>Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.</i> , 2006

	BCSC 1018, [2006] B.C.J. No. 1639
14.	<i>Nortel Networks Corporation (Re) (2009)</i> , 2009 Carswell Ont 3028 (Ont. S.C.)
15.	<i>CanWest Publishing Inc. (Re)</i> , 2010 CarswellOnt 1344 (S.C.)
16.	<i>Muscletech Research and Development Inc., Re</i> , 2006 CanLII 3282 (ON SC)
17.	<i>Re Canadian Red Cross Society</i> , 1999 Carswell Ont 3234 (Ont. S.C.), Order of Blair J. dated July 28, 1999
18.	<i>ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.</i> Order of Campbell J. dated March 17, 2008
19.	<i>WestLB AG, Toronto Branch v. Rousseau Resort Developments Inc.</i> , Order of Pepall J. dated August 20, 2009
20.	<i>MF Global Canada Co.</i> Order of Campbell J. dated November 14, 2011
21.	<i>Dugal v. Research In Motion Ltd.</i> (2007), 87 O.R. (3d) 721 (S.C.J. – Commercial List)
22.	<i>Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board</i> (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.)
23.	Order of Justice Morawetz, <i>Re Sino-Forest</i> , dated March 20, 2013 (Ernst & Young settlement approval order)

SCHEDULE "B"
RELEVANT STATUTES

1. Ontario Rules of Civil Procedure, R.R.O. 1990, REGULATION 194

Representation of an interested person who cannot be ascertained

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the *Variation of Trusts Act*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

2. Ontario Rules of Civil Procedure, R.R.O. 1990, REGULATION 194

Proceeding against representative defendant

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so. O. Reg. 465/93, s. 2 (3).

3. Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36)

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

Requirement for licence

6. (1) No person or entity shall act as a lender unless the person or entity,
- (a) is licensed as a lender and, subject to section 17, has received notice in writing from the Registrar of the licence; or
 - (b) is deemed to be licensed under section 18. 2008, c. 9, s. 6 (1).

Same, loan broker

- (2) No person or entity shall act as a loan broker unless the person or entity,
- (a) is licensed as a loan broker and, subject to section 17, has received notice in writing from the Registrar of the licence; or
 - (b) is deemed to be licensed under section 18. 2008, c. 9, s. 6 (2).

Consequence

- (3) If a lender who is not licensed enters into a payday loan agreement with a borrower, the borrower is only required to repay the advance to the lender and is not liable to pay the cost of borrowing. 2008, c. 9, s. 6 (3).

5. *Criminal Code, R.S.C. 1985, c. C-46*

347. (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is

(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

“credit advanced”

« *capital prêté* »

“credit advanced” means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

“criminal rate”

« *taux criminel* »

“criminal rate” means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

“insurance charge”
« *frais d’assurance* »

“insurance charge” means the cost of insuring the risk assumed by the person who advances or is to advance credit under an agreement or arrangement, where the face amount of the insurance does not exceed the credit advanced;

“interest”
« *intérêt* »

“interest” means 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;

“official fee”
« *taxe officielle* »

“official fee” means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

“overdraft charge”
« *frais pour découvert de compte* »

“overdraft charge” means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons or a deposit taking institution the deposits in which are insured, in whole or in part, by the Canada Deposit Insurance Corporation or guaranteed, in whole or in part, by the Quebec Deposit Insurance Board;

“required deposit balance”
« *dépôt de garantie* »

“required deposit balance” means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

(6) An accused or a defendant against whom a certificate referred to in subsection (4) is produced may, with leave of the court, require the attendance of the actuary for the purposes of cross-examination.

(7) No proceedings shall be commenced under this section without the consent of the Attorney General.

(8) This section does not apply to any transaction to which the Tax Rebate Discounting Act applies.

347.1 (1) The following definitions apply in subsection (2).

“interest”
« *intérêts* »

“interest” has the same meaning as in subsection 347(2).

“payday loan”
« *prêt sur salaire* »

“payday loan” means an advancement of money in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card.

(2) Section 347 and section 2 of the Interest Act do not apply to a person, other than a financial institution within the meaning of paragraphs (a) to (d) of the definition “financial institution” in section 2 of the Bank Act, in respect of a payday loan agreement entered into by the person to receive interest, or in respect of interest received by that person under the agreement, if

- (a) the amount of money advanced under the agreement is \$1,500 or less and the term of the agreement is 62 days or less;

- (b) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and
- (c) the province is designated under subsection (3).

(3) The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.

(4) The Governor in Council shall, by order, revoke the designation made under subsection (3) if requested to do so by the lieutenant governor in council of the province or if the legislative measures described in that subsection are no longer in force in that province.

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36 AS AMENDED**

Court File No. CV-14-10518-00CL

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE
FINANCIAL SERVICES Inc., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC.,
7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS
"THE TITLE STORE"**

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at TORONTO

FACTUM

**(re: appointment of representative counsel
for class action plaintiffs, returnable June
11, 2014)**

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Andrew J. Hatnay – LSUC No. 31885W
Tel: 416-595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

James Harnum – LSUC No. 60459F
Tel: 416-542-6285/Fax: 416-204-2819
Email: jharnum@kmlaw.ca

Agent for Harrison Pensa LLP, counsel to
Timothy Yeoman (class plaintiff)