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

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

BRIEF OF AUTHORITIES
(re: appointment of representative counsel for class action, returnable June 11, 2014)

May 30, 2014

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TO: SERVICE LIST

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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

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

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

BRIEF OF AUTHORITIES
(re: appointment of representative counsel for class action, returnable June 11, 2014)

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

TAB 1

Case Name:

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

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

[2011] O.J. No. 595

2011 ONSC 923

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

2011 CarswellOnt 802

Court File No. 03-CV-257357 CP

Ontario Superior Court of Justice

G.R. Strathy J.

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

(28 paras.)

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

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

Counsel:

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

Meagan J. Swan, for the Defendants/Respondents.

ENDORSEMENT

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

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

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

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

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

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

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

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

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

The Action and Certification

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

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

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

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

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

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

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

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

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

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

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

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

Settlement Approval

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

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

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

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

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

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

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

23 I therefore approve the settlement.

The Fee of Class Counsel

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

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

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

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

Conclusion

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

G.R. STRATHY J.

cp/e/qlafr/qljzg/qlpxm/qlced

TAB 2

Case Name:

Smith v. National Money Mart Co.

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

[2007] O.J. No. 46

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

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

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

2007 CarswellOnt 29

Court File No. 03-CV-1275

Ontario Superior Court of Justice

A. Hoy J.

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

(146 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

Counsel:

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

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

Christopher D. Bredt for the Franchisees

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REASONS FOR DECISION

A. HOY J.:--

INTRODUCTION

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

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

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

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

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

THE BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE TEST FOR CERTIFICATION

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

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

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

5(1)(a): Cause of Action

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

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

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

Declaratory Relief

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

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

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

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

Conspiracy

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

Unjust Enrichment

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

Injunction

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

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

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

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

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

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

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

Tracing Order and Constructive Trust, as against Dollar

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

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

5(1)(b): An Identifiable Class

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

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

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

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

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

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

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

5(1)(c): The Common Issues

The Test

41 Section 1 of the CPA defines common issues:

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

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

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

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

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

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

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

The Common Issues

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

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

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

Common Issue 1

47 Common issue 1 is as follows.

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

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

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

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

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

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

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

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

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

Common Issues 2 and 3

55 Proposed Common Issues 2 and 3 are as follows:

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

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

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

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

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

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

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

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

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

63 I disagree.

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

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

Common Issues 4 and 5 - Unjust Enrichment and Constructive Trust

66 Common Issue 4 is as follows:

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

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

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

Unjust Enrichment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Constructive Trust

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

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

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

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

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

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

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

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

Common Issue 7: Conspiracy

The Parties' Positions

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Common Issues 13, 14 and 16

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

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

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

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

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

5(1)(d): Preferable Procedure

The Test

112

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

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

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

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

The Parties' Positions and Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 5(1)(e)

The Proposed Representative Plaintiffs

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

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

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

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

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

A Workable Plan

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

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

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

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

CONCLUSION AND ORDER TO ISSUE

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

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

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

A. HOY J.

* * * * *

APPENDIX A

COMMON ISSUES

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

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

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

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

TAB 3

Case Name:

McCutcheon v. The Cash Store Inc.

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

[2006] O.J. No. 1860

80 O.R. (3d) 644

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

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

2006 CarswellOnt 2973

2006 CanLII 15754

[2006] O.T.C. 424

Court File No. 04-12118 CP

Ontario Superior Court of Justice

M.C. Cullity J.

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

(85 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

Civil Code of Quebec, Article 3168

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

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

Consumer Protection Act,

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

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

Counsel:

David Thompson and Matthew G. Moloci for the Plaintiff

Timothy Pinos, Robin Moodie and Peter Henein for the Defendants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 5(1)(c): common issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

M.C. CULLITY J.

TAB 4

Case Name:

Joseph v. Quik Payday Inc.

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

[2006] O.J. No. 4835

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

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

2006 CarswellOnt 7681

Court File No. 05-CV-283048 CP

Ontario Superior Court of Justice

A. Hoy J.

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

(32 paras.)

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

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

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

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

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

Statutes, Regulations and Rules Cited:

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

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

Counsel:

Odette Soriano, for the Plaintiff

Andrew J. Roman, for the Defendants

ENDORSEMENT

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

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

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

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

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

Should the Action be Certified as a Class Proceeding?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Should the Settlement Agreement be Approved?

The Terms of the Settlement Agreement

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

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

Test on Approval of the Settlement

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

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

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

Analysis

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

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

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

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

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

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

Approval of Class Counsel's Fees

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

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

Order to Issue

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

A. HOY J.

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*.

TAB 12

Case Name:

Kilroy v. A OK Payday Loans Inc.

Between
Doris Kilroy, Plaintiff, and
A OK Payday Loans Inc., Defendant

[2006] B.C.J. No. 1885

2006 BCSC 1213

273 D.L.R. (4th) 255

[2006] 12 W.W.R. 626

59 B.C.L.R. (4th) 78

21 B.L.R. (4th) 42

151 A.C.W.S. (3d) 927

2006 CarswellBC 2039

Vancouver Registry No. S041137

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: April 6, 2006.
Judgment: August 9, 2006.

(73 paras.)

Civil procedure -- Parties -- Class or representative actions -- Application for summary judgment by the representative plaintiff in the class proceeding allowed -- Defendant payday loan company's agreements requiring borrowers to pay interest on small loans of 21 per cent per annum over 15-day period, plus charging of "Service Fee" and "Late Fee", which met definitions of "interest" as described in s. 347 of the Criminal Code, provided for effective rate of interest over 60 per cent -- Defendant's contracts contravened s. 347 of the Criminal Code and were unconscionable, inequitable and therefore in contravention of the Trade Practices Act and the Business Practices and Consumer Protection Act -- Defendant was unjustly enriched and the plaintiff was entitled to recover the interest

paid in excess of the lawful amount permitted by s. 347 -- Criminal Code, s. 347 -- Business Practices and Consumer Protection Act, s. 8 -- Trade Practice Act, s. 4

Commercial law -- Banking -- Financial institutions -- Loan companies -- Loans -- Interest -- Loan agreement -- Application for summary judgment by the representative plaintiff in the class proceeding allowed -- Defendant payday loan company's agreements requiring borrowers to pay interest on small loans of 21 per cent per annum over 15-day period, plus charging of "Service Fee" and "Late Fee", which met definitions of "interest" as described in s. 347 of the Criminal Code, provided for effective rate of interest over 60 per cent -- Defendant's contracts contravened s. 347 of the Criminal Code and were unconscionable, inequitable and therefore in contravention of the Trade Practices Act and the Business Practices and Consumer Protection Act -- Defendant was unjustly enriched and the plaintiff was entitled to recover the interest paid in excess of the lawful amount permitted by s. 347 -- Criminal Code, s. 347 -- Business Practices and Consumer Protection Act, s. 8 -- Trade Practice Act, s. 4.

Commercial law -- Unjust enrichment -- Enrichment -- Application for summary judgment by the representative plaintiff in the class proceeding allowed -- Defendant payday loan company's agreements requiring borrowers to pay interest on small loans of 21 per cent per annum over 15-day period, plus charging of "Service Fee" and "Late Fee", which met definitions of "interest" as described in s. 347 of the Criminal Code, provided for effective rate of interest over 60 per cent -- Defendant's contracts contravened s. 347 of the Criminal Code and were unconscionable, inequitable and therefore in contravention of the Trade Practices Act and the Business Practices and Consumer Protection Act -- Defendant was unjustly enriched and the plaintiff was entitled to recover the interest paid in excess of the lawful amount permitted by s. 347.

Application for summary judgment by the representative plaintiff in the class proceeding. Specifically, the plaintiff sought answers as to whether certain charges, including Processing Fees and Late Fees charged by the defendant, A OK Payday Loans, constituted interest as defined by and for the purpose of s. 347 of the Criminal Code. If so, the plaintiff sought a determination as to whether the standard form agreements pursuant to which the fees had been collected from class members constituted agreements or arrangements to receive interest at a criminal rate. The plaintiff also sought determination as to whether, if the agreements or arrangements offended s. 347 of the Code, they constituted unconscionable acts and practices within the meaning of s. 4 of the Trade Practices Act and s. 8 of the Business Practices and Consumer Protection Act. The defendant was in the business of providing short-term loans for small amounts. At all times, the defendant advanced payday loans pursuant to standard form loan agreements. The agreements provided for a maximum term of 15 days or the borrower's next payday. The borrower was required to repay the principal amount of the loan advanced on the due date with interest at a rate of 21 per cent per annum, calculated and charged for a two-week period, and a "processing fee" in an amount equal to 19 per cent or more of the principal amount. If the cheque provided by the borrower as security was returned NSF or the borrower otherwise failed to attend on or before the due date to make payment, the standard form loan agreements required the borrower to pay a further fee of $75.

HELD: Application allowed. The Processing Fees constituted interest as defined by s. 347 of the Code. The processing fee was a charge payable for the advancement of credit under an agreement. Correspondingly, it fell within the Code's definition of interest. The Late Fees charged by the defendant also constituted late fees as defined by s. 347 of the Code. It was a penalty tied to the advancement of credit, imposed when the borrower did not repay on a specific date. "Interest" was

defined as including a "penalty ... or other similar charge ... paid or payable for the advancing of credit". The standard form loan agreements constituted agreements to receive interest at a criminal rate. The agreements' result was to impose an effective annual interest rate of more than 60 per cent, contrary to s. 347(1)(a). The defendant was unjustly enriched and the plaintiff was entitled to recover the interest paid in excess of the lawful amount permitted by s. 347. In the circumstances of the case (small short-term loans to consumers, using standard form agreements), when the defendant's contracts contravened s. 347, they were unconscionable, inequitable and therefore in contravention of the Trade Practices Act and the Business Practices and Consumer Protection Act. The court was unable to determine on the evidence and argument before the court whether members of the class were entitled to damages, rather than, or in addition to, restitution, or one of the other remedies provided by the Acts. Further submissions were required as to the necessity and appropriateness of the relief sought.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 18A

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

Criminal Code, s. 347

Trade Practices Act, R.S.B.C. 1996, c. 457, s. 4, s. 22(1)

Counsel:

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

Counsel for the Defendant: R.B.E. Hallsor

BROWN J.:--

INTRODUCTION

1 This is a class proceeding, certified on October 6, 2005. The plaintiff now applies, pursuant to Rule 18A, to have the Court determine the following common issues:

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

(c) If the answer to (a) is yes, do the standard form agreements pursuant to which the Processing 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***?

(d) If the answer to (a) or (b) is yes, then has the collection by A OK of those fees from Class members in relation to their Class Loans resulted in the payment by Class members to, and the receipt by A OK of, interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***?

(e) If the answer to (d) is yes, then has A OK been unjustly enriched by the collection of those Fees?

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

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

(ii) is A OK liable to account to those Class members for the Processing Fees or Late Fees received from them and all profits earned therefrom?

(g) If the answer to (c) or (d) is yes, then does the provision by A OK of the Class Loans to Class members on terms that offend s. 347 of the ***Criminal Code***, or the receipt by A OK of interest at a criminal rate in respect of those Class Loans, constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practice Act,*** R.S.B.C. 1996, c. 457, and s. 8 of the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2, irrespective of whether the factors set out in s. 3(a) through (d) of those sections are present?

(h) If the answer to (g) is yes, is A OK 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 Practice Act***and ss. 105 and 171 of the ***Business Practices and Consumer Protection Act***?

BACKGROUND FACTS

2 Since 1998, A OK has been in the business of providing short-term loans for small amounts, known as "payday loans", at three locations in British Columbia. These loans were generally for amounts of between $100 and $500.

3 At all times, A OK advanced payday loans pursuant to standard form loan agreements. Those agreements provided that:

(a) the term of the loan advanced would be a maximum of 15 days or the borrower's next payday, whichever came first; and

(b) the borrower was required to repay the principal amount of the loan advanced on the due date with interest at a rate of 21% per annum, calculated and charged for a two week period, and a "processing fee" in an amount equal to 19% or more of the principal amount advanced (the "Processing Fee").

4 A OK operated under the following procedure. In order for a borrower to obtain a loan, it required that borrower to provide it with a signed cheque in the amount of the payday loan, applicable

interest, and the Processing Fee. A OK would hold this cheque as security for repayment of the loan. It would use this cheque to obtain repayment of the payday loan, the applicable interest, and the Processing Fee, or alternatively, would permit the borrower to attend on or before the due date of the loan to repay the loan, interest and fee by other means, such as by cash or through debit transaction.

5 If the cheque provided by the borrower was returned NSF or the borrower otherwise failed to attend on or before the due date to make payment, the standard form loan agreements required the borrower to pay a further fee of $75 (the "Late Fee").

6 All of the class members, including the representative plaintiff, have paid to A OK in respect of their class loans:

(a) the full amount of the loan principal advanced;
(b) interest at a rate of 21% per annum calculated and charged for a two-week period;
(c) a Processing Fee amounting to 19% or more of the principal amount advanced

either on the due date of the loan or within 135 days of the loan advance.

7 Expert actuarial evidence provided by Mr. Karp, F.S.A., F.C.I.A., establishes that:

(a) the maximum ratio of return a lender may receive on the principal amount advanced for 15 days, without receiving a return of greater than 60%, is a ratio of 1.1019503 on the principal advanced, which amounts to 1.95% of the principal advanced; and
(b) a return of 19% of the principal advanced will result in an effective annual rate of interest in excess of 60% if the loan is repaid within 135 days of the loan advance, regardless of how many payments are made in repayment of that loan advance.

POSITIONS OF THE PARTIES

8 The plaintiff argues that there are no facts at issue on this application, as it is brought on both the basis of facts admitted by the defendant pursuant to a Notice to Admit and uncontroverted expect actuarial evidence. The plaintiff argues that the matter is therefore appropriate for determination under Rule 18A.

9 The defendant disputes whether some of the common issues can be decided on the evidentiary record. Its argument is threefold: (1) a breach of the ***Code*** does not necessarily give rise to a civil cause of action; (2) even if the plaintiff can establish a breach of s. 347, she is not entitled to any remedy as the traditional doctrine of illegality results in losses lying where they fall; (3) the evidentiary record does not permit this Court to determine if trade legislation has been contravened. I address these arguments in the course of deciding the common issues.

ANALYSIS

Do the Processing Fees charged by A OK constitute interest as defined by s. 347 of the Criminal Code?

10 Section 347 of the ***Criminal Code*** provides that everyone who enters an agreement or arrangement to receive interest at a criminal rate (s. 347(1)(a)) or receives a payment or partial payment of interest at a criminal rate (s. 347(1)(b)) is guilty of a criminal offence. The ***Criminal Code*** defines "interest" 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.

and a "criminal rate" as:

> ... an effective annual rate of interest ... that exceeds sixty per cent ....

11 As noted, A OK advanced payday loans pursuant to standard form loan agreements which provided for interest at a rate of 21% per annum, calculated and charged for a two-week period, and a Processing Fee equal to 19% or more of the principal amount advanced. This is evident from A OK's standard form loan agreements, one of which provides:

> A OK Payday loans extends credit for maximum of 15 days or your next payday, whichever comes first. The interest rate is 21% per annum and is calculated and charged for a 2 week period. In addition, for every $50 you borrow there is a $9.50 processing fee. There will be an additional $75 service charge for any NSF cheque.

12 Another form of the agreement provides:

> A OK Payday specializes in deferred deposits. We will defer your deposit for a maximum of 15 days, or your next payday, whichever comes first. For this service, there is a $25 processing fee for every $100 you defer. The interest rate is 21% per annum and calculated and charged for a two week period. In addition, there will be a $75 service charge for any of the following: NSF cheque, default cheque, stop payment, funds not cleared, account closed or an account not paid, in full (for any reason), by the due date.

13 Is the Processing Fee interest pursuant to s. 347 of the ***Criminal Code***? In ***Garland v. Consumers' Gas Co.***, [1998] 3 S.C.R. 112 (***Garland No. 1***), the Supreme Court of Canada found that for the purposes of s. 347, "interest" is a comprehensive term. The Court adopted the words of Huddart J. (as she then was) in ***Mira Design Co. v. Seascape Holdings Ltd.*** (1981), 34 B.C.L.R. 55 at 60 (S.C.):

> The thrust of the definitions of "credit advanced" and "interest" is to cover all possible aspects of any transaction to ensure that the cost of using someone else's money never exceeds the criminal rate. Thus, they focus on the actual benefit given to the borrower and the real cost of borrowing. The actual

> benefit is the real amount in the borrower's hands minus all the penalties, commissions and other costs incurred. The cost of borrowing is also widely defined. Clearly the intention of the legislature was to concentrate on the substance of the transaction, not on its mechanics or form.

14 Here, the Processing Fee is a charge payable for the advancement of credit under an agreement. Correspondingly, it falls within the ***Code's*** definition of "interest".

15 A OK argues that the Processing Fee is not interest, but rather, "a fee for its service of deferring deposit of its client's cheques". It argues that when a borrower takes a loan from A OK it must provide it with a signed cheque in the amount of the payday loan, applicable interest, and Processing Fee as security for repayment. The Processing Fee, it says, is simply the fee charged for not immediately depositing the client's cheque. However, even if this could be considered a service provided to the borrower, it does not change how the Processing Fee is treated under the ***Code.***A service provided in connection with the granting of credit does not exclude it from the definition of "interest". Other services provided in relation to a loan, such as legal services, have been included within the definition of interest: ***Transport North American Express Inc. v. New Solutions Financial Corporation*** (2002), 60 O.R. (3d) 97 (C.A.) at [paragraph] 10-11, rev'd on other grounds [2004] 1 S.C.R. 249.

Do the Late Fees charged by A OK also constitute interest as defined by s. 347 of the Criminal Code?

16 A borrower is required to pay a Late Fee if either his or her cheque is returned NSF or the borrower fails to attend, on or before the due date, to repay the payday loan, interest and Processing Fee.

17 The plaintiff argues that the Late Fee is a penalty, and therefore included in the definition of interest in s. 347(2) of the ***Criminal Code***. The defendant argues that the Late Fee is a necessary charge, given that it incurs costs when the borrower fails to repay on time. To this end, it says:

> The reason that we charge a service fee when a customer defaults is that ... when the default occurs, an A OK employee must personally attend at the customer's financial institution on one or more occasions to try to have the cheque certified. Many financial institutions now also charge their own service charges to certify cheques.

18 The Late Fee does not vary according to the costs incurred by A OK in this regard; the fee is not merely the recovery of a disbursement. The Late Fee is a fee charged to the borrower when he or she does not repay on the due date. It is a penalty tied to the advancement of credit, imposed when the borrower does not repay on a specific date. "Interest" is defined as including a "penalty ....or other similar charge ... paid or payable for the advancing of credit ....". In ***Garland No. 1***, the Supreme Court of Canada held:

> 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). (at [paragraph] 61)

19 I am satisfied that the Late Fee is also interest pursuant to s. 347.

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

20 An agreement constitutes an agreement to receive interest at a criminal rate, contrary to s. 347 (1)(a), when the agreement *requires* payment of interest at a criminal rate: ***Degelder Construction Co. v. Dancorp Developments Ltd.***, [1998] 3 S.C.R. 90 at [paragraph] 29; ***Brehnan v. Outback Products Inc.***, [2004] B.C.J. No. 981, 2004 BCCA 272 at [paragraph] 6. The A OK standard agreements do just that: they require the borrower to repay the principal, interest, and Processing Fee, within 15 days. Mr. Karp opines that this will result in an effective annual interest rate of more than 60%. The loan agreements, therefore, are agreements to receive interest at more than 60%, contrary to s. 347(1)(a).

Has the collection of those fees resulted in the receipt by A OK of interest at a criminal rate?

21 I accept the plaintiff's submission that if Processing Fees and Late Fees are interest, and their payment results in payment at a criminal rate, then A OK has necessarily received interest at a criminal rate, contrary to s. 347(1)(b).

Has A OK been unjustly enriched by collection of the fees?

22 The test for unjust enrichment was set out in ***Garland v. Consumers' Gas Co.,*** [2004] 1 S.C.R. 629 at [paragraph] 30; 2004 SCC 25 [***Garland No. 2***]:

(1) an enrichment of the defendant;
(2) a corresponding deprivation of the plaintiff; and
(3) an absence of juristic reason for the enrichment.

23 I accept that the defendant has been enriched by the receipt of the Processing Fees and the Late Fees, and the class members, correspondingly deprived. The question that remains for determination is whether a juristic reason brought about the deprivation.

24 The analysis to be applied in determining whether a juristic reason exists was set out by the Court in ***Garland No. 2***. The two-step analysis was described as follows:

> ... the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. ... The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments. ([paragraph]s 44-46)

25 Turning to the first stage of this analysis, the defendant says that the payments were made pursuant to loan agreements, which constitute a juristic reason. The plaintiff argues that the loan agreements relied upon by the defendant are illegal under s. 347(1)(a) of the ***Code,*** and cannot constitute a juristic reason.

26 A similar argument was before the Court in ***Garland No. 2***. In that case, the plaintiff brought a class action, seeking restitution of late payment penalties (LLPs) collected by the defendant, Consumers' Gas Co. The LLPs were imposed and collected based on an order of the Ontario Energy Board (made within its jurisdiction: see [paragraph] 52), which authorized and required Consumers' Gas Co. to charge the LLPs. Consumers' Gas Co. argued that, as the LLPs were ordered by the OEB, there was a juristic reason for its enrichment. In rejecting this argument, the Court held:

> ... if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. ([paragraph] 51)

27 The same reasoning applies here. The loan agreements are in conflict with s. 347(1)(a) of the ***Code***. They cannot form a juristic reason for A OK's enrichment.

28 Under the second stage of the juristic reason analysis in ***Garland No. 2***, courts are to consider whether, in all of the circumstances of the transaction, there is another reason to deny recovery. In this regard, the Court is to consider the reasonable expectations of the parties and public policy considerations.

29 Again, the Supreme Court's analysis in ***Garland No. 2*** is informative. Although the Court had found that the OEB orders were inoperative, it held that the parties' reliance on them was relevant in considering their reasonable expectations. Consumers' Gas Co. had a reasonable expectation that it could charge and recover fees because it could expect that the OEB would not authorize a penalty scheme that was in violation of the ***Criminal Code***. By contrast, consumers had no reasonable expectation that they would not have to pay a fee for late payment. Thus, until Consumers' Gas Co. was put on notice that the fees could be illegal, its reliance on the OEB's orders provided a juristic reason for the enrichment. The Court continued, however, that:

> ... in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in

> charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs. ([paragraph] 59)

30 It is apparent from this reasoning, that unless there is an acceptable reason for a party to believe that an otherwise illegal arrangement is legal, it is unreasonable for the party to place any expectations on that arrangement. Here, there is no evidence that A OK had a basis to believe that the fees that it charged were not in breach of the ***Code***. It follows that A OK had no reasonable expectation that fees in excess of the criminal rate should be paid.

31 What of public policy? In ***Garland No. 2***, Consumers' Gas Co. argued that it had, in reliance on the OEB orders, changed its position by not charging higher gas rates and that this was a reason to allow it to retain the fees. The Court held:

> ... the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime ... ([paragraph] 57)
>
> ...
>
> The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. ...
>
> ... 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. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them. ([paragraph]s 64-65)

32 That reasoning applies equally to this case. A OK has received the benefit of the Processing Fees and the Late Fees in contravention of the ***Criminal Code***. It cannot be unjust for it to return them.

33 Two of the arguments of the defendant are best addressed, in my opinion, in the context of the public policy discussion. The first of these is the defendant's argument that the traditional doctrine of illegality, under which courts will not assist either party to the illegal transaction, should apply in the present case. The second argument is that A OK's loan agreements should not be impugned on the basis that they are contrary to s. 347 because that section, in fact, is aimed at a different evil, notably, "loan sharking".

34 The defendant's first argument, that the law precludes the plaintiff from recovering funds paid pursuant to a prohibited contract, is met by ***Kiriri Cotton Co. Ltd. v. Dewani,*** [1960] A.C. 192. There the plaintiff sued to recover a premium paid for lease of an apartment. The premium was contrary to the Uganda Rent Restriction Ordinance. Neither party realized that their activities were illegal. The Privy Council said:

> The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers v. Ingham.* If there is something more in addition to a mistake of law - if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake - then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other - it being imposed on him specially for the protection of the other - then they are not in pari delicto and the money can be recovered back; see *Brown v. Morris,* by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other - because he has misled the other when he ought to know better - then again they are not in pari delicto and the money can be recovered back; see *Harse v. Pearl Life Assurance Co.,* by Romer L.J. These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received. (at 204)

The Privy Council concluded:

> In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant "key-money." Section 3(2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the person who "asks for, solicits or "receives any sum of money," but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see *Johnson v. Youden* and section 3 of the Rent Restriction (Amendment) Ordinance, 1954), but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to "jump the queue,'" or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.
>
> Seeing then that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law: and it is not necessary to find a remedy given by the Ordinance, either expressly or by implication. The commission of a statutory remedy does not, in cases of this kind, exclude the

> remedy by money had and received. That is amply shown by the numerous cases to which their Lordships were referred, such as those arising under the statutes against usury, lotteries and gaming, in which there was no remedy given by the statute but nevertheless it was held that an action lay for money had and received. (at 205-06)

35 As was the case with the Rent Restriction Ordinance at issue in ***Kiriri,*** the ***Code*** acknowledges that one party has a primary duty to observe the law, and take responsibility for its breach. Section 347(1) makes it an offence to enter into a contract to *receive*, or to *receive*, interest at a criminal rate. Section 347(1) does not prohibit the borrower from borrowing money under such an arrangement, nor does it prohibit the payment of interest.

36 That s. 347(1) was intended to protect borrowers is also clear from the section's legislative history. The section's roots lie in the ***Money Lenders Act,*** R.S.C. 1952, c. 181. The Minister of Justice held upon second reading of that act that: "[t]he object of the bill is to protect the class of small borrowers": *House of Commons Debates* (March 20, 1906) at 854. A similar intent was expressed when the ***Small Loans Act***, R.S.C. 1970, c. S-11, was passed. With respect to that Act, the Minister of Justice noted that the bill was to address "a real and extensive evil". He described that evil as the "loan shark" business and "a class of business known as the small loan business": *House of Commons Debates* (April 25, 1939) at 3203. ***Criminal Code*** provisions respecting criminal interest rates have also had, as their purpose, the protection of the borrowing public. In ***Mira Design Co.*** the Court held with respect to the predecessor to s. 347(1) that it is was "designed to protect borrowers" ([paragraph] 21).

37 A number of decisions have held that a borrower is entitled to the recovery of unlawful interest. In ***Smith v. Bromley*** (1760), 2 Dougl. 696, 99 E.R. 441 at 444, Lord Mansfield held: "But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid.". Likewise, in ***Browning v. Morriss*** (1778), 2 Cowp. 791, 98 E.R. 1364 Lord Mansfield said

> ... where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. For instance, by the Statute of Usury, taking more than 5 per cent is declared illegal, and the contract void; but these statutes were made to protect the needy and necessitous persons from the oppression of usurers and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and, with their eyes wide open, not only break the law but complete their ruin. Therefore, the party injured may bring an action for the excessive interest. (at 1364-65)

38 A strict application of the traditional rule was recently considered, and also rejected, by the Court in ***New Solutions Financial Corp. v. Transport North American Express Inc.,*** [2004] 1 S.C.R. 249. In that case, the Court held:

> There is broad consensus that the traditional rule that contracts in violation of statutory enactments are void *ab initio* is not the approach courts should necessarily take in cases of statutory illegality involving s. 347 of the *Code*. Instead, judicial discretion should be employed in cases in which s. 347 has been violated in order to provide remedies that are tailored to the contractual context involved. ([paragraph] 4)

39 The Court articulated a more flexible approach to statutory illegality:

> A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the *Code*. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitive loan-sharking arrangements and contracts that have a criminal object should be declared void *ab initio*. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. ... In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved. ([paragraph] 6)

40 I turn, then, to the second argument advanced by the defendant. As I understand it, the defendant argues that llegality under the ***Code*** should not, in and of itself, invalidate A OK's arrangement because the primary purpose of s. 347 is to curb more coercive and surreptitious creditors who participate in what is commonly known as "loan sharking". I am unable to accede to this argument. It is true that the purpose of s. 347 has been subject to criticism: see ***Transport North American Express Inc.*** at [paragraph] 34-44. However, that does not entitle the Court to selectively enforce it. Section 347 does not, on its terms, draw the distinction suggested by the defendant. As noted in ***Garland No. 1***:

> The ostensible purpose of s. 347 was to aid in the prosecution of loan sharks. See *House of Commons Debates*, 1st Sess., 32nd Parl., vol. III, July 21, 1980, at p. 3146; *Thomson, supra*, at p. 549. However, it is clear from the language of the statute -- e.g., its reference to insurance and overdraft charges, official fees, and property taxes in mortgage transactions -- that s. 347 was designed to have a much wider reach, and in fact the section has most often been applied to commercial transactions which bear no relation to traditional loan-sharking arrangements. Although s. 347 is a criminal provision, the great majority of cases in which it arises are not criminal prosecutions. Rather, like the case at bar, they are civil actions in which a borrower has asserted the common-law doctrine of illegality in an effort to avoid or recover an interest payment, or to render an agreement unenforceable. For this reason, the provision has attracted criticism from some commercial lawyers and academics, and calls have repeatedly been made for its amendment or repeal. See, e.g., J. S. Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986), 11 *C.B.L.J.* 233; "Section 347 of the Criminal Code" (1994),

> 23 *C.B.L.J.* 321. Nevertheless, it is now well settled that s. 347 applies to a very broad range of commercial and consumer transactions involving the advancement of credit, including secured and unsecured loans, mortgages and commercial financing agreements. (at [paragraph] 25)
>
> ... the plain terms of s. 347 must govern its application. If the section is to be given a more directed focus, it lies with Parliament, not the courts, to take the required remedial action. ([paragraph] 52)

41 That the section applies to the short term loan industry is supported by the section's legislative history. In introducing the ***Small Loans Act***, the Minister of Justice stated that the legislation would apply to thee classes of lenders: federally incorporated small loan companies, their provincially incorporated counterparts and individual money lenders: *House of Commons Debates* (April 25, 1939), p. 3203-04. As noted above, it was introduced to deal with "a class of business known as the small loan business" (p. 3203).

42 I am not satisfied that public policy considerations should lead me to conclude that there is a juristic reason for the defendant to be enriched by interest exceeding the criminal rate.

43 The plaintiff submits that in the present case, this Court should allow the plaintiff to recover the interest paid in excess of the lawful amount permitted by s. 347(1). In other words, that the benefit/deprivation equates to interest paid in excess of 60%. In support, it relies on ***Affordable Payday Loans v. Harrison,***[2002] A.J. No. 824, 2002 ABPC 104; ***Canadian Business Centre Ltd. v. Bridge Holdings Ltd.,*** [2005] B.C.J. No. 2773, 2005 BCSC 1772. The defendant relies on ***Bon Street Developments Ltd. v. Terracan Capital Corp,*** [1992] B.C.J. No. 2729, for the proposition that the court will only stray from the traditional approach (of not allowing recovery) where it can conclude, based on the circumstances of the case, that to do so is appropriate. The defendant says that the Court does not have the information to make this determination.

44 The defendant's argument was considered in ***Bodnar v. The Cash Store Inc.,*** [2006] B.C.J. No. 1171, 2006 BCCA 260. There, the Court of Appeal held that the facts in ***Bon Street*** required that the Court balance the equities between the parties. It went on to distinguish that case from ***Bodnar***, a case very similar to the case before this Court. With respect to ***Bodnar,*** the Court held:

> Here there were standard terms and small borrowers. In 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. ([paragraph] 17)

45 In ***Transport North American Express Inc*** the Court cited the following factors to be considered in shaping a remedy: (1) whether the purpose or policy of s. 347 would be subverted by severance; (2) whether the parties entered into the agreement for an illegal purpose or with an evil intention (3) the relative bargaining positions of the parties and their conduct in reaching the agreement (4) whether the debtor would be given an unjustified windfall ([paragraph] 42). The first two of these factors militated in favour of severing the offending portions of the contract. The Court's

findings on these factors apply equally in the present case. With respect to the third factor, there is no reason on the evidence for me to conclude that that the parties had disparate bargaining positions. If anything, I take the fact that A OK operated under standardized practices as evidence that it was in a stronger bargaining position than that of the plaintiff. With respect to the fourth consideration, I note that the plaintiff seeks only the return of interest charged that exceeds the criminal rate.

46 Having considered the above factors, I conclude that the plaintiff is entitled to recover the interest paid in excess of the lawful amount permitted by s. 347.

Does A OK hold the benefit it has received as a result of this unjust enrichment in trust?

47 In ***Soulos v. Korkontzilas,*** [1997] 2 S.C.R. 217, the Court clarified that constructive trusts may be seen as falling into two general categories:

> The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. ... The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. ([paragraph] 36)

48 Common to both is the unifying concept underlying the doctrine of constructive trust, good conscience:

> ... a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case. ([paragraph] 34)

49 The plaintiff submits that both grounds exist in this case to find a constructive trust. Given my conclusion under the preceding question, it is clear that the plaintiff has established unjust enrichment, in an amount equal to interest paid in excess of the lawful limit. It is less clear, however, whether it has established that a constructive trust may be available on the basis that A OK engaged in wrongful conduct. The plaintiff claims that this arises out of A OK's wrongful act of collecting payments that were illegal under the ***Criminal Code***. A constructive trust will, however, arise as a result of wrongful conduct only if the test set out in ***Soulos*** is met. That test provides the following:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
(3)

> The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. ([paragraph] 45)

50 With respect to a constructive trust founded on unjust enrichment, Professor Waters, in *Waters' Law of Trusts in Canada 3rd Ed., (*Toronto: Thomson, 2005) clarfies at 469 that there is a two stage inquiry:

> If a defendant is required to make restitution of an unjust enrichment, this can be achieved in different ways. The defendant might be required to pay a sum of money measured by the value of the defective transfer; or he might be required to return the enrichment *in specie*. This second possibility is usually activated by the constructive trust. So there are two steps. The liability in unjust enrichment is established by the proof of the three elements of the cause of action. There then follows a second inquiry, into how restitution should be made. The same issue arises where a defendant is required to disgorge the profits of a wrongful act. He could be ordered to pay a sum of money, or he could be declared to be a constructive trustee of the gain.

51 The inquiry required at this second stage is discussed in ***Peter v. Beblow***, [1993] 1 S.C.R. 980. There, the Court held that once the three elements of unjust enrichment are made out:

> ... the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property". Or to quote Dickson J., as he then was, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

52 A second inquiry is also required when a constructive trust is sought on the basis of wrongful conduct. In ***Lac Minerals Ltd. v. International Corona Resources Ltd***, [1989] 2 S.C.R. 574, LaForest held:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. ... a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. (at 678)

52 As noted above, in ***Soulos***, the Court held that a trust would only be available where it would not, in all the circumstances of the case, be unjust to the interests of third parties.

53 In the present case, I am unable to conclude on the argument and evidence currently before me whether a monetary award is inadequate or whether there is a reason to grant to the plaintiff the additional rights that flow from a constructive trust. Nor, am I able to determine whether a constructive trust in these circumstances would have an unfair effect on the defendant or third parties. The equities in this case may favour a remedy of constructive trust, but it may be more appropriate to order an accounting and restitution.

Does the provision by A OK of loans that offend s. 347 of the Criminal Code, or the receipt by A OK of interest at a criminal rate in respect of those loans, constitute unconscionable acts or practices?

54 The plaintiff argues that A OK's practice of providing payday loans constitutes "an unconscionable act or practice by a supplier" within the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 ("***BPCPA***") and its predecessor, the ***Trade Practice Act,*** R.S.B.C. 1996, c. 457 (***TPA***"). Each of those acts provides that if a consumer has entered a consumer transaction involving an unconscionable act or practice, the court may award damages, or order rescission or restitution.

55 The ***BPCPA*** provides in s. 8:

> **8**(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> (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;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) a prescribed circumstance.

(Section 4 of the ***TPA*** is to similar effect. It was repealed July 4, 2004 and was replaced by the ***BPCPA***. Some of the claims in this action pre-date the ***BPCPA*** and would be covered by the ***TPA***. However, there is no substantive difference between the two sections for the purposes of this action. It is attached as Schedule A to these reasons.)

56 The plaintiff says that these transactions come within the provisions because they amount to a "consumer transaction", which is the supply of "personal property" (under the ***TPA***) or "goods and services" (under the ***BPCPA***), to persons for purposes that are "primarily personal, family or household". "Credit" is included within the definition of "personal property" (***TPA***) and "goods" (***BCPCA***). The defendant does not suggest that these are not consumer transactions.

57 I agree that A OK's loans come within the definition of "consumer transaction". They are small, short term loans made to people who are currently working or who receive income from another source, such as a pension.

58 The plaintiff relies only on s. 8(3)(e) of the ***BCPCA*** and s. 4(3)(e) ***TPA***. It says that providing loans at a criminal interest rate must, without more, be "so harsh ... as to be inequitable".

59 The defendant argues that ss. 8 and 4 of the acts require the court to consider all of the surrounding circumstances of a transaction and, in particular, those at sub-sections (3) (a)-(d) of each section. It says that the court must consider the individual circumstance of each borrower and each loan agreement, and that this individualized inquiry means that it cannot, at this stage, be determined if the sections apply. This argument was raised and rejected by this Court in ***Bodnar v. The Cash Store Inc.***, [2005] B.C.J. No. 1904, 2005 BCSC 1228:

> With respect to the trade practice/unconscionable transaction issues, the defendants again argue that the court must conduct an individual inquiry, that the issue cannot be determined class-wide.
>
> ...
>
> [43] The plaintiffs do not propose to prove breach of the trade practices legislation and unconscionability by reference to individual circumstances. The plaintiffs have been careful to limit these issues, so that they are determined without reference to subsections (3)(a) to (d), which require individual considerations. In other words, the plaintiffs' theory is that, regardless of individual circumstances, charging/receiving fees in breach of s. 347 is necessarily unconscionable.

> [44] In ***Knight v. Imperial Tobacco Company Ltd.***, [2005] B.C.J. No. 216 (S.C.), 2005 BCSC 172, this court certified a claim against the defendant, where the plaintiff alleged that the marketing of light and mild cigarettes constituted a deceptive trade practice. The plaintiff asserted that it could satisfy the required element of reliance without reference to individual circumstances. The court said at para. 36:
>
> > I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the ***TPA***, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.
>
> [45] Here, too, the plaintiffs will not rely on individual circumstances to establish an unconscionable practice. They may not succeed in this approach, but I am not satisfied that the issues should not be certified

60 This issue was also considered by the Court of Appeal in ***Bodnar***. Mackenzie J.A. said at [paragraph]s 13 and 14:

> The appellants submit that issues 13 to 16, which address the alleged unconscionable acts or practices prohibited by the *Trade Practice Act* ("the *TPA*") and the *Business Practices and Consumer Protection Act* ("the *BPCPA*"), should not have been certified as they raise individualized issues. Specifically, the appellants raise the circumstances set out in ss. 8(2) and (3) of the *BPCPA* .... The appellants say that the first four of the s. 8(3) factors all require individualized assessment.
>
> The respondents intend to limit their allegations to those falling under s. 8(3)(e) ... and advance a general submission that the terms or conditions of all transactions are so harsh or adverse to the consumer as to be inequitable. 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 ss. 8(3)(a) to (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 clams 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. In my view, the commonality of issues 13 to 16 as defined by the Chambers judge is not undermined by the statutory direction in s. 8 of the *BPCPA*. The restriction of consumer transactions by definition under the *BPCPA* to transactions "for purposes that are primarily personal, family or

> household" should be capable of application by general inference from the small size of the loans without involving individual inquiry.

61 The plaintiff argues, and I accept, that the court may proceed on the basis that there is no evidence of "other factors" pursuant to s. 8 of the ***BPCPA*** (and s. 4 of the ***TPA***). The only factor is whether the terms, in requiring payment at an illegal rate of interest, were so harsh or adverse as to be inequitable.

62 The plaintiff acknowledges that there is little authority directly on point. In ***Morrison v. Coast Fin. Ltd.*** (1965), 55 D.L.R. (2d) 710, the B.C. Court of Appeal said at p. 713:

> ... a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable ...

63 McIntyre J.A. (as he then was) restated the rule in the following terms in ***Harry v. Kreutziger*** (1978), 9 B.C.L.R. 166 at 173, (C.A.):

> Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

64 Lambert J.A., added in the same case

> 26 In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison* case and the *Bundy* case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.

> 27 The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more relevant than those from other lands, where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were in some respects rougher and in other respects more fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law.

65 The plaintiff relies on the approach adopted by Lamer J.A., and in particular, the statement that commercial morality is to be defined with reference to legislation, which embodies those standards. The plaintiff says that the ***Criminal Code*** functions to set the outer limits of societal conduct, and that conduct worthy of penal sanction is also conduct so harsh or adverse as to be inequitable.

66 I am in agreement with the plaintiff. I conclude that in the circumstances of this case (small short-term loans to consumers, using standard form contracts) when the defendant's contracts contravene s. 347, they are unconscionable, inequitable, and therefore, in contravention of the ***BPCPA*** and ***TPA.***

Is A OK liable for damages to those who have suffered any loss or damage because of the unconscionable act or practice?

67 The ***TPA*** provides for damages in s. 22(1):

> **22(1)** If a consumer has entered a consumer transaction involving a deceptive or unconscionable act or practice by a supplier, a court may, in an action in respect of the transaction, do one or more of the following:
>
> (a) award the consumer damages in the amount of any loss or damage suffered by the consumer because of the deceptive or unconscionable act or practice, including punitive or exemplary damages;
> (b) make any order, including rescission of the transaction or restitution of any money, property or other consideration given or provided by the consumer;
> (c) subject to section 4(4), impose other terms the court considers just.

69 The ***BPCPA*** provides

> **171. Damages recoverable**
>
> 171(1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> (a) supplier,
> (b)

reporting agency, as defined in section 106 *[definitions]*,
(c) collector, as defined in section 113 *[definitions]*,
(d) bailiff, collection agent or debt pooler, as defined in section 125 *[definitions]*, or
(e) a person required to hold a licence under Part 9 *[Licences]*

who engaged in or acquiesced in the contravention that caused the damage or loss.

172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

(a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
(b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

(2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.
(3) If the court grants relief under subsection (1), the court may order one or more of the following:

(a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
(b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
(c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

...

(7) In an action brought under subsection (1), or an appeal from it, the plaintiff is not required to provide security for costs.

70 The plaintiff says that if a breach of s. 8 of the ***BPCPA*** (and s. 4 of the ***TPA***) is made out, damages are recoverable.

71 I am not able to determine on the evidence and argument before me whether members of the class are entitled to damages, rather than, or in addition to, restitution, or one of the other remedies provided by the ***TPA*** and ***BPCPA***.

CONCLUSION

72 The common issues in the class proceeding are determined as follows:

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

Answer: Yes.

(b) If the answer to (a) is yes, then do the Late Fees charged by A OK also constitute interest as defined by and for the purpose of s. 347 of the ***Criminal Code***, either in whole or in part?

Answer: Yes.

(c) If the answer to (a) is yes, do the standard form agreements pursuant to which the Processing 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***?

Answer: Yes.

(d) If the answer to (a) or (b) is yes, then has the collection by A OK of those fees from Class members in relation to their Class Loans resulted in the payment by Class members to, and the receipt by A OK of, interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***?

Answer: Yes.

(e) If the answer to (d) is yes, then has A OK been unjustly enriched by the collection of those Fees?

Answer: Yes.

(g) If the answer to (c) or (d) is yes, then does the provision by A OK of the Class Loans to Class members on terms that offend s. 347 of the ***Criminal Code***, or the receipt by A OK of interest at a criminal rate in

respect of those Class Loans, constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practice Act,*** R.S.B.C. 1996, c. 457, and s. 8 of the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2, irrespective of whether the factors set out in s. 3(a) through (d) of those sections are present?

Answer: Yes.

73 With respect to questions (f) and (h), I will require further submissions from the parties (and possible additional evidence) as to the necessity and appropriateness of the relief sought in the circumstances of this case for the members of the class. The parties will be at liberty to make further submissions and file such additional evidence as they may feel appropriate on these issues.

BROWN J.

* * * * *

CORRIGENDUM

Released: August 16, 2006.

On page 15, paragraph 34, second paragraph should read:

"The Privy Council concluded:"

* * * * *

SCHEDULE A

Trade Practice Act, R.S.B.C. 1996, c. 457, s. 4

4. Unconscionable acts or practices

4(1) An unconscionable act or practice by a supplier in relation to a consumer transaction may occur before, during or after the consumer transaction.

4(2) In determining whether an act or practice is unconscionable, a court must consider all the surrounding circumstances that the supplier knew or ought to have known.

4(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(a) that the consumer was subjected to undue pressure to enter into the consumer transaction;
(b) that the consumer was taken advantage of by the consumer's inability or incapacity to reasonably protect his or her own interest because of

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 it;

(c) that, at the time the consumer transaction was entered, the price grossly exceeded the 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, there was no reasonable probability of full payment of the price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer transaction was entered by the consumer are so harsh or adverse to the consumer as to be inequitable;

(f) the other circumstances prescribed by the regulations.

4(4) If there is an unconscionable act or practice in respect of a consumer transaction, that consumer transaction is unenforceable by the supplier.

4(5) Nothing in this section limits, restricts or derogates from the court's power and jurisdiction.

TAB 13

Case Name:

Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.

Between
Gracia Tracy, plaintiff, and
Instaloans Financial Solutions Centres (B.C.) Ltd.,
Instaloans Financial Solution Centres (Kelowna) Ltd.,
Instaloans Financial Solutions Centres (Mgmt) Ltd.,
Instaloans Financial Solutions Centres (Vernon) Ltd.,
Tim Latimer and Marc Arcand, defendants
(Registry No. L051076)
And between
Gracia Tracy, plaintiff, and
Instaloans Financial Solutions Centres (B.C.) Ltd.,
Instaloans Financial Solution Centres (Vernon) Ltd.,
903759 Alberta Ltd., 856402 Alberta Ltd.,
864556 Alberta Ltd., Tim Latimer and Marc Arcand,
defendants
(Registry No. L051975)

[2006] B.C.J. No. 1639

2006 BCSC 1018

151 A.C.W.S. (3d) 365

Vancouver Registry Nos. L051076 and L051975

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: March 8 - 9 and 17, 2006.
Judgment: June 30, 2006.

(109 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common issues -- Common interests -- Members of class -- Representative plaintiff -- Court certified class proceedings in two actions regarding charging of criminal rate of interest on loans -- Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4.

Civil procedure -- Injunctions -- Preservation of property -- Mareva injunctions -- Plaintiff entitled to mareva injunction where she established that the defendant might act to dissipate its assets.

Commercial law -- Consumer protection -- Loan transactions -- Court certified class proceedings in two actions regarding charging of criminal rate of interest on loans -- Criminal Code, R.S.C. 1985, c. C-46, s. 347.

Application by Tracy for certification of two actions as class proceedings and to be appointed as representative plaintiff in each of the proceedings -- Tracy also moved for prejudgment relief, including a Mareva injunction restraining the defendants from dissipating or disposing of assets -- The defendants, Instaloans and others, applied for stay of the class proceedings respecting class members whose claims were subject to arbitration -- The proceedings related to two types of loans, Payday and Title Loans, obtained by Tracy -- Tracy claimed that with respect to both loans, Instaloans charged an illegal amount of interest contrary to the Criminal Code -- There was evidence Instaloans had provided Payday Loans to more than 32,000 different borrowers who would qualify as members of the Payday Loan class, and that it had provided Title Loans to 589 different borrowers, 90 per cent of whom repaid their Title Loans without default and would qualify as Title Loan class members -- The other 10 per cent of Title Loan borrowers had their vehicles seized by Instaloans -- HELD: Application and motion by Tray allowed; defendants' application dismissed -- It was not plain and obvious that the actions would not succeed and the pleadings disclosed a cause of action -- Further, the proceedings raised common issues, which related to whether Instaloans charged a criminal rate of interest -- The 10 per cent of Title Loan claimants could be part of the class in the second action pursuant to s. 7(1)(e) of the Class Proceedings Act -- A class proceeding was the preferable route procedure for the fair and efficient resolution of the common issues -- Finally, Tracy was an appropriate representative for both proceedings -- Tracy was also entitled to prejudgment relief as sought -- She had a good and arguable case, she had established that there was a risk of dissipation of assets by the defendants and the balance of convenience favoured granting the relief sought -- The defendants were not entitled to a stay, as the certification of class proceedings rendered the arbitration clauses in the PayDay Loan agreements inoperative.

Statutes, Regulations and Rules Cited:

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

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4, s. 4(1)(a), s. 4(1)(c), s. 4(1)(e), s. 4(1)(e)(ii), s. 4(2), s. 7(1)(e), s. 38.1

Commercial Arbitration Act, R.S.B.C. 1996, c. 55., s. 15

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

Trade Practices Act, R.S.B.C. 1996, c. 457, s. 4, s. 8, s. 22(1)

Counsel:

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

Counsel for the defendants: G. McLennan, S. Chambers

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1 **BROWN J.**:-- The plaintiff applies to certify these proceedings as class proceedings pursuant to s. 4 of the ***Class Proceedings Act,*** R.S.B.C. 1996, c. 50 and to be appointed as representative plaintiff in each of the class proceedings. These applications were argued together and raised many common issues and, as such, I will deal with them together in this judgment. In the first action, L051076, which I will refer to as the "Payday Loan Action", the proposed class is all residents of British Columbia who have borrowed money as a "Payday Loan" from an Instaloans location and:

(a) have repaid the loan and the standard "finance charge" to Instaloans on the due date of the loan;
(b) have repaid those amounts within 173 days of the loan advance or the last extension ("rollover") of the loan; or
(c) have rolled over the loan at least 5 times.

(Collectively the "Class Loans"), as of the date notice is given of this class proceeding.

2 In the second action, L051975, which I will refer to as the "Title Loan Action", the proposed class is all residents of British Columbia who have borrowed money as a "Title Loan" from an Instaloans location and:

(a) have repaid the loan and the standard "fee" to the Instaloans defendants on the due date of the loan;
(b) have repaid those amounts within 173 days of the loan advance or the last extension ("rollover") of the loan;
(c) have rolled over the loan at least 5 times; or
(d) had the vehicle pledged to obtain the loan seized by the Instaloans defendants.

(Collectively the "Class Loans"), as of the date notice is given of this class proceeding.

3 The plaintiff alleges that the fees charged to her and to other members of the proposed classes contravene s. 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46. That section makes it illegal to agree to receive or to receive a rate of interest, which exceeds 60% per annum.

4 The plaintiff seeks the following relief in the Payday Loan Action:

(a) a declaration that the Finance Charges charged by the Instaloans Defendants in relation to the Class Loans are interest within the meaning and for the purpose of s. 347 of the ***Criminal Code***;
(b) a declaration that the standard form loan agreements used by the Instaloans Defendants to advance the Class Loans to the Class members are unlawful;
(c)

a declaration that all Unlawful Finance Charges received by the Defendants in relation to the Class Loans are held in constructive trust for the benefit of the Plaintiff and Class members;

(d) an accounting and restitution to the Plaintiff and Class members of all Unlawful Finance Charges received by the Defendants in relation to the Class Loans;

(e) damages for unconscionable trade acts and practices pursuant to s. 22 (1) of the ***Trade Practices Act***, R.S.B.C. 1996, c. 457 (the "***Trade Practice Act***") and ss. 105 and 171 of the ***Business Practices and Consumer Protection Act,*** S.B.C. 2004, c. 2 (the "***BPCPA***");

(f) damages for conspiracy;

(g) punitive damages; and

(h) interest.

5 In the Title Loan Action, the plaintiff seeks similar relief:

(a) a declaration that the Fees charged by the Instaloans defendants in relation to the Class Loans are interest within the meaning of and for the purpose of s. 347 of the ***Criminal Code***;

(b) a declaration that the standard form loan agreements used by the Instaloans Defendants to advance the Class Loans are unlawful as contrary to s. 347(1) of the ***Criminal Code***;

(c) a declaration that all unlawful Fees received by the Defendants in relation to the Class Loans are held in constructive trust for the benefit of the plaintiff and Class members;

(d) a declaration that the Surpluses retained by the Instaloans Defendants from the plaintiff and Seized Vehicle Subclass members are held in a constructive trust for the benefit of the plaintiff and Seized Vehicle Subclass members;

(e) an accounting and restitution to the plaintiff and Class members of all Unlawful Fees received by the Defendants in relation to the Class Loans;

(f) an accounting and restitution to the plaintiff and Seized Vehicle Subclass members of the Surplus unlawfully retained by the Instaloans defendants;

(g) damages for unconscionable trade acts and practices pursuant to s. 22 (1) of the ***Trade Practice Act*** and ss. 105 and 171 of the ***BPCPA;***

(h) damages for conspiracy;

(i) punitive damages; and

(j) interest.

I note at the outset that I granted a very similar application for certification in ***Bodnar et al. v. The Cash Store et al.***, [2005] B.C.J. No. 1904, 2005 BCSC 1228 aff'd [2006] B.C.J. No. 1171, 2006 BCCA 260. In that action, plaintiffs who had borrowed payday and title loans from Cash Store locations alleged that the broker fees and interest charged exceeded the criminal rate of interest and contravened trade practices legislation. Many of the issues addressed in that application arose in this proceeding, and as such, the reasons of this Court and the Court of Appeal on that application inform much of these Reasons.

Background

6 These actions focus on Payday Loans and Title Loans provided through Instaloans outlets. The plaintiff asserts that the fees charged for these loans constitute interest within s. 347(2) of the ***Criminal Code***, exceed the criminal rate of interest, and breach the ***Trade Practice Act*** and ***BPCPA***. The plaintiff seeks recovery of these fees, as well as damages.

Instaloans' Payday Loans

7 From December 1998 to April 21, 2005 Instaloans provided short-term Payday Loans at Instaloans' locations throughout British Columbia. The loans were for amounts of up to $500, and for terms of up to 30 days. The term of the Payday Loan was based on a borrower's next scheduled pay from an employer, pension, unemployment insurance or disability benefit. Instaloans' standard form loan agreements required the borrower to pay charges calculated at 25% of the principal amount of the Payday Loan (the "Finance Charge"). As security, the borrower was required to provide Instaloans with a signed cheque for the amount of the Payday Loan and Finance Charge. Instaloans held that cheque and would use the cheque to obtain repayment of the loan, provided the borrower neither attended to repay the loan and Finance Charge by other means, nor opted to roll over the Payday Loan by paying the Finance Charge then due and executing a new standard loan agreement, thereby extending repayment of the principal (and a second Finance Charge) to a future date.

8 From time to time Instaloans advanced Payday Loans on a "$50 for $50" program. Under this promotion, the borrower could avoid paying the Finance Charge if the Payday Loan was repaid on the due date in cash rather than by the cheque provided at the time the loan was obtained.

Title Loans

9 From July 14, 2000 to April 21, 2005 Instaloans provided a second type of short-term loan, known as a "Title Loan", which was secured by an automobile or other motor vehicle. These arrangements were not structured as a typical loan. Rather, the borrower was required to complete a buying form and lease agreement (by which Instaloans leased the motor vehicle back to the borrower with an option to purchase) and provide a promissory note. Instaloans would register a security interest in the motor vehicle at the Personal Property Registry. The amount of the loan was a fraction of the value of the borrower's vehicle to a maximum of $10,000. Its term was for up to 30 days.

10 Under the Title Loan standard form agreement, the borrower was required to repay the principal amount of the Title Loan plus an amount equal to 25% of the principal advanced (the "Fee") on or before the loan's due date. By paying the principal and Fee, the borrower "repurchased" his or her vehicle. As with the Payday Loan, the borrower could extend the loan for an additional period of up to 30 days by paying the Fee on the original due date, and rolling over the principal. Where this occurred, the borrower "repurchased" the vehicle at the extended due date upon paying the principal and second Fee. In some circumstances, the borrower was charged an amount equal to only 10% of the Title Loan plus Fee outstanding to extend the loan. Although the defendants do not state the circumstances in which this reduced fee was charged, it appears, based on the evidence of past loan agreements, that it was charged where the loan exceeded $1,000.

11 If the borrower failed to repay the Title Loan in full on or before the due date, Instaloans obtained repayment of the Title Loan and Fee by taking possession of the vehicle. The plaintiff alleges that Instaloans did not account to the borrower for the value in excess of the amount owed that was received from the sale, retention, or transfer of ownership of the vehicle.

The Plaintiff's Evidence

12 The plaintiff has provided evidence of her dealings with Instaloans, with respect to both a Payday Loan and Title Loan. In particular, the plaintiff provided evidence that on April 15, 2003 she borrowed $50 from Instaloans for a term expiring April 28, 2003. She provided a post-dated cheque to April 28, 2003 for $62.50, which was accepted by Instaloans as repayment on that date. The plaintiff also provided evidence of Payday Loans obtained by David Wournell. Starting in approximately 2003, he obtained more than 30 Payday Loans from Instaloans for an average amount of $200. On many occasions, he paid a Finance Charge equal to 25% of the principal amount he borrowed or rolled over.

13 With respect to her Title Loan, the plaintiff provided evidence that on May 21, 2003 she provided Instaloans with title to her 1994 Chrysler Le Baron. Instaloans determined that the wholesale value of her vehicle was $2,300 and the retail value, $5,855. It advanced her $1,000, to be repaid with a $250 Fee on June 21, 2003. The loan contract provided for the extension of the Title Loan for a period of up to 30 days upon payment of an additional $250 Fee. The plaintiff made three payments to Instaloans of $500, $250 and $500 on August 29, 2003, October 31, 2003 and December 19, 2003 respectively. Her vehicle was seized on approximately April 19, 2004.

14 The plaintiff has also provided actuarial opinion evidence from Mr. Ian Karp, F.S.A., F.C.I.A. That evidence addresses the effective annual rate of interest charged under the Class Loans. Mr. Karp shows that if $100 is advanced and $125 is repaid 14 days later, the effective annual interest rate is 33,519%. He also calculates that where a Finance Charge is 25% of the principal advanced, the effective annual rate of interest will exceed 60% of the principal amount of the loan when it is repaid (with Finance Charge) within 173 days of the loan advance. He also opines that if a 25% fee is charged and the loan is rolled over five times or more at intervals of 30 days or less, the effective annual interest rate will exceed 60% per annum.

15 Instaloans has provided Payday Loans to more than 32,000 different borrowers who would qualify as members of the Payday Loan class. Instaloans has provided Title Loans to approximately 589 different borrowers, 90% of whom repaid their Title Loans without default and would qualify as Title Loan class members. Of the remaining 10%, approximately 60 borrowers may be class members if they repaid a Title Loan within 173 days of the loan advance, rolled their Title Loan over 5 or more times, or had the vehicle they pledged to obtain the Title Loan seized by Instaloans.

The Requirements for Certification

16 Section 4(1) of the ***Class Proceedings Act***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.

17 I will review these requirements in turn.

Do the Pleadings Disclose a Cause of Action?

18 It is well established that in determining if the pleadings disclose a cause of action, the threshold the plaintiff must meet is a low one. As stated in ***Brogaard v. Canada (Attorney General)*** (2002), 7 B.C.L.R. (4th) 358, 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. The threshold is a very low one.

19 The plaintiff submits that this threshold is met. She says that, with the exception of the liability of the directors, the claims made in this action are identical to those recognized in ***Bodnar***. With respect to the claims against directors, she notes that a similar claim was found to disclose a cause of action in ***Tschritter v. Rent Cash*** (2004), 2 B.L.R. (4th) 309, 2004 ABQB 590.

20 The defendants argue that the threshold is not met. First, they submit that the pleadings in the Payday Loan Action do not disclose a cause of action against the defendant, Instaloans Financial Solutions Centres (Management) Ltd., as it at no time issued or offered Payday Loans (or for that matter Title Loans) to any customers in British Columbia. Likewise, they say, the pleadings do not disclose a cause of action against the defendants 856402 Alberta Ltd. and 864556 Alberta Ltd. in the Title Loan Action because neither company made Title Loans in this province. Second, the defendants argue, many members of the proposed class will not have a cause of action against the defendants because their claims are statute barred, their claims have been compromised or settled with Instaloans, they failed to repay some or all of the principal or fees owing to Instaloans, or they are subject to a mandatory arbitration clause.

21 As ***Brogaard*** indicates, it must be plain and obvious that the plaintiff cannot succeed for the court to refuse to certify a class action under s. 4(1)(a) of the ***Class Proceedings Act***. In making this determination, the court is not to assess the evidence. In my opinion, the issues raised by the defendants go to the sufficiency of the evidence underlying these claims and to defences that may be available against subsets of the proposed classes. These arguments do not make it plain and obvious that the plaintiff cannot succeed.

22 I am satisfied that the pleadings do disclose a cause of action.

Is there an Identifiable Class of Two or more Persons?

23 The plaintiff proposes the following classes, which she notes are identical in material respects to the class definition approved in ***Bodnar***:

> Payday Loan Action:
>
> All residents of British Columbia who have borrowed money as a "Payday Loan" from an Instaloans location and:
>
> (a) have repaid the loan and the standard "Finance Charge" to Instaloans on the due date of the loan;
> (b) have repaid those amounts within 173 days of the loan advance or the last extension ("roll over") of the loan; or
> (c) have rolled over the loan at least five times.
>
> Title Loan Action:
>
> All residents of British Columbia who have borrowed money as a "Title Loan" from an Instaloans location and:
>
> (a) have repaid the loan and the standard "Fee" to the Instaloans defendants on the due date of the loan;
> (b) have repaid those amounts within 173 days of the loan advance or the last extension ("roll over") of the loan;
> (c) have rolled over the loan at least five times; or
> (d) had the vehicle pledged to obtain the loan seized by the Instaloans defendants.

24 The defendants submit that these definitions are overly broad and unworkable because they do not account for the number of defences that may apply to a class member's claim. They also submit that under each definition it is possible that an individual who borrowed and repaid monies once but subsequently took out a loan which was not repaid will come within the class definition when he or she has no cause of action.

25 The purpose of a class definition is threefold: (1) to identify those people who have a potential claim for relief against the defendant(s); (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: ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172 at 175 (Ont. Ct. Gen. Div.); see also ***Western Canadian Shipping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46 at [paragraph] 38. The proposed class is adequately defined to meet these objectives. It is sufficient to objectively identify those people who have a *potential* claim against the defendants. It defines the parameters of the lawsuit so as to identify those who will be bound by its result and describes those who are entitled to notice. In making this finding, I note that in ***Bruley v. Instaloans et al*** (Ont. Action No. 05-CV-294691 CP) - the national counterpart to this action which has been certified by consent for settlement - the Court certified an almost identical class:

> "All persons in Canada save and except those residents of British Columbia, other than the defendants, who borrowed money from one of the corporate defendants as a "Payday Loan" ... between January 1st 1998 and April 21, 2005 ... and who:

(a) repaid the loan and the standard finance charge to one or more of the corporate defendants on the due date of the loan;
(b) repaid those amounts within 173 days of the loan advance or the last extension (rollover) of the loan or
(c) rolled over the loan at least five times.

26 That the defendants may have a defence, counter-claim or set-off against an individual who falls within the class definition does not mean that the class is overly broad. These defences may be treated as a common issue, or dealt with at the individual issues stage. A set-off can be dealt with when determining entitlement.

Do the Claims raise Common Issues?

27 Under s. 4(1)(c) of the ***Class Proceedings Act*** the court must determine if the claims of the class members raise common issues. The common issues which the plaintiff proposes for the Payday Loan Action are:

(a) Do the Finance Charges charged by the Instaloans defendants 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 Finance Charges 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 the Instaloans Defendants of those Finance Charges in accordance with the terms of the standard form agreement on which the Payday Loans have been advanced by Instaloans 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 the Instaloans defendants of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code?***
(d) If the answer to (c) is yes, have the Instaloans defendants been unjustly enriched by the collection of those Finance Charges from the Class Members?
(e) If the Instaloans defendants have 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 the Instaloans defendants to the Class Members at the direction and for the benefit of Arcand and Latimer?
    (ii) were the Finance Charges received by the Instaloans defendants paid in whole or in part to Arcand and Latimer? And
    (iii) did Arcand and Latimer direct the transfer, use, or otherwise have the benefit of the Finance Charges

collected by the Instaloans defendants from the Class Members?

(f) If the answer to any one of (e)(i) to (iii) is yes, then have Arcand and Latimer 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 the Instaloans defendants of the Class Loans to Class members on terms that offend s. 347(1) of the ***Criminal Code***, or and the receipt by the Instaloans Defendants 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 Practice 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?

(i) If the answer to any one of (e)(i) to (iii) is yes, then does such conduct of Arcand and Latimer constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practice 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 Practice 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 did the Instaloans defendants, Arcand, and Latimer (or any combination thereof) conspire to implement a scheme to provide those Loans to the Class Members in order to earn profits on the Class Loans at an unlawful rate of interest?

(l) If any or all of the Defendants conspired to provide the Class Loans to the Class Members at an unlawful rate of interest, then are those defendants jointly and severally liable for damages to those Class Members who have suffered loss or damage as a result of that illegal conspiracy?

(m) If the answer to (b) or (c) is yes, then are Latimer and Arcand jointly and severally liable for the acts of the Instaloans Defendants, or any of them, 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 the criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code.***

(n) If the answer to (b) or (c) is yes, and if Arcand or Latimer has participated in and been unjustly enriched by or conspired with the Instaloans Defendants in respect of the Class Loans, then does the conduct of the defendants justify an award of punitive or exemplary damages?

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

28 The common issues for the Title Loan Action are essentially the same:

(a) Do the Fees charged by the Instaloans defendants 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 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 the Instaloans Defendants of those Fees in accordance with the terms of the standard form agreement on which the Title Loans have been advanced by Instaloans 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 the Instaloans defendants of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***?

(d) If the answer to (c) is yes, have the Instaloans defendants been unjustly enriched by the collection of those Fees from the Class Members?

(e) If the Instaloans Defendants have 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 the Instaloans Defendants to the Class Members at the direction and for the benefit of Arcand and Latimer?

  (ii) were the Fees received by the Instaloans defendants paid in whole or in part to Arcand and Latimer? And

  (iii) did Arcand and Latimer direct the transfer, use, or otherwise have the benefit of the Fees, collected by the Instaloans defendants from the Class Members?

(f) If the answer to any one of (e)(i) to (iii) is yes, then have Arcand and Latimer 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) Have the defendants or any of them been unjustly enriched by the value received from the sale, retention, or transfer of ownership of the vehicles of the Class members who have lost possession of their vehicle to the Instaloans defendants (the "Seized Vehicle Subclass") in excess of any amounts lawfully owed (the "Surplus")?

(i) If the answer to (h) is yes:

(i) Do those defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Seized Vehicle Subclass members who provided that benefit to those defendants? and

(ii) Are those defendants liable to account to those Seized Vehicle Subclass members for the benefit received from them and all profits earned therefrom?

(j) If the answer to (b) or (c) is yes, does the provision by the Instaloans defendants of the Class Loans to Class members on terms that offend s. 347(1) of the ***Criminal Code***, or and the receipt by the Instaloans defendants 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 Practice 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?

(k) If the answer to any one of (e)(i) to (iii) is yes, then does such conduct of Arcand and Latimer constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practice 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?

(l) If the answer to (j) or (k) 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 Practice Act*** s. 22(1) and the ***Business Practices and Consumer Protection Act*** ss. 105 and 171?

(m) If the answer to (b) or (c) is yes, then did the Instaloans defendants, Arcand, and Latimer (or any combination thereof) conspire to implement a scheme to provide those Loans to the Class Members in order to earn profits on the Class Loans at an unlawful rate of interest?

(n) If any or all of the defendants conspired to provide the Class Loans to the Class Members at an unlawful rate of interest, then are those defendants jointly and severally liable for damages to those Class

Members who have suffered loss or damage as a result of that illegal conspiracy?

(o) If the answer to (b) or (c) is yes, then are Latimer and Arcand jointly and severally liable for the acts of the Instaloans defendants, or any of them, 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***.

(p) If the answer to (b) or (c) is yes, and if Arcand or Latimer has participated in and been unjustly enriched by or conspired with the Instaloans defendants in respect of the Class Loans, then does the conduct of the defendants justify an award of punitive or exemplary damages?

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

29 The defendants submit that the plaintiff's claim does not raise common issues. They argue that the first three of the plaintiff's proposed common questions in both the PayDay Loan Action and Title Loan Action cannot be answered globally, as there is insufficient commonality in the way that Instaloans contracted with its customers. They further submit that proposed common issues (h) and (i) of the Title Loan Action are not, in fact, "common" because they relate to only a small portion of the proposed class: the approximately 24 individuals who actually had their vehicle seized. The defendants also argue, with respect to the majority of the above issues, that these questions cannot be answered without considering the individual circumstances of each plaintiff. I address these arguments in turn.

(1) No Commonality

30 The defendants say that the terms of Instaloans' PayDay Loans varied so widely over the class period as to make it impossible for the questions proposed by the plaintiff to be answered for all class members. They say the loan agreements evolved over the proposed class period and were commonly varied or amended orally.

31 The plaintiff says, in reply, that there has been no material change to Instaloans standard form of contract during the class period. She points to the defendants' concession that the form of contract used for Payday Loans was essentially the same from December 7, 1998 to February 14, 2003. Thereafter, she notes, Instaloans:

(a) changed the name of the document from "Terms, Conditions, and Client Rights Contract" to "Statement of Disclosure";

(b) clarified that the $25 in finance charges per $100 borrowed included a $13 documentation fee, an $11.50 administration fee and $.50 in interest;

(c) removed a 5% per month penalty charged on overdue accounts;

(d) included a clause enabling the customer to enrol in a loan balance insurance program; and

(e) included a mandatory arbitration clause.

32 The plaintiff says these changes are merely cosmetic and that in material respects, the PayDay Loan contract remained the same. She notes that the 5% penalty on overdue accounts and the

insurance program clause are not in issue in this litigation, and that the arbitration clause is only relevant to the question of whether a class proceeding is a preferable procedure.

33 To be considered common, issues need not be dispositive of the litigation. As noted in ***McDougall v. Collinson***, [2000] B.C.J. No. 571, 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

Will the resolution of the common issues proposed by the plaintiff advance the litigation forward?

34 I agree with the plaintiff that the changes to the standard loan agreement are of limited significance. At issue in this action is whether Instaloans' various charges constitute interest within the meaning of s. 347 of the ***Criminal Code***. That the earlier form, "Terms, Conditions and Rights Contract", describes all charges as "finance charges", while the later form, "Statement of Disclosure" describes those charges as "total finance charges" comprising of $13 for "documentation", $11.50 for "administration" and $5.00 for "interest" does not prevent that issue from being addressed. The broad scope of the definition of "interest" in s. 347(2) makes it clear that the nomenclature given to charges is of limited significance in determining if s. 347(1) has been contravened.

35 Nor, in my opinion, does Instaloans' practice of varying the standard form contract orally prevent these issues from being answered globally. The defendants identify only one such variation at the date of contract: the $50 for $50 promotion. The other variations identified are concessions made after default. The plaintiff correctly argues that subsequent variations are not relevant in determining if an agreement for credit violates s. 347(1)(a). Section 347 considers credit charges as determined at the time the transaction is entered into: ***Garland v. Consumer's Gas***, [1998] 3 S.C.R. 112, 165 D.L.R. (4th) 385 ["***Garland #1***"]; ***Degelder Construction v. Dancorp Developments***, [1998] 3 S.C.R. 90, 165 D.L.R. (4th) 417.

36 The variation made at the time of contract, the $50 for $50 loan, was a promotional offer made by Instaloans under which a borrower could borrow $50 and repay the loan without fees or interest, provided the borrower repaid the loan in cash on his or her next pay day. When making the loan, Instaloans required a cheque from the borrower for $62.50, which it would deposit if the borrower did not attend to repay with cash.

37 That some Payday Loans were made on these terms does not detract from the commonality of the proposed issues. It is clear on reviewing the plaintiff's proposed class definition that individuals who borrowed on these terms and repaid in cash will not fall within the proposed class definition because they will not have paid the "standard finance charge'". Where individuals have paid the Finance Charge, the proposed issues remain relevant. It may be that individuals who paid fees in these circumstances may be found to have done so voluntarily, such that Instaloans can raise a voluntariness defence. However, that defence does not detract from the common issues; indeed, it may itself be a common issue. As I noted in ***Bodnar***:

> 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. ([paragraph] 36)

38 Similarly, here, whether failing to return to pay in cash makes payment voluntary can be considered on a class-wide basis. If it cannot, then the defendants may raise it as a defence to be considered at the individual issues stage.

39 With respect to the proposed Title Loan issues, the defendants argue that the proposed common issues are not shared by all class members, as only some of the class members have had their vehicles seized. They say that an issue that applies to such a minute proportion of the class can hardly be said to be a "common issue".

40 Section 7(e) of the ***Class Proceedings Act***, however, contemplates that an issue can be shared by a subset of the proposed class. That section provides:

> 7. Certain matters not bar to certification
>
> The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> ....
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

41 Thus a common issue does not need to be shared by every member of the proposed class. Whether the defendants have been unjustly enriched by seizing motor vehicles is a question that advances this litigation forward, and therefore meets the test in ***McDougall.***

42 The defendants also submit that the common issues respecting Title Loans cannot be answered because these loans varied, depending on the value of a borrower's vehicle. This, however, does not mean that the loans were provided on materially different terms, it simply shows that the amount of the loan varied between customers.

(2) Individual Inquiries

43 The defendants also allege that any attempt to answer these questions on a class wide basis will ultimately fail because the court will be required to consider the individual circumstances of each claimant.

44 First, the defendants argue that the court will be required to determine in each case whether the principal was repaid and the length of time over which it was repaid to determine if the total interest paid exceeds 60%. Such an inquiry, however, will not be required. The plaintiff's class definition is limited so that, if the plaintiff's theory is correct, interest will necessarily exceed 60%.

45 Second, the defendants submit that the court will be required to consider individual circumstances to determine whether or not a claim falls outside of the applicable six year limitation period. The plaintiff, in reply, submits that this argument overlooks s. 38.1 of the ***Class Proceedings Act***, which suspends the limitation period applicable to a cause of action from the time a proceeding starts to the time an application for certification is denied and either the time for appealing that denial expires or an appeal of the denial is disposed of. They say that because a previous action against Instaloans (***MacKinnon v. Money Mart et al.***, [2005] B.C.J. No. 399, 2005 BCSC 271) was commenced in January 2003 and not abandoned until after this action commenced, the applicable limitation period was suspended. Moreover they submit, the existence of a limitation defence in these circumstances is an issue of law that can be determined as part of the common issues trial.

46 I am not satisfied that the applicable limitation period is necessarily six years. In any event, I agree with the plaintiff, particularly in light of the potential applicability of s. 38.1 of the ***Class Proceedings Act***, that the existence of a limitation defence is an issue that goes to the merits of the action, to be considered at trial.

47 Third, the defendants claim that individual circumstances will have to be assessed to determine if a claimant is subject to a mandatory arbitration clause. The existence of a mandatory arbitration clause is of no effect in this action because, for reasons that follow, I find these clauses to be inoperative.

48 Fourth, the defendants argue that because the plaintiff seeks equitable relief, the court will be required to consider the specific circumstances surrounding each plaintiff's dealings with Instaloans, such as whether an individual knew that the interest rate exceeded 60%; whether an individual comes to court with "clean hands"; and what expectations an individual held. With respect to the constructive trust sought by the plaintiff, the defendants argue that the court will be required to determine if the factors set out in ***Soulos v. Korkontzilas***, [1997] 2 S.C.R. 217, 9 R.P.R. (3d) 1, have been met. Those factors are (1) was the defendant under an equitable obligation? (2) Have the assets resulted from deemed agency activities? (3) Does the plaintiff have a legitimate reason for seeking a proprietary remedy? (4) Are there factors which would render the imposition of a constructive trust unjust in all of the circumstances?

49 On these issues, the plaintiff relies on ***Garland v. Consumers Gas Co.***, [2004] 1 S.C.R. 629, 2004 SCC 25 ["***Garland #2***"]. In that case, the Court held that "[w]here the defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert it would be unjust to return the enrichment to the Plaintiff" ([paragraph] 65). The plaintiff says, in light of the foregoing, that as a question of law one who receives payment of interest at a criminal rate has necessarily been unjustly enriched, and cannot argue that relief be denied based on the conduct of the plaintiff. She also relies on ***Kiriri Cotton Co. Ltd. v. Dewani***, [1960] A.C. 192 (P.C.) for the proposition that knowledge on the part of the plaintiff that the loan breaches s. 347, as a matter of law, is not relevant in this enquiry. If it is, she says, that can be determined at the common issues trial.

50 As in ***Bodnar,*** I accept the plaintiff's arguments on the restitution issues. A similar issue was before the Court of Appeal in ***Elms v. Laurentian Bank of Canada*** (2001), 90 B.C.L.R. (3d) 195, 2001 BCCA 429. In that case, the plaintiff investors sought to certify a class action against a number of defendants involved in a mortgage scheme. The defendants argued that issues characterized as common by the Chambers judge, including whether a fiduciary duty existed, could only be answered through an individualized analysis. The Court said at [paragraph] 44:

> The investors' characterization of their claim suggests that the issues of whether there is a duty of care, the scope of that duty, and whether there is a fiduciary duty are issues that are capable of extrapolation to each member of the class or subclass. The investors' argument is that Oliver had a duty, in the absence of reliance, based on the relationship Oliver had with all investors. Because the investors claim that any individual differences do not affect the nature of Oliver's duty to each of them, the resolution of this issue would be applicable to all members of the class. Similarly, the investors argued that the Bank had the same duty to each of them regardless of a particular investor's individual circumstances. They note that the documents by which each of them opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly.

51 In ***Bodnar***, I found that situation to be analogous to the one before me. On the plaintiff's theory no individual inquiry is required: under ***Garland #2*** and ***Kiriri Cotton Co. Ltd.*** the conduct of the plaintiff is immaterial and any potential knowledge irrelevant, in determining if Instaloans can deny recovery. In response to a very similar argument in ***Bodnar*** I said "[t]he plaintiffs may fail on this issue, but I am not satisfied at this point that the issue necessarily cannot be decided without an individual inquiry" ([paragraph] 40). That comment is apposite here.

52 Fifth, the defendants say that individual circumstances will have to be considered to determine if Instaloans has a set-off or counter-claim against a plaintiff. In my opinion, that the defendants may have a set-off or counterclaim does not detract from the commonality of the issues. As noted above, this can be addressed at the individual issues stage.

53 Sixth, the defendants argue that the court will not be able to determine if s. 4 of the ***Trade Practices Act*** and s. 8 of the ***BPCPA*** apply, given that each section requires the court to consider individual circumstances in determining if unconscionable acts or practices have taken place. A similar argument was made in ***Bodnar***. I held at [paragraph] 43-45:

> The plaintiffs do not propose to prove breach of the trade practices legislation and unconscionability by reference to individual circumstances. The plaintiffs have been careful to limit these issues, so that they are determined without reference to subsections (3)(a) to (d), which require individual considerations. In other words, the plaintiffs' theory is that, regardless of individual circumstances, charging/receiving fees in breach of s. 347 is necessarily unconscionable.
>
> In ***Knight v. Imperial Tobacco Company Ltd.***, [2005] B.C.J. No. 216 (S.C.), 2005 BCSC 172, this court certified a claim against the defendant, where the plaintiff alleged that the marketing of light and mild cigarettes constituted a deceptive trade practice. The plaintiff asserted that it could satisfy the required element of reliance without reference to individual circumstances. The court said at [paragraph] 36:

> I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the ***TPA***, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

> Here, too, the plaintiffs will not rely on individual circumstances to establish an unconscionable practice. They may not succeed in this approach, but I am not satisfied that the issues should not be certified.

54 The approach taken by counsel for the plaintiff is the same in this case, and therefore, these comments apply.

55 Finally, the defendants argue that individual circumstances will have to be considered to determine whether punitive damages or exemplary damages are appropriate. They say that the court will be required to determine in each case whether a borrower knew the interest rate exceeded 60%, whether he or she defaulted, and whether the defendants' conduct towards each borrower can be said to be uniform. In reply, the plaintiff relies on ***Reid v. Ford Motor Company***, [2003] B.C.J. No. 2489, 2003 BCSC 1632 and ***Fakhri v. Alfalfa's Canada Inc.*** (2004), 34 B.C.L.R. (4th) 201, 2004 BCCA 549, where the applicability of punitive damages was found to be a common issue.

56 I find that the question of whether punitive or exemplary damages apply in the present action is, on the plaintiff's theory, 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, it is clear that 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. Such a flexible approach is, as noted by the Court of Appeal in ***Fakhri*** at [paragraph] 26, contemplated by the ***Class Proceedings Act***. In this regard, the plaintiff's approach to damages is similar to her approach to the restitution and breach of trade issues previously discussed.

57 As the defendants acknowledge that the conspiracy and director liability issues are common issues, I need not address them.

Is a Class Proceeding the Preferable Procedure?

58 The next step is to determine whether a class proceeding is, in the words of the section, the preferable procedure for the fair and efficient resolution of the common issues. Here, the court must consider the factors listed in s. 4(2) of the ***Class Proceedings Act***:

> (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.

59 I consider these questions in turn.

(1) Do the Common Issues Predominate?

60 The plaintiff submits that if the common issues are resolved in favour of the plaintiff, it will be determinative of Instaloans' liability to class members. They say that the remaining individual issues are simple mathematical assessments required to determine entitlement, which are both contemplated by the ***Class Proceedings Act*** in s. 7(a) and a common part of the bifurcated nature of class action proceedings. The defendants argue that if a class action were to proceed, the determination of eligibility would be a complex function, requiring an assessment of, among other things, whether the loan has been repaid or can be set-off; whether the terms of the loan have been amended, varied or compromised; and whether the relief sought is foreclosed based on the plaintiff's conduct.

61 I am not convinced that the concerns raised by the defendants should be considered at the certification stage. As I note above, these questions either do not arise on the plaintiff's class definition, or amount to defences which can be treated as common issues or addressed at a later stage of the action. Once again, ***Bodnar*** is instructive. In that case, I held at [paragraph] 58 - 59:

> Determination of the common issues will significantly advance the litigation. As the plaintiffs argue, the claims of the class members do raise issues which are common to the class as a whole and which do not engage an assessment of evidence that is individual to each class member. In addition, it may be that some of the defences raised can be determined on a class-wide basis, for example, whether electing to obtain the loan funds by use of the cash card is a voluntary payment for the purposes of s. 347(1) of the ***Criminal Code***.
>
> Counterclaims may be advanced, but this does not preclude certification. As the court noted in ***Metera v. Financial Planning Group***, [2003] A.J. No. 468, 2003 ABQB 326 at para. 69:
>
> > It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ...

62 In my opinion, to accede to the defendants argument would be to overemphasize the presence of individual issues, which as ***Metera*** instructs, is to be avoided.

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

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

(3) Are the Claims Subject of Other Proceedings?

64 There are no other proceedings in British Columbia against Instaloans. A national class action against Instaloans relating to Payday Loans was settled on a national basis in the ***Bruley*** action, however that settlement excluded B.C.

(4) 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 experience if relief were sought by other means?

65 I have collapsed the last two factors into one, as in the context of this case and the submissions of the parties, they address the same consideration.

66 On this point, the plaintiff says that the small amount of an individual's claim, compared to the high cost of pursuing litigation individually, makes it unlikely that plaintiffs will pursue their own claims. As a result, they say, a class proceeding is practical and efficient and will not create difficulties. The defendants submit that Instaloans' willingness to pay arbitrations costs and reasonable legal expenses, combined with the fact that anticipated individual damage claims will be small, makes arbitration preferable.

67 In ***MacKinnon v. National Money Mart Co.*** (2004), 41 B.L.R. (3d) 198, 2004 BCSC 136, rev'd (2004), 203 B.C.A.C. 103, 2004 BCCA 473, where similar claims were pursued and the defendants argued that an arbitration procedure was preferable, I said at [paragraph] 22-25:

> The claims advanced in this case are exactly those contemplated by the ***Class Proceedings Act***. Individually, they are very small, and could not be litigated economically. Even if there were no legal fees involved, an expert's report would be required to establish a criminal rate of interest. This alone would make the litigation uneconomical. Given the potential recovery, it is unlikely that any individual claimant would litigate.
>
> Similarly, it is highly unlikely that any claimant would arbitrate. Arbitration would be as uneconomical as litigation. Even if a claimant were to represent him or herself, the cost of an expert's report would likely exceed any potential recovery. I am not satisfied that any offer by the defendants to pay the arbitration fees would increase the ability of claimants to arbitrate.
>
> A stay in these circumstances does not serve the policy objectives of the ***Commercial Arbitration Act*** or the ***Class Proceedings Act.*** It does not expedite resolution of the dispute or save costs that would be incurred in a

court action. Rather, it effectively bars resolution of the dispute by placing an insuperable hurdle before the claimants.

I concur with Cumming J. in ***Huras*** [2000] O.J. No. 1474, at paras. 43 - 46:

> Two of the normative purposes of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. As I have said, someone in the plaintiff's position is not as a practical reality going to seek arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator. Primerica submits that the arbitration clause is enforceable even if utilization of the clause might prove inconvenient or more costly to the plaintiff and similarly-situated persons.
>
> I disagree. The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent, any resolution of a dispute other than upon the terms dictated by Primerica ...
>
> The arbitration clause in the case at hand, if enforceable, would defeat the public policy inherent in the ***CPA***.

This, to my mind, is an absurd result: a case otherwise suited to class proceedings will be stayed; the stay will not fulfill the policy objectives of either act; the claimants will be denied access to effective justice.

68 The Court of Appeal held:

> I take no issue with the case management judge's analysis of the competing policy objectives of both statutes in the circumstances of this case. She had before her the evidence of Mr. MacKinnon and other individuals who have obtained payday loans from some of the defendants that they would not be able to pursue their claims if they had to proceed with individual actions. She considered the cost-saving objectives of both arbitration and class proceedings, and concluded that individual actions or arbitrations would likely create an economic bar to the resolution of the individual claims, while a class proceeding would allow the claimants economic access to justice. This is a proper approach to a preliminary or *prima facie* analysis of whether a class proceeding is the preferable procedure. ([paragraph] 47)

69 In my view, in the context of this action, arbitration is also not a preferable procedure. Ms. Tracy and Mr. Wournell depose that they could not afford to hire a lawyer to pursue their claims against Instaloans. It is likely that other members of the class would be in the same position. Their claims are for very small amounts and could not be litigated or arbitrated in a cost effective way. Each

of them is legally complex. Each will require expert evidence. The results of arbitration would not be binding on the class.

70 Even though Instaloans is prepared to pay the fees of the arbitrator and the facility; group claims together; agree not to be represented at the arbitration; and waive costs of the arbitration if successful, arbitration is not an effective way to pursue the class claims. 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.

71 In support of their argument that a class proceeding is not preferable, the defendants also submit that certifying this action will inevitably lead to the destruction of the payday loan industry. They say this is not a desirable outcome to the many borrowers who use the services of short-term loan providers. This argument, however, is a policy argument, which must be left to the legislature and parliament. Section 347 has not been amended to except the payday loans industry. The court cannot selectively apply the ***Criminal Code*** or trade practice legislation.

Is the Plaintiff a Suitable Representative?

72 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.

73 The defendants argue that the plaintiff is not a proper representative. They say that in the Payday Loan Action, the plaintiff cannot adequately represent the class because, in obtaining her Payday Loan on the $50 for $50 promotion, there may be a voluntariness issue regarding her payment of Finance Charges. The defendants also point to the plaintiff's past borrowing habits. They say that because she often paid her $50-$50 loans back in cash, her total interest charge on loans totalling $450 equals only $12.50. They make a similar argument in respect of Mr. Wournell's suitability. With respect to her Title Loan, the defendants say that Ms. Tracy is not a suitable representative plaintiff because she defaulted on her loan and because any payments received by Instaloans in excess of the principal owed do not constitute interest charges, but rather, the payment of storage costs.

74 The plaintiffs, in reply, argue that the fact that Ms Tracy may have a specific defence does not mean her interests conflict with other class members; that other loans she obtained are irrelevant to establishing if Instaloans charged interest in excess of the criminal rate; and, with respect to the Title Loan, that whether the fee she paid constitutes a storage cost is an issue that goes to the merits of the plaintiff's claim and not her suitability to act as a representative plaintiff.

75 I am satisfied that Ms. Tracy is a suitable representative plaintiff. That she obtained many loans without paying interest is immaterial. The loan at issue, and for which the plaintiff brings this action, is the loan under which she paid interest in excess of 60%.

76 As I note at [paragraph] 37 above, the potential availability of a voluntariness defense does not undercut the plaintiff's proposed common issues. This observation applies equally in assessing Ms.

Tracy's suitability as plaintiff. As noted by this Court in ***Fakhri v. Alfalfa's Canada Inc.***(2003), 26 B.C.L.R. (4th) 152, 2003 BCSC 1717 at [paragraph] 75:

> The inquiry about whether the representative plaintiff adequately and appropriately represents class members and potential conflicts of interest is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest. *Hoy v. Medtronic*, [2001] B.C.J. No. 1968, [paragraph] 83-85; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (B.C. S.C.) at [paragraph] 66.

77 Many members of the class may have obtained their loans in similar circumstances. Therefore, whether payment was voluntary may be a common issue. If it is not, then it may apply at the individual issues stage. Regardless, it does not appear to me that the issue will impact on the common issues. I therefore do not see how Ms. Tracy's interests conflict with other members of the class. Ms. Tracy has sworn that she will represent the interests of the class and see the matter through to conclusion. I find that she is a suitable representative plaintiff.

78 With respect to s. 4(1)(e)(ii), the defendants submit that the plaintiff's plan neither complies with the ***Class Proceedings Act*** nor addresses the complexities of this case.

79 The plan here is identical in material respects to the plan proposed in ***Bodnar***. As in that case, I am satisfied that the plan sets out a workable method.

Evidentiary basis

80 Although cast as an issue under s. 4(1)(a) by the defendants, the sufficiency of the plaintiff's evidentiary basis is relevant in determining if all the requirements for certification have been met. As noted in ***Hollick v. Toronto***, [2001] 3 S.C.R. 158, 2001 SCC 68 at [paragraph] 25:

> ... the representative of the asserted class must show some basis in fact to support the certification order .... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at para. 4.60.

81 In determining if the plaintiff has met this requirement, however, the court must not assess the evidence. As noted in ***Hollick***at [paragraph] 15 - 16:

> ... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> It is particularly important to keep this principal in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that

> new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions, supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.

82 The defendants argue that there is no evidentiary basis for the claim against Instaloans Financial Solution Centres (Mgmt) Ltd., 856402 Alberta Ltd. and 864556 Alberta Ltd. In support of this, they rely on Mr. Latimer's deposition that none of these companies "engage[d] in the business of offering payday loans, or title transactions ... to any customers in the Province of British Columbia". The plaintiff says this is of no significance because the pleadings allege that the defendants functioned as an integrated business.

83 I am satisfied that the plaintiff has established an evidentiary basis for each of the certification requirements. At this stage, the plaintiff is not required to provide evidence to prove all the allegations in the statement of claim. Certification is not a determination of the merits of the action. Further, the evidence the defendants rely on in claiming that the corporate defendants did not carry on business in this province is very circumscribed. Mr. Latimer does not, for example, address the allegation that these defendants received payment or partial payment of interest at a criminal rate contrary to s. 347 (1)(b), or the allegation of conspiracy against these defendants.

Conclusion

84 I conclude that the plaintiff's action should be certified as a class action.

THE DEFENDANTS' APPLICATION FOR A STAY

85 The defendants ask to have this action stayed for all members of the class whose claims are subject to arbitration. In support of a stay, the defendants rely on s. 15 of the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55.

86 The effect of mandatory arbitration clauses in class proceedings has been considered by our Court of Appeal in ***MacKinnon***. There the Court said at [paragraph] 3-4, 52:

> The appellants claim that the arbitration clauses in their contracts take precedence over Mr. MacKinnon's intended class proceedings. Counsel for

> Mr. MacKinnon argues in response that the public policy dimension of class proceedings justify Brown J.'s refusal to stay the action.
>
> While I am in general agreement with Brown J.'s reasoning, it is my opinion that the order refusing to stay the action was premature. If a proceeding is certified as a class proceeding, it logically and legally follows that an arbitration agreement is "inoperative". That decision cannot be made, however, before the court determines whether the proceeding will be certified.
>
> ....
>
> It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration agreement is "inoperative". It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the "preferable procedure" and the other requirements for certification have been met.

87 As I am satisfied that the PayDay Loan Action should be certified, the arbitration clauses included in the PayDay Loan agreements are rendered inoperative. The defendants' application for a stay must therefore be refused.

THE PLAINTIFF'S APPLICATION

88 The plaintiff brings parallel motions in both the PayDay Loan Action and the Title Loan Action, seeking among other things, a Mareva injunction restraining the defendants from dissipating or disposing of their assets (except as is required in the ordinary course and to comply with obligations under the settlement reached in ***Bruley***); an order requiring that outstanding funds being held for the defendants be deposited in trust with the defendants' solicitors; and an affidavit listing the location and value of the defendants' assets.

89 The plaintiff says that she has established a good arguable case that the fees charged by the defendants are contrary to s. 347 of the ***Criminal Code*** and that class members are entitled to restitution of unlawful fees paid. She says that the defendants have sold the Instaloans business and have engaged in "asset protection" strategies to protect the proceeds of sale from execution and, therefore, that the balance of justice and convenience favours an injunction to prevent further dissipation of assets. She says that because she is a representative plaintiff, she should not be required to provide an undertaking as to damages.

90 In opposing these motions, the defendants say that there is no evidence that the defendants have taken steps to dispose of their assets since this action was started; that the court does not have jurisdiction to order an injunction where the defendants are not resident, nor have assets in the province; that the plaintiff delayed in bringing these motions; that granting these motions may cause prejudice to third parties; that the assets the plaintiff seeks to have secured are disproportionate to the percentage of the business and net revenues generated by the defendants in the British Columbia; and that to order the defendants to disclose the location and value of their assets is to permit pre-judgment execution. They further submit that as the plaintiff's motion had not been certified at the time I heard argument, the only claim for which security can be sought is the plaintiff's individual claim, which they say amounts to less than $300.

91 In ***Mooney v. Orr*** (1994), 100 B.C.L.R. (2d) 335, [1995] 3 W.W.R. 116 (S.C.), Huddart J. (as she then was) set out the two-step approach to Mareva injunctions:

> The comparable approach to a Mareva injunction would be to require a strong prima facie (which seems to have been favoured in *Aetna*, supra) or a good arguable case (as expounded in *Ninemia*, [1984] 1 All E.R. 398) to cross the threshold, and then to balance the interests of the two parties, having regard to all the relevant factors in each case, to reach a just and convenient result. Included in such factors will be evidence that establishes the existence of assets within British Columbia (for a domestic injunction) or outside (for a national or international injunction) and a real risk of their disposal or dissipation so as to render nugatory any judgment. ([paragraph] 51)

92 This approach was followed in ***Silver Standard Resources Inc. v. Joint Stock Co. Geolog*** (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196 (C.A.). In that case, Newbury J.A. said that "[t]he overarching consideration in each case is the balance of justice and convenience between the parties" ([paragraph] 20). She went on to state at [paragraph] 21:

> ... it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

93 This concern was cast in ***Aetna Financial Services Ltd v. Seigelman***, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97, as requiring that the plaintiff establish that there is a genuine risk of disappearance of assets.

94 I accept that the plaintiff has made out the first condition: that her claim advances a good arguable case. The thrust of the defendants' argument on this point concerned the individual defendants, namely that the plaintiff's claim against the individual defendants was weak because it hinged on affixing personal liability to their conduct as directors. The plaintiff refers me to ***642947 Ontario Limited v. Fleisher*** (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182 at [paragraph] 68 (C.A.):

> Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done". *Clarkson v. Zhelka* (1967), 64 D.L.R. (2d) 457 at 578. Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1986), 28 O.R. (3d) 423 (Gen. Div.) at 433-34, affirmed [1997] O.J. No. 3754 (C.A.) [summarized 74 S.C.W.S. (3d) 207]: "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct".

95 The plaintiff has a good arguable case that the fees charged constitute interest in excess of the criminal rate; that the individual defendants as the directors and officers of the corporate defendants

directed that wrongful thing to be done; and in light of the foregoing, that the court will pierce the corporate veil to affix liability to those individuals.

96 The plaintiff submits that the balance of convenience also favours an injunction. She says there is a risk that the defendants are dissipating assets and engaging in asset protection strategies. The defendants submit that the plaintiff's claims regarding asset protection are unfounded and any restructuring of assets on their part is not improper. They say the balance of convenience weighs against granting the injunction for the following reasons: (1) the motion, as amended, serves no useful purpose because all exigible funds held by the defendants will likely go to obligations under the settlement in ***Bruley***; (2) a freezing order will compromise the interests of national class members who have settled; and (3) the motion, coupled with the plaintiff's motion to be relieved of her undertaking as to damages, prejudices the defendants.

97 The Instaloans assets were sold in April 2005 for $39.5 million. In December of that year, a settlement was reached in ***Bruley***, the national class action against the defendants and others. The plaintiff relies on research into the financial state of the defendants that was conducted for the ***Bruley*** settlement. There, class counsel filed an affidavit saying:

> Apart from the vagaries of litigation, it appeared to us that Instaloans had no substantial assets but was simply a group of shell companies operating out of retail locations and employing low paid staff. Thus, in the event that we were able to obtain a judgment against Instaloans, we would likely have been left with uncertain rights of recovery against the individual directors and officers, who might not have personal assets to meet a claim, and who had likely received sophisticated advice on asset protection.

98 The defendants were careful not to disclose background information in that action. Instead, they provided class counsel with an opinion from independent counsel, the terms of which were as follows:

> We have been asked to provide an independent commentary on the sale of the business assets of Instaloans to Rent-Cash Inc. and a subsidiary thereof, effective April 21, 2005, the dispensation of the proceeds derived therefrom and the various debtor protection strategies historically implemented by Tim Latimer and Marc Arcand (the "Individuals") and Instaloans. We have had no previous solicitor/client relationship with either Instaloans or the Individuals prior to this retainer.
>
> It is agreed between our firm, McLennan Ross LLP ("MR") and McNally Cuming Raymaker that the information that we have reviewed will remain privileged and will not be disclosed to [class counsel] any time in the future, under any circumstances. In addition, the provision of this letter to [class counsel] does not constitute a waiver of the solicitor/client privilege between our firm and Instaloans and the Individuals.

99 The defendants did not did not provide any access to underlying financial information. The independent opinion provided in lieu of access concluded:

> Subject to the assumptions and understandings conveyed to MR and set out in this letter and subject to the qualifications and restrictions set out in this letter, we are satisfied that a judgment rendered against Instaloans and the

> Individuals in due course in the class action proceedings will go unsatisfied except to the extent of the attachment of the assets referenced in the Watson Aberant Opinion.

100 The plaintiff says that the defendants ceased operating the Instaloans business and shielded the sales proceeds to ensure that few or no assets would be available to the claimants in this action and in the national action. She also submits that the small settlement in the national action was driven by the absence of readily exigible assets.

101 In ***Mooney v. Orr*** (1994), 98 B.C.L.R. (2d) 318 at [paragraph] 7, 33 C.P.C. (3d) 13 (S.C.), Newbury J. (as she then was) reviewed the authorities respecting pre-judgment Mareva injunctions:

> In *Derby & Co. v. Weldon (No. 2),* [1989] 1 All E.R. 1002 (C.A.), the Court .... affirmed its general jurisdiction to make a worldwide order pre-judgment, emphasizing the need for courts to adapt to the changing conditions in which sophisticated parties can dissipate or conceal assets. Lord Donaldson of Lymington, M.R. said this ...:
>
> > "The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment it may not be possible for him to obtain satisfaction of that judgment fully or at all, *the court should not permit the defendant artificially to create such a situation.* [emphasis in original]

102 She noted at [paragraph] 11:

> In my view, this reasoning is compelling both as a matter of logic and as a matter of commercial reality in this jurisdiction as well. The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.

103 At [paragraph] 14 she went on to note that the plaintiff must demonstrate a real risk of removal or dissipation of assets to avoid judgment before a Mareva injunction will issue:

> Underlying all these elements in each case is the realization that a Mareva injunction can result in substantial harm and inconvenience to a defendant,

> which harm and inconvenience are obviated only in part by the undertaking as to damages normally required to be given by the applicant. The courts are understandably unwilling to allow Mareva injunctions, much less those with extra-territorial effect, to become the norm, especially before a judgment has been given against the defendant. This is why the "risk" must be a "real" and substantiated one, not simply an apprehension arising out of the suspicion that normally exists between litigants, or a stratagem to obtain security for costs not otherwise available under the Rules. As noted by Nicholls, L.J. in *Derby & Co. v. Weldon (No. 1)* ...:
>
> > "An order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order. The risk of prejudice to which, in the absence of such an order, the plaintiff will be subject is that of the dissipation or secretion of assets *abroad*. This risk must, on the facts, be appropriately grave before it will be just and convenient for such a draconian order to be made. It goes without saying that before such an order is made the court will scrutinize the facts with particular care .... I do not think that it is correct, that if an order is made in the present case regarding overseas assets, such an order will become, or should become, the norm in cases where a restraint order is made regarding assets within the jurisdiction.

104 I am satisfied that the plaintiff has established a real risk of dissipation of assets, or, as some of the cases have put it, the "defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain": ***Polly Peck International plc v. Nadir (No. 2)***, [1992] 4 All E.R. 769 (C.A.). The sale of the business assets for $39.5 million, combined with the evidence before the Court on the national class action settlement is sufficient to establish a real risk.

105 Where does the balance of convenience lie? The plaintiff has been careful to limit the terms of the injunction; the injunction will not interfere in the ordinary day-to-day business of the defendants or prevent payment of the ***Bruley*** settlement. The inconvenience to the defendants and third parties has been circumscribed. The balance of convenience favours granting the injunction sought by the plaintiff.

106 The plaintiff asks to be relieved of the obligation to provide an undertaking for damages, as this is a representative action. I am satisfied that it is appropriate in this case not to require an undertaking: these proceedings are brought by the plaintiff, whose wherewithal is limited, on her own behalf and on behalf of others in similar circumstances. To require an undertaking would defeat the plaintiff's ability to obtain an injunction for the class. Given the circumscribed injunction in this case, damages, if any, have been minimized.

107 I am not convinced, as the defendants argue, that this Court does not have jurisdiction to grant the injunction because the defendants do not reside and may not have assets in British Columbia. As the English Court of Appeal noted in ***Derby & Co. v. Weldon (No. 6)***, [1990] 3 All E.R. 263 at 272-73 (C.A.), the granting of a Mareva injunction is not a matter of territorial jurisdiction, but a matter of *in personam* jurisdiction. The defendants have attorned to the jurisdiction of this Court. The Court has *in personam* jurisdiction to grant the injunction.

108 The plaintiff also seeks to amend the style of cause to add 864556 Alberta Ltd. as a defendant. The Style of Proceeding and Statement of Claim will be amended accordingly.

109 In the result, I grant the orders sought in the plaintiff's Amended Notices of Motion.

BROWN J.

TAB 14

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009*
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees
Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Alan Mersky, Derrick Tay for Applicants
Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay
M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund
Leanne Williams for Flextronics Telecom Systems Ltd.
Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.
Gail Misra for Communication, Energy and Paperworkers Union of Canada
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Mark Zigler, S. Philpott for Certain Former Employees of Nortel
G.H. Finlayson for Informal Nortel Noteholders Group
A. Kauffman for Export Development Canada
Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several

groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Table of Authorities

Cases considered by *Morawetz J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act.*

Morawetz J.:

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

> (i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
>
> (ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.
>
> (iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.
>
> (iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it 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.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

> (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
>
> (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
>
> (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as

possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to

under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former

employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view,

to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

Footnotes

* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

TAB 15

2010 ONSC 1328
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 1344, 2010 ONSC 1328, 185 A.C.W.S. (3d) 865, 65 C.B.R. (5th) 152

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: March 5, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities
Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Hilary Clarke for Bank of Nova Scotia, Administrative Agent for Senior Secured Lenders' Syndicate
Janice Payne, Thomas McRae for Canwest Salaried Employees and Retirees (CSER) Group
M.A. Church for Communications, Energy and Paperworkers' Union
Anthony F. Dale for CAW-Canada
Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments, as well as accrual of pensionable service — There were further nine employees who were, or would be, entitled pursuant to executive pension plan to pension benefits in excess of those under main pension plan — Moving parties sought order permitting them to represent those employees, for appointment of counsel, and for funding of counsel — Respondents did not object to appointment representatives or counsel, but opposed funding of counsel — Motion granted — All four proposed representatives had claims against LP Entities that were representative of claims that would be advanced by former employees — Individuals at issue were unsecured creditors whose recovery expectations might be non-existent, however they found themselves facing legal proceedings of significant complexity — Evidence was that members of

group had little means to pursue representation and were unable to afford proper legal representation at this time — Employees were vulnerable group and there was no other counsel available to represent their interests — Canadian courts did not typically appoint unsecured creditors committees — It would be of considerable benefit to have representatives and representative counsel who could represent interests of salaried employees and retirees — There were three possible sources of funding: LP Entities, Monitors, or senior secured lenders — Court had power to compel senior secured lenders to fund or alternatively to compel LP Administrative Agent to consent to funding — Source of funding other than salaried employees themselves should be identified now — Funding would be prospective in nature and would not extend to investigation of or claims against directors — Counsel were directed to communicate with one another to ascertain how best to structure funding and report back to court by certain date.

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

MOTION by group of employees for funding for appointment of representatives, appointment of counsel, and funding of counsel.

***Pepall J.*:**

Reasons for Decision

Relief Requested

1 Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and

Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

3 On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

5 Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately $14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

6 Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current services and special payments in respect of the active registered pension plan; and

(c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

7 The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding.

This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

9 No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

> The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee.

11 The LP Administrative Agent does not consent to the funding request at this time.

12 On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

13 Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?

(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?

(3) If so, should the request for funding be granted?

Positions of Parties

15 In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

16 The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

18 The LP Senior Lenders support the position of the LP Entities.

19 In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

20 No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

21 Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;

- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- 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
- the position of other stakeholders and the Monitor.

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

23 The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. 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.

25 The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

26 I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this

time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

27 In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

28 Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

Motion granted.

TAB 9

Case Name:

Bodnar v. The Cash Store Inc.

Between
Andrew Bodnar and Jose Bartolome, plaintiffs, and
The Cash Store Inc., Rentcash Inc., All Trans Credit Union Ltd., and Card Capital Inc., defendants

[2005] B.C.J. No. 1904

2005 BCSC 1228

142 A.C.W.S. (3d) 30

67 W.C.B. (2d) 53

Vancouver Registry No. S041348

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: April 18 and 19, 2005.
Judgment: August 26, 2005.

(73 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests -- Representative plaintiff -- Disposition without trial -- Dismissal of action -- Time for applying -- Commercial law -- Consumer protection -- Loan transactions.

Application by Bodnar and Bartolome to certify their action as a class proceeding, and to be appointed representative plaintiffs. The defendants were the Cash Store, a business that provided money to customers on a short-term basis, All Trans Credit Union, the source of the funds, and Card Capital, the company providing cash cards Cash Store customers could use to obtain the funds they borrowed from ATM machines. The members of the proposed class of plaintiffs were residents of British Columbia who had borrowed money from any Cash Store location in the province and had been charged what was alleged to be a criminal rate of interest. They sought restitution of unlawful interest, damages for unlawful conspiracy and damages for unconscionable trade acts and practices. Bodnar obtained a $300 loan with a one-month term from the Cash Store, which he repaid in full after rolling it over for five months. He paid $470 in broker fees, $40 in interest, $12 in transaction fees and a $10 cash card fee. Bartolome obtained several short term loans from the Cash Store. Each time he

was charged a 22.54 percent broker fee and after the first loan, over $2 in transaction fees. An actuary gave an opinion that, including the broker and transaction fees as interest, the effective annual interest rate Cash Store was charging was over one million percent. He also gave the example of a loan advanced on October 28 for $104, repaid in full on November 7 for $105, which had an effective annual interest rate of more than 79 percent. Bodnar and Bartolome presented a plan for dealing with the individual entitlement of each proposed plaintiff after the common issues were settled. Cash Store had not provided an estimate of the number of potential plaintiffs, but disclosed it operated 22 locations in British Columbia, as well as more in other provinces. Two other class proceedings were proposed for Ontario and Alberta but had not yet been certified. All Trans moved for a dismissal of the action against it. The plaintiffs had not conducted examinations for discovery yet.

HELD: Application allowed. The action was certified as a class proceeding and Bodnar and Bartolome were appointed representative plaintiffs. The pleadings disclosed a reasonable cause of action. The class definition was not overly broad, even though it included persons who made no payments on their loans, because these persons would have paid broker fees. Card Capital and All Trans were not prejudiced because some potential plaintiffs did not use a cash card to obtain their loans, because there were very few of them. The potential plaintiffs shared a common interest in that they each borrowed money subject to the same terms and conditions, and presumably paid the same fees. It was not necessary for the Court to look into individual circumstances facing each plaintiff to determine the action. Individual actions would be impractical. The plan for dealing with the entitlement to compensation of each individual plaintiff was adequate. All Trans's application was adjourned pending discovery of documents and examination for discovery.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, S.B.C. 204, c. 2, ss. 8, 8(3)(a), 8(3)(b), 8(3)(c), 8(3)(d), 105, 171

British Columbia Supreme Court Rules, Rules 18A

Class Proceedings Act, R.S.B.C. 1996, c. 50 , ss. 4, 4(1), 4(1)(e), 4(1)(e)(i), 4(1)(e)(iii), 4(2), 27(1)(b)

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

Trade Practice Act, R.S.B.C. 1996, c. 457, ss. 4, 22(1)

Counsel:

Counsel for the Plaintiff: P.R. Bennett
M.W. Mounteer

Counsel for the Defendant All Trans Credit Union Ltd.: M. Gianacopoulos

Counsel for the Defendants The Cash Store Inc. and Rentcash Inc.: W.K. Branch

Counsel for the Defendant Card Capital Inc.: R.J. Lesperance J.C. Halpin

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BROWN J.:--

INTRODUCTION

1 The plaintiffs apply to certify this proceeding as a class proceeding pursuant to s. 4 of the Class Proceedings Act, R.S.B.C. 1996, c. 50, and to be appointed as representative plaintiffs for the class proceeding. The proposed class is all residents of British Columbia who have borrowed money as a "payday loan" or a "title loan" from a Cash Store location and: (1) have repaid the loan and the standard "broker fee" charged by the Cash Store on the due date of the loan; (2) for loans advances prior to March 2004, have repaid those amounts within 157 days of the loan advance or the last extension ("rollover") of the loan; (3) for loans advanced subsequent to March 2004, have repaid those amounts within 173 days of the loan advance or the last rollover of the loan; or (4) have rolled over the loan at least five times; (collectively, the "class loans") as of the date notice is given to the class of this class proceeding.

2 The plaintiffs allege that the fees charged to them and to other members of the class for their loans contravene s. 347 of the Criminal Code, R.S.C. 1985 C-46, as interest is charged and paid at a criminal rate, a rate that exceeds 60% per annum.

3 The plaintiffs seek restitution of unlawful interest, damages for unlawful conspiracy, and damages for unconscionable trade acts and practices:

(a) a declaration that the broker fees charged by the Cash Store in relation to the class loans are interest within the meaning of and for the purpose of s. 347(1) of the Criminal Code;
(b) a declaration that the standard form loan agreements used by the Cash Store to advance the class loans are unlawful as contrary to s. 347(1) of the Criminal Code;
(c) a declaration that certain fees charged by Card Capital and All Trans and paid by class members in order to obtain the class loans (the "debit fee") are interest within the meaning of s. 347 of the Criminal Code;
(d) a declaration that all unlawful interest paid by the class members in respect of the class loans, and received by the defendants, is held in a constructive trust for the benefit of the plaintiffs and other class members;
(e) an accounting or restitution to the class members of all unlawful interest paid by the class members in respect of the class loans;
(f) damages for unconscionable trade acts and practices pursuant to s. 22 (1) of the Trade Practice Act, R.S.B.C. 1996, c. 457 and ss. 105 and 171 of the Business Practices and Consumer Protection Act, S.B.C. 204, c. 2, against each of the defendants;
(g) damages for conspiracy against each of the defendants;
(h) punitive damages against each of the defendants; and
(i) interest.

BACKGROUND

4 The focus of this action is loans provided to individuals through Cash Store outlets. The plaintiffs assert that fees charged for these loans are interest within s. 347 of the Criminal Code, exceed the criminal rate of interest, and breach the Trade Practice Act and Business Practices and Consumer Protection Act. The plaintiffs seek recovery of these fees and damages.

5 The Cash Store Inc. is a wholly owned subsidiary of Rentcash Inc. Cash Store began operating in British Columbia in September 2002. Cash Store does not provide funds itself; it obtains those funds from one of nine lenders with whom it has a relationship. Cash Store provides two types of loans: short term unsecured advances which are due on the customer's next payday, unless they are rolled over; and title loans which are secured by a P.P.S.A. registration on the customer's vehicle and are usually due within approximately 30 days.

6 In a typical transaction, when a borrower enters a Cash Store location for the first time to obtain a loan, the borrower is required to complete a standard form loan application. Under the standard terms of the loan application, the borrower pays the Cash Store a brokerage and documentation fee of 22.54% of the loan principal (after March 2004 the broker fee was increased to 25% of the loan principal advanced). The Cash Store then finds a lender for the borrower from one of the nine lenders with which it has a brokerage relationship. Each of these lenders has an agreement with the Cash Store in which the Cash Store is retained to carry out various functions in connection with advancing loans to borrowers and management of the loans. These agreements also provide that interest must be charged on the loans at 59% per annum. The loan term cannot be more than eighteen days, unless it is secured against a motor vehicle, in which case it cannot be more than thirty-five days. If unsecured, the maximum loan amount is $500 or one-third of the borrower's two week take home pay, and if secured the maximum initial loan amount is $3,000.

7 The terms are the same, regardless of which lender provides the loan. Each borrower must pay: (a) interest at a stated rate of 59% per annum (which the plaintiffs have calculated to be in excess of 60%) and (b) a broker fee of 22.54% or 25% of the principal of the loan.

8 To obtain the loan, the borrower is required to complete Cash Store's standard form lending documents which include a disclosure statement, a promissory note, two directions to pay and wage assignments (in favour of both the Cash Store and the lender). The borrower is provided with a customer receipt which sets out the principal advanced, the broker fee and interest payable, and the loan due date.

9 In a typical transaction, the borrower is provided with a Cash Store cash card which allows the borrower to obtain cash from an automated teller machine. The loan principal is deposited to the cash card. The borrower is charged a $10 fee to obtain the cash card, and then retains the cash card for future Cash Store loans. (There is a dispute in the evidence as to whether all loans are made available through cash cards, as Rentcash indicates in its 2003 annual report, or whether borrowers have an option to obtain the loan by way of a cheque, wire transfer, or cash card.)

10 The Cash Store cash cards are provided by Card Capital. Card Capital provides pre-paid cash cards to various outlets to allow their customers to access cash. Card Capital lists as its "partners" the Cash Store Inc., Payroll Loans, Instaloans, and Q.T. Cash. Each time the Cash Store loads a Cash Store cash card with a loan advance, Card Capital charges the borrower $0.50, and when the borrower obtains cash by withdrawing funds at an automated teller, Card Capital charges the borrower $1.90.

11 The cash cards are provided to Card Capital by All Trans Credit Union Ltd. pursuant to an agreement of November 9, 2001. Pursuant to this agreement, Card Capital was retained by All Trans to carry out the functions necessary to manage the card database, including performing specified responsibilities of All Trans as the card issuer. In exchange for providing debit card facilities to Card Capital, All Trans receives $0.20 for each cash card transaction from Card Capital.

12 Again, in a typical situation, where the borrower wishes to receive a fixed amount net, the Cash Store will add $4.00 to the amount of the loan to cover these amounts: $2.40 to Card Capital, $1.50 to the third party operating the automated teller machine.

13 The individual plaintiffs have provided evidence of their dealings with the Cash Store. Mr. Bodnar obtained one loan from the Cash Store on March 19, 2003 of $300. He rolled that loan over five times. He repaid it in full on July 11, 2003. He paid $470.43 in broker fees, $40.13 in interest, and $12.40 in Card Capital transaction fees, plus a $10 cash card fee.

14 Mr. Bartolome obtained several short term loans from the Cash Store. The first time he obtained his loan in cash because the location had just opened and did not yet have cash card facilities. The second time he was provided with the loan through a cash card, although he asked for cash. Each time, he was charged a 22.54% broker fee and, after the first loan, $2.40 in transaction fees.

15 The plaintiffs have provided actuarial opinion evidence from Mr. Ian Carp, F.S.A., F.C.I.A. It is Mr. Carp's opinion that, considering a specified loan to Mr. Bartolome on October 28, 2003, if the broker fee and Card Capital transaction fees are included in interest under the Criminal Code provisions, then the effective annual interest rate is 1,125,187%. Secondly, if $104 is advanced on October 28, 2003 and $105.68 is repaid on November 7, 2003 (i.e. only the monies described as interest in the agreement are considered), then the effective annual interest rate is 79.48%.

16 Mr. Carp also opines that if the broker fee is considered as interest, then any loan that is rolled over five times or more will result in an effective annual rate of interest which exceeds 60% per annum.

17 He also opines that if the brokerage fee is interest, then a broker fee of 22.54% will result in an effective annual rate of interest in excess of 60% if the loan is repaid within 153 days of the loan advance; a 25% broker fee will result in an effective annual rate of interest in excess of 60% if the loan is repaid within 173 days of the loan advance.

18 The defendants have not, to date, provided an estimate of the number of potential class members. However, there are 152 Cash Store locations in Canada, 22 of which are in British Columbia. For the six month period ending December 31, 2004, Rentcash received $20,543,604 in broker fees, which, if divided proportionally across the country, is approximately $3,081,540 in British Columbia.

THE REQUIREMENTS FOR CERTIFICATION

19 Section 4(1) of the Class Proceedings Act 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.

Do the Pleadings Disclose a Cause of Action?

20 The threshold which the plaintiffs are required to meet is a low one:

> 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.
>
> [Brogaard v. Canada (Attorney General) (2002), 7 B.C.L.R. (4th) 358, 2002 BCSC 1149 at [paragraph] 30]

21 I am satisfied that the pleadings do disclose a cause of action. Indeed, the defendants do not argue that they do not.

Is There an Identifiable Class of Two or More Persons?

22 The plaintiffs propose that the class for this proceeding is defined as: all residents of British Columbia who have borrowed money as a "payday loan" or a "title loan" from a Cash Store location and (1) have repaid the loan and the standard broker fee charged by the Cash Store on the due date of the loan; (2) for loans advances before March 2004, have repaid those amounts within 157 days of the loan advance or the last extension of the loan; (3) for loans advanced after March 2004, have repaid those amounts within 173 days of the loan advance or the last extension of the loan; or (4) have rolled over the loan at least five times; (collectively, the class loans) as of the date notice is given as a class proceeding.

23 The defendants object to the class definition.

24 The Cash Store and Rentcash argue that the class definition is overly broad in that it includes people who have never paid any amounts on their loans and defines a class member as a person who has borrowed money from a Cash Store location. They argue that a Cash Store location is not the entity that provides loans.

25 Card Capital argues that the class is overly broad in that it would include people who may have taken loans but not used a card to obtain the loan. Card Capital argues that it will be required to defend an action against a class which includes people to whom Card Capital cannot be liable and that it is prejudiced as a result.

26 The purpose of a class definition is: (1) to identify those people who have a potential claim for relief against the defendant(s); (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: see Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 at 175 (Ont. Ct. Gen. Div.).

27 I am satisfied that the class is adequately defined. The purpose of the class definition, as Bywater indicates, is to identify the claimants. Defining the claimants as those who obtained a loan from a Cash Store location adequately identifies those individuals. It is not necessary for the purpose of identifying individuals to name the legal entity which provided the funds.

28 Secondly, I accept the plaintiffs' argument that the class definition is not overly broad because it includes people who have never paid any amount on their loans, but have rolled the loan over at least five times: those who have rolled the loan over five times have paid broker fees for each rollover and, arguably (the Plaintiffs say), have paid an amount greater than the principal of the loan plus interest at the rate of 60%.

29 Third, even if not all borrowers obtained their loans by means of a cash card, and may not have a claim against Card Capital or All Trans, they would still have a claim for the broker fees paid to the Cash Store and would properly be included in the class. It is not necessary for each member of the class to have a claim against each defendant (Campbell v. Flexwatt Corp. (1997), 44 B.C.L.R. (3d) 343 (C.A.)).

30 Further, this does not prejudice Card Capital or All Trans because they would not be defending claims made by such individuals and, based on the evidence before me, there would be few, if any, in this category.

Do the Claims Raise Common Issues?

31 The common issues which the plaintiffs propose are:

(1) Do the broker fees charged by the Cash Store constitute interest as defined by and for the purpose of s. 347 of the Criminal Code, either in whole or in part?
(2) If yes, do the agreements pursuant to which these broker fees have been collected constitute an agreement to receive interest at a criminal rate?
(3) If yes, has the collection of broker fees from class members resulted in payment of interest at a criminal rate?
(4) If yes, has the Cash Store been unjustly enriched?
(5) If the Cash Store has received a payment of interest at a criminal rate:

    (a) were the class loans at the direction of and for the benefit of Rentcash?
    (b) were the broker fees received paid in whole or in part to Rentcash? and
    (c) did Rentcash direct the transfer, use or otherwise receive the benefit of the broker fees?

(6) If the answer to any one of question (5) is yes, then has Rentcash been unjustly enriched?
(7) If the Cash Store or Rentcash have been unjustly enriched:

(a) do those defendants hold the benefit in trust for the class members?
(b) are those defendants liable to account to class members?

(8) Do the debit fees charged by Card Capital and All Trans constitute interest as defined by s. 347 of the Criminal Code?
(9) If yes, have Card Capital and All Trans received a payment of interest at a criminal rate?
(10) If yes, then have Card Capital and All Trans been unjustly enriched by receipt of interest at a criminal rate?
(11) If the answer to question (9) is yes, have either the Cash Store or Rentcash been unjustly enriched by the debit fees?
(11A) Does the card cash fee charged by the Cash Store constitute interest as defined by s. 347?
(11B) If the answer to (11A) is yes, then has the Cash Store received a payment of interest at a criminal rate?
(11C) If the answer to (11B) is yes, were the cash card fees received by the Cash Store paid in whole or in part to Rentcash?
(11D) If the answers to (11B) or (C) is yes, then has either the Cash Store or Rentcash been unjustly enriched by the cash card fees?
(12) If the defendants have been unjustly enriched by the debit fees or cash card fees, then:

(a) do those defendants hold the benefit that they have received in trust for class members?
(b) are those defendants liable to account to class members for the benefit and all profits earned?

(13) If the Cash Store class loans offend s. 347 of the Criminal Code, does that constitute an unconscionable act or practice within s. 4 of the Trade Practice Act and s. 8 of the Business Practices and Consumer Protection Act regardless of whether the other factors set out in subsections 3(a) through (d) are present?
(14) If Rentcash directed or had the benefit of payment of interest at a criminal rate, did the conduct of Rentcash constitute an unconscionable act or practice within the meaning of s. 4 of the Trade Practice Act and s. 8 of the Business Practices and Consumer Protection Act, regardless of whether the other factors set out in subsections 3(a) through (d) are present?
(15) If All Trans and Card Capital have received a payment of interest at a criminal rate, does their conduct constitute an unconscionable act or practice within s. 4 of the Trade Practice Act and s. 8 of the Business Practices and Consumer Protection Act, regardless of whether the other factors listed in subsection (3)(a)-(d) are present?
(16) Are those defendants liable for damages to class members who have suffered loss or damage because of an unconscionable act or practice?
(17)

Did the Cash Store and Rentcash conspire to implement a scheme to provide loans to class members in order to earn profits on the class loans at an unlawful rate of interest?

(18) If the Cash Store and Rentcash conspired to implement a scheme to provide class loans to class members at an unlawful rate of interest, did All Trans and Card Capital subsequently become parties to that conspiracy by agreeing to assist?

(19) Are the defendants jointly and severally liable for damages as a result of an illegal conspiracy?

(20) Does the conduct of the defendants justify an award of punitive or exemplary damages?

(21) If the conduct justifies an award of punitive or exemplary damages, what is the appropriate amount of damages to be awarded?

(I have paraphrased the common issues. The complete text of the proposed common issues is attached to these Reasons as Schedule "A")

32 The defendants argue that the issues are not common:

(a) the court is bound by MacKinnon v. National Money Mart Co., [2005] B.C.J. No. 399, 2005 BCSC 271;

(b) the issues cannot be determined without considering the claimants individual circumstances;

(c) the issues are not common to all defendants;

(d) not all borrowers use a cash card, so not all issues are common to the class;

(e) debit fees must be considered individually, apart from all other fees and interest;

(f) the Plaintiffs have not established an evidentiary basis against Card Capital and All Trans.

I will deal with each of these in turn.

MacKinnon

33 The circumstances of MacKinnon are quite different from these. In MacKinnon there were more than twenty defendants, operating eighteen businesses, with many different business models. Each defendant charged fees, which may have little or nothing in common with the fees charged by another lender. An individual claimant may have borrowed from only one defendant lender. The court's conclusions with respect to one fee of one lender may have no application beyond a particular borrower and lender. In those circumstances, I concluded that the issues, as phrased, were not common issues.

34 By contrast, here, we are concerned with only one business model. The thrust of the plaintiffs' claim is that Cash Store and Rentcash have set up a business where the borrower pays brokerage fees, cash card fees and debit fees to obtain a loan. The plaintiffs assert that each of the fees is interest and is in breach of s. 347 of the Criminal Code. Each of the claimants will have borrowed following the same Cash Store standard terms and procedures; each will have paid the same (or most of the same) fees; each will have a claim that the fees which they paid for their loan were unlawful interest.

Individual Inquiries

35 The defendants argue that the criminal interest rate issues are not truly common because they necessarily involve an inquiry into the individual circumstances of each class member. The defendants argue that a borrower chooses when broker's fees will be incurred, chooses whether to receive funds using a cash card and chooses how many debit transactions will be made. They say that the resulting fees are incurred voluntarily, that voluntariness is a defence. They say that the court must determine whether the payments were made voluntarily and that this will require the court to look at the claimant's individual circumstances.

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.

37 The defendants argue that the unjust enrichment issues also necessarily involve an inquiry into each individual claimant's circumstances. The defendants say that to establish unjust enrichment, a plaintiff must show that the defendant has been enriched, the plaintiff has suffered a corresponding deprivation and that there is no juristic reason for the deprivation. They say that this inquiry must be conducted case by case. They say also that they will raise a "change of position" defence which, too, requires a case-by case analysis.

38 The plaintiffs rely on Garland v. Consumers Gas Co., [2004] 1 S.C.R. 629, 2004 SCC 25: "Where the defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert it would be unjust to return the enrichment to the Plaintiff." (para. 65) The plaintiffs argue:

> (1) as a question of law, one who receives payment of interest at a criminal rate has been unjustly enriched, and in the circumstances of this case, cannot establish a reason to deny recovery;
> (2) the only individual circumstance identified by the defendants is a claimant's knowledge that the loan breaches s. 347, which, as a matter of law is not a circumstance that the court can consider (Kiriri Cotton Co. Ltd. v. Dewani, [1960] A.C. 192 (P.C.)); materiality of the knowledge issue can be determined at the common issues trial;
> (3) an issue may not be certified only where the court is satisfied that any attempt to answer the issue on a class-wide basis must fail because, as a matter of law, the court must refer to individual circumstances.

39 I accept the plaintiffs' arguments on this point. This case is akin to Elms v. Laurentian Bank of Canada, [2001] B.C.J. No. 1284 (A.A.), 2001 BCCA 429, where the court said at para. 44:

> The investors' characterization of their claim suggests that the issues of whether there is a duty of care, the scope of that duty, and whether there is a fiduciary duty are issues that are capable of extrapolation to each member of the class or subclass. The investors' argument is that Oliver had a duty, in the absence of reliance, based on the relationship Oliver had with all investors.

> Because the investors claim that any individual differences do not affect the nature of Oliver's duty to each of them, the resolution of this issue would be applicable to all members of the class. Similarly, the investors argued that the Bank had the same duty to each of them regardless of a particular investor's individual circumstances. They note that the documents by which each of them opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly.

40 As in Elms, on the plaintiffs' theory, no individual inquiry is required. The plaintiffs may fail on this issue, but I am not satisfied at this point that the issue necessarily cannot be decided without an individual inquiry.

41 With respect to the trade practice/unconscionable transaction issues, the defendants again argue that the court must conduct an individual inquiry, that the issue cannot be determined class-wide.

42 Section 8 of the Business Practices and Consumer Protection Act provides:

> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> (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, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a prescribed circumstance.
>
> [Section 4 of the Trade Practice Act is substantially the same.]

43 The plaintiffs do not propose to prove breach of the trade practices legislation and unconscionability by reference to individual circumstances. The plaintiffs have been careful to limit these issues, so that they are determined without reference to subsections (3)(a) to (d), which require individual considerations. In other words, the plaintiffs' theory is that, regardless of individual circumstances, charging/receiving fees in breach of s. 347 is necessarily unconscionable.

44 In Knight v. Imperial Tobacco Company Ltd., [2005] B.C.J. No. 216 (S.C.), 2005 BCSC 172, this court certified a claim against the defendant, where the plaintiff alleged that the marketing of light and mild cigarettes constituted a deceptive trade practice. The plaintiff asserted that it could satisfy the required element of reliance without reference to individual circumstances. The court said at para. 36:

> I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the TPA, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

45 Here, too, the plaintiffs will not rely on individual circumstances to establish an unconscionable practice. They may not succeed in this approach, but I am not satisfied that the issues should not be certified.

Commonality of Issues - Defendants

46 The defendants argue that the issues are not properly common issues because there is no commonality of issues across defendants, there are issues which specifically address one or more of the defendants.

47 There is no requirement that each common issue must be relevant to each defendant. Rather,

> The essence of a class action is the commonality of the issues between the plaintiffs and one or more of the defendants. 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. ...
>
> [McDougall v. Collinson, [2000] B.C.J. No. 571, 2000 BCSC 398 at para. 86]

Use of Cash Card

48 The defendants argue that not all borrowers received their loans through cash cards and therefore not all borrowers would be interested in the Card Capital and All Trans issues. The evidence before me does not disclose any individual who did not receive a loan by way of cash card. Although Mr. Bartolome received his first loan in cash, all of his other loans were by cash card. Second, Rentcash in its 2003 annual report says that all advances to customers are loaded onto cash cards. There is no evidence to suggest that there are individuals who received loans other than by cash card

such that protection of the interests of those sub-class members requires that they be separately represented.

Debit Fees

49 Card Capital argues that the debit fees must be considered independent of interest, broker fees and other fees charged. This is a substantive legal argument and does not affect the commonality of the issue.

Evidentiary Basis

50 Card Capital and All Trans argue that the evidentiary basis is not sufficient, that there is no evidence to support the conspiracy issue against Card Capital and All Trans, and no evidence that All Trans receives a portion of the debit fees.

51 The defendants rely on Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68. There the Court said at paras. 15 - 16 and 24 - 25:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> 16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.
>
> ...
>
> 24 In Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no

> evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (emphasis added). While the Class Proceedings Act, 1992 does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order" (p. 381).
>
> 25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at para. 4.60.

52 As this extract indicates, the plaintiffs are required to adduce evidence of the certification requirements - s. 4 of the British Columbia Act. A plaintiff is not required to provide evidence to prove all of the allegations in the statement of claim. Certification is not a determination of the merits of the action.

53 There are formal agreements setting out the terms upon which Card Capital and All Trans provide the services used by the Cash Store. Card Capital was aware that the cards were being used to facilitate loans. When a borrower receives the loan funds through a card, he or she enters a contract with Card Capital for the use of the card which discloses that the card is used for a Cash Store loan.

54 Mr. Alexander, the Chief Executive Officer of All Trans, deposes that because All Trans is not a member of the Credit Union Central of Ontario it is able to issue multiple debit cards to a single member, in this case Card Capital. In November of 2001 he met with Jeff Smith of Card Capital to discuss a Card Capital business proposal. Card Capital proposed that All Trans would issue multiple debit cards to Card Capital. He understood that Card Capital would use the debit cards as pre-paid cash cards. In its agreement with Card Capital, All Trans irrevocably retains Card Capital to carry out all of the functions necessary to manage the cash card base, including processing all transactions requested using a cash card, determining whether to authorize the completion of a transaction. All Trans provided Card Capital with sufficient card numbers to allow the issuance of 99,999,999 distinct cash card numbers.

55 All Trans receives $.20 for each cash card transaction from Card Capital.

56 This evidence is sufficient to establish a rational connection between the class and the common issues asserted against these defendants. The claims are not ridiculous or incapable of proof; it is not plain and obvious that the claims cannot succeed. The plaintiffs have met the evidentiary burden.

Is a Class Proceeding the Preferable Procedure?

57 Here, the court must consider the factors listed in s. 4(2) of the Class Proceedings Act. The court must consider all of the 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.

Do the common issues predominate?

58 Determination of the common issues will significantly advance the litigation. As the plaintiffs argue, the claims of the class members do raise issues which are common to the class as a whole and which do not engage an assessment of evidence that is individual to each class member. In addition, it may be that some of the defences raised can be determined on a class-wide basis, for example, whether electing to obtain the loan funds by use of the cash card is a voluntary payment for the purposes of s. 347(1) of the Criminal Code.

59 Counterclaims may be advanced, but this does not preclude certification. As the court noted in Metera v. Financial Planning Group, [2003] A.J. No. 468, 2003 ABQB 326 at para. 69:

> It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ...
>
> Do a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions?

60 There is no evidence that there are members who would have an interest in pursuing individual actions. Indeed, this is unlikely, given the amount involved and the complexity of the litigation.

Are the claims the subject of other proceedings?

61 I understand that there are two other proposed class proceedings, one in Ontario and one in Alberta. Neither of these has been certified.

> Are other means of resolving the class members' claims less practical and 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?

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.

Are the Plaintiffs Suitable Representatives?

65 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.

66 From the evidence before me, it appears that the plaintiffs would vigorously prosecute the claim and have an interest in common with 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 the common issues. Indeed, the defendants do not dispute that the plaintiffs satisfy the requirement of s. 4(1)(e)(i) and s. 4(1)(e)(iii).

67 The focus of the defendants' argument is with respect to the second requirement. The defendants argue that the plan put forward by the plaintiffs is not a proper case management plan. The defendants argue 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". The plaintiffs propose that after the common issues are determined an independent claims evaluator will be appointed by the court. Using the defendants' records, the claims evaluator will determine the amount of interest received at a criminal rate. The

claims evaluator 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 evaluator will submit a report to the court setting out each class member's entitlement for approval. This approach is contemplated by the Act in s. 27(1)(b).

68 As this court has noted in Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market), [2003] B.C.J. No. 2618, 2003 BCSC 1717 at para. 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. ...

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

PRE-TRIAL APPLICATION: ALL TRANS CREDIT UNION LTD.

70 All Trans argues that the action against it should be dismissed pursuant to Rule 18A.

71 The plaintiffs say that they have not yet had an opportunity to conduct examinations for discovery. There has been no discovery of documents. They say that it is a reasonable inference, based on the evidence before the court, that a portion of the fees paid to Card Capital flows through to All Trans Credit Union, and therefore All Trans receives part of the alleged unlawful interest. They say there is evidence to support the allegations of conspiracy. The plaintiffs say that the summary trial application is premature and could proceed after they have had examinations for discovery of All Trans and Card Capital.

72 The plaintiffs will require discovery of documents at the examination for discovery of All Trans and Card Capital to allow them to effectively respond to All Trans' summary trial application. I will adjourn this application pending discovery of documents and discovery of these parties.

CONCLUSION

73 The plaintiffs' application is granted. All Trans' summary trial application is adjourned, pending discovery of documents and examination for discovery of a representative of Card Capital and All Trans.

BROWN J.

* * * * *

SCHEDULE "A"

Common Issues

1. Do the Broker Fees charged by the Cash Store constitute interest as defined by and for the purpose of s. 347 of the Criminal Code, either in whole or in part?
2. If the answer to (1) is yes, then do the agreements or arrangements pursuant to which those Broker 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 the answer to (1) is yes, then has the collection by The Cash Store of Broker Fees from Class members in relation their Class Loans, resulted in the payment by Class Members to and the receipt by The Cash Store of a payment or partial payment of interest at a criminal rate, contrary to s. 347(1)(b) of the Criminal Code?
4. If the answer to (3) is yes, then has the Cash Store been unjustly enriched by the collection of those Brokers Fees from the Class Members?
5. If The Cash Store has received a payment of interest at a criminal rate from Class Members in respect of the Class Loans, then:

    (a) were the Class Loans advanced by The Cash Store to the Class Members at the direction and for the benefit of Rentcash?
    (b) were the Broker Fees received by The Cash Store paid in whole or in part to Rentcash? And
    (c) did Rentcash direct the transfer, use, or otherwise have the benefit of the Broker Fees collected by The Cash Store from the Class Members?

6. If the answer to any one of (5)(a) to (c) is yes, then has Rentcash been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of their Class Loans?
7. If The Cash Store or Rentcash have been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of the Class Loans"

    (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 benefit received from them and all profits earned therefrom?

8. Do the Debit Fees charged by Card Capital and All Trans and paid by the Class Members to obtain the Class Loans from The Cash Store constitute interest as defined by s. 347 of the Criminal Code, either in whole or in part?
9. If the answer to (8) is yes, then have Card Capital and All Trans received a payment or partial payment of interest at a criminal rate as a result of the Debit Fee paid by the Class members to obtain the Class Loans?
10. If the answer to (9) is yes, then have Card Capital and All Trans been unjustly enriched by the receipt of interest at a criminal rate from the Class Members?
11.

If the answer to (9) is yes, then has either The Cash Store or Rentcash been unjustly enriched by the Debit Fees charged by Card Capital and All Trans and paid by Class Members?

11A. Does the Cash Card Fee charged by the Cash Store and paid by the Class members in respect of their Class Loans constitute interest as defined by s. 347 of the Criminal Code either in whole or in part?

11B. If the answer to 11A is yes, then has the Cash Store received a payment or partial payment of interest at a criminal rate as a result of the Cash Card Fees paid by the Class members in respect of their Class Loans?

11C. If the answer to 11B is yes, were the Cash Card Fees received by the Cash Store paid in whole or in part to Rentcash or did Rentcash transfer use or otherwise have the benefit of those Cash Card Fees?

11D. If the answer to 11B or 11C is yes, then has either the Cash Store or Rentcash been unjustly enriched by the Cash Card Fees charged by the Cash Store and paid by Class members?

12. If All Trans, Card Capital, The Cash Store, or Rentcash have been unjustly enriched by the Debit Fees or the Cash Card Fees paid by the Class Members in order to obtain the Class Loans:

    (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 benefit received from them and all profits earned therefrom?

13. If the answer to (1) or (2) is yes, does the provision by The Cash Store of the Class Loans to Class Members on terms that offend s. 347(1)(a) of the Criminal Code, or the receipt by The Cash Store of interest at a criminal rate in respect of those Class Loans, 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?
14. If the answer to any one of (5)(a) to (c) is yes, then does such conduct of Rentcash 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?
15. If All Trans and Card Capital have received a payment or partial payment of interest at a criminal rate as a result of Debit Fees paid to Card Capital by Class Members in order to obtain the Class Loans, then does such conduct of

Card Capital and All Trans 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. (2)(a) through (d) of those sections are present in any individual case?

16. If the answer to (13), (14) or (15) 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 s. 22(1) of the Trade Practices Act and s. 105 and 171 of the Business Practices and Consumer Protection Act?
17. If the Cash Store has advanced the Class Loans to Class Members on terms which are prohibited by s. 347(1)(a) of the Criminal Code or has collected interest at a criminal rate from Class Members in respect of the Class Loans advanced to them, contrary to s. 347(1)(b) of the Criminal Code, then did The Cash Store and Rentcash conspire to implement a scheme to provide those Loans to the Class Members in order to earn profits on the Class Loans at an unlawful rate of interest?
18. If The Cash Store and Rentcash conspired to implement a scheme to provide the Class Loans to the Class Members in order to earn profits on those Payday Loans at an unlawful rate of interest, then did All Trans and Card Capital subsequently become parties to that conspiracy by agreeing to assist The Cash Store and Rentcash in the implementation of the scheme by providing debit card facilities and other services in order to facilitate and enable The Cash Store to charge and receive interest on the Class Loans at a criminal rate?
19. If any or all of the Defendants conspired to provide the Class Loans to the Class Members at an unlawful rate of interest, then are those Defendants jointly and severally liable for damages to those Class members who have suffered loss or damage as a result of that illegal conspiracy?
20. If the Cash Store has advanced the Class Loans to Class Members on terms which are prohibited by s. 347(1)(a) of the Criminal Code or has collected interest at a criminal rate from Class Members in respect of the Class Loans advanced to them, contrary to s. 347(1)(b) of the Criminal Code, and if Rentcash, Card Capital, or All Trans has participated I and has been unjustly enriched by, or conspired with the Cash Store in respect of, these Loan transactions with Class Members, then does the conduct of the Defendants justify an award of punitive or exemplary damages?
21. If the conduct of any of the Defendants justifies an award of punitive or exemplary damages, what is the amount of punitive or exemplary damages to be awarded?

SCHEDULE "B"

No. S041348
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANDREW BODNAR and JOSE P. BARTOLOME

PLAINTIFFS

AND:

THE CASH STORE INC., RENTCASH INC., ALL TRANS CREDIT UNION LTD. and CARD CAPITAL INC.

DEFENDANTS

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

AMENDED 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 Defendants will deliver their 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 Defendants are 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 intent 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 Defendants will be required to account for all monies received as Broker Fees or Debit Fees from Class members in relation to Class Loans that were repaid on the due date of the loan. These monies will be placed in a trust fund for the benefit of the Class members (the "Class Fund"), together with any award of punitive damages made on behalf of the Class.

(c) An independent Claims Evaluator will be appointed by the Court. Using the Defendants' records, the Claims Evaluator shall determine the amount of interest received at a criminal rate in relation to all other Class Loans that were not repaid on the due date of the loan using Claim Processing Rules developed by the parties and agreed upon by the Court. The Claims Evaluator will submit a report to the Court setting out the unlawful amount collected by each Defendant in relation to these other Class Loans. Upon approval of that report by the Court, the Defendants will be required to account for all unlawful amounts received in relation to all Class Loans that were not repaid on the due date of the loan. These monies will be placed in the Class Fund for the benefit of the Class members.

(d) Notice will be given to all Class members of the completion of the common issues trial and will include instructions on making a claim against the Class Fund using claim forms to be approved by the Court.

(e) The Claims Evaluator shall then determine each Class member's entitlement to payment from the Class Fund based on the Claim Processing Rules developed and approved by the Court. The Claims Evaluator will submit a report to the Court setting out each Class member's entitlement for approval.

(f) If any Class member disputes a Class member's entitlement as determined by the Claims Evaluator, they must set out in writing the basis for that dispute along with supporting evidence. Class Counsel will review and attempt to resolve the Class member's dispute.

(g) Any disputed claim that cannot be resolved will be referred to an independent Referee 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.	Certificate Date plus 180 days	Delivery of

		Plaintiffs' Reports
6.	Certification Date plus 240 days	Delivery of Defendants' Reports
7.	Certification Date plus 270 days	Delivery of Plaintiffs' Reply Reports
8.	Certification Date plus 1 year	Summary Trial

TAB 10

Case Name:

Bodnar v. Payroll Loans Ltd.

Between
Andrew Bodnar, Plaintiff, and
Payroll Loans Ltd., Payroll Loans (Vancouver) Ltd., Pay Credit (B.C.) Ltd., Pay Credit (Vancouver) Ltd., Hornby Loan Brokers (B.C.) Inc., Thurlow Capital (B.C.) Inc., Hornby Management Inc., Thurlow Management Inc., David Ash, David Feller, Brent Stickland, Praveen Varsnyey, Sokhie Puar and Patrick Warren, Defendants

[2006] B.C.J. No. 1705

2006 BCSC 1132

151 A.C.W.S. (3d) 771

Vancouver Registry No. L051078

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: June 15 and 16, 2006.
Judgment: July 24, 2006.

(75 paras.)

Commercial law -- Banking -- Loans -- Interest -- The plaintiff successfully applied to certify a class proceeding on behalf of those who had borrowed money on a payroll loan from the defendants, alleging that the fees charged amounted to a criminal interest rate -- The issues proposed were common and suitable for a class proceeding, the plaintiff would vigorously pursue the claim, and it was the preferable procedure.

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests -- Members of class -- Representative plaintiff -- The plaintiff successfully applied to certify a class proceeding on behalf of those who had borrowed money on a payroll loan from the defendants, alleging that the fees charged amounted to a criminal interest rate -- The issues proposed were common and suitable for a class proceeding, the plaintiff would vigorously pursue the claim, and it

was the preferable procedure.

The action was certified as a class action -- The plaintiff applied to certify a class proceeding on behalf of those who had borrowed money on a payroll loan from the defendants, alleging that the fees charged amounted to a criminal interest rate of over 60 per cent annually -- HELD: The action was certified as a class action -- The issues proposed were common and suitable for a class proceeding, and was the preferable procedure in this case -- The court was satisfied the plaintiff would vigorously pursue the claim, and had common issues and interests with proposed class members -- The court found the following: the pleadings did disclose a cause of action; there was an identifiable class, that of all B.C. residents who had borrowed money as a "payroll loan" from the defendants and who had repaid the loan in full and the standard "Brokerage Fee" within 128 days of the loan advance; there were sufficient common issues, and the variations did not detract from the commonality of these; whether punitive damages should be awarded could be decided on a class-wide basis.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4, s. 12

Criminal Code, s. 347

Trade Practice Act,

Counsel:

Counsel for the plaintiff, P. Bennett and M. Mounteer

Counsel for the defendants, Loan Brokers (B.C.) Inc., Thurlow Capital (B.C.) Inc., Hornby Management Inc., Thurlow Management Inc., David Feller, Praveen Varsnyey and Sokhie Puar, W.K. Branch and L. Brasil

Counsel for the defendants, Payroll Loans Ltd., Payroll Loans (Vancouver) Ltd., Pay Credit (B.C.) Ltd., Pay Credit (Vancouver) Ltd., David Ash, D. Gruber and D. Neave

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BROWN J.:--

Introduction

1 The plaintiff applies to certify this proceeding as a class proceeding pursuant to s. 4 of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50, and to be appointed as the representative plaintiff for the class proceeding. The proposed class is:

> All residents of British Columbia who have borrowed money as a "Payroll Loan" from a business carrying on under the name Payroll Loans or Mogo (collectively "PRL") and have repaid the loan in full and the standard "Brokerage Fee" to PRL within 128 days of the loan advance. (collectively the "Class Loans").

2 The plaintiff alleges that the fees charged to him and to other members of the class for their loans contravene s. 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46, as interest is charged and paid at a criminal rate, a rate that exceeds 60% *per annum*.

3 The plaintiff seeks restitution of unlawful interest, damages for unlawful conspiracy, and damages for unconscionable trade acts and practices. In particular, the plaintiff seeks:

(a) a declaration that brokerage fees charged by PRL are interest within the meaning and for the purpose of s. 347 of the ***Criminal Code***;
(b) a declaration that the standard form loan agreements used by PRL are unlawful;
(c) a declaration that all brokerage fees received by the defendants are held in constructive trust for the benefit of the class members;
(d) an accounting and restitution to the members of the class for brokerage fees received;
(e) damages for unconscionable trade acts and practices;
(f) damages for conspiracy;
(g) punitive damages; and
(h) interest.

Background

The Payroll Loans Business

4 A number of corporate entities and individual directors have been involved in the PRL business that is the subject of this action.

5 In November 1995, the defendant David Ash incorporated what is now called Pay Credit (B.C.) Ltd. with a view to providing short-term small capital loans. In 1996, Mr. Ash restructured the business of Pay Credit (B.C.) Ltd. so that it continued as a lender and a second company, now known as Payroll Loans Ltd., was set up to act as a credit reference company. In early 1998, Mr. Ash again restructured the PRL business so that Payroll Loans Ltd. acted as a loan broker instead of as a credit reference company. In 2003 Payroll Loans (Vancouver) Ltd. and Pay Credit (Vancouver) Ltd. were formed as part of a planned reorganization of the PRL business.

6 Mr. Ash was at all material times the sole officer and director of the defendants Payroll Loans Ltd., Pay Credit (B.C.) Ltd., Payroll Loans (Vancouver) Ltd., and Pay Credit (Vancouver) Ltd. (collectively the "PRL Companies").

7 In approximately October 2003 the assets of Payroll Loans Ltd. and Pay Credit (B.C.) Ltd. were sold to Hornby Management Inc. and its wholly owned subsidiary, Hornby Loan Brokers (B.C.) Inc.

8 The shares of Hornby Management Inc. are owned by David Feller and the Varsnyey family. Mr. Feller and Praveen Varsnyey acted as directors and officers of Hornby Management Inc. and Hornby Loan Brokers (B.C.) Inc. between August 26, 2003 and October 1, 2004. From October 1, 2004 to March 20, 2006, Mr. Feller was the sole officer and director of both companies.

9 Hornby Loan Brokers (B.C.) Inc. carried on brokerage services from the retail branches acquired from the PRL Companies. It did not, however, act as lender. A separate entity, Thurlow Capital (B.C.) Inc. granted the loans brokered by Hornby Loan Brokers (B.C.) Inc.

10 Thurlow Capital (B.C.) Inc. is a wholly owned subsidiary of Thurlow Management Inc. Until January 1, 2004 the defendants Sokhie Puar and Patrick Warren were the sole officers and directors of Thurlow Capital (B.C.) Inc. and Thurlow Management Inc., although it is alleged Patrick Warren was not active in this role. After January 1, 2004 Sokhie Puar was the sole officer and director of Thurlow Capital (B.C.) Inc. and Thurlow Management Inc. I refer to Hornby Management Inc., Hornby Loan Brokers (B.C.) Inc, Thurlow Capital (B.C.) Inc. and Thurlow Management Inc. collectively as the "Thurlow/Hornby Companies".

11 The plaintiff alleges that although the corporate entities have changed over the class period, standard operating procedures with respect to the PRL business have remained consistent. Under those procedures:

(a) Loans were provided from retail locations under the trade name "Payroll Loans".

(b) In order to obtain a PRL loan, a borrower was required to complete a standard form document which contained two parts: a loan agreement with a corporate entity designated as the lender, and a broker agreement with a corporate entity designated as the broker. The broker agreement required that the borrower pay a loan broker's fee (the "Brokerage Fee"), which was a fixed amount, depending on the amount of the loan (for all first time loans the Brokerage Fee charged exceeded 18% of the principal amount advanced). The loan agreement required the borrower to pay interest at 1.13% per week, calculated from the date of the advance to the date of repayment of the loan.

(c) The term of the loan provided was set in relation to the borrower's next scheduled pay day, up to a maximum of 35 days.

(d) Loans were advanced in $100 increments up to a maximum of $1,000. The maximum amount of the Payroll Loan advanced to a borrower was determined in relation to the amount the borrower would receive on the borrower's next scheduled pay day.

(e) The borrower was required to provide PRL with a signed post-dated cheque payable on the due date of the Payroll Loan and in the amount of the Payroll Loan, the applicable interest, and the Brokerage Fee. The cheque was held by PRL as security for repayment of the loan. If the borrower failed to repay the Payroll Loan on or before the due date by cash or debit transaction, the post-dated cheque was deposited by PRL in repayment.

12 Starting in December 2005, the Hornby/Thurlow Companies started a discount program for repeat borrowers. Under the program, if a loan was repaid on or before the due date by cash or debit transaction and immediately re-borrowed, the fees and interest paid by the borrower would be reduced for the subsequent loan. Each consecutive time the borrower re-borrowed, the total fees would be reduced by a further $1 per $100 advanced (to a maximum discount of $15 per $100 advanced). These reductions would be made pursuant to a standard form contract between PRL and the borrower executed at the time of the loan advance.

13 In or about November 2005, PRL stopped operating under the name "Payroll Loans" and began operating under the trade name "Mogo". The standard operating procedures appear to have remained the same.

The Plaintiff

14 The plaintiff, Andrew Bodnar, obtained various Payroll Loans which qualify as class loans. For example, on March 28, 2000 Mr. Bodnar borrowed $500 from PRL. He signed a standard form lending document that contained both a loan agreement with Pay Credit (B.C.) Ltd. and a broker agreement with Payroll Loans Ltd. Pursuant to the terms of the lending document, Mr. Bodnar was required to pay $593.43 on April 7, 2000. This included $85.50 in Brokerage Fees and $7.93 in interest. On April 16, 2004 Mr. Bodnar borrowed $800 from PRL. He signed a standard form lending document that contained both a loan agreement with Thurlow Capital (B.C.) Ltd. and a broker agreement with Hornby Loan Brokers (B.C.) Ltd. On April 30, 2004 Mr. Bodnar paid PRL $999.10 by debit transaction. This payment included $181 in Brokerage Fees and $18.10 in interest.

Actuarial Evidence

15 The plaintiff has provided three expert reports setting out the actuarial evidence of Mr. Ian Karp, F.S.A, F.C.I.A.

16 With respect to Mr. Bodnar's first transaction, referred to above, Mr. Karp opines that if Brokerage Fees are included in the calculation of interest, then the effective annual interest rate of Mr. Bodnar's loan was 57,747%. With respect to the transaction for a loan taken out on April 16, 2004, Mr. Karp suggests the effective annual rate of interests was 33,264%.

17 In his report of June 16, 2005 Mr. Karp shows that a fee equal to 18% 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 fee within 128 days of the loan advance. This will result regardless of how many payments are made in repayment. In his report of May 26, 2006, Mr. Karp shows that if a loan is repaid within 35 days along with an amount equal to 15% of the principal advanced (the lowest fee possible under the discount program), the effective annual rate of interest will still always exceed 60%.

Statistical Evidence

18 Between 1996 and October 2003 PRL provided Payroll Loans to more than 8,497 different borrowers in British Columbia. Of these, 5350 failed to make payment on the due date of at least one of their loans, but only 404 defaulted on their first loan such that a partial or total loss was taken on the loan. Between October 2003 and December 31, 2005 PRL provided Payroll Loans to more than 44,302 different borrowers in British Columbia.

The Requirements for Certification

19 Section 4(1) of the ***Class Proceedings Act***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.

20 I review these requirements in turn.

Do the Pleadings Disclose a Cause of Action?

21 In determining if the pleadings disclose a cause of action, the threshold the plaintiff must meet is a low one. As stated in ***Brogaard v. Canada (Attorney General)*** (2002), 7 B.C.L.R. (4th) 358, 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. The threshold is a very low one.

22 With the exception of certain claims made against the directors, the claims made in this action are identical to those recognized in ***Bodnar v. The Cash Store Inc.***, [2005] B.C.J. No. 1904, 2005 BCSC 1228, aff'd [2006] B.C.J. No. 1171, 2006 BCCA 260. This claim differs from ***Bodnar*** in respect of the joint and several liability of the directors of the PRL Companies and the Hornby/Thurlow Companies. However, in ***Ayrton v. PRL Financial (Alta.) Ltd.***(2005), 370 A.R. 141, 2005 ABQB 311, aff'd 57 Alta. L.R. (4th) 1, 2006 ABCA 88, a case that involved the operation of the PRL business in Alberta, LoVecchio J. concluded in response to an application by an individual defendant to strike the claim that "[t]he allegations of fact in this case, assuming they are proven, are the type that might convince a court to lift the corporate veil" ([paragraph] 32).

23 Therefore, when recent decisions with respect to Payroll Loans in this and other jurisdictions are considered, namely ***Bodnar, Ayrton***and ***McCutcheon v. The Cash Store Inc.***, [2006] O.J. No. 1860, it cannot be plain and obvious that the plaintiff's claim cannot succeed. It follows that the pleadings do disclose a cause of action. Indeed, the defendants did not argue otherwise.

Is there an Identifiable Class of Two or more Persons?

24 As noted above, the plaintiff's proposed class is:

> All residents of British Columbia who have borrowed money as a "Payroll Loan" from a business carrying on under the name Payroll Loans or Mogo (collectively "PRL") and have repaid the loan in full and the standard

"Brokerage Fee" to PRL within 128 days of the loan advance. (collectively the "Class Loans").

25 The purpose of a class definition is threefold: (1) to identify those people who have a potential claim for relief against the defendant(s); (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: ***Bywater v. Toronto Transit Commission***(1998), 27 C.P.C. (4th) 172 at 175 (Ont. Ct. Gen. Div.); see also ***Western Canadian Shipping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46 at [paragraph] 38.

26 I am satisfied that there is an identifiable class of two or more persons in this case. A proposed class member can tell with a minimum of effort, and on objective terms, whether he or she is a member of the proposed class.

Do the Claims raise Common Issues?

27 Under s. 4(1)(c) of the ***Class Proceedings Act*** the court must determine if the claims of the class members raise common issues. The common issues which the plaintiff proposes are:

(a) Do the Brokerage Fees charged by PRL 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 Brokerage 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 PRL of those Brokerage Fees in accordance with the terms of the standard form agreement on which the Payroll Loans have been advanced by PRL to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members, and the receipt by the PRL Companies, or any one of them, of interest at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*?

(d) If the answer to (c) is yes, have those Defendants been unjustly enriched by the collection of those Brokerage Fees from the Class members?

(e) If the PRL Companies have 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 the PRL Companies to the Class members at the direction and for the benefit of Ash?

  (ii) were the Brokerage Fees received by the PRL Companies paid in whole or in part to Ash? and

  (iii) did Ash direct the transfer, use, or otherwise have the benefit of the Brokerage Fees collected by the PRL Companies from the Class members?

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

(g) If the Hornby/Thurlow Companies have 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 the Hornby/Thurlow Companies to the Class members at the direction and for the benefit of Feller, Varsnyey, Puar, or any one or more of them?

(ii) were the Brokerage Fees received by the Hornby/Thurlow Companies paid in whole or in part to Feller, Varsnyey, and Puar, or any one or more of them? and

(iii) did Feller, Varsnyey, Puar, or any one or more of them direct the transfer, use, or otherwise have the benefit of the Brokerage Fees collected by the Hornby/Thurlow Companies from the Class members?

(h) If the answer to any one of (g)(i) to (iii) is yes, then have Feller, Varsnyey, Puar, or any one or more of them been unjustly enriched by the payment by Class members of interest at a criminal rate in respect of their class Loans?

(i) If the answer to (d), (f), or (h) 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 to 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?

(j) If the answer to (b) or (c) is yes, does the provision by the PRL Companies and the Hornby/Thurlow Companies, or any one of them, of the Class Loans to Class members on terms that offend s. 347(1) of the *Criminal Code*, or the receipt by the PRL Companies and the Hornby/Thurlow Companies, or any one of them, 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?

(k) If the answer to any one of (e)(i) to (iii) or (g)(i) to (iii) is yes, then does such conduct of Ash, Feller, Varsnyey, Puar, or any one or more of them, 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?

(l) If the answer to (j) or (k) 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* s. 105 and 171?

(m) If the answer to (b) or (c) is yes, then did the Defendants (or any combination thereof) conspire to implement a scheme to provide those Loans to the Class members in order to earn profits on the Class Loans at an unlawful rate of interest?

(n) If any or all of the Defendants conspired to provide the Class Loans to the Class members at an unlawful rate of interest, then are those Defendants jointly and severally liable for damages to those Class members who have suffered loss or damage as a result of that conspiracy?

(o) If the answer to (b) or (c) is yes, then is Ash jointly and severally liable for the acts of the PRL Companies, or any of them, in advancing Class Loans on terms that offend s. 347(1)(a) of the *Criminal Code* or received interest in respect of the Class Loans at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*.

(p) If the answer to (b) or (c) is yes, and if Ash has participated in and been unjustly enriched by or conspired with the PRL Companies in respect of the Class Loans, then does the conduct of any of those Defendants justify an award of punitive or exemplary damages?

(q) If the answer to (b) or (c) is yes, then are Feller, Varsnyey, and Puar, or any one or more of them, jointly and severally liable for the acts of the Hornby/Thurlow Companies, or any of them, in advancing Class Loans on terms that offend s. 347(1)(a) of the *Criminal Code* or received interest in respect of the Class Loans at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*.

(r) If the answer to (b) or (c) is yes, and if Feller, Varsnyey, and Puar, or any one or more of them, have participated in and been unjustly enriched by or conspired with the Hornby/Thurlow Companies in respect of the Class Loans, then does the conduct of any of those Defendants justify an award of punitive or exemplary damages?

(s) If the answer to (p) or (r) is yes, what is the amount of punitive or exemplary damages to be awarded?

28 I note that the plaintiff amended the common issues to remove Patrick Warren, a named defendant who was a director and officer of Thurlow Capital (B.C.) Inc. and Thurlow Management Inc. The plaintiff does not seek certification against him, as there is evidence that Mr. Warren was not involved in the management of the business and on January 1, 2004 relinquished all of the shares that he had owned.

29 The defendants argue that the issues are not common. They say that the circumstances in this case are closer to ***MacKinnon v. National Money Mart Company et al.,*** [2005] B.C.J. No. 399, 2005 BCSC 271, than they are to ***Bodnar***, in that there are multiple, independently owned companies with multiple business purposes and models, varying loan agreements, and a discount program that

reduced the Brokerage Fee for repeat borrowers. They also submit that the issues cannot be determined without considering the claimant's individual circumstances. I will deal with each of these arguments in turn.

(a) Is this case similar to ***MacKinnon v. National Money Mart Company et al.****?*

30 In ***MacKinnon,*** certification was sought against more than twenty defendants, operating eighteen businesses, with many different business models. Each defendant charged a fee, which may have had little or nothing in common with the fees charged by another lender. An individual claimant may have borrowed from only one defendant lender. The court's conclusions with respect to the fee charged by one lender may have had no application beyond a particular borrower and lender. In those circumstances, I concluded that the issues, as raised, were not common.

31 Here, the defendants argue that the circumstances are similar to those of ***MacKinnon***. First, they submit there was no common ownership of the corporate defendants, as there was an asset transfer between Payroll Loans Ltd. and Pay Credit (B.C.) Ltd., and Hornby Management Inc., not a share transfer. Second, they emphasize that the defendants carried on business with multiple business purposes and models. To this end, they argue that the PRL Companies adopted one business model, which they describe as:

(i) provision of short-term loans with no additional charges (beyond interest);
(ii) credit reference fee charged by a separate company;
(iii) brokerage services provided by one company, loans provided by a separate company.

Whereas the Thurlow/Hornby Companies pursued a different business model, described as:

(i) brokerage fees set pursuant to a schedule with changes to the rate schedule; the lender is Thurlow with whom there is no common ownership;
(ii) discount program introduced in or about December 2005 with decreasing brokerage fees with each new loan.

32 Third, they argue that loan agreements under the PRL business were more varied than those at issue in ***Bodnar***. In particular, they point to the fact that documentation used by the defendants did not include an "entire agreement clause". They say there is evidence that agreements were varied or supplemented through verbal agreement.

33 Finally, they say that the existence of the discount program creates a complexity not present in ***Bodnar***. As discussed above, under that program, customers could pay as little as 15% in Brokerage Fees on subsequent loans. The defendants say that the plaintiff's class definition assumes that a Brokerage Fee of 18% or greater was charged, and that therefore, where a loan was repaid in the 128 day time frame, it is not necessarily the case that an illegal rate of interest will have been charged.

34 I accept the plaintiff's submissions that PRL effectively operated one business over the class period, operating first under the name Payroll Loans and then under the name Mogo. Although the business changed hands during the class period, the business model and fee structure remained essentially the same.

35 Further, I do not agree with the submission that the defendants' multiple business purposes and models make this action inappropriate for class certification. I am not satisfied that the business practices or standard form agreements vary so widely that there is no commonality. The defendants have not identified any change to the standard form of loan agreement which is material to the claims advanced.

36 With respect to the defendants' argument regarding the oral variation of loan agreements, there is no evidence that the standard form agreements were varied at the date the loan was entered into. Ms. Erin Feller, in her affidavit of May 31, 2006 says:

> The customer service representatives are authorized by Thurlow Capital to verbally amend the terms of a loan agreement for any given loan, based on the borrower's circumstances, prior to or on the due date of the loan. These changes typically include extending the term of the loan by a few days or to the person's next pay period without charging any additional interest or fees.
>
> It is very common for borrowers to contact the customer service representatives prior to or on the due date of their loans and request extensions of a few days, often Friday to Monday. This occurs primarily due to the personal circumstances of each borrower.

37 The defendants also filed two affidavits from borrowers, the first from Chad Saalfeld. In his affidavit, Mr. Saalfeld says:

> I generally arranged for repayment of each of my loans to be due on a Friday. I selected Friday as the due date as that was the day of the week on which I usually received my paycheque from my employer. ... Certain, but not all of my loan agreements with Pay Credit, changed the written terms by extending the specified loan due dates by as many as five days beyond that set out in the written loan agreement documents. I recall that verbal terms were included in my loan agreements with Pay Credit on approximately four occasions during the period from 2001 to 2003. For example, on the occasions when I determined that my employer would not be issuing me a paycheque on a Friday - and instead would issue the cheque on the following Monday or Tuesday - verbal terms were included which extended the due date of the loan by three to five days, that is to the Monday, Tuesday or Wednesday of the following week, so that I could make the repayment personally and in cash ... in addition, verbal terms were incorporated into my loan agreements when I was working outside the lower mainland area such that it was not possible for me to go personally to the Payroll Loan branch in Surrey to repay my loan on the due date specified in the written terms. In those circumstances, the Payroll Loans representatives and I agreed that the due date of the loan in issue would be extended from a Friday to the following Tuesday or Wednesday so that I could again attend and pay the amount owed in cash.

38 The second affidavit is from Mr. Dawson. Mr. Dawson also indicates that "on two occasions, verbal terms were included in ... loan agreements with Pay Credit which changed the written terms by

extending the specified loan due dates set out in the written loan agreement documents." The plaintiff has, however, filed an additional affidavit from Mr. Dawson in which he elaborates, saying:

> Each time I borrowed a loan from Payroll Loans the same procedure was followed. I would be asked by the customer service representative how much I wanted to borrow and the date of my next scheduled payday. The Customer Service Representative would enter this information into a computer system and print out a one-paged standard form lending document .... The computer would automatically set the due date of the loan to be my next scheduled payday....
>
> ...
>
> As I deposed in the 2004 Affidavit, on at least two occasions the term of the loan I obtained was extended.
>
> On the first occasion, I called Payroll Loans a few days before my loan was due and explained that I would not be able to come in to re-borrow my loan until the Monday following my payday because my father was ill ...
>
> On the second occasion, I called Payroll Loans immediately before my loan was due and explained that I was unable to get off work before the Payroll Loans location closed, and therefore, could not come into the location to re-borrow my loan until the following day.

39 I understand from these affidavits that Payroll Loans from time to time agreed to give the borrower extra time to attend to repay his or her loan. There is no affidavit which indicates that the standard loan agreements were varied at the time they were granted.

40 I accept the plaintiff's submission that variations made after the loan is granted are not relevant in determining if an agreement for credit violates s. 347. Section 347 considers credit charges at the time the transaction is entered into: ***Garland v. Consumer's Gas***, [1998] 3 S.C.R. 112; ***Degelder Construction v. Dancorp Developments***, [1998] 3 S.C.R. 90. Variations to the loan agreement made after the date of contract are not relevant in determining if an agreement for credit violates s. 347. Further, those who received a short extension within which to pay their loan will come within the class definition nonetheless, because they would have repaid the loan and the standard Brokerage Fee within 128 days of the loan advance. I am therefore not satisfied that the variations of which I have evidence detract from the commonality of the issues.

41 With respect to the discount program, the reduced Brokerage Fee only applies to repeat borrowers. The Brokerage Fee is reduced from 18% for future loans if a borrower has repaid three loans in cash or debit card on their respective due dates. Therefore, before a borrower would receive a Brokerage Fee of less than 18%, the borrower must have repaid at least three loans, together with a flat fee of more than 18%. Accordingly, each borrower would have at least three loans which would qualify as class loans before the brokerage fee would fall to 15%. In addition, Mr. Karp's report of May 26, 2006 indicates that a brokerage fee of 15% repaid in 35 days, if that brokerage fee is interest, will still result in the payment of a criminal rate of interest.

(b) Do the common issues require individual inquires?

42 The defendants also argue that the issues proposed by the plaintiff are not truly common issues because they necessarily involve an inquiry into the individual circumstances of each class member.

43 The defendants argue that issues dealing with unjust enrichment, unconscionable acts and practices contrary to the ***Trade Practice Act,*** and punitive damages will require an individualized inquiry.

44 The arguments with respect to unjust enrichment and unconscionable acts and practices were made and dismissed in ***Bodnar***at [paragraph]s 37-45. The defendants' arguments cannot succeed on these points and are dismissed for the same reasons as those given in ***Bodnar***.

45 With respect to punitive damages, in ***Reid v. Ford Motor Company,*** [2003] B.C.J. No. 2489, 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.

46 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 ***Aryton***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)

Is a Class Proceeding the Preferable Procedure?

47 A class proceeding must, in the words of s. 4(1)(d), be the preferable procedure for the fair and efficient resolution of the common issues. Here, the court must consider the factors listed in s. 4(2) of the ***Class Proceedings Act***:

(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.

(a) Do the Common Issues Predominate?

48 The defendants argue that, as in ***MacKinnon***, individual issues overwhelm the common issues, such that a class proceeding is not the preferable proceeding. They say that even if a particular form of agreement is found to constitute an agreement to receive interest at a criminal rate, to resolve a member's claim the Court will be required to look to individual circumstances because:

(a) In various cases the agreements were varied orally at the time of execution or later;
(b) The court will have to determine for each individual the date of the advance of the principal and the date of repayment. Small payments may have been made from time to time and the court will have to determine what interest, if any, has been received;
(c) In some cases, payment will be made after collection procedures are initiated and the court will have to consider what portion of the payment is principal, what portion interest and what portion costs;
(d) Defences will be raised to each of the claims: *res judicata* for some claims; voluntariness of payments exceeding 60%;
(e) With respect to trade practice claims and punitive damages, the defendants will raise individual circumstances in defence to these claims: were the individuals fully informed, were they under pressure, etc.;
(f) The defendants and third parties may bring counter-claims against the plaintiffs for unpaid amounts: borrowers may borrow on more than one occasion and may repay in full on one occasion and not on another;
(g) The court will be required to investigate for each individual whether compensatory or punitive damages are appropriate and a proper amount.
(h) Depending on the individual agreement, it may be just for the court to apply the principle of notional severance to cure the illegality.

49 Counsel for the PRL Companies also submits that certification of the proposed common issues does not promote access to justice or judicial efficiency, which are considerations that inform the preferability inquiry: see ***Hollick v. City of Toronto***, [2001] 3 S.C.R. 158 at [paragraph]s 32-34.

50 In my view, a class proceeding is the preferable procedure in this case. As I note above, this case is very different from ***MacKinnon***. That proposed class action concerned many more defendants carrying on a range of different businesses under materially different business models. Furthermore, the class definition in ***MacKinnon***was very broad:

> All persons who have borrowed money as a Pay Day loan, defined as a loan payable on the borrower's next scheduled pay day or in any event within 60 days of the loan advance from any of the businesses operated by the defendants either directly or through the operation of a franchise system between January 29, 1997 and the date the action is certified as a class proceeding.

51 It was in this context that I said in ***MacKinnon*** that the individual issues overwhelmed the common issues.

52 By contrast, here, because of the narrowness of the class definition, on the plaintiff's theory every person will necessarily have paid interest at a criminal rate. On the plaintiff's theory, resolution of the common issues will necessarily advance each person's claim. Further, it may be that some of the defences raised can be determined on a class-wide basis, for example, the voluntariness issue. Counterclaims may be advanced in this action, but this does not preclude certification. As the Court noted in ***Metera v. Financial Planning Group*** (2003), 12 Alta. L.R. (4th) 120, 2003 ABQB 326 at [paragraph] 69:

> It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be over-emphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ...

53 With respect to the argument that a class proceeding is not preferable because it does not accord with the objectives set out in ***Hollick***, I note that in similar proceedings, the courts have found that the three policy objectives of the ***Class Proceedings Act*** were served by certifying the action: see ***Aryton*** at [paragraph]s 93-97; ***Bodnar*** at [paragraph]s 63-64; ***McCutcheon*** at [paragraph] 77.

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

54 There is no evidence that there are individuals who would have an interest in pursing individual actions.

> *(c) Are the Claims Subject of Other Proceedings?*

55 There are no other proceedings in British Columbia which relate to the subject matter of this proceeding. A class proceeding against PRL has been certified in Alberta.

> *(d) Are other means of resolving the class members' claims less practical or less efficient?*

56 As in ***Bodnar***and ***Aryton***, the individual claims for class members are for modest amounts. They would be at most a few thousand dollars. This plaintiff does not have the financial means to pursue an individual action. It is likely that others in the class would be in a similar situation: without the resources to pursue expensive litigation for a modest recovery. As I said in ***Bodnar***:

> 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. ([paragraph] 62)

> *(e) Would the administration of the class proceeding create greater difficulties than those likely to be experienced if relief were sought by other means?*

57 I am not satisfied that the administration of the class proceedings would create difficulties not present if a different form of relief were pursued.

Is the Plaintiff a Suitable Representative?

58 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.

59 Counsel for the Thurlow/Hornby Companies argues that Mr. Bodnar is not an appropriate representative because of his motivation and credibility. They say that because he knew that the interest rate being charged by PRL might well constitute an illegal rate of interest, having commenced an earlier action against another loan company, he manufactured the lawsuit against the Thurlow/Hornby Companies which he now presents to the court for certification. They say that given such a motivation, certifying this class proceeding would not meet the objectives of class proceedings discussed in ***Hollick.***

60 Mr. Bodnar has filed an affidavit in which he swears that he borrowed further loans in 2004 because he was struggling financially and did not believe he would be able to receive a loan from a conventional lender; that he went to PRL because he had borrowed numerous loans from the business

in the past and was familiar with its procedures; and that he did not obtain the 2004 loans with the intention of commencing an action in respect of those loans.

61 There is no basis in the materials before me to conclude that Mr. Bodnar was seeking to manufacture a lawsuit. Indeed, there would be no reason for Mr. Bodnar to borrow from PRL in order to create a cause of action because, at that time, Mr. Bodnar knew Mr. MacKinnon was already pursuing a potential class proceeding against Payroll Loans.

62 Accordingly, I am not satisfied that Mr. Bodnar's motivation is suspect, or that this is a basis for rejecting him as a representative plaintiff. I note that in ***Aryton***, the Alberta Court of Appeal said:

> The appellants submit that [Mr. Aryton] took out the Hornby and Thurlow loan with full knowledge of the purported illegality and unconscionability of the loans.
>
> Without determining the issue of whether the appellants are estopped from raising this new objection on appeal, the appellants have not demonstrated that Mr. Aryton cannot fairly and adequately represent a class as required. ... While his knowledge of the loans at the time he took out the loan from Hornby and Thurlow made Mr. Aryton atypical of the other defendants, he was in a similar and typical position when he took out the loan from Payroll and PRL Financial. ...
>
> While Mr. Aryton may have sought a loan from Hornby and Thurlow for the purpose of creating a cause of action against them, that action is not in conflict with the common issues and interests of other prospective class members. ([paragraph]s 15-17)

63 The defendants have provided me with a recent decision of the Ontario Superior Court of Justice, ***Arabi v. The Toronto Dominion Bank***, [2006] O.J. No. 2072, 2006 CanLii 16833. There Madam Justice Ellen MacDonald said:

> ... if it is established that the transaction was deliberately orchestrated, this fact may be a reason to refuse certification. (at para. 44)

64 I am not satisfied that Mr. Bodnar took out the loan with the purpose of creating a cause of action against the Thurlow/Hornby Companies. Indeed, the evidence is otherwise.

65 I am satisfied on the evidence before me that the plaintiff will vigorously prosecute this claim and has, on the common issues, interests in common with proposed class members.

66 A plan that the plaintiff has provided is attached as Schedule "B". It is essentially the same plan as was provided in ***Bodnar*** and is acceptable.

67 I note that the parties have adjourned the issue of who should receive notice of this action to a later date.

Conclusion

68 I conclude that the plaintiff's action should be certified as a class action.

Application of Mr. Ash

69 Mr. Ash argues that the action against him should be dismissed pursuant to Rule 18A.

70 The plaintiff says that he has not had an opportunity to conduct examinations for discovery. There has been no discovery of documents.

71 The nature of the claims against Mr. Ash is such that the plaintiff will require discovery of documents and an examination for discovery of Mr. Ash to allow him to effectively respond to Mr. Ash's summary trial application.

Payroll Loans Ltd. and Pay Credit B.C. Ltd. Application to Strike the Claim as an Abuse of the Process of Court

72 The Payroll Loans Ltd. and Pay Credit (B.C.) Ltd. apply to strike this action on the basis that Mr. MacKinnon seeks similar relief against them in the ***MacKinnon*** action. They say that Mr. Bodnar is the privy of Mr. MacKinnon and that this action is an abuse of the process of the court.

73 Until an action is certified, in my view it is not appropriate to describe Mr. Bodnar as the privy of Mr. MacKinnon. Until the action is certified, each is an individual plaintiff. It is only when the action is certified that the representative plaintiff conducts the action on behalf of the class.

74 It is always possible that more than one plaintiff will commence a proposed class action against the same defendants, seeking similar relief. In such a case, the ***Class Proceedings Act*** provides in s. 12 that the court may make any order it considers appropriate respecting the conduct of class proceedings. There has been no application made before me pursuant to s. 12. Section 13 provides that the court may at any time stay any proceeding related to the class proceeding on the terms the court considers appropriate. Again, there has been no application made before me pursuant to s. 13.

75 As it happens, Mr. Bodnar and Mr. MacKinnon share the same counsel. It may be appropriate, now that the ***Bodnar*** action has been certified to stay the ***MacKinnon*** action, or it may be that the ***MacKinnon*** action should be consolidated with the ***Bodnar*** action. Be that as it may, the ***Bodnar*** action does not constitute an abuse of process.

BROWN J.

TAB 11

Case Name:

Ayrton v. PRL Financial (Alta.) Ltd.

Between
Jacob Ayrton, As Representative Plaintiff, plaintiff,
and
PRL Financial (Alta.) Ltd., Payroll Loans (Alberta) Ltd., Hornby Loan Broker (Alberta) Inc., Thurlow Capital (Alberta) Inc., David Feller, Praveen Varshney, Sokhie Puar, Patrick Warren and David Ash, defendants

[2005] A.J. No. 466

2005 ABQB 311

[2006] 2 W.W.R. 536

52 Alta. L.R. (4th) 106

370 A.R. 141

11 C.P.C. (6th) 28

139 A.C.W.S. (3d) 626

2005 CarswellAlta 550

Docket: 0301 15879

Alberta Court of Queen's Bench
Judicial District of Calgary

LoVecchio J.

Heard: February 18, 2005.
Judgment: April 22, 2005.

(108 paras.)

Civil procedure -- Actions -- Joinder of causes of action and consolidation -- Parties -- Class or representative actions -- Certification -- Common interests -- Members of class -- Representative plaintiff -- Striking out parties --Corporations and associations law -- Corporations -- Legal

personality -- Lifting the corporate veil.

Application by the plaintiff Ayrton for certification of the present action as a class action and for consolidation of two actions. The defendant Ash, the director of the defendant PRL Financial, sought an order to be struck as a party to the action. Ayrton had obtained several payday loans from PRL Financial. In the present action, Ayrton claimed that the cumulative amounts he was required to pay for interest and other administrative charges constituted a criminal rate of interest. He then commenced another action against Hornby, Thurlow arguing that these defendants also charged a criminal rate of interest and violated the Fair Trading Act. Hornby, Thurlow had purchased the assets of PRL. These defendants were also parties to the present action and the same claims were made against them in both actions. The statement of claim in the present action alleged that Ash, as director, authorized or acquiesced in the conduct of PRL and was thus jointly and severally liable.

HELD: Application by Ayrton allowed. Application by Ash dismissed. The action was not struck out as against Ash. The allegations against him were the type that might convince a court to lift the corporate veil. The issue of Ash's personal liability was an issue to be determined at trial. The action could properly proceed as a class action. The defined class, as proposed by Ayrton, consisted of individuals who borrowed money as a payday loan from PRL within a certain time frame and were charged interest and a brokerage fee. This definition provided objective criteria for membership in the class based on borrowing and repayment of a loan, and the class was related to the common issue of whether criminal rates of interest were charged. The claims in this case raised similar issues of fact and law and advanced the class members' claims in a meaningful way. The issue of whether the brokerage fee charged constituted a criminal rate of interest was a central issue to all members' claims. The fact finding and legal analysis in this case would be shared by the class members. In the context of the entire claim, common issues predominated over individual issues. Ayrton met the requirements to be a representative plaintiff. The two actions were consolidated since they shared the same issued of law and fact. Consolidation would also remove concerns about duplicity. The defendants Hornby, Thurlow were struck from the present action to remove further duplicity.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court Rule 42, Rule 129, Rule 129(d), Rule 129(1)(a), Rule 229

Class Proceedings Act s. 1(e), s. 5, s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 5(2)(a), s. 5(2)(b), s. 5(2)(c), s. 5(2)(d), s. 5(2)(e), s. 5(3), s. 8

Consumer Credit Transactions Act, R.S.A. 1985, c. C-22.5

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

Fair Trading Act, R.S.A. 2000 c. F-2, s. 13(3), s. 98(3)

Judgment Interest Act, R.S.A. 2000, c. J-1

Limitations Act, R.S.A. 2000, c. L-12

Trade Practice Act, R.S.B.C. 1996, c. 457

Counsel:

Mr. William E. McNally of McNally Cuming Raymaker for the Plaintiff Jacob Ayrton

Mr. A. Webster Macdonald, Jr., Q.C. and Mr. S.B. Gavin Matthews of Blake, Cassels & Graydon LLP for the Defendants PRL Financial (Alta.) Ltd., Payroll Loans (Alta.) Ltd., and David Ash.

Mr. Todd Lee of Miles Davison LLP for the Defendants Hornby Loan Broker (Alta.) Inc., Thurlow Capital (Alta.) Inc., David Feller, Praveen Varshney, Sokhie Puar, and Patrick Warren.

REASONS FOR JUDGMENT

LOVECCHIO J.:--

Introduction

1 Jacob Ayrton has on several occasions obtained loans, commonly referred to as "payday loans", from the Defendant companies. Payday loans are generally short-term (being due around the borrower's next scheduled payday) and require the borrower to pay both interest at a stipulated rate and some other administrative charges.

2 Mr. Ayrton says that the cumulative amounts he was required to pay on these payday loans constitute a criminal rate of interest. On October 8, 2003, Mr. Ayrton filed a Statement of Claim in this Court against Payroll, PRL and Mr. Ash asking this Court to:

a) declare that the Brokerage Fees charged by the corporate Defendants is interest within the meaning of s. 347 of the Criminal Code[1] and that the agreements made by the corporate Defendants for payday loans are void because they resulted in the receipt of interest at a criminal rate contrary to s. 347 of the Criminal Code;

b) declare that the agreements made by the corporate Defendants for payday loans failed to comply with the Fair Trading Act[2] and are void;

c) order an accounting of all monies received by the Defendants, or one or any of them, and order repayment or damages of all monies received by the Defendants;

d) award statutory damages from the Defendants, or one or any of them, in the amount equal to the lessor of $500 or 5% of the maximum outstanding balance of the Payday Loan and financial charges as provided by s. 98(3) of the Fair Trading Act;

e) award punitive and/or exemplary damages;

f) award interest on all amounts found to be owing pursuant to the Judgment Interest Act.[3]

3 The Statement of Claim was filed by Mr. Ayrton as a Representative Plaintiff in a proposed class proceeding.

4 The Defendants do not agree with these assertions and do not accept that this is an appropriate case for certification as a class proceeding.

Case Management

5 On May 26, 2004, I was appointed by the Associate Chief Justice as the Case Manager of this proceeding and, as will be detailed below, another similar proceeding.

The Parties to these Proceedings, the Payroll Loan Procedure and the Proceedings to Date

6 The following brief chronology will help to explain the parties involved in this action, their relationship to each other, the nature of the loans and the proceedings to date.

7 In March of 2003, Mr. Ayrton obtained a payday loan from Payroll Loans at one of their retail outlets. Payroll brokered the loan for a lender, PRL Financial. David Ash is the sole director of Payroll and PRL.

8 In October, 2003, Hornby Loan Broker purchased the assets of Payroll. Hornby carried on business in the same retail outlets that had been used by Payroll.

9 In February of 2004, and on later dates, Mr. Ayrton obtained payday loans from Hornby. Hornby had brokered these loans for a lender, Thurlow Capital. The directors of Hornby are David Feller and Praveen Varshney. The directors of Thurlow are Sokhie Puar and Patrick Warren.

10 In order to obtain the loans with the Defendant companies, Mr Ayrton was required to sign two standard form agreements. One form was a Broker Fee Agreement with the broker of the loan. Both Payroll and Hornby's Broker Fee Agreements required Mr. Ayrton to pay a brokerage fee of approximately 20% of the loan. For example, Mr. Ayrton was charged a brokerage fee of $95 on a loan of $500.

11 The other form that Mr. Ayrton was required to sign was a loan agreement with the companies actually extending credit, either PRL or Thurlow. The loan agreement disclosed the rate of interest on the loans. Both PRL and Thurlow charged interest at the rate of 1.13 % per week, or approximately 59% per annum. For example, Mr. Ayrton was charged $11.32 in interest for a two-week loan of $500.

12 As already noted, Mr. Ayrton filed a Statement of Claim in this Court against Payroll, PRL, and Mr. Ash on October 8, 2003. Mr. Ayrton filed the Statement of Claim as the Representative Plaintiff in a proposed representative action under Rule 42 of the Alberta Rules of Court.

13 On April 19, 2004, Mr. Ayrton filed an Amended Statement of Claim in this Court. The Amended Statement of Claim adds the Defendants Hornby, Thurlow, and their respective Directors, to the Statement of Claim. The Amended Statement of Claim alleges that these corporate Defendants, authorized by their respective Directors, also charged a criminal rate of interest and violated the Fair Trading Act. This claim will be referred to as Action #1.

14 On August 10, 2004, Mr. Ayrton filed a new Statement of Claim in this Court against Hornby, Thurlow and their respective directors, as a Representative Plaintiff in a proposed class proceeding under the Class Proceedings Act.[4] The Statement of Claim echoes the allegations made against these Defendants in the Amended Statement of Claim of April 19, 2004. This second claim will be referred to as Action #2.

These Applications

15 As part of the Case Management process, I heard three applications on February 18, 2005. They were:

(1) Mr. Ash applied to be struck from the claim under Rule 129 of the Alberta Rules of Court, the alleged basis being the Statement of Claim does not disclose any cause of action against him;
(2) Mr. Ayrton applied to have the two proceedings certified as class proceedings; and
(3) Mr. Ayrton applied under Rule 229 of the Alberta Rules of Court to consolidate this action with the other proceeding.

Decision

16 For the reasons which follow:

(1) the Defendant Ash will not be struck from the Statement of Claim;
(2) these proceedings will be certified as a class proceeding with Mr. Ayrton as the Representative Plaintiff; and
(3) Action #1 and Action #2 will be consolidated and, as an ancillary matter to the consolidation, the Defendants Hornby, Thurlow, and their respective Directors will be struck from Action #1.
(1) The Application to Strike the Defendant Mr. Ash

Discussion

17 Rule 129 (1)(a) of the Alberta Rules of Court allows a court to strike pleadings in an action if the pleadings do not disclose a cause of action. This rule is in place to relieve parties from litigation which is needless or doomed to fail. The principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled. In brief, the Court must assume that the allegations of fact made by the Plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The burden of proof to have pleadings struck rests on the Applicant, and it will only be done in the clearest of cases.[5]

18 So, the question that arises in this Application is whether, assuming all of the facts set out in the Statement of Claim are true, it is plain and obvious that no cause of action is disclosed against the Defendant Mr. Ash?

19 The starting point for this analysis is the Statement of Claim itself. Paragraphs 43 and 44 of the Statement of Claim are relevant. They read:

43. Further, the conduct of the Defendants, or one or any of them, is intentional and deliberate and is undertaken by the Defendants, or one or any of them, to exploit the economic vulnerability and necessitous circumstances of the representative Plaintiff and other Class members ...
44. The individual Defendant Ash authorized or assented or acquiesced or participated or omitted to do anything for the purposes of aiding or abetting the acts or omissions set forth above and is jointly and severally liable with the corporate Defendant PRL Corporations to the representative Plaintiff and other Class members ...

20 Counsel for Mr. Ash argues that the allegations in these pleadings, even if proven to be true, do not form a cause of action against him personally. He argues a rule which every first year law student is taught: namely, the Court should not pierce the corporate veil. Stated another way, a corporation is a separate legal identity, distinct from its directors and shareholders, with rights and liabilities of its own. As a result, a corporate veil is created whereby the acts of directors are seen as the acts of the corporation, and any liability arising from those acts attaches to the corporation, and not to the directors personally.[6]

21 Counsel for Mr. Aryton, having been a first year law student at one time, acknowledges the existence of the rule. But he adds, the rule is not absolute. So, while the rule affords protection to directors for legitimate corporate purposes, the corporate veil may be lifted and liability may attach to a director in certain circumstances.

22 Courts have commented on the circumstances in which the corporate veil will be lifted. These circumstances include: where there are findings of fraud or deceit against a director,[7] where a director's actions are tortious in and of themselves,[8] where there is evidence that the director(s) either a) formed the corporation for the purpose of doing a wrongful act, or, b) directed that the corporation do a wrongful thing after it was formed[9] and where doing so (that is to say recognizing the corporate veil) would result in a decision "too flagrantly opposed to justice".[10]

23 In two recent cases, courts have specifically considered the issue of striking pleadings from a statement of claim when the directors of corporations allegedly involved in illegal payday loan operations were personally named as defendants in the action. The two cases were Tschritter v. Rentcash Inc.,[11] and Bellows v. Quickcash Ltd..[12]

24 In Tschritter, the Plaintiff commenced an action against the corporation, The Cash Store, and its sole officer and director. The Plaintiff also named the corporate shareholder of the Cash Store, Rent Cash, as a defendant as well as the past and current directors of Rent Cash. The Plaintiff claimed that the fees charged on loans amounted to an annual interest rate of over 1000%, which is well in excess of the allowable rate of interest under the Criminal Code.

25 The defendants argued that the action should not proceed against all of them as to do so would lift the corporate veil and no facts were pled to establish personal liability against them.

26 My brother Hawco J. observed that the statement of claim contained the following allegations: the Cash Store contravened s. 347(1) of the Criminal Code; the purpose of The Cash Store was to lend money at a criminal interest rate; and that the directors of Rent Cash had authorized the company to commit the criminal act. He relied on the following statement from Rainham to confirm that these allegations disclose a cause of action against the individual directors:

> If a company is formed for the express purpose of doing a wrongful act, or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences.[13]

As a result, Justice Hawco did not strike the individual defendants from the claim and the directors' personal liability was left for the trial judge to determine.

27 In Bellows, the Plaintiff filed a claim against a payday loan corporation called Quik Cash, and its officers and directors, alleging the defendants charged and collected interest on loans at a criminal

rate of interest. The defendant officers and directors applied to strike the claim against them, saying the claim lacked sufficient facts to disclose a cause of action against them personally. They also argued there is no personal liability at law for directors and officers arising out of the actions of the corporation.

28 The Court pointed to a number of cases which held that controlling minds may be personally liable when they have directed that a wrongful thing be done, or used the corporate structure for clearly improper conduct and declined to strike the pleadings.

29 Counsel for Mr. Ash submits that Tschritter and Bellows are distinguishable from this case. He submits that the Statement of Claim in this action does not allege the corporation was incorporated for an illegal purpose, nor does it allege that Mr. Ash knew the corporations' actions were wrong, or that Mr. Ash benefited from the corporations' acts. He also submits that in the recent Supreme Court decision, Transport North American Express Inc. v. New Solutions Financial Corp.,[14] the Court held that a finding that a corporation contravened s. 347 of the Criminal Code was not evidence that the company in question had been established for a criminal purpose.

30 Counsel for Mr. Ayrton submits that the Statement of Claim in this case is strikingly similar to those in the Tschritter and Bellows actions and submits the law does not require a corporation to be established for an illegal purpose, or to have as its sole purpose an illegal act, in order to find a director personally liable; it is sufficient if, once formed, the director expressly directs a wrongful thing be done.

31 Counsel for Mr. Ayrton then submits the Statement of Claim makes just this type of allegation against Mr. Ash in paragraph 43, which alleges that "the conduct of the Defendants, or any one of them, was intentional and deliberate", meaning that Mr. Ash allegedly intended the criminal conduct. Furthermore, paragraph 44 of the claim also specifically alleges that Mr. Ash "authorized or assented or acquiesced or participated or omitted to do anything for the purposes of aiding or abetting the acts or omissions set forth above".

32 The allegations of fact in this case, assuming they are proven, are the type that might convince a court to lift the corporate veil. The issue of Mr. Ash's personal liability is an issue to be determined at trial and the pleadings against Mr. Ash will not be struck.

(2) The Application to Certify these Proceedings as a Class Proceeding

Discussion

33 There are three main policy objectives behind class proceedings: access to justice; judicial economy; and behaviour modification. A class proceeding may offer litigants better access to justice by distributing the costs of litigation across a large number of class members, making litigation more economical. Judicial economy is achieved by having cases with similar fact-finding and legal analysis done in one action rather than being duplicated in many actions. Finally, a class proceeding helps to deter actual and potential wrongdoers by making them accountable to the public.

34 In a certification application, the Court is interested in whether the action is well suited to being tried as a class proceeding. The Court is not testing the merits of the application.

35 The Class Proceedings Act (the "Act") came into force in April of 2004. While these proceedings were instituted prior to the Act coming into force, the parties have agreed that I should apply the Act in this Application.

36 In order to have these proceedings certified as a class proceeding, and to recognize the person seeking to bring the class action as a representative plaintiff, the Court must be satisfied that the requirements in s. 5 of the Act are met. Section 5 reads:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> (b) whether a significant number of the prospective class members 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.

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

Position of the Parties

37 Mr. Ayrton submits these proceedings should be certified as they meet all the requirements of s. 5.

38 The Defendants PRL, Payroll, and David Ash oppose certification. The main thrust of their argument is that there are too many individual circumstances that the Court will have to take into consideration, and that these individual circumstances may result in different determinations of the alleged illegalities and remedies for the class members. They also argue that Mr. Ayrton was knowledgeable about the nature of the later loans that he entered into, which may situate him differently from other class members, and so he is not an appropriate representative plaintiff.

39 The Defendants Hornby, Thurlow, David Feller, Praveen Varshney, Sokhie Puar and Patrick Warren, substantially agree with the submissions of PRL, Payroll and Mr. Ash. They part ways regarding whether Mr. Ayrton is an appropriate representative plaintiff, with the Hornby and Thurlow group of Defendants approving of Mr. Ayrton as a representative plaintiff if these proceedings are certified.

40 In light of the requirements of s. 5 and the position taken by the parties, there are three main issues which must be addressed. First - Is the class definition proposed by Mr. Ayrton too broad? Second - Do the questions of fact or law common to the prospective class members predominate over questions affecting only individual prospective class members - or vice versa? Third - Is Mr. Ayrton a suitable representative plaintiff? I will consider each in turn.

Class Definition

41 The Defendants argue that the proposed class definition is too broad and includes class members who are not commonly situated so the proposed class members will be facing different legal issues, resulting in an incohesive and unworkable class.

42 The Defendants point to two types of differences between potential class members and argue that these differences will likely mean that success for one will not be success for all.

43 The first difference between the proposed class members is that some of them have likely defaulted on their loans with the Defendants. The Defendants estimate that a high percentage (69%) of their customers have defaulted on their loans on at least one occasion. When a customer defaults, the Defendant companies enter into different agreements with the customers depending on the customer's circumstances.

44 In some cases, loan extensions are given for a few days and no additional fees are levied on top of the fees already agreed to. In other cases, arrangements are made with customers whereby customers pay the loan in equal instalments of a 6 to 12 month period without additional fees being

charged. There are also cases where the Defendant companies have accepted settlements with customers for only a partial recovery of the original loan.

45 As a result of these types of differences, the Defendants argue that a different analysis will need to be done in order to answer questions about whether the brokerage fee was interest, the transaction was unconscionable, or there was an unjust enrichment. Therefore, each claim of the proposed class members will be fact-specific and depend on the individual circumstances of the customers. The Defendants argue this is especially true because the class members seek equitable remedies, and the granting of those remedies will also depend on the level of sophistication, knowledge and motivation of the individuals seeking loans.

46 The second difference that the Defendants raise is that the class members are subject to different legislation. Mr. Ayrton, as the proposed Representative Plaintiff, has requested that the Court certify as a class all individuals who borrowed money from the Defendants from January 1, 1997 to date.

47 The Defendants point out that the Limitations Act[15] bars a claimant from commencing an action once two years have passed from the time the claimant first knew or ought to have known about the existence of the claim. Therefore, a number of the proposed class members may be statutorily barred from participating in the action.

48 The Defendants also point out that Mr. Ayrton seeks to rely on remedies under the Fair Trading Act retroactive to January 1, 1997, but that the Fair Trading Act only applies to consumer transactions arising after September 1, 1999.

49 Mr. Ayrton responds that the class is commonly situated because there is one overarching issue to this case which unites them all. The overarching issue is whether the Defendants entered into agreements by which they sought to charge interest at a criminal rate. The determination of whether an agreement violates s. 347(1)(a) of the Criminal Code is based on the time the transaction is entered into - so the fact that a customer may have received an extension on repayment is irrelevant to the question of whether the brokerage fee constitutes interest at a criminal rate.

50 As for the differences in legislation, Mr. Ayrton argues that the predecessor legislation to the Fair Trading Act, the Consumer Credit Transactions Act,[16] incorporated similar provisions regarding the disclosure of interest costs, so should not be a bar to certifying the class.

51 The other legislation in issue, the Limitations Act, may not be a bar based on public policy reasons as ultimately the constitutional doctrine of paramountcy may prevent the Defendants from relying on a provincial statute to shelter them from the consequences of their misconduct in an action based on a Criminal Code violation. In any event, Mr. Ayrton argues that the determination of this matter is for the common issues judge to determine at trial.

52 In the end, the identifiable class requirement is an inquiry into whether the members of the class can be identified by objective criteria and, while the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation.[17] But ease of identification through objective criteria should not become the agent to make the class unnecessarily broad. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[18]

53 The defined class, as proposed in the certification motion, is individuals who borrowed money as a payday loan from the Defendant companies subsequent to October 15th, 2001 (which Ayrton seeks to amend to January 1, 1997), were charged interest fees and a brokerage fee, and repaid the original loan amount, plus fees and interest on or after the due date.

54 This definition provides objective criteria for membership in the class based on the borrowing and repayment of a loan, and the class is related to the common issue of whether criminal rates of interest were charged. A person will know they are a member of the class if they obtained and repaid the original loan amount, plus fees, from the Defendant companies during the period specified. Individuals who had all or part of their original loan forgiven will be excluded by definition.

55 The issues raised by the Defendants' regarding the Limitations Act will have to be addressed, but for me to decide that issue would be delving into the merits of the case, and the authorities are clear that the certification stage is not meant for that purpose. That is an issue for the common issue judge to determine. The inclusion of individuals whose claims may ultimately be found to be statute barred is not a barrier to proper identification of the members of the class, nor does it expand the class unnecessarily.

56 The other issue raised by Defendants, regarding individual circumstances that may affect remedies, is best addressed under the next section on common issues. At this stage, the identifiable class requirement is met if there is "some rational relationship between the class and common issues".[19]

57 In my view, there is a rational relationship between the class - persons who borrowed and repaid their loans in full from the Defendants, and the common issues - whether those loan agreements were unlawful, and if so, what remedies may be available to them. Similarly, the fact that some class members may ultimately be denied a remedy due to their individual circumstances does not mean that the class is overbroad and should not be certified.

Do Common or Individual Issues Dominate?

58 In the Certification Motion, Mr. Ayrton proposes sixteen common issues between the class members and Defendants. In his brief, Mr. Ayrton organized the issues into four categories: criminal interest rate issues; restitution issues; Fair Trading Act issues; and punitive damages issues.

59 Briefly, the issues in each of these categories are as follows:

1. Criminal Interest Rate Issues

   Were the fees charged by the Defendants interest for the purposes of s. 347 (1) of the Criminal Code? If the fees are characterized as interest, then a) are the loan agreements in contravention of s. 347(1)(a) of the Criminal Code, and b) did the collection of the fees under the agreements result in the receipt of interest at a criminal rate, contrary to s. 347(1)(b) of the Criminal Code?

2. Restitution Issues

   If the Defendants received interest at a criminal rate, then have they been unjustly enriched by the retention of that criminal interest? If so, are the Defendants liable to account to the class members?

3. Fair Trading Act Issues

> Irrespective of the criminal rate issues - are the Defendants liable under the Fair Trading Act for failing to disclose the total cost of credit to the class members on the loan agreements? Did the Defendants also fail to comply with the Fair Trading Act by receiving wage assignments from the class members? If the Defendants failed to comply with the Fair Trading Act, are statutory and exemplary damages owed to the class members?

4. Punitive Damages Issues

> If the Defendants are found to have received interest at a criminal rate, or to have breached the Fair Trading Act, does this conduct justify an award of punitive damages? If so, what is the amount to be awarded?

60 The Defendants concede that there is one common issue to the class members in the first category - whether the brokerage fee constitutes interest under s. 347 the Criminal Code - but submit this issue will not materially advance the class members' claims in any meaningful way. The resolution of the interest rate issue will only be a preliminary hurdle for the class members, but the other issues in this category will need to be resolved on an individual basis because of the individual variance in many of the loan agreements.

61 The Defendants relied heavily on the Transport case for their argument. The case concerned two corporations who entered into a credit agreement for $500,000. There were a number of fees and charges in the agreement in addition to a 4% per month interest rate.

62 The various payments, when totalled, resulted in a criminal rate of interest as defined in s. 347 of the Criminal Code. When the payments became too onerous, the borrower applied to the court for a declaration that the agreement contained an illegally high rate of interest and should not be enforced.

63 The Supreme Court of Canada upheld a decision by the lower court that applied the doctrine of "notional severance" to the agreement, allowing the offending interest rate to be read down so that the contract provided for the maximum legal rate of interest. The Court directed courts to use judicial discretion when deciding on the remedies available in cases arising under s. 347 of the Criminal Code:

> There is a broad consensus that the traditional rule that contracts in violation of statutory enactments are void ab initio is not the approach courts should necessarily take in cases of statutory illegality involving s. 347 of the Code. Instead, judicial discretion should be employed in cases in which s. 347 has been violated in order to provide remedies that are tailored to the contractual contest involved. ...
>
> A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the Code. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitative loan-

> sharking arrangements and contracts that have a criminal object should be declared void ab initio. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. ... In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved.[20]

64 The Supreme Court of Canada ultimately held that notional severance was appropriate in the case because the agreement was a commercial transaction entered into by experienced and independently advised commercial parties. There was nothing inherently illegal about the parties intentions to enter into the contract. The Supreme Court of Canada outlined the following approach to determine if an otherwise illegal agreement should be partially enforced rather than being declared void ab initio. A court should consider the following factors:

1) whether the purpose or policy of s. 347 would be subverted by severance;
2) whether the parties entered into the agreement for an illegal purpose or with an evil intention;
3) the relative bargaining position of the parties and their conduct in reaching the agreement;
4) the potential for the debtor to enjoy an unjustified windfall.[21]

65 Based on this case, the Defendants argue that even if the criminal rate issue is resolved, the Court will still be required to engage in individual inquiries to determine, on a case by case basis, whether the doctrine of notional severance should be applied. Therefore, the Defendants submit that there is only one preliminary common issue in the first category of common issues, the resolution of which will result in negligible judicial economy, and does not provide justification for a class proceeding.

66 The Defendants also rely on the Transport case to negate the framing of the restitution issues, in category two, as common issues. They submit that in order to determine whether the parties entered into the agreement for an illegal purpose, the court will be required to look at evidence on the intention of each party to each individual loan agreement. Similarly, the Court will need to look at evidence on the bargaining position of each individual class member and their conduct in reaching the loan agreements.

67 The "common issues" under the Fair Trading Act category, are also "uncommon" issues according to the Defendants. The Defendants point to s. 13(3) of the Fair Trading Act, which requires a court to consider the following when determining whether to grant relief under the Act: "whether the consumer made a reasonable effort to minimize any damage resulting from the unfair practice and to resolve the dispute with the supplier before commencing the action in the Court". Due to this requirement, the Court will be required to inquire into the individual efforts of the class members to mitigate their damages or resolve the dispute on their own.

68 The Defendants also submit that the forth category, punitive damages, cannot be a common issue for the class members because individual inquiries will need to be made. Punitive damages are awarded when compensatory damages are inadequate to achieve the objectives of retribution, deterrence and denunciation. The determination cannot be made until after individual inquiries have been made relating to compensatory damages and notional severance.

69 The Defendants also rely on a recent decision from British Columbia, MacKinnon v. National Money Mart Company et al.,[22] that considered whether to certify a class proceeding against 20 defendants who run payday loan type companies. This decision was released after the Applications were argued and the parties made additional submissions subsequent to its release.

70 In National Money Mart, Mr. MacKinnon proposed to certify as a class all persons in the Province of British Columbia who had taken out payday loans from any of the 20 different payday loan businesses. Justice Brown called this proposed class action "industry-wide litigation".[23]

71 The Defendant companies in the case, as in the present case, opposed certification on the ground there were insufficient common issues shared by the class members. Justice Brown specifically denied certification on that ground, stating that she was not satisfied the proposed common issues were common to the class. She noted the manner in which payday loan companies operate their businesses differs widely.

72 In order to determine the criminal interest rate issues, each fee charged by each defendant would need to be reviewed, and a determination made as to the amount of interest charged and received. The fact finding and legal analysis done for one class member and defendant, such as Mr. MacKinnon and Money Mart, would have little or no application to other borrowers and lenders because the court would be required to look at each separate form of agreement and fee charged.[24]

73 Justice Brown also held that even if there was sufficient commonality in the legal analysis, a class action would still not be the preferable procedure as each defendant company would be required to attend and participate in the review of agreements and business models which have little in common with theirs. Individual plaintiffs would be required to wait for determination of their claim while unrelated fees and agreements were considered.[25]

74 She held that the remaining common issues, namely restitution, payments to franchisers, Trade Practice Act[26] issues and punitive damages, could not stand alone as common issues because they were all dependant on a determination of the criminal interest rate issue.[27] She also noted that even if a particular standard form loan agreement was found to constitute an agreement to receive interest at a criminal rate, the court would still have to look at individual circumstances such as: oral variations to the contract, repayments made by individuals, whether collection procedures were used, defences of defendants based on voluntariness or individuals being fully informed, and counterclaims for unpaid amounts.[28]

75 Justice Brown found that for any individual claimant or defendant it may take a very significant period of time, as the court works through other issues, before their individual circumstances are dealt with and that was not an efficient use of judicial resources.[29]

76 She commented that these claims could potentially be pursued more effectively in "less ambitious" class proceedings.[30]

77 The Defendants say National Money Mart is on point with this case. They acknowledge that the large number of defendants and different business models was a factor in the case, but submit that numerous other factors, that were relevant to the decision, are present in this case. In particular, the Defendants point to the following issues that were raised by Justice Brown in her reasons dismissing certification, and say that they are also issues that should result in dismissing the certification of this action:

> - variances were made to the loan agreements;
>
> -the court will have to determine on an individual basis the date of the advance of principal and the dates of repayment;
>
> - payments may have been made after collection procedures are initiated requiring the court to consider what portion of the payment is principle versus interest and costs; and
>
> - there are differences in the individual borrowers regarding their knowledge and reasons for entering into the loans that will effect the trade practice and punitive damages claims.

78 Mr. Ayrton's position is that one common issue predominates over all other issues in the case. He submits that the criminal rate issue is an overarching issue that unifies all class members. He also argues the standard form agreements used by the Defendants set out the brokerage fees upfront, therefore to determine whether the fee constitutes interest under the Criminal Code will involve the same fact finding and legal analysis for all class members. Mr. Ayrton submits that the calculation to determine if the Defendants received a criminal rate of interest under s. 347(1)(b) will involve a simple mathematical calculation based on the amount of repayment and when it is received, which is information contained in the ledgers of the corporate Defendants. Therefore, the analysis of individual circumstances is not necessary for these inquiries.

79 As for the Transport case, Mr. Ayrton submits the loan agreements at issue fall into the "exploitive loan sharking" end of the spectrum of illegal contracts referred to by the Supreme Court of Canada, and are not akin to a situation where a court would apply notional severance:

> Using notional severance to read down interest provisions to be just within the legal limit would not find application in traditional loan-sharking transactions. It would be available as a remedy where a court recognizes the commercial sophistication and professional advice received by both parties, concludes that the violation of s. 347 by the parties was unintentional, and considers it equitable to give effect to the highest legal interest obligation available.[31]

80 Mr. Ayrton also argues the Defendants have miscast the restitution issues by suggesting the Court will have to focus on borrowers' individual circumstances to determine if restitution should be awarded. In an action for unjust enrichment, after the court finds an enrichment of the defendant and corresponding deprivation of the plaintiff, the court next inquires whether there is a juristic reason for the enrichment. Mr. Ayrton submits that in a case involving s. 347 of the Criminal Code the juristic reason inquiry focusses on the lender, not on the borrower.

81 For example, in Garland v. Consumer's Gas Co.[32], the Supreme Court of Canada found a juristic reason for criminal rates of interest that a gas company had charged through its late payment penalty. The juristic reason was that the Ontario Energy Board, which regulated the gas company, had ordered the late payment penalties. However, as soon as the gas company was put on notice that there was a serious possibility the payments violated the Criminal Code, it could no longer rely on the orders as a juristic reason for the unjust enrichment.

82 Mr. Ayrton submits that it is clear from this analysis that the "individual circumstances" to be considered in this action would be the knowledge of the lenders, not the borrowers. Therefore, the restitution issue can be considered for the class as a whole.

83 While it is true some assessments of damages will need to be done on an individual basis, Mr. Ayrton argues that in most cases the Court will be able to ascertain damages based on his circumstances, since he is the Representative Plaintiff. The pretext to a class proceeding is that the representative plaintiff stands in the place of the class members because his circumstances are similar to those of the class members. Accordingly, the legal analysis proceeds based on those circumstances.

84 In determining whether the proposed issues are common issues or individual issues, it is important to look to the Act. The Act defines a common issue as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts".[33] The Class Proceedings Act (British Columbia) shares this definition, and as it has been in existence for some time, courts in B.C. have had a chance to interpret this definition. A common issue has been interpreted as an issue that will be applicable to all in a class or subclass and will move the litigation forward.[34]

85 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.

86 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.

87 In addition, the Defendants' opposition to certification is largely answered by s. 8 of the Act itself. Section 8 directs the court not to refuse certification because damages will be assessed individually after the common issues are determined or because a subclass has claims that raise common issues not shared by all the prospective class members.

88 The National Money Mart case is distinguishable from this case on a number of grounds. In her decision, Justice Brown highlighted why the fact finding and legal analysis would not be shared among the class members by pointing out differences in the schemes of the payday loan companies. The companies charged various different fees such as processing fees, administration fees, documentation fees and so on. The organization of the companies also differed, with some acting as brokers for lenders, and some offering loans on their own behalf. Many of the companies also offered special terms or arrangements, that differed from other companies special arrangements, to their customers depending on the borrowers' circumstances or credit rating.

89 The fact finding and legal analysis in this case will be shared by the class members. The Defendant companies used nearly identical forms and operated under the same scheme whereby a retail store brokered a loan for a separate lender, and charged interest plus a brokerage fee. The rate of

interest charged and the brokerage fee scale appears to be the same for Payroll/PRL as it is for Hornby/Thurlow. Therefore, the question regarding whether the brokerage fee is interest, and whether it is interest at a criminal rate, will involve the same legal analysis for all corporate Defendants, and is clearly a common issue.

90 In National Money Mart, the failure of the criminal interest issue to be classified as a common issue resulted in the failure of the other proposed issues to be found in common. Justice Brown found that the restitution issues, Trade Practice Act issues, and Punitive Damages issues were all dependent on a determination that the defendants provided loans at a criminal rate of interest. Justice Brown's decision on this point highlights the interconnectedness of the issues regarding restitution, the Fair Trading Act and punitive damages, to the central issue regarding the criminal rate of interest. By resolving the criminal rate issue in this case, the class members' claims will unquestionably be advanced in a meaningful way.

91 It is true that Justice Brown also found that individual circumstances added to the reasons that the claims were not suitable for a class proceeding. She stated that it was neither fair nor efficient for a claimant or defendant to wait as the court deals with individual circumstances regarding the variance of loan agreements, defences, counterclaims, and so on.

92 I agree that in the context of the proposed class proceeding in the National Money Mart case the issues regarding individual circumstances were a further reason not to certify the proceeding. In the balancing done between "common issues" and "individual issues", the individual circumstances added even more weight to the "individual issues" side of the scale. However, that side of the scale was already fully loaded considering that Justice Brown did not find a single common issue in the proceeding.

93 That is not so in this case. This is an example where the claims may be pursued effectively in, to use the words of Justice Brown, "less ambitious" class proceedings.

94 When deciding whether a class proceeding is the preferable procedure, one should also keep in mind the policy reasons behind class proceeding legislation: access to justice; judicial economy; and behaviour modification. In my view, these three policy objectives will be met by certifying this action.

95 Access to justice will be provided to a group of people who would find it uneconomical to litigate one of these actions individually, both due to the potentially modest recovery and due to the reality that those seeking payday loans are generally not in a position to fund expensive litigation.

96 Judicial resources will be used efficiently by having similar issues of fact and law analyzed in one action.

97 Finally, if the plaintiffs are successful in their claims, the goals of accountability for wrongful actions and deterrence of future wrongful actions will likely be met.

98 I find that in the context of the entire claim, the common issues predominate over individual issues.

Appropriate Representative Plaintiff

99 The Defendants Payroll, PRL, and Mr. Ash also argued that Mr. Ayrton is not an appropriate representative plaintiff. They submit that Mr. Ayrton was knowledgeable about the nature of the loans

when he entered into the later loan agreements, and is therefore potentially situated differently from others in the class and cannot represent them adequately.

100 The Defendants Hornby, Thurlow, and the directors of those companies, agree that Mr. Ayrton may be differently situated from other class members because they allege he entered into loans with their companies in order to push forward the class action and will not be deserving of a remedy. However, these Defendants feel that having a representative plaintiff with these personal circumstances will benefit their case, so they do not oppose his role as a Representative Plaintiff.

101 The arguments of the Defendants are arguments for the common issues judge to determine as they go to the merits of the case. Mr. Ayrton took out loans with all of the corporate Defendants. He and the class members share the common issue, namely, whether the Defendants charged interest at a criminal rate on their loans, therefore he is in a position to fairly and adequately represent the interests of the class.[35] He has produced a workable plan for the proceeding to progress. There is no evidence to suggest that he is in a conflict of interest with other class members regarding the common issues.

102 I am satisfied that Mr. Ayrton meets the requirements under the Act to be a representative plaintiff.

103 The Application for certification of these proceedings is granted and Mr. Ayrton is appointed as the Representative Plaintiff.

(3) Application to consolidate Action #1 and Action #2

104 Mr. Ayrton asks for Action #1 and Action #2 to be consolidated. He argues that the parties and issues are essentially identical and should be consolidated pursuant to Rule 229 of the Alberta Rules of Court.

105 The Defendants Hornby, Thurlow, and the Defendant directors of those companies oppose consolidation. They argue that the two actions are exactly the same, and that this duplicity constitutes an abuse of process of the court. Therefore they ask that Action #2 be struck under Rule 129(d) of the Alberta Rules of Court for being an abuse of process.

106 Actions #1 and #2 share the same issues of law and fact, as the discussions in the previous sections have explained. Rule 229 allows consolidation where two or more actions have a common question of law or fact. Consolidating these two actions would partly remove the Defendants' concerns about duplicity, as they would then be heard together.

107 The Defendants Hornby, Thurlow, and their respective Directors would still be named in both so some duplicity would remain. The way to remove that duplicity is to strike them from Action #1.

108 I order that Actions #1 and #2 be consolidated and that the Defendants Hornby, Thurlow, and their respective Directors be struck from Action #1.

Costs

Counsel for Mr. Ayrton asked that this matter proceed on the basis of a no costs regime because it is a matter of public interest. As this issue was not raised in the Notice of Motion, it is inappropriate for me to consider the matter at this time. Counsel is advised to file a new Notice of Motion regarding this issue. Otherwise, costs for this application may be spoken to later by the parties.

LOVECCHIO J.

1 R.S.C. 1985, c. C-46

2 R.S.A. 2000, c. F-2

3 R.S.A. 2000, c. J-1

4 R.S.A. 2003, c. C-16.5

5 Tottrup v. Alberta (Minister of Environment) (2000), 81 Alta. L.R. (3d) 27, 2000 ABCA 121.

6 Salomon v. Salomon, [1895-99] All E.R. Rep. 33 (H.L.)

7 Montreal Trust Co. of Canada Inc. v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711 (Ont. C.A.) at 720.

8 Blacklaws v. Morrow (2000), (2001) 84 Alta. L.R. (3d) 270, 2000 ABCA 175 at 284.

9 Rainham Chemical Works, Ltd. and others v. Belvedere Fish Guano Co., Ltd., [1921] All E.R. Rep. 48 at 52.

10 Kosmopoulos v. Constitution Insurance Co. of Canada, [1987] 1 S.C.R. 2 at 10.

11 [2004] A.J. No. 900, 2004 ABQB 590.

12 [2004] N.J. No. 352, 2004 NLSCTD 191.

13 Tschritter, note 11 at para. 17.

14 [2004] 1 S.C.R. 249, 2004 SCC 7.

15 R.S.A. 2000, c. L-12

16 R.S.A. 1985, c. C-22.5.

17 Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 38.

18 Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68, at para. 21.

19 Hollick, note 18, at para. 20.

20 Transport, note 14, at paras. 4 and 6.

21 Transport, note 14, at para. 43.

22 MacKinnon v. National Money Mart Company et al, [2005] B.C.J. No. 339, 2005 BCSC 271.

23 National Money Mart., note 22, at para. 2.

24 Ibid. at paras. 23 - 26.

25 Ibid. at para. 31.

26 R.S.B.C. 1996, c. 457.

27 National Money Mart, note 22, at paras. 32 - 35.

28 Ibid. at para. 39.

29 National Money Mart., note 22, at para. 40.

30 Ibid. at para. 40.

31 Transport, note 14, at para. 39.

32 [2004] 1 S.C.R. 629, 2004 SCC 25

33 Class Proceedings Act, note 4, s. 1(e)

34 Harrington v. Dow Corning Copr. (2000), 193 D.L.R. (4th) 67, 2000 BCCA 605, at para. 24; Scott v. TD Waterhouse Investor Services (Canada) Inc. (2001), 94 B.C.L.R. (3d) 320, 2001 BCSC 1299, at para. 76.

35 Fakhri v. Alfalfa's Canada Inc. (c.o.b. Capers Community Market) (2003), 26 B.C.L.R. (4th) 152, 2003 BCSC 1717, at para. 75.