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.